Critical Legal Studies and the Rule of Law

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Critical Legal Studies and the Rule of Law

JEFFREY M. BLUM*

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* Associate Professor, Law School, State University of New York at Buffalo. In addition to the usual inclusions about current employment, every law review article should begin with a starnote where the author explains why this piece is being written, how it is supposed to achieve its objectives, and what type of social context stimulated the author to embark on such a pursuit. Often the story will run: I am writing this to get tenure. I want to please and excite three people who in turn will find ten others to say I am an authentic scholar. I also want to bore or in other ways calm down ten or twelve potentially hostile people who will do me less harm if they think I am not saying anything too controversial, or better yet, if they do not think about me at all.

Because most of us live in social contexts not unlike that which produces the above, many of the important things that ought to be discussed do not get said. Though the strategy of avoiding controversial positions makes sense from the perspective of each individual career move, the unintended cumulative effect on society is detrimental. People's capacity for critical reasoning tends to be deployed least where it is needed most. The first half of this article is my attempt to identify areas where segments of our law teaching profession are going awry. The second half of this article is a more proper academic piece. I have tried to show my capacity as an academic by reformulating other people's ideas at great length. The style is carefully poised halfway between being unreadably boring and bothersomely controversial.

The two halves of the article together suggest that proponents of a Critical Legal Studies movement are somewhat confused about what they are doing. They think they are spreading radicalism and destroying the ideas of legal principle and Rule of Law; in fact, they are contributing to a growing academic sophistication about legal principles while diverting radicals from developing effective forms of political rhetoric, many of which will at least implicitly rely on the idea of Rule of Law. They think that liberalism is their enemy and that their critique exposes its bankruptcy. In fact, they are basically liberals themselves, and their critique, if correctly oriented, tends to strengthen the hand of reformist liberals against formalistic defenses of entrenched conservatism.

I am sure that various readers will disagree violently with some of the things said in Part One. But I hope these readers will nevertheless defend—if not to the death, then at least at the coffee machine—my right to say these things. To spurn the article's bona fide academic contributions on the basis of certain statements in it having upset you would violate at least the spirit of our First Amendment. My interest in liberalism as a force for good has been stimulated by research into the
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unfolding “War on Drugs.” This “war” appears increasingly as a kind of Trojan Horse posing serious risks to the continuation of liberal democratic social order in the United States. The fact that many self-professed “liberals” support this “war” will no doubt contribute to the belief, particularly among the young, that liberalism is an intrinsically fraudulent enterprise.

But liberalism is not responsible for the miserable state of our current mainstream politics any more than Hegel and Nietzsche were responsible for Nazism. All ideas can be corrupted and made into instruments for the subversion of what they profess. The trick is to recognize their authenticity and corruption, and to know how to separate the two. Liberalism will not guarantee us a fine and rational society any more than it will doom us to being a highly racist and hypocritically authoritarian one.

Liberalism, however, is one of our best tools for warding off a threatened future that is nasty, brutish and short. It would seem that now, when the country is facing an authoritarian threat that has captured several agencies of government and grows stronger by the month, is a particularly inauspicious time for younger left scholars to be reflexively attacking liberalism, or for older, more moderate ones to be routinely denouncing all political activity outside the mainstream.

I am indebted to Alan Freeman and John Henry Schlegel who read and commented on Part Two. Their criticisms and the state of current literature on CLS convinced me of the need to write a separate Part One. For helping me to understand the timeless, and now increasingly urgent, political importance of liberalism I thank David Richards. I am also indebted to Jonathan Johnsen, Howard Aranoff, and John Mulholland for helpful research assistance. I also pay tribute to Professor John Kaplan, both for his pioneering work on the irrationality of marijuana prohibition, and for the protection his work has over the years accorded thousands of Stanford undergraduates, myself once included. As a result of the enlightened policies which John Kaplan’s work did much to influence, we have, almost all of us, gone on to become respected contributing professionals rather than clients of an already overburdened criminal justice system.
I. INTRODUCTION: A TRUCE FOR OUR TIMES

THOUGH mistakes may be the mortar and springboard of history,¹ eventually it comes time to admit and to rectify them. So it is with cleavages between liberals, and radicals who have defined themselves in opposition to one another. Rooted in the bitter experience of the decline of the New Left some twenty years ago,² this antagonism has surfaced in most social science disciplines. In law, it has taken the form of clashes between would-be radicals committed to the development of an anti-liberal Critical Legal Studies movement, and liberals committed to expanding legal rights and preserving the Rule of Law.

However, in law as elsewhere, both the radicals’ attacks and the liberals’ responses have been largely counterproductive for the values shared by each. Arguably the antagonism has been self-defeating in each direction. The only forms of progressive radicalism that have shown prospects of catching on in contemporary America are radical liberalism. Conversely, the corporate and monetary dominance of national electoral politics³ make it unlikely that liberalism could again become politically dominant in the United States without significant radical activism on its behalf. One may suspect that the antipathy between self-identified “radicals” and “liberals” has worked largely to the detriment of both.

Each side of this opposition has been a factor in the decline in political influence of liberalism in the United States. Because of this decline, the last twenty years have witnessed the more humane and intelligent segments of our political spectrum become equivocal and self-negating. As a result, Americans have turned increasingly to conservative and neo-authoritarian fantasies, not because these have been in any way cogent or beneficial, but because everyone yearns to stand for something, and liber-

als in recent decades have frequently seemed not to stand firm for anything. They have tended either to become depoliticized or to expend their limited courage and energy on the politically safe, but largely useless activity of berating would-be radicals. Hence the recurring clashes between "liberals" whose identity is anchored by their being "not radical," and "radicals" who are perennially unable to distinguish themselves from liberals in any serious programmatic way. Rather than producing any genuine alternative to liberalism, these clashes have served to divert attention from the serious and substantial task of using universities as bases from which to strengthen the causes of liberalism and internationalism in American society.

