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CRITICAL LEGAL STUDIES AS A TEACHING METHOD, AGAINST THE BACKGROUND OF THE INTELLECTUAL POLITICS OF MODERN LEGAL EDUCATION IN THE UNITED STATES

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I see the role of this paper as providing some perspective and background to Gerald Frug's much more thorough and detailed account of some teaching methods of critical legal studies (CLS).[1] Let me start with the boring proposition that although one could think of CLS as a movement in jurisprudence, or as a movement in social theory, it is also useful to think of it as an episode in the history of American legal thought and education, as a bundle of critiques directed against some very specific practices — the theories, doctrines, teaching methods, social assumptions, and cultural mannerisms that had by the 1950s and 1960s come to prevail in the American legal-educational establishment. Some of these doubtless have Australasian counterparts; others probably do not. The significance of CLS is thus perhaps primarily a local, rather than a general one. Yet of course there would be no point in trying to talk about CLS to a non-American audience if one could not hope that through inspection of the ways in which CLS has dealt with its local situations in the USA, there might be something of interest for Australian law teachers in their own situations, by way at least of analogy if not always direct application.

CLASSICAL FORMALISM, REALISM AND ALL THAT

If my boring proposition is right, to account for CLS one has to go back a bit, to see where legal education in the USA had arrived by the time CLS came on the scene. It was an education heavily under the influence of the legal realist critiques of the classical, or formalist style of legal reasoning. Of course few even of the classical common lawyers were ever thoroughgoing formalists in the civilian positivist or Pandectist modes; we are too case-bound and situation-bound for that. The common lawyers of pre-realist times certainly would have insisted that theirs was a jurisprudence of principles, and would have been shocked at the implication that it might not be. But they were also skittish about trying to elaborate and defend any of the principles in any sustained or explicit way; and always ready to concede that although their principles could and should apply across the general run of cases, there would always be exceptional situations they would not fit. Lines of precedent, equitably appealing facts and hard cases at the margins, would always exercise their own gravitational pulls. There never was any such thing as "purely deductive logical formalism" or "mechanical" or "slot-machine jurisprudence."

Nevertheless, it still seems fair to describe the period from 1880 to 1920 as one in which judges and treatise writers aspired to what appears in the history of the common law to have been an exceptional degree of formal abstraction

in both private and public law. Their method was, first, to devise strict binary either/or doctrinal categories, that would cut across social groups and situations to apply equally to all persons natural or artificial, depicted as featureless A's and B's; to treat membership in the categories as natural properties of the objects assigned to them; and thirdly to attach to membership in each such category an entire package of inescapable legal consequences. I think there is also no doubt that they believed that their categories, however they might be blurred at the edges in hard cases, possessed inherent cores of meaning accessible to trained professionals: that due care, jurisdiction quasi in rem, forseeability, proximate cause, consideration, unilateral contracts, interstate commerce, duress or property were as real in their own way as chairs and tables. So also were the plain core meanings of constitutions, statutes, contracts, wills and trusts. Most importantly, they believed that this system of common law and constitutional rules and principles, always of course subject to adjustment to changing circumstances, was (or at least was evolving toward) the system that would maximise social wealth and individual natural liberty.

It is worth a moment's pause to review the main lines of the realist critique of classical legalism, because realism has on the whole been wilfully and absurdly caricatured (just as classicism in its time was caricatured by the realists, and CLS is caricatured by most of its critics today).

Realism had two sets of projects, one negative and critical and the other constructive.

First, perhaps the best known of the negative projects were the critiques of conceptualism and objectification. Objects cannot be assigned naturally to categories; categories do not have inherent properties; texts do not bear inherent meanings. Thus the judge's role in assigning facts to categories, and interpreting the meaning of texts is the discretionary work of an artificer. As Karl Llewellyn put it, discussing the cases asking whether there had been an offer or an acceptance, "out of offer, as out of a major premise or a magician's high hat, anything can be taken which is first put in." [2] At every point, the judge's actions rely upon assumptions (Holmes' "intermediate major premises") that are not expressed in the formal discourse. These assumptions are inescapably judgments of policy.

Here perhaps is the main insight, that policy is everywhere; that all common law rules and decisions are distributional; that there is no difference in kind between judicial and legislative decisions (though obviously there is a rough division of labour between legislatures, courts and administrative agencies deriving from traditional roles and different institutional resources and specialised competences). Pre-realist common law of course never excluded considerations of policy altogether. Policy in the classical system plays a crucial role in the justification of basic principles ("so use your own as not to injure another's"; "to be duress, economic pressure must be such as to suspend the capacity for free choice," and so on). And policy crops up again as a resource for deciding hard cases, the exceptional situations falling dead on the bright lines between doctrinal categories. [3]

The realists liked to emphasise the creative, constructive role of decision-makers not only in hard cases but in every case. The uninteresting version of their critique, often attributed to Jerome Frank and through him to the whole realist movement, reduces the judicial policy-making function to idiosyncratic personal whims or class positions of individual judges. The more interesting and far-reaching version is the one taking apart the claims to determinacy of the principles and the doctrinal categories deriving from them, and to the determinacy of plain core meanings of legal texts. Here belongs the critique of objectivism in the construction of precedent, constitutions, statutes, contracts, wills, trusts: the insistence that any account of the holding of the prior cases or the "intent" of the legislature or the testator or contracting parties must be constructed, and in every case constructed, by choosing among alternative sources of meaning — judicially standardised language, trade-standardised language, transaction-contextualised language, context at the time of utterance, or purposes at the time of breach, purposes broadly or narrowly conceived, and so forth. The realists were fond of demonstrating this through situational variation. They would take a formal rule or principle, and show how, in different jurisdictions and different fact situations, the courts constantly gave shifting and often indeed contradictory meanings to the principle; or how patterns of exceptions persistently tended to swallow up rules; or how language held to have a fixed and invariant

meaning at one historical time turned out to have an opposite fixed and invariant meaning thirty years later. Furthermore, the formalist method of assigning objects to categories was inverted. Instead of asking, "is it an offer", they would ask, "what would be the practical consequences if we labelled this an offer?" And, "couldn't we say it should be treated as an offer for some purposes but not others?" So too realism inverted rights and remedies; it is now the remedies available that define the scope of the right.