Much of the bickering can be traced to the political center-left's failure of nerve in the waning years of the Civil Rights Movement and Vietnam War. For the first time in fifty years, a large segment of the population had been organized to oppose governmental atrocities and war. As the antiwar movement grew and threats of repression escalated, the question was presented to the liberal left: should we restore peace on the campuses by pretending Vietnam was an anomaly, or should we try to extend our opposition from the war itself to the whole foreign policy orientation that produced it? Similarly, with Civil Rights there came to be a split between those favoring slow progress toward racial equality but opposing black power, and those who recognized that transfer of power was essential for meaningful equality. The majority who favored the former adopted the self-image of "liberal"; those who favored black power and a continued internationalist opposition to American militarism adopted the label "radical." Each necessarily viewed the other with a degree of suspicion and disdain.

Through the 1970's the moderate liberals prevailed. Campuses became depoliticized. A U.S.-backed fascist conspiracy to overthrow Chilian democracy achieved its objective with scarcely any protest in the United States. Liberals came to be viewed as being opportunistically acquiescent and ungenuine in their liberalism. True to their instincts, they favored the compromise of depoliticization at grassroots levels, but pursuit of foreign-policy reforms and civil rights legislation in Congress. Limited success was achieved in exposing and curbing abuses of the C.I.A. The troops were withdrawn from Southeast Asia, and some important civil rights legislation was passed. But in time, most of the liberal Senators came to be removed from office, many having been targeted by pro-defense political action committees wielding enormous de facto subsidies from the government.
Although Watergate helped to propel a Democrat into the White House, by the mid-1970's, mainstream national politics was poised to become a string of worsening disappointments. Radicals' perceived need to rebel remained high, but rebellion on a national level seemed increasingly futile. The general tendency of the less militaristic segments of the population was to drop out of politics altogether. Activists sought localities and microcosms within which to play out their rebellion.

Older liberals were left trying to hide from themselves the many ways in which their principles and beliefs were deeply contradicted by government policies. Younger people, some viewing themselves as "radical," were deeply disgusted by the squeamish behavior of their elders, and sought to differentiate themselves from it. So there persisted an angry and seemingly sharp differentiation between "radicals" on the one hand and "liberals" on the other. Both groups lost track of the fact that all were basically liberals who were experiencing fear and rage in varying degrees. Their common cause was easy to overlook because each so conveniently reaffirmed the other's prevailing passion: the liberals, disgusting in their cowardice, fueled the radicals' angry contempt; the radicals, aimless in their angry disillusionment, fueled the liberals' fear of emerging chaos.

This dynamic, which has been reverberating over the last twenty years, has produced some rather shallow philosophizing aimed at strawmen on both sides of the aisles it has spawned. Prominent among the refuse has been the Critical Legal Studies attacks on liberalism, most of which have been superficially philosophical, but also essentially sophomoric. This latter quality has now been effectively exposed by bright interdisciplinarians such as Joan Williams, Don Herzog, John Stick and others.

8. One of the first to set the general outlines of progressive political critique of critical legal studies was Sparer, Fundamental Human Rights, Legal Entitlements and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement, 36 STAN. L. REV. 509 (1984). Though I rooted against (while partially agreeing with) him at the time, I would now concede that I am among the many influenced directly or indirectly by Sparer. An important addition showing basic flaws in the CLS approach to constructing radical political theory was Hutchinson & Monahan, Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought, 36 STAN. L. REV. 199 (1984). (Parenthetically, it is here worth noting that my critique of CLS as a political movement should not be interpreted as meaning it is not worthwhile to attend CLS conferences. There one meets a great variety of interesting, talented people like, for example, Alan Hutchinson.)
But if CLS leaders deserve jeers for their half-baked intrusions into the world of political theory, some anti-CLS liberals also merit rebuke. Having implicitly equated "rule of law" with obeying and not offending those in government, they helped to make the concept appear so unappealing that no self-respecting political person would want to go near it. By tacitly defining liberalism as "reasonable, not radical," they provided license for some astonishingly crude betrayals of liberal principle to occur under the banner of liberalism.9

As radicals came increasingly to define "liberal" as meaning either self-compromising involvement with corrupt government or total lack of courage, they began to seek conceptual ways of distinguishing themselves from liberals. Hence the fantasy of a radically anti-liberal Critical Legal Studies movement. But the sad fact is that any movement for political change must be rooted in the indigenous sentiments of the population it seeks to organize, and for this purpose no one has come close to discovering an adequate substitute for liberalism. Though much maligned in our national politics, liberalism remains very influential in our culture—strong in its libertarian, welfare-state, rationalistic and just plain good neighbor tolerance incarnations.

It can now be argued that radicals should cease searching for conceptual means of opposing liberalism and "attempt to recover some of the content and surprise of liberalism"10 since the source of the failure of nerve that inspired their antipathy was not the ideas of liberalism per se but the human frailty and lack of courage of people who happened to be liberals. The ironic result of their misplaced rivalry is that liberals and radicals now confront pressures to become what they would least like to be. Radicals increasingly must think of devoting their energies to a defense of liberal social order, lest our society become not only irrationally

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9. Some instances where large numbers of self-professed "liberals" have grossly betrayed liberalism include, most recently, support for extreme and arbitrary measures in the War on Drugs; before that, support for American militarists seeking to destabilize the government of Nicaragua; and well before that a tactically unwise decision to concede issues of freedom of speech and electoral campaign finance regulation to the right wing.

militaristic, but increasingly authoritarian as well. Liberals, having now been all-but-fully exiled from the centers of power, must begin to think about adopting some of the methods and goals of radical activism if they are to have any hope of building grassroots support and regaining lost influence. Perhaps the time has come for intellectuals of the center-left to abandon past mistakes of enhancing rivalries between liberals and radicals, and to work instead for a common cause of liberalism that for better or worse, is likely to be taking on an increasingly radical character.

It is in this vein that I offer a two-part assessment of the Critical Legal Studies movement. By “movement” I mean something much narrower than the totality of scholars and work presented at various CLS conferences. The term refers to a somewhat theoretically unified collection of work that has been contributed to by most of the main founders of CLS and centers around the idea of indeterminacy of legal doctrine (hereafter “CLS-indeterminacy approach” or “radical indeterminacy approach”). This work constitutes the major distinctive CLS theoretical contribution to jurisprudence and political theory, and it has an ambivalent character. In the eyes of its founders, CLS has sought to be both a jurisprudential movement affecting the way we think of law, and a political movement stimulating the growth of political radicalism in the United States. My two part assessment turns on this distinction. As a contribution to jurisprudence, CLS has been useful particularly for clearing away vestiges of outmoded legal formalism and inviting more sophisticated, social science-oriented ways of thinking about law and legal principles. As a basis for a political movement, however, the CLS-indeterminacy approach—Duncan Kennedy, Robert Gordon, Clare Dalton, Mark Kelman, Mark Tushnet, Karl Klare, Frances Olsen, Roberto Unger, Gerald Frug and Peter Gabel, to name ten—and defer to the clear and helpful summary recently offered by Minda, The Jurisprudential Movements of the 1980’s, 50 OHIO ST. L. J. 599 (1989), along with the earlier summary, Note, 'Round and Round the Bramble Bush: From Legal Realism to Critical Legal Studies, 95 HARV. L. REV. 1669 (1982). In a more comprehensive vein, see M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987), which attempts to articulate an overarching philosophical coherence of the CLS-indeterminacy approach generally. The attempt is useful, even though part of its usefulness has come in helping critics to focus their attacks on incoherent aspects of CLS ideas. See, e.g., Stick, Review of N. Kelman, A Guide to Critical Legal Studies (Book Review), 88 COLUM. L. REV. 407 (1988).

11. Rather than attempt to pick out particular works that are most exemplary I will merely mention several names prominently associated with the predominant CLS-indeterminacy approach—Duncan Kennedy, Robert Gordon, Clare Dalton, Mark Kelman, Mark Tushnet, Karl Klare, Frances Olsen, Roberto Unger, Gerald Frug and Peter Gabel, to name ten—and defer to the clear and helpful summary recently offered by Minda, The Jurisprudential Movements of the 1980’s, 50 OHIO ST. L. J. 599 (1989), along with the earlier summary, Note, 'Round and Round the Bramble Bush: From Legal Realism to Critical Legal Studies, 95 HARV. L. REV. 1669 (1982). In a more comprehensive vein, see M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987), which attempts to articulate an overarching philosophical coherence of the CLS-indeterminacy approach generally. The attempt is useful, even though part of its usefulness has come in helping critics to focus their attacks on incoherent aspects of CLS ideas. See, e.g., Stick, Review of N. Kelman, A Guide to Critical Legal Studies (Book Review), 88 COLUM. L. REV. 407 (1988).

12. See Minda, supra note 11; Binder, On Critical Legal Studies as Guerrilla Warfare, 76 GEO. L. J. 1 (1987); Schlegel, Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies, 36 STAN. L. REV. 391 (1984). In a somewhat exhuberant vein, Tushnet warns fellow CLSers that “when they find out what we are doing they're going to come after us with guns.” Id. at 403.

terminacy approach has fared poorly. Its contribution has been on balance negative—not so much because of particular adverse effects it has caused, but because it has been strikingly ineffectual.

Since this latter assessment places me among the ranks of liberal critics of CLS, I wish to differentiate my position from three types of criticism that I do not share. First, I do not think that the CLS-indeterminacy approach should be condemned for being nihilist, but only for lacking moral force and being politically ineffective. Nihilism can be an appropriate concomitant and facilitator of reformism in certain circumstances. I will attempt to demonstrate that certain traditional legal approaches and liberal doctrines, such as First Amendment separation of church and state, now furnish a much stronger basis for effective nihilism than does CLS-indeterminacy theory. Critical Legal Studies, though superficially negative in form, bears a relation to real nihilism much like that of strawberry wine cooler to fine cognac. Theoretically, one can become intoxicated and experience a sense of empowerment with either, but the latter is stronger, more seductive, and thus more likely to achieve the result.

Secondly, I do not believe that CLS has had any profound demoralizing effect on defenders of civil liberties or that it has inadvertently ushered in an authoritarian politics by weakening people’s conceptions of legal rights. At most, it has contributed to political deterioration indirectly by routing a significant number of very talented people toward various recitations of indeterminacy theory and away from work that might have turned out to be more usefully connected with political activity.

Thirdly, I wish to disassociate myself from the suggestion made by one irresponsible law school dean that persons associated with CLS

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14. In this respect I would note the prescient words of Harlan Dalton: “In my view, negative critique and positive program are, or at least can be, symbiotic; the former launches the latter and keeps it on course, whereas the latter saves the former from petulance and self-parody.” Dalton, supra note 8, at 436 n.4. See also, Singer, The Player and the Cards: Nihilism and Legal Theory, 94 Yale L. J. 1 (1984).