There was also an incipient critique of the formal categories as dangerous mind-bending mystification: that the manner in which the particular categories of the classical scheme had constructed the world were especially useless or dysfunctional ones. To quote Llewellyn again, "if the world of law is thus at its very creation in a student's mind created in divisions and in concepts which falsify the facts of law, the student is helpless. The false concepts give him his only eyes to see that legal world, his only words to describe it. All later effort of qualification leaves it permanently distorted to him." [4]

Secondly, in all these critiques, of course, there was a strong assumption that some apprehensible underlying reality of social facts and social functions was being distorted, and that legal doctrine could be reformulated so as to reflect that reality truly rather than crookedly (in "functional" rather than "formal" terms, as the realists liked to put it).

This second project, that of finding the social subtexts of law, varied somewhat from field to field. The realist critique of public law, especially constitutional and administrative law, was what we would now call a "hermeneutics of suspicion", devoted to exposing the reactionary class prejudices or partial economic theories or obsolete social conditions underlying purportedly neutral decisions. The realist critique of private common law fields sometimes took the same tack as, for example, in the critiques of "freedom of contract" or of negligence as the exclusive basis of tort liability. But just as often the realists conceded that common law courts reached socially functional and distributionally fair results, but reached them by manipulating formal doctrine instead of candidly stating their reasons. This made law needlessly obscure and uncertain to practising professionals, and deprived judges of the chance to reflect on their real reasons, which were necessarily those of policy. For some realists, this concern with function led them to undertake complex empirical research into the "law in action". They did so with a view either to exposing the seamy underbelly of the legal system's hypocritical formal pretences so as to shame the system into making its promises good, or else to reforming the formal law to make it more like the presumably functional law in action. For others, like Llewellyn himself, the quest was to develop legal standards that would encourage complex particularistic judgments in specific conflicts, making as much use as possible of local custom and non-legal specialised expertise.

As everyone who has sympathetically studied the movement recognises, one of the tragedies of realism is that the realist impulse faltered before much work could be done to fill out the counter-vision. Such constructive work as was done often suffered badly from the crude positivism of the social-science models that were all the realists had to work with, for example stimulus-response behaviourism. Some realists never got beyond the strategy of infinite situational variation — every case is different, and to be decided on its own facts. Others, pressing to redraw categories on functional rather than formal lines, reverted to pre-classical superficiality, and rather unimaginatively drew them from existing occupational or social roles or practice contexts. They categorised contracts into contracts of employment, commercial and consumer sales, construction, insurance, services, and so forth. Torts were classified into liabilities of manufacturers, of railroads to passengers, shippers and so on. A few were more theoretically ambitious. For example, Douglas reconceptualised corporate law doctrines as relating to the three basic processes of assembly of resources, control and direction of the enterprise and absorption of losses. A few, like AA Berle Jr, Thurman Arnold and Walton Hamilton, joined the New Deal and translated their technocratic visions into policy-making.

POST-REALISM: THE METHOD OF THE 1950S AND 1960S

By the time I got to law school in the late 1960s, realism had triumphed everywhere in the curriculum, but only in the curiously chastened shapes to which it had gradually been shrinking in the post-war years. Teaching was dominated by the method one might call ad hoc interstitial realism.

Realism had triumphed in the sense that a central aim of teaching was to show up the limitations of conceptualist reasoning, the reasoning still used by most of the judges who were deciding the cases assigned. My impression is that by contrast British law teaching is relatively respectful to judicial authority. What British judges say is the law; and so law teachers pay careful attention to the language of decision and distinctions drawn between cases, engage in much discussion of what is ratio, what merely dicta, and so forth. The American method after 1945 is quite different. It was pioneered by lawyers and legal academics possessing little regard for the average run of judges and tending to identify professionally with those select judges and legal policymakers who pride themselves on seeing through conventional legal rhetoric (Holmes, Brandeis, Cardozo, Hand, Traynor, Harlan and Friendly). The role of authority and precedent in case analysis is, as one would expect anyway from a legal system overrun with cases, rather minimal, compared to what I take to be British practice. Likewise in America there is a less significant role for what English lawyers call "common sense" — the robustly asserted ipse dixits that help British judges and advocates sail over rough patches in the argument. In American teaching the cases are treated chiefly as material for criticism, as largely inept or confused attempts to deal with the underlying issues of fact and policy, or else simply as storehouses of factual examples. The teacher takes the relatively formal, general sentences of the opinion, which beginning students rely on as stating the rule or principle, and leads his or her class by interrogation. The teacher creates hypotheticals slightly varying the facts to show that the rules as stated cannot be generalised very far without leading to absurd or contradictory results; that they assume a hidden paradigmatic case situation, and are at best intended to serve the functional needs of that situation and cannot be transferred to deviant contexts without causing trouble. The student learns very early on how cases can be reconciled by formulating their holdings broadly and distinguished by narrowing to contextual particulars. Over and over again, the teacher interrogating a student will ask if a rule designed for the factual setting of a prior case is appropriate for the next one. My contracts teacher, Lon Fuller, was a master of this kind of situational variation: the challenge in his class was to locate in each case the crucial fact that gave the clue to how policies and equities should be balanced in that case. There was only one per case, and it was often quite obscure, maybe buried in a footnote or brought out only in a dissenting opinion. "The insurance company had a resident agent in Oklahoma City. What does that tell you?" It told you, as I recall, that the company could at small cost have investigated and discovered the fraud, and thus perhaps should have to bear the risk of loss on the contract.) The post-realist casebooks are often organised to show similar principles leading to opposing results, to follow a case presenting a rule with a case stating the counter-rule, or with cases multiplying exceptions to the rule to such an extent that they swallow it up altogether. [5] The student is constantly warned to be alert to the pragmatic consequences of classification, that the question, "is an advertisement an offer?" can only be answered by looking at what results might follow from labelling it thus and asking if they seem to be desirable ones. Language attributing force or motion or consequences to purely juristic categories tends to be ridiculed as meaningless garbage. When a student, repeating language from an opinion, says, "consideration moves from the promisor," the teacher responds amazed, "consideration moves? How fast?" As you can readily see, the classroom practice thus daily re-enacts the realist generation's slaying of its forefathers.