15. In this respect the fear raised by Sparer, supra note 8, at 516-552, may have been somewhat exaggerated except insofar as some CLS people may have contributed to a heightening of the nastiness of academic politics. But realistically, most of the nastiness around the country has come from traditional legal scholars, many of whom profess to be liberals. While the declining hopes of public interest law and the decreased willingness of courts to take liberal rights seriously may indeed be moving the country dangerously closer to authoritarianism, the total CLS contribution to this process is probably equivalent to that of one ten-minute nap by Ronald Reagan, except insofar as one posits speculatively that people influenced by the CLS-indeterminacy approach might otherwise have been doing things that were politically more useful.
ought not to be teaching in law schools. There have been two bases put forward for that suggestion—that CLS is a dangerous form of radicalism, and that it will cause mass demoralization by negating all conceptions of legal principle. The first half of this article argues that CLS-indeterminacy theory is an extremely undangerous form of radicalism, and the second, that it does not negate conceptions of legal principle or ordered doctrine. It simply places pressure on advocates to define legal principles in a more sophisticated way. Thus, it may be argued that the purge suggestions stem from tendencies aptly described by the titles of Richard Hofstadter's two books, The Paranoid Style in American Politics and Anti-Intellectualism in American Life.

II. PART ONE: CRITICAL LEGAL STUDIES AS A POLITICAL MOVEMENT

A. Taking Liberalism Seriously: Exploring the Potential That Lies Beyond Impulsive Radical Rejection

It is a characteristic American faith that nearly everything can be solved by advances in technology. In accord with this, it could be argued that some of the stranger and more radical of CLS propositions, such as the dictum to oppose all illegitimate hierarchy, to relocate major political power in the hands of city officials, and to place the basic terms of social life politically up for grabs, could become appropriate if we had a certain new invention—a time machine. If, for example, we could return to the days of the Paris Commune during the Franco-Prussian War, then each of these suggestions might be, if not well-advised, then at least polit-

18. See Frug, The City as a Legal Concept, 93 HARV. L. REV. 1057 (1980). The idea of relocating greater political power in cities, unlike the abolition of hierarchy or the basic terms of political life being continually up for grabs, is not inherently implausible. But Frug's implicit proposal only makes political sense in the context of the general shift of power away from nation-states in order to create a viable international order. Internationalist kinds of issues furnish some of the strongest reasons for favoring a relocalization of taxing power and control of at least some basic policies. For example, I think we would all be safer and better off generally if the broad outlines of our nation's nuclear policies and "covert action" initiatives were controlled by a confederation of city governments rather than by the entrenched bureaucracies in Washington, some of which still dwell mentally in pre-nuclear realities. See S. KULL, MINDS AT WAR (1989). Unlike the German Green Party (e.g., "think globally, act locally"), Frug does not draw the connection between localism and internationalism because the latter is viewed as largely beyond the ambit of Critical Legal Studies.
ically plausible—although it would still be appropriate to pay greater attention to the imperatives of armed self-defense than either the Commune or CLS scholars have done.

Unfortunately, though, we cannot change our historical context merely by wishing we had another. At least until the time machine is invented, we should base political critiques and plans for organizing political movements on realistic assessments of the possibilities posed by our actual historical circumstances. Our current period is one dominated by the rapid rise of life-transforming technologies: nuclear weapons, television, computers, tools of global industrialization and, vastly improved means of transportation and communication. These changes have affected politics in at least three major ways. They have made the nation-state obsolete as a viable unit of military territorial sovereignty and set in motion a historical clock during which a viable international order will be achieved or global destruction from war or insufficient ecological regulation will result. They have at least arguably strengthened the political power of elites against their populaces by heightening dependence on elite-dominated instruments of mass communication, and by making armed insurrection too costly in terms of human life. And they have reinforced the importance of liberalism's program of organizing tolerance and peaceful coexistence among diverse racial, ethnic, cultural and religious groups; all of whom must learn to live together in the global village.

Currently in the United States, we are experiencing a kind of political confusion and backlash against liberalism that threatens to impose a substantially more authoritarian domestic social order. The stock CLS formula of attacking "liberal legalism" is becoming increasingly inappropriate as a result. Insofar as what is being objected to is the codification of liberal ideas in law, I would argue that it is politically preferable to favor legalism of this sort. The CLS idea of "overcoming the public-private distinction," while attractive from a socialist perspective if one keys the word "private" to the abuses of insufficiently regulated corporations, takes on a rather different cast when applied to individuals and politically


targeted cultural or ethnic minorities. Roberto Unger's alluring vision of overcoming the liberal separation of self and others\textsuperscript{23} may ring true during moments of ecstatic communion taking place within voluntary organizations, but something rather different is summoned forth when the individuals to be merged are twenty-five million marijuana users, and the "community" is a national one headed by Oliver Cromwell's heir-apparent, William Bennett. Likewise, it may be argued that politics itself depends on a distinctive public sphere to achieve the kinds of dialogue that make rational governance possible.\textsuperscript{24} If by "liberal legalism" CLS writers intend to target not law's specifically liberal content, but the very project of law and legalism itself, then it may be contended that they have chosen a target that is simply too large and fundamental to our kind of society for them to make any significant headway against. Also, even if the transcendence of law as a constraining social form could be achieved, it is easier to envision bad things (life becoming nasty, brutish and short) resulting than good ones (overcoming of alienation through submergence in self-actualizing community).