But then, out of negativity and chaos, comes the promise of order; out of relentlessly hammering scepticism, the possibility of faith. The order is, as it was also for the private law realists, that of the immanent functional rationality of the legal system. The key skill, once more, is to locate the core set of functional interests — in efficiency, fairness, or whatever — underlying the formal categories of the cases (offer-and-acceptance, consideration doctrine, mistake, and so on) and to suggest how, in each particular configuration of facts, an ad hoc balancing might be accomplished. Virtually every rule of law that exists, simply because it exists, may be rationalised as serving some policy.

Yet the underlying order thus suggested, or wistfully hinted at, was deliberately under-theorised and for good

reason. It was really quite incoherent. Legal rules, it is assumed, are designed to serve policies and purposes, or to adjust competing interests, but the policies, purposes and interests hypothesised are extremely miscellaneous and often in conflict with one another. We want to promote the security of transactions, protect reliance interests, encourage good faith dealing, free up resources for allocation to their highest uses, allocate risks to those in the best position to bear them, compensate for bargaining inequalities and so on. We also, it seems, want to give these interests and purposes different weights, strike a different balance among them all as we move from case to case. It is, however, also important, for the sake of horizontal equity and administrative simplicity, to try to preserve consistency of rules and principles across cases. The teacher would sometimes elicit from a student one or two policy rationales for a decision, and then confound the student by proposing one or two opposing ones. So haphazard was the jumble of rationales that you could never hope to predict which ones, in what combination, aggregated together or traded off against one another, would be implicated in any particular case. All you really could be sure of was that the existing regime of rules — or more accurately a somewhat reformed version of them, the existing law worked over for a generation or so by liberal-Democratic judges, legislators and smart law professors — would magically or providentially turn out to be the optimal regime.

As with much pre-realist law, the impression of order brought about by rational method is achieved only by virtue of refusal to proceed beyond a middle level of rationalisation. The principles are sometimes fairly abstractly stated, but the manner of their reconciling remains an irreducible mystery of case-by-case common law reasoning, process and craft. The classical framework of conceptual categories, though disputed at all its points of application, remains the organising framework; and there is no attempt to reconceptualise private law categories at large — not even to re-examine, at any moderately high level of generality, the boundaries between contract and tort. [6]

Moreover, though all law is conceded to be policy, we are never allowed to forget that we are lawyers, not economists or psychologists or historians. The suggested policy rationales are invariably brief, never given more than a sentence or two, and casually asserted rather than argued or justified or empirically supported. [7] Often, I recall, they took the form of rhetorical questions — "but do we really want to do away with advertising?'; "aren't some sex differences self-evidently rational bases for differential treatment?" — whose purpose was not to induce serious discussion, but to affirm a presumed consensus on background assumptions to the discussion. Nor is context ever much elaborated — we are not sociologists or anthropologists either — the "facts" are those as quickly sketched by the courts' opinions, supplemented from time to time by a student or teacher's peculiar knowledge. We thus preserve our credentials as lawyers by means of deliberate dilettantism. The unpleasant side of this habit of mind (which was obviously useful in some ways) was an unbecoming lawyers' arrogance towards those social sciences of which the lawyers had remained determinedly ignorant.

The great Socratic teachers of the post-realist generation never told you what they thought, never offered their own synthesis. Enlightenment was for the pupil to discover, each in his or her own arduous way. This was all the more irritating since the older ones especially were usually teachers of considerable professional and governmental experience, who could have told us a lot about how law really worked if they had wanted to. Some of them were quite cynical about the actual products of the legal system, its statutes, decisions, administrative rulings, but their ironic treatment only served to highlight the implied presence of a Platonic ideal order of closely reasoned law-as-policy analysis, of which people as smart as themselves and their very best students, were or could become the masters. To them, the law was full of "mistakes", many more mistakes than the English lawyer will acknowledge, sometimes it seemed almost nothing but mistakes. But any notion of error of course presupposes a system of truth from which it deviates, and my teachers were often romantics beneath their ironic surfaces. There were also among them some whom one might call disintegrated realists — men who had long since lost any faith that the legal system made much sense, who delicately picked it apart for the savage fun of the exercise without suggesting any pattern beneath the muddle. But even these men attributed a kind of autonomous, as it were existential, value to sheer pyrotechnical agility in doctrinal argument and analysis.

At a deeper level still, below the dazzling word games and cynical poses, below even the Platonic or romantic ideals of perfectly analysed cases, there was a deep, unruffled complacency about the legal order as it stood — or again, to be absolutely precise, as it would come to stand after a few years more tinkering by liberal-Democratic policy-makers and judges. This is still, by the way, the method found in most American law schools below the elite level and in many classrooms at the elite level. One of the mysteries of the method of legal education I am describing is how effectively it manages to inculcate the conventional culture of legal decision- making at the same time as it presents law as a jumble of incoherent policies. Lawyers who can analyse a case up and down and every which way, stand it on its head and turn it inside out, can still usually guess pretty accurately, once a problem case within the system has been formulated, how it is likely to come out. This is an ability that comes with socialisation into the system; and law school starts one along that road of socialisation. The ways it is done are various and very subtle. Some student responses are treated as simply "off the wall", or re-phrased to fit within the conventional boundaries. Sometimes the teacher imparts the common sense solutions to the case, in confiding asides, off-hand sotto voce remarks out of role ("of course no sensible court would ever consider doing anything like this"). And sometimes the device is simply to assert a social consensus about the basic value choices.

What had been mostly lost by the 1950s generation of private law teachers, was the urgent sense of the 1920s and 1930s realists that the issues raised by the common law cases were also the great contested issues of morals and political economy, issues of the practical meanings of freedom and coercion, of allocation and distribution, of the shifting of burdens and sharing of benefits, of the extent to which law should facilitate the pursuit of self-interest and the formation of the basic conditions of community. American courts of the classical period (1880–1930) had made manifest the contestable political content of the common law because they had constitutionalised certain versions of common law doctrines and in the name of basic common law principles had laid waste broadly popular social reform legislation and administrative regulation. The British courts of the same period and inclinations had to be content to snipe at the regulatory state from the sidelines, by adverse interpretations, and then risk having parliament remove whole areas of contention out of range of judicial fire. The American scholar-critics of the 1920s and 1930s who wrote on private law thus had in their sights a conspicuous target — an ideology that had become a central instrument of governance. By 1937, however, *eco*nomic- due-process constitutionalism had ceased to be a threat to the regulatory state. New statutes and delegations to administrative tribunals had removed some of the most contentious issues, such as the ground rules of labour-capital conflict, from judicial resolution. Some writers on the 1930s believe that the spectre of fascism also warned legal intellectuals off digging for the political roots of law, apparently by convincing them that loudly claiming law was autonomous from politics would actually make it so.

These explanations are not fully convincing because, as Laura Kalman's recent book [8] has shown, realism probably registered its highest point of influence on teaching in the casebooks put out by members of the Yale faculty of the 1940s. (The Columbia teaching experiments of the 1920s — for example Berle's corporate finance materials and Llewellyn's family law materials — were as radical but even more ephemeral. [9]) Some of these were strikingly innovative. There was, for example, Friedrich Kessler's work, which depicted private contracting structures like vertical franchising as a form of new industrial feudalism, which Kessler thought common law courts could regulate by loading up the dominated parties with entitlements to fair treatment. [10] There was also Shulman and James' casebook on torts, which under cover of the orthodox doctrinal categories, slyly discussed fundamental issues of wealth distribution. [11] The teaching elite was now moreover invaded by young veterans of the New Deal, who brought with them the statutes they had helped to draft and administer — the National Labour Relations Act, the Securities and Exchange Act, the Internal Revenue Code of 1939 and so on — into the second and third year curricula.

One might have thought that those who in the 1930s had broken with legal tradition and made new policy while the orthodox corporate bar attacked them as socialists would have stressed in their teaching the combative and

political elements in law-making and application. They turned out instead to be more interested in consolidating their revolution as the new established wisdom. Once statutes had pulled out the most contentious issues, the common law subjects could gradually revert to their curious and paradoxical status as lawyers' law, deriving prestige and authority from seeming relatively removed from vulgar social struggles and capable of being ideologically central to professional identity precisely because they were politically marginal. Meanwhile the public law subjects, which dealt with the New Deal statutes, were taught no longer as embodying and responding to conflicts, but as having resolved them, each statute being taken to express a single set of functional purposes resting on a broad consensus. Mildly progressive taxation, labour regulation through supervised collective bargaining and grievance arbitration, were accepted principles. The legitimacy of big business was accepted too, as were trade unions in their proper sphere. In the antitrust course, all traces of the moral and social critiques of corporate concentration produced by sixty years of populist agitation had disappeared, save as straw positions to be briefly and casually dismissed as economic folly. Meanwhile the rapid accretion of cases interpreting every section of the statutes made it easy to displace attention from the struggles underlying the statutory regimes to doctrinal exegesis. The Cold War and Red scares of the 1950s doubtless also encouraged this de-politicising of legal doctrine. [12] By the time I got to law school in the late 1960s, the only general perspective on the curriculum was that imparted in the famous Hart and Sacks legal process course, which so took for granted a basic consensus on substantive social goals served by the legal system that the sole criterion left by which to evaluate legal decisions was whether they had been made by the appropriate institutions following the correct procedures. Only constitutional law, convulsed by the Warren court's resurrection of the civil rights program of radical reconstruction, was an acknowledged battleground of contending forces and beliefs.

CONTEXT, POLICY AND CONFLICT — DECLINE AND REVIVAL

To recapitulate: the realists at their most ambitious promised to show how law emerged from and re-shaped its social context; to articulate and make explicit the policy considerations upon which legal decisions were based; to reveal the grounding of law in political conflict and social struggle; and finally to reformulate doctrine and clinical training of lawyers on the foundation of this new science. By the 1950s the third and fourth of these aims (conflict-revelation and reformulation) had been largely forgotten and the first two (elaboration of context and policy) drastically scaled down, the exploration of context being limited to facts stated in the appellate cases, and policy left to casual ad hoc interstitial improvising.

In the late 1960s the realist projects began to revive. There were several of these revivals and I would like to say just a bit about each of them, because they set the stage for the emergence of CLS.

The first revival came from the liberal left inspired by new social movements in which law students were becoming involved and were pressuring their schools to recognise in the curriculum black civil rights, welfare rights and legal services for the poor, the women's movement, consumerism, environmentalism and similar courses. The schools responded by adding a battery of courses in urban law, poverty law, race and sex discrimination, environmental law and the like, and these proved a great boost to context, policy and clinical approaches to teaching. [13] Though mostly confined to small seminar and clinical ghettoes in the second and third year, and often viewed with some contempt by the "hard" teachers and students of business law as a degraded form of social work, these subjects acquired a modest vogue. Thanks to the prevailing faith in courts as instruments of social reform, inspired by the Warren court and activist judges like Traynor, Francis and Wright who were busily promoting expansion of common law sellers', manufacturers', employers' and landlords' liabilities, the revival even trickled down onto the bedrock doctrinal subjects of the first year. Civil procedure could now be taught partly as a law reform litigation course, with materials on class actions and complex injunctions. Property expanded its treatment of landlord-tenant relations and land-use planning; contracts of unconscionability in consumer transactions; torts of product liability.

Ultimately it was the liberal trends in legal regulation of 1964–70 — the statutes and constitutional decisions on race and gender discrimination; judicial intrusion into administration of schools, welfare, prisons and mental institutions; the creation of vast new federal powers and agencies to regulate the environment, occupational health, and consumer transactions; the expansion of common law civil liabilities — and the theorising and teaching that had grown up around these trends in the legal academy, which proved the undoing of the unspoken political consensus underlying post-war doctrinal teaching. Though proponents and defenders of these reforms have become the new liberal centre of academic law, and probably account for the majority of American law teachers under 50 — consider for instance the overwhelming opposition of law teachers to the nomination of Robert Bork — they have never established anything like the hegemony of the post-New Deal consensus. Instead the reforms touched off fierce criticisms from both the left and the right.