Probably what is meant by the term "liberal legalism" is something narrower than any of the above interpretations. CLS radicals may be expressing their revulsion at liberal legal scholars who are afraid to clash in any serious way with the political prescriptions of the dominant national power centers. If so, the revulsion may be well-grounded, but it should be expressed more clearly as a denunciation of the scholars' lack of political courage—especially since that lack is likely to be manifested as an abandonment rather than promotion of liberal ideas.

What is really needed is an intelligent truce between those who understand that liberalism and internationalism are both essential for any revival of political sanity in our country, and those who have the impulses of personal radicalism and courage that could help them to become effective, politically engaged organizers and intellectuals. At last, in what I think will stand as a landmark article, Don Herzog has initiated suggestions that if followed, could lead to such a truce.\textsuperscript{25}

Herzog's first suggestion is that CLS writers "drop their mechanical polemic against liberalism" because it is based on "a reading of liber-

\textsuperscript{23} This idea was originally articulated in R. Unger, Knowledge and Politics (1978), and has been a continuing theme throughout Unger's subsequent work. For Critique see Powell, The Gospel According to Roberto: A Theological Polemic, 1988 DUKE L. J. 1013 (1988).

\textsuperscript{24} See Asaro, supra note 8, at 143-148 (applying theory of Hannah Arendt).

\textsuperscript{25} See Herzog, supra note 6.
alism” that is “a mess.”\(^{26}\) Their reading is inadequate because it is based on a methodology of taking political slogans wielded by liberals in the past, removing them from their political contexts, and then equating them with liberalism as a philosophical system. The result is an easy trashing of an absurd straw-man. Liberals, Herzog argues:

> [D]id not advance a set of hopelessly naive claims about subjectivity, individualism, the naturalness of social relationships, and the formalism of law. Instead they brandished such claims as political weapons. And their goals were admirable: they sought to put an end to religious civil war, to alert individuals to the potentially oppressive claims of groups and leaders, to stop market meddling that impoverished already poor workers, and to eliminate capricious sovereign meddling in legal affairs.\(^{27}\)

Confusion is generated by CLS writers forgetting about politics when they address liberalism. The political slogans wielded by liberals are treated by CLS authors as claims about metaphysics, epistemology, the structure of the self, ethics—as anything but political claims. It’s as though liberals began with abstruse philosophical premises and from them deduced liberal politics. This reading of liberalism is naive and misleading.\(^{28}\)

The polemic against liberalism should be abandoned, Herzog argues, because liberal categories such as individual rights, equality under the law, separation of church and state, and reasoned pursuit of general welfare need not be seen as:

> [T]rite or worse yet nefarious coverups for the continuing failure of allegedly liberal societies to deal with poverty and racism, exploitation and sexism, neocolonialism and the all too well orchestrated government suppression of radical politics.

> It’s perfectly coherent to agree that we face severe problems and at the same time to embrace liberalism. Indeed, one might think that liberalism provides just the right resources for criticizing our practices and suggesting changes. To take that possibility seriously, we need to recapture some of the content and surprise of liberalism.\(^{29}\)

Similarly, CLS denunciations of the very idea of Rule of Law ought to be toned down to correspond to the actual force of legal realist and CLS attacks on legal formalism. Typically, these denunciations are double-barrelled—the Rule of Law concept is “trashed”\(^ {30}\) for being polit-

\(^{26}\) Id. at 630.
\(^{27}\) Id.
\(^{28}\) Id. at 611.
\(^{29}\) Id. at 609-10.
ically pernicious in general, and then seen as entirely illusory in any event. Legal rights are viewed as more chimera than substance because "rights discourse is internally inconsistent, vacuous or circular. Legal thought can generate equally plausible rights justifications for almost any result."  

What ought to be said is that both the Rule of Law concept and rights discourse can be used in politically pernicious ways, depending upon their particular usage and context, and that the idea of Rule of Law becomes largely illusory if overstated in ways that are invited by extreme or simplistic versions of legal formalism. But the failure to satisfy extreme formalist criteria of objectivity and separation from politics do not negate the existence of doctrinal regularities differentiating law from purely ad hoc politics; nor does it mean that legal rights have no substance that is worth preserving. This principal fallacy underlying CLS attacks on "rights discourse" and Rule of Law has been ably described by Joan Williams in a particularly important and illuminating article.  

Williams both gives CLS scholars their due as interpreters and appliers of what she calls "the second wave of the new epistemology" and exposes some significant weaknesses of their endeavor. She notes that the radical indeterminacy claims of CLS "Irrationalists" rest on a fundamental inconsistency. Proponents of this view reject the old "picture theory" epistemology of legal formalism by exposing the historically contingent, political nature of law, but then fall into embracing a dichotomy between objective analytic certainty, and pure arbitrariness and unconstrained choice. However, this dichotomy itself derives from the old "picture theory" epistemology that CLS scholars reject. Having lapsed back into the very thing they were transcending, CLS scholars fail to grasp the existence of intermediate, historically contingent forms of determinism that are present in the shared understandings of actors in a given culture and period. Williams' application of a Wittgensteinian approach shows how CLS falls far short of demonstrating any infinite manipulability of legal doctrine, other than in a fictitious world where the only sources of constraint are derived from abstract, analytic logic.  

Neither Williams nor the other critics have sought to analyze why this weakness appears. Clearly it does not come simply from lack of intellectual talent. The leading CLS writers appear consistently impressive in

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32. Williams, supra note 5, at 471-96.
33. Id.
their fluency and erudition. Their philosophical weakness can be seen as a cost borne by scholars attempting, whether heroically or not, to become radical, politically engaged intellectuals. In order to make their enterprise, which is considerably stronger as creative scholarship than as radical praxis, appear even remotely plausible as a basis for political transformation, CLS scholars have felt impelled to make grandiose claims exaggerating their own potential to effect transformation. So, for example, their demonstrations of doctrinal manipulability—which Williams sees only as "highlight[ing] our responsibility for the certainties we choose"—are viewed more grandly as something that will trigger widespread rebellion against law's hypocrisy and delegitimize the existing legal order by revealing its arbitrariness. This hope appears to be accompanied by an extreme idealism which suggests that intellectuals can transform the world by reimagining it in the comprehensive manner occasioned by the practice of "total critique.'