One mode of critique revived the realist interest in social context, in the form of empirical studies of the effectiveness of legal regulation. From the left, relatively speaking, scholars writing for the *Law and* Society *Mew* registered a growing disillusionment with liberal reforms. They depressingly concluded that regulation designed to benefit the weak actually benefits the powerful. It is ineffective and gives a patina of legitimacy to reforms that change nothing. It sometimes actually harms its presumed beneficiaries. From the right, contributors to the *Journal of Law and Economics* mostly agreed with the diagnosis of regulatory failure, though of course their cure was to give up on regulation and return to markets rather than press for more radical reforms. Yet if there is one universal constant in human history, it is that you can never get most law teachers to take much interest in how law actually works. Thus the revival of social research in law has not yet much influenced law teaching outside a few specialised fields.

What really has had an influence, and a deep and far-reaching one at that, is not the empirical brand of law-and economics, but the theoretical brands pioneered by Posner and Landes at Chicago and Calabresi and later Williamson at Yale. So far the direct influence has been confined mostly to elite law schools, such as Chicago, Yale, Stanford and Virginia. My impression is that most teachers and practising profession still look on law-and-economics with beady eyes as suspiciously non-lawyerly. But its spread now seems inevitable, for in subtle disguises, unladen with graphs and jargons, it has invaded some of the major casebooks and textbooks, [14] not to mention the opinions of law professors whom President Reagan has placed on the federal bench and in the administrative agencies. New law teachers, who come overwhelmingly from elite schools, will all have had some exposure to it. One major doctrinal field after another is gradually being reorganised around some vulgarised version of the paradigm of law as an efficiency-promoting mechanism, whose primary role is to facilitate joint-maximising social interactions by reducing their transaction costs. For example, contract law is viewed as a set of standardised state-provided gap-filling rules allocating risks as the parties would have done if they had bargained over them; torts as a means to assign liability to the cheapest cost-avoider; property as a means of allocating rights to their highest-valuing users; corporations as a network of contracts designed to lower agency-monitoring costs. (That is the pure version. In the centre-left, or Yale, or Calabresi-Ackerman-Kronman version, these “efficiency” concerns are never allowed completely to dominate private law decision-making, but must be traded off against concerns of “fairness” and distributional equity.)

For all the well-known weaknesses of the law-and-economics school — its absurd psychology and historical and philosophical illiteracy, its insular insistence on a primitive positivism as the only valid form of social knowledge, its pose of brutal realism about self-interest that masks a curious naivete about power and conflict — it has greatly improved the conduct of legal discourse. For one thing, it has helped to reunify what had become a very fragmented doctrinal universe. Its categories cut across private and public law, and across the private law categories of contract, tort and property. Most importantly, it has actually tried to fulfil the realist project of reformulating doctrine on a theory of legal policy, of the social functions law is supposed to perform — a theory that would work as a theory, not just as a set of ad hoc rationalisations of the decided cases. In the process it has helped to re-connect

legal analysis with many, though still too few, of the classic problems of morals, social theory and political economy. Rawlsian moral philosophy tried to do the same thing, but it has never given such powerful leverage to the analysis of doctrine as law and economics has done. It remained in the jurisprudence ghetto as a "perspective" on law rather than a method of doing law. I remember the excitement that I and many other people in my cohort felt when we started reading the early work in this field — Michelman and Ackerman on takings, Calabresi and Melamed on property rights, Posner's theory of negligence, Goetz and Scott on contract remedies and relations, Williamson on markets and hierarchies and so on. Some of it seemed dazzling, some perverse, wrong-headed, oppressive and reactionary; but even the worst stuff was at least about something real and important and had some graspable intellectual content. Unlike the maddeningly elusive post-War games of doctrinal analysis and ad hoc armchair policy invention, it was something you could sink your teeth into. Moreover, because the most popular version was the Chicago right wing version, it was politically controversial. The liberal centre had suddenly to defend its political presuppositions instead of simply assuming them as the common sense of the legal system. Law and economics served as a sort of Marshall Plan for legal-doctrinal scholarship. It rebuilt a devastated country into terrain worth contesting.

ENTER CLS

Critical Legal Studies is basically a movement of legal intellectuals, originating in intellectual quarrels with their own legal education. Most activist students of the 1960s who were involved in radical or left-liberal politics found the studiedly anti-political teaching of that time simply irrelevant to their concerns; they scrounged such slim practical pickings from law school as they could, got the degree, and moved on. But the 1960s law students who went on to form the core of CLS mostly became teachers themselves, and so were motivated to engage with the content and style of orthodox doctrinal teaching and scholarship. I think perhaps the first authentic piece of CLS scholarship is a book-length essay Duncan Kennedy wrote as a second-year student at Yale, taking apart the Hart and Sacks' legal process materia1s; [15] It was followed, in this first and almost wholly negative and critical phase of CLS, by several more such attacks on the conventional reasoning modes of ordinary doctrinal scholarship. Further critiques were made of some of the more general unexamined background presuppositions of legal argument such as the ideology of adversary advocacy and the underlying Whig history of the progressive evolution of legal institutions. In the process, the CLS writers rediscovered the early scholarship of realism — not the relatively uninteresting realist general jurisprudence or theories of judicial decision-making, but the substantial realist scholarship on torts, contracts, bankruptcy, conflicts, trusts, property, and so forth, in which the realists had trashed their own elders. Later, as law-and-economics gradually articulated its theories of legal policy, solidifying the utilitarian bases of legal doctrine into a target worth shooting at, CLS began attacking those as well. [16] CLS also produced about a dozen intellectual histories of doctrinal fields such as tortious interference with contracts and spendthrift trusts. [17] From my perspective as a legal historian, I tend to think this is among its best work. In its most recent phase CLS writers have turned to more constructive projects, trying to suggest how leeways and opportunities in the legal system might be strategically exploited in the service of progressive politics. [18] I have gone into some detail to mention this critical, historical, and constructive work on middle-level issues of doctrine and policy because, although such work is the vital core of CLS scholarship, it is almost never read and taken into account by most critics of CLS.

INFLUENCES OF CLS ON TEACHING TECHNIQUES

I would like to use the remaining space simply to describe in general terms how the CLS intellectual agenda has influenced the ways in which at least some of us teach law.

To begin with, I think having a critical approach to your own legal system gives you at the outset an enormous intellectual and pedagogical advantage. You need not try to "rationalise" the legal system to your students nor do

you have to try to defend most of its decisions nor explain most of it as making sense. You can help the students acquire the skills they need to understand how the system works, and to function inside it as counsellors and advocates, without assuming the heroic, Herculean one might say, task of constructing it as a coherent system or as one having what Ronald Dworkin would call "integrity". [19] For perhaps the most central CLS tenet is that the legal system is not a single, integral system at all. Rather it is a teeming jungle of multiple, overlapping, contradictory systems, each pregnant at every historical moment with multiple alternative interpretations, possibilities and trajectories of future development. Each alternative is perfectly consistent with the system's operating premises and processing logic but only a few in any given moment are actually selected for adoption. This is, of course, a fundamental point of difference between both CLS and legal realism (in realism's constructive, technocratic mode) and between CLS and law and economics.

Gerald Frug's paper for this meeting has described a typical piece of CLS teaching in the best possible way of describing it, by means of a detailed example. [20] I would like to supplement his account with a brief list of techniques the CLS teacher can use to bring home to his or her students the multiple alternatives of possible legal orders and the clues to the selection mechanisms that currently produce and reproduce the legal order that we are familiar with. Let me emphasise again that whatever insights CLS may have to offer into legal study are best taught not in a separate course on jurisprudence or legal theory, but in the ordinary process of teaching the regular law subjects.

Cataloguing Conventional Arguments

The first technique, though very simple, can be surprisingly radical in its applications. In whatever subject one is teaching, start by making an inventory of its conventional argumentative moves. Conventional teaching imparts familiarity with these moves piecemeal, then draws very selectively from the total stock of moves in discussing each case. CLS teachers like to get all of the moves out on the table at the beginning, eliciting them all from the class in discussing the first cases, or simply by reciting them all in a handout.

The next step is to organise the stock of moves, by reducing and abstracting them, and then by arranging them in opposing pairs. For example, an enormous amount of argument in contract law can be organised around the opposing poles of the rhetorics of formality and informality. On the formal side, there are arguments for rules, binary on/off decisions, privileging of formal signs of intention, and so on. On the informal side, there are arguments for standards ("good faith", "reasonableness") requiring detailed particularised inquiries, decisions lying along a spectrum, little or no privilege for formal over informal evidence of intentions. Much argument can be organised around polar categories of (neo-Hobbesian) individual self-reliance which involves no obligations to others beyond those formally assumed, no protections for oneself beyond those formally recorded. This category can be set in opposition to (neo- Durkheimian) community involving obligations to share gains, losses, bargaining advantages, which may arise out of relationships regardless of formal assumption. The CLS teacher also tries to unveil the backstage devices that are commonly employed in the manipulation of concepts like "forseeability" or "intent". The devices include moving timeframes for rational choices back and forth, or constructing the desires of "reasonable men" and "women", testators, legislators, trust settlors and contracting parties by reference to a few stereotypical traits or to much denser and more elaborate descriptions of personality.

Another teaching method which I am particularly fond of is, as the course moves forward, to compare and contrast how the courts draw differentially upon the common stock of devices in different fields of law. For instance, in contract law it is always interesting to contrast the degree of discretion that courts are willing to give one party to police or judge the adequacy of the other's performance in franchisor-franchisee, employer-employee and supplier-customer relationships. I also like taking up the body of contracts cases dealing with promises and relations between intimates and family members, to show that much law is made by judges saying how fundamentally

different such relations (the technique of stereotyped contextualisation), or how fundamentally similar (the technique of acontextual abstraction) are from commercial ones. This again is just a device emphasising how social worlds are judicially constructed by the way relations are abstractly or concretely described, and how they are stereotyped when described concretely.

Throughout the term the teacher can encourage students to practise using the devices as they learn them. With the moves clearly inventoried and organised, it becomes relatively simple, when a court or a student in a case under discussion makes one of the conventional doctrinal arguments, to elicit from the class the conventional counter-arguments. The process also, incidentally, helps students get a grip on the arguments and counter-arguments being made in their other courses, whether or not taught by CLS types.

Where doctrinal arguments seem inconclusive, the next resort of the lawyer is usually to policy (or just "common sense"). Accordingly, the CLS teacher's next move is to perform exactly the same operations on policy arguments: make an inventory, match arguments systematically with counterarguments, display and catalogue the common artifices of manipulation. Here the new law and economics learning has proved invaluable, because it has already produced ready-to-wear off-the-rack concise, elegant and usefully formalised versions of most of the common efficiency-based argumentative moves in the legal system. Moreover, for each set of arguments there is generally a right-wing Chicago version and then a Yale centre-left version with which to contrast it. [21]This is a somewhat more complex enterprise, and CLS teachers have to decide whether to teach the more formal versions of the efficiency arguments or stick with the informal versions. Some give a little crash course in the relevant elementary economics, right in the middle of the term. Some just try to teach the quick informal versions of the arguments. Sometimes it is enough simply to show that the validity of many commonly made and commonly accepted arguments depends upon elaborate empirical assumptions that are in the particular context quite implausible or which would require extensive research that clearly nobody is going to do. Counter-arguments based on equally-if-not-more plausible assumptions are likely to be just as valid.

So the basic method here is just to bring out the submerged premises, empirical assumptions, narrative artifices; to elaborate them; to encourage students to elaborate them; to show there is a limited number of basic moves, endlessly repeated across doctrinal fields; to demonstrate that they are all in conflict with one another; and to examine how they can all be drawn upon in the analysis of every case. So too with policy arguments. Policy is not a way out of doctrinal indeterminacy and contradiction, but just a gate of entry into a new kind of indeterminacy and contradiction.