Herzog, rejecting both this idealism and the extreme formalism against which CLS writers react, proudly describes his having spent years arguing that "law is politics carried on by other means," but he chides the author of the statement, "law is politics pure and simple" for failing to seriously consider the implications of "by other means." In other words, the concept of Rule of Law is not an impossibility. But what is impossible, and properly rejected by CLS, is the attempt to use the concept as a basis for arguing that law is either "politically neutral" or "above politics" in every sense of the word. It is worth noting that contemporary leading proponents of the Rule of Law, such as Ronald Dworkin, do not make such claims.

The reason that Rule of Law cannot be deemed pernicious in general—apart from the fact that it frequently is used to defend desirable social practices—is that CLS imaginings of how its rejection will automatically liberate are unfounded. Herzog states:

[n]othing of political note in the debate between CLS writers and liberals follows from accepting the claim that forms of life are socially constructed

34. See R. UNGER, supra note 19 (expressing faith that exposure of indeterminacy of legal doctrine could stimulate oppositional movements); see also note 12, supra.
35. Williams, supra note 5, at 496.
37. Herzog, supra note 6, at 611.
38. Schlegel, supra note 12, at 411.
39. See, e.g., R. DWORKIN, LAW'S EMPIRE (1986) (law viewed as a means of achieving and adapting a substantive political vision).
and not mandated by any kind of natural or transcendant necessity. It does not follow, for instance, that radical change may be achieved simply by persuading people of the social construction thesis. Nor does it follow that everything must always be up for grabs.\(^{40}\)

For these reasons acceptance of the Rule of Law idea, or of legal doctrine as having some degree of coherence and consistency cannot be assumed to be a primary factor negating people's political freedom to transform the world.

Rule of Law should not be seen as simply illusory because the concept can still have a meaningful existence even when extreme formalist versions of it are abandoned. Herzog notes:

> CLS writers pose a stark binary choice: either the law tells passive judges what to do, either rules times facts equals decisions, or it is all up for grabs and anything goes. It would be profitable here for defenders of legal interpretation to explore middle grounds, to articulate positions that differ from both.\(^{41}\)

True indeed, and easy from this to see what is very likely the major contribution of CLS to jurisprudence: in the longstanding debate over principles versus adhocracy in law, CLS has forcefully articulated the negative moment when antiquated formalist conceptions of legal principle are cast aside. No longer can anyone straight-facedly say that judicial opinions represent complete statements and application of legal principle.\(^{42}\)

But it is most unlikely that the longstanding debate will end at this point. More likely, there will be a new positive moment in response when middle-ground theories, probably of a functionalist sort, anchor connected bodies of doctrine in terms of larger underlying programs which make recurring doctrinal patterns appear sensible and correct.\(^{43}\)

In the second half of this article I argue that CLS-indeterminacy critique's greatest significance may be in furthering the development of such conceptions of legal principle.

However, at this point the more interesting questions are the political ones, and questions pertaining to the evolution of jurisprudence are pertinent only in one respect: they affirm that CLS has had real value in

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40. Herzog, supra note 6, at 622-23.
41. Id. at 629.
42. See discussion in Part Two, Section B infra.
43. See Williams, supra note 5, at 491-496. For an example of an attempt to formulate such a theory in the First Amendment context, see Blum, The Divisible First Amendment: A Critical Functionalist Approach to Freedom of Speech and Electoral Campaign Spending, 58 N.Y.U. L. REV. 1273 (1983).
legal education in at least two regards. It has been a quite useful correc-
tive—and I speak from the experience of being educated first by tradi-
tional, formalist-leaning Harvard Law School professors and then by
CLSers—to the not inconsiderable naivete fostered in students by law
professors’ penchant for teaching “in-role” as lawyers or judges and thus
speaking more in the language of formalism than any sophisticated per-
son would now think. But students, if unexposed to the CLS counter-
point, really do learn to think that way, and probably are made more
helpless as neophyte attorneys as a result. Also, as mentioned, CLS has
constituted a negative moment or antithesis in the dialectical evolution of
conceptions of legal principle. This achievement retains its value even if
the kinds of future accomplishments to which CLS may be leading are
things that CLS leaders themselves disdain.

It is worth emphasizing that the positive achievements of CLS in no
way depend upon its leaders’ radical fantasies that have grossly exagger-
ated the transformative potential of their work. Nor do the achievements
depend upon the harsh, albeit philosophically incoherent, rejections of
liberalism and Rule of Law that such fantasies have encouraged. If CLS
leaders are still serious about promoting political radicalism, then they
ought to consider retracting some of their past positions and opening
their minds to alternative approaches. Their radical indeterminacy the-
ory has hamstrung them by making anathema certain concepts that
could now become supremely useful in the project to which they have
aspired. It has also directed them to conceptualize politics at a level of
abstraction where confusion comes easily. Sporadic, confused utterances
have resulted, as when one of the brightest and most politically commit-
ted of second-generation CLS scholars showed up at our law school only
to tell a crowd of people that his methodology was “to tell people to take
wrong turns.” The crowd was not impressed. Nor were a group of inter-
national human rights activists impressed when another CLS luminary
showed up to warn them against continuing their good-hearted “spread-
ing of legalistic false consciousness.”