Now for purposes of practical pedagogy, we might at this point have gone far enough. We have given the students a systematic inventory of the arguments available, and some training in their use. This is of obvious value for equipping students for adversary advocacy, or just for helping them see the diversity of possible legal and policy conclusions that may reasonably be drawn out of the same factual situations. It gives them, at the least, more suppleness and flexibility than can be derived from teaching the law as an authoritative set of solutions. Of course it could teach them that since the system supplies no right answers, they will be justified in making as much money as they can pushing whatever arguments benefit the client of the moment. But it could also teach, as it ought to do, that there can be no absolution from doing bad things as a lawyer simply by virtue of the fact that one has been acting out a role within the system. If the system is open-ended, if its operations always involve selection from among contradictory moves, there is always some possibility of choice, and, therefore, always responsibility for the choices actually made. We say, essentially, there are no solutions, only arguments. And maybe that is all there is time for in a first year course.

Beyond the Cataloguing of Arguments

Understandably, however, few CLS teachers are content with this stopping point. First, because they will not as yet

have done anything to describe or explain the conventional selections among the contradictory alternatives that the current legal system does seem recurrently to settle on. Even if the teacher does not feel an obligation to justify those selections, the teacher ought to try to account for them. Secondly, because the CLS teachers will not have filled out the unconventional alternatives to the existing system in enough detail to make them plausible to law students. Students, like most people, and certainly most lawyers, are strongly attracted to the authority of going practices, to the normative power of the actual. A conscientious CLS classroom practitioner should have something to say about both, or risk ending up in the morally dubious position of conveying that law is only chaos full of plausible arguments for any side.

How best to explain the current conventions turns out to be one of the big disputed issues within CLS. There is general agreement that current practices help to justify the production and reproduction of hierarchy in social life, existing stratifications along lines of class, status, race and gender. The dispute is over how close the relations are between the legal practices and the social practices they are used to justify. One CLS school takes a relatively traditional left wing position, in the form of the claim that particular methods of doctrinal and policy justification in legal argument inherently reinforce (have a "tilt" in the direction of) specific types of social relations. This school is given to arguing, for example, that the abstraction and individualism of classical contract law are the legal forms that are most instrumentally serviceable to the economic arrangements of late nineteenth century laissez-faire individualism, just as the relative particularism, informality and mild communitarianism of present day contracts replicate the political economy and social compacts of the regulatory welfare state. [22] Others in the same school argue to like effect that abstract individualism is a characteristically male-dominant form of argument, just as concrete-particularistic- relational argument is feminist-insurgent [23]; or that the contractualist theories of the corporation prevalent both in the 1880s and 1980s are devices intended to shield companies from state regulation. [24] An opposing school within CLS holds that such relations between legal forms and social hierarchies, to the extent they exist at all, are purely contingent. (This opposing school delights in giving counter examples: for example, formal-individualist arguments used for emancipatory purposes and cosy-community arguments used to justify traditional-authoritarian hierarchies.) That is, at given historical moments certain forms of legal arguments and social relations are assembled into something that looks like a system. For example, individualist ideology, formalist law and conservative political economy are not necessarily inseparable, but in 19th century America and Europe they were woven into a tough ideological web believed to be indivisible. But any set of arguments within the system may at any moment be detached from the others, turned around, and put to work in the service of an innovative politics. This is exactly what happened to the 19th century system, as revisionist liberals reinterpreted all its premises. For example, they argued that one cannot have true freedom of contract, true individualism, without substantial redistributions of power and property. It is perfectly possible to use both methods at once — for instance, to show how labour law decisions ideologically tilt in favour of managerial authority and against worker challenges to that authority; but also to show how many of the same ideological premises of economic efficiency and self-development through control of property could quite plausibly lead to more democratically organised workplaces.

Both schools, however, generally agree that one of the basic techniques used by the legal system to extract the appearance of order from multiplicity and contradiction is that of regularly privileging one pole of each of its contradictory poles over the others. In contract law, for instance, the preferred poles even today are those of rules over standards, formal signs of intent over informal signs, individualism over communitarianism, ex ante risk allocation over ex post loss-sharing, ex ante bargaining over relational reliance, and so on. The suppressed poles never disappear. Indeed they are fully present as potential sources of argument in every case, but they are considered of lesser legitimacy, to be invoked only in marginal or deviant circumstances, as equitable exceptions to the normal rule of law. So one way of exploring with students alternative social arrangements to those we are currently used to is to ask what a piece of the world would look like if it were arranged more in accordance with the legal- political vision of the suppressed pole than of the privileged pole. In this exercise it helps to provide students

with descriptions of real social practices or experiments that actually do express the implications of the alternative vision. In contracts this turns out to be simple, because the actual practices of business firms in continuing commercial relations in many ways much more closely resemble the suppressed informal-communitarian vision of contract law than they do the privileged hard-boiled neo-Hobbesian vision. Other examples I have seen in CLS class materials are Gerald Frug's materials on local government law, which examine ways of making local governments more democratically responsive; and William Simon's materials on corporations, which contain a large section on the theory and practice of worker-managed cooperatives.

In all these classes the technique is to examine some practices which appear to embody a more democratic, egalitarian and solidary vision of social life, but which conventional wisdom condemns as naive, silly, deviant or impractical; to show that the normative justifications for such practices are already immanent in the conventional wisdom itself, only hidden from view; and finally to show that here and there in actual social operation there are some experimental examples that suggest how these partially suppressed other readings of the legal system might be more widely vindicated. We still have a long way to go in producing such teaching materials and techniques. As a teacher in a school where almost every one of the students goes on to big-firm big-city corporate practice, I do not think CLS will succeed on its own terms until it has developed resources that will enable left-liberal students — who as of now believe they must abandon all their progressive political ideas if they enter corporate practice — to work in modest ways to reform such practices. By this I mean reducing hierarchy in firm working conditions as well as encouraging their corporate clients to socially responsible conduct in routine practice settings and engaging in public interest causes outside regular practice. This means as a bare beginning that we have to develop good descriptive materials on what it is that corporate lawyers in various practice settings actually do — something, incredibly, that law teachers have never had — and out of those materials some practical suggestions about what can be done and how to do it.