The first-generation CLS scholars who have striven to maintain an
ideologically coherent, politically radical movement have diverted polit-
ical energy more than they have inspired it. By maintaining a strong pre-
tense of radicalism largely unmatched by substance, they have triggered
reaction and academic firings without even developing the politically
threatening quality that usually summons forth repression of this nature.

44. Because I regard both this speaker and the one previously quoted as friends, and am aware
that each is both very bright and in some ways politically committed, I decline to identify either.
Consequently, the limited political practice of CLS has been largely defensive or reactive in nature, consisting of acceding to demands of minority scholars that they aggressively promote affirmative action and of trying to defend the academic career prospects of scholars tagged as being in CLS. Reforms that stretch beyond the confines of legal academia, such as favoring legalization of marijuana, liberalization of government secrecy laws, or regulation of campaign finance, have been tacitly rejected as beyond the pale of CLS.

So it would appear that CLS leaders in their incarnation as political radicals have little to lose by accepting Herzog's truce offering. But the "truce" as articulated thus far is one-sided. It comes close to being a simple call for surrender and does not address the underlying problem of self-professed liberals' political inauthenticity that originally inspired the revulsion and desire to turn against liberalism. While Herzog himself decries "the continuing failure of allegedly liberal societies to deal with poverty and racism, exploitation and sexism, neocolonialism and the all too well orchestrated government suppression of radical politics" and notes the aggravating effects of "self-avowed liberals who are complacent, even smug, in downplaying or denying our social and political problems," he does not propose any means of redressing even the latter. He merely suggests that CLS scholars not "insist ahead of time that [their] analysis be radical." The converse, which I will present under the rubric of Taking Liberalism Seriously (TLS) is that liberals should not insist that their analyses always be politically moderate or centrist. They should commit themselves at least in the first instance to the moral philosophical project of identifying the liberal principles to which they will adhere. Secondly, they should be open to diverse opinions about which areas of law pose particularly grave or sharp problems of injustice, oppression or betrayal of liberal principles. They should then be willing to learn facts pertinent to these areas and take seriously the implications of these facts for the principles to which they have committed themselves. Part of taking facts seriously involves exercising due diligence in learning when not to rely on the demagoguery of official sources, but to embrace information from alternative or even suppressed sources. If this is done, I suspect that

45. Herzog, supra note 6, at 610.
46. Id.
liberalism will no longer be seen "as a creaky old doctrine that inspires only groans and boredom on the left." 48

Similarly, if the Rule of Law concept is to be politically rehabilitated, it should be made clear that "law" is not the exclusive province of a judiciary that has grown less liberal with each passing year. Rather, it should be seen as having diverse but connected layers—some comprised of the moral principles and expectations of the people which condition their views of what is and is not valid law, and others consisting of the positive doctrine laid down by courts and other officially authorized decisionmakers. We may then speak of contradictions, conflicts and strain within the law and view law largely in the way suggested by Robert Cover—as an ongoing dialogue between rulers and ruled, in which each may legitimately take some of the initiative in fostering change. 49 In short, the Rule of Law idea must be divorced not only from the crude legal formalism of the past, but from the legal positivism that has been implicit in smug liberals' definitions of themselves as "reasonable, not radical."

If liberalism is really taken seriously in this way, then it will have significant implications for academic disciplinary boundaries and the way law teaching is conceived. No longer should we be tied to studying simply that which appellate courts pronounce. The creation of well-informed socially responsible citizens should be an explicit mission. Law faculties might, then take greater initiative in proposing long-overdue law reform that seems not to be occurring through the primary channels of government. Liberals will be pressed to develop the courage of their convictions, and with it a willingness to stand openly against the oppressive and irrational policies of our national government.

For example, we ought to take seriously the liberal idea of government's fundamental obligations to act rationally and to promote the general welfare. For this it will not suffice to engage in rhetorical demonstrations of how the concept of "national security" is vacuous, circular, internally inconsistent, et cetera. We must learn about the nuclear arms race, and the subversive nature of the CIA's militaristic adventurism in the third world, and we must be able to explain why both are fundamentally at odds with the real security needs of the American peo-

48. Herzog, supra note 6, at 609.
In short, we must allow open advocacy of internationalism, and not insist in advance that liberals do nothing to cast doubt on their loyalty to the nation-state.

In taking seriously the liberal ideas of rational governance and checking abuses of power, we should be able to spot failures where they are occurring. Ideally, our national government has three separate branches—the legislature, the executive, and the judiciary—that check the errors and excesses of one another. There is also the ostensibly "free press," the fourth estate, that independently checks abuses by truthfully informing the people of them. But what if the reality is rather different? What if we find in one policy area after another collusion between Congress and the executive in support of patently irrational policies that are effectively rubber stamped by the judiciary? What if the media, instead of truthfully exposing, simply heightens politicians' temptation to become demagogues by rewarding them with favorable coverage whenever they stimulate excitement by appealing to widespread prejudices?

Might it not then be suggested in accordance with the TLS program that there is now a need for a fifth estate to check the combined abuses of the other four? Does it not seem likely that universities are the only major societal institution that is well equipped to play this role? Would this not call for some revision of academic standards to reward careful, truthful scholarship that is politically engaged and does not saddle itself with the false objectivity of mirroring the prevailing prejudices of those in government?