So in the end, what teaching CLS is all about, or ideally ought to be about, is empowering students to read multiple interpretations, multiple alternative institutions and practices, multiple possible directions, out of a legal order that is too often presented as complacently or tragically frozen into a unitary system and course of development. It is about teaching students to recognise the larger political visions buried in the most technical arguments of doctrine and policy, and to debate these visions openly. I am quite convinced, incidentally, that CLS teachers who are sometimes accused of proselytising in the classroom actually expose their students to a much wider range and diversity of political views than do traditional-doctrinal or law-and-economics teachers. Of course nobody with any sense thinks that the legal system is infinitely malleable or stretchable in any direction one pleases at any time. It is always surrounded by the constraints of entrenched powers, customary inertia, reliance on sunk costs and existing expectations and fear of the unknown. But to impart, through one's teaching, some hope of movement towards a more egalitarian society by pushing at the possibilities already inhering in our familiar legal arrangements — that is worth trying to do.

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[1] See G Frug, A Critical Theory of Law [1989] LegEdRev 5; (1989) 1 *Legal Educ Rev 43.*

[2] K Llewellyn, On Our Case Law of Offer and Acceptance (1938) 48 *Yale LJ* 1, at 35 n 63.

[3] Re-realists would say things like, "usually you can determine intent from the plain meaning of the instrument, but sometimes you have to imply intent; considerations of policy, fairness, and justice are introduced where gaps, conflicts, ambiguities are starkly revealed or where conventional reasoning seems likely to produce grotesque

consequences."

[4] Llewellyn, *supra* note 2, at 783.

[5] F Kessler & M Sharp, *Contracts: Cases and Materials* (New York: Prentice- Hall, 1953) is a marvellous specimen of this genus.

[6] Contrast in this regard works from an earlier period of realism, like RL Hale and Morris Cohen on the distributional bases of contract law, or Fuller & Perdue on contract remedies.

[7] An important exception was the course in antitrust, which had already become a course in applied economic theory, with the cases treated as more or less (usually less) correct applications of the theory.

[8] L Kalman, *Legal Realism at Yale, 1927–1960* (Chapel Hill: University of North Carolina Press, 1986).

[9] See for example AA Berle, *Studies* in *the Law* of *Corporation Finance* (Chicago: Callaghan, 1928).

[10] F Kessler & M Sharp, *Contracts: Cases and Materials* (New York: Prentice- Hall, 1953).

[11] H Shulman & F James, *Cases and Materials on the Law of Torts* (Chicago: Foundation Press, 1942).

[12] I recall that in the Harvard Law School of the 1960s, the throbbing centre of the mystery, the holy of holies, the relative mastery of which would fix forever the aspirant's exact position in the priest-craft of lawyers, was the series of cases elaborating what is known to students of American federalism and civil procedure as the *Erie* doctrine (*Eire Railroad Co v Tompkins* [1938] USSC 94; (1938) 304 US 64). This is the doctrine that federal courts hearing disputes between citizens of different states must apply the law of the forum. The doctrine is technically very complex, though it had not been since the 1890s of much practical importance, and was always trembling on obsolescence because Congress periodically threatened to abolish federal jurisdiction over such cases altogether.

[13] For reasons I have never entirely grasped, tradition-minded lawyers who generally resist social science are much less hostile when it is brought to bear on legal problems of the disadvantaged. Criminology is a legitimate (if very marginal) subject in law schools in a way that, for example, sociology of business organisations is not.

[14] See, for example, RC Clark, *Corporate Law* (Boston: Little Brown, 1986) and TH Jackson, *The Logic and Limits of Bankruptcy Law* (Cambridge: Harvard University Press, 1986).

[15] HM Hart Jr & A *Sacks, The Legal Process: Basic Problems in the Making and Application of Law,* tentative ed (Cambridge Massachusetts: 1958).

[16] The best treatment by far of the middle-level doctrinal and policy critiques of CLS is in M Kelman, *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987).

[17] See, for example, G Alexander, The Dead Hand and the Law of Trusts in the Nineteenth Century (1985) 37 *Stan L Rev* 1189; R Bone, Normative Theory and Legal Doctrine in American Nuisance Law 1850 to 190 (1986) 59 *S Cal L Rev* 1101; D Kennedy, The Structure of Blackstone's Commentaries (1979) 28 *Buffalo L Rev* 209; E Mensch, The Colonial Origins of Liberal Property Rights (1983) 31 *Buffalo L Rev* 635; J Singer, The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld [l9821 *Wis L Rev* 975; R Weisberg, Commercial Morality, The Merchant Character, and the History of the Voidable Preference (1986) 39 *Stan L Rev* 3.

[18] See, for example, D Kennedy, The Effect of the Warranty of Habitability on Low-Income Housing: Milking and Class Violence (1987) 15 *Fla St UL Rev* 485; W Simon, Legality, Bureaucracy and Class in the Welfare System (1983) 92 Yale *LJ* 1198; K Klare, The Labour-Management Cooperation Debate: A Workplace Democracy Perspective (1988) 23 *Harv CR-CL L Rev* 39; G Frug, Empowering Cities in a Federal System (1987) 19 *Urb L* 553; P Gabel & P Harris, Building Power and Breaking Images: Critical Legal Theory and the Practice of Law (1982) 11 *NYU Rev L & Soc Change* 369; and of course the massive project in three volumes of R Unger, *Politics* (Cambridge: Cambridge University Press, 1987).

[19] See R Dworkin, *Law's Empire* (Cambridge: Belknap Press, 1986).

[20] See Frug, *supra* note 1.

[21] See, for example, the debate between Ackerman (Yale) and Komesar (Chicago) on housing-code warranty enforcement, in B Ackerman, Regulating Housing Codes, Housing Subsidies and Income Redistribution Policy (1971) 80 *Yale LJ* 1093.

[22] See P Gabel & JM Feinman, Contract Law as Ideology, in D Kairys, ed *The Politics of Law* (New York: Pantheon Press, 1982) at 172.

[23] See, for example, A Scales, The Emergence of Feminist Jurisprudence: An Essay (1986) 95 *Yale LJ* 1373.

[24] See M Horwitz, Santa Clara Revisited. The Development of Corporate Theory (1985) 88 *W Va L Rev* 173.