If there are substantial numbers of liberals in academia who are open to such a proposed truce, then clearly TLS is a direction in which radicals should be heading. In the remainder of the first half of this article, I will present two types of arguments in favor of the TLS approach. The first addresses the nature of political radicalism and argues that a concept of moral force is central to its success. I will argue that CLS-indeterminacy theory is radically self-limiting as a basis for political radicalism because critiques that are rooted in it are destined to be highly abstract and to lack moral force. By contrast, I will argue that moral force in our society is closely connected with ideas of standing, arbitrariness, truth and falsehood, perceived irrationality, and deprivation of liberty—in short, the main ideas of liberal legalism.


Secondly, I will attempt to demonstrate the much stronger moral force of arguments rooted in a TLS approach by presenting an actual political exhortation in the form of a letter to colleagues. The letter will have a principally nihilist character both because this is an area where CLS-indeterminacy approaches might be thought to have an advantage, and because it affords an opportunity to show readers unfamiliar with political theory what real nihilism looks like.\textsuperscript{52} Readers may then contrast it with the anemic reflection of nihilism that appears in some CLS literature.

\section*{B. Moral Force and the Political Limits of a CLS-Indeterminacy Approach}

Assume for purposes of argument that our goal is to promote political radicalism in and around law schools. We want to know whether a better conceptual vehicle for this can be found by organizing legal scholars around Critical Legal Studies rejections of what its founders call "liberal legalism," or by using familiar concepts of liberal legalism to express shared outrage over things that are happening in society. A closely related question is whether to attack law in general for being basically a sham, or whether to attack particular areas of law as being out of sorts with the ideals and principles of our laws generally.

Let us begin by articulating the kind of critique that progressive critics of CLS-indeterminacy theory would be likely to present. They would probably view the theory as not terribly radical in its substantive political implications, but as having a heretical character because it clashes with the way most advocates of social change have conceived of the relation between their movements and law.

Indeterminists' strategy of delegitimizing all legal principles can be characterized as a kind of urban renewal model of social change. It views the existing legal order as a blighted landscape which should be leveled, so that more attractive structures can then be constructed, or open spaces preserved. Such a model is unrealistic, insofar as it implicitly envisions a society so free from conflict and coercion that people are able to transcend their psychological needs to identify with legal authority. A better analogy might be drawn between legal principles and buildings in

\begin{footnote}
\textsuperscript{52} See, e.g., Nock, \textit{On Doing the Right Thing}, in \textit{Our Enemy the State} (1950); L. Spooner, \textit{Vices Are Not Crimes}: \textit{A Vindication of Moral Liberty} (1980); R. Tucker, \textit{Instead of a Book}: \textit{By a Man Too Busy to Write His Own} (1897); \textit{Revolutionary Pamphlets} (R. Baldwin ed. 1927).
\end{footnote}
protracted urban guerilla warfare. Combatants in such struggles do not seek to level every building in the area. Rather, they inhabit some structures which are used as bases in fighting the opposition who inhabit other structures. Different legal rules and principles are in some sense inhabited, by contending social groups. The shelter they provide is two-fold, encompassing both protection from hostile forces, and satisfaction of the need to perceive oneself and one's political initiatives as lawful.

The fact that diverse laws differentially furnish supporting contexts for the political initiatives of various groups imbues legal doctrine with heterogeneous political meaning. If existing doctrine encompasses some patterns that have genuine strategic value for progressive change, then there is an argument that the proponents of such change should have the intellectual capacity to formulate and defend legal principles, as well as attack them. Such defense seems particularly appropriate when political initiative is largely with the forces of reaction, and progressive forces are seeking to freeze and perpetuate relatively congenial aspects of the legal order.

But regardless of the particular political context, there are strong reasons to doubt the political efficacy of any strategy aimed at delegitimizing law generally. CLS proponents would likely have more success if their renunciation of legal principles were conceived of as an intermittent tactic rather than a general program. Hence, the question posed by indeterminists—whether one favors legitimacy or delegitimation in general—may be politically the wrong question; the right one being, when should particular doctrines be supported or undermined?

If renunciation of established legal principles were conceived of as tactic rather than program, it would be applied sparingly and directed at the most politically regressive rules and patterns. Renouncing principle in some areas of law (either by disavowing coherence or by denouncing the purposes that underlie acknowledged coherence) would be seen as compatible with taking the opposite tack of formulating and defending principles in other areas. The intellectual tools of “trashing” would then be understood as available both for renunciation and for principled normative argument favoring one strategy of governance over another. The

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53. This analogy, like that of Critical Legal Studies to guerilla warfare in Binder, supra note 12, suffers from being what a literary agent recently called “a false analogy.” In each case the differences between the two phenomena being compared so outweigh the points of similarity that the analogy, if taken seriously, is likely to be more confusing than illuminating. Nevertheless, the comparison does serve to illustrate a point in each case.

54. This was pointed out in Sparer, supra note 8.
CLS movement would be encouraged to foster capacity to construct as well as deconstruct principles, so that the choice between construction and renunciation could be made tactically based upon a political analysis of how diverse areas of law differentially redistributed power and initiative.

The indeterminist program of general renunciation is usually accompanied by a broader strategy of seeking to delegitimize the existing legal order as a whole. However, such a strategy is likely to be impeded by people's affirmative needs to generate mentalities that facilitate their acquiescence to established power. Very few people would ever have the capacity to reject the legal order as a whole because of flaws in the cogency and coherence of its ideology. Most strive to believe in its legitimacy because doing so enables them to guide themselves away from self-destructive conflict without feeling the fear that they would otherwise need for such internal guidance.

If one truly internalized a burning feeling of illegitimacy that applied to all established symbols of authority one would either need substantial fear to keep "anti-social tendencies" in check, or one would run amok. A sense of illegitimacy for all authority is sometimes internalized in a way that is necessarily detached from action. This detachment, far from being temporary or peripheral, is intrinsic to the type of message being internalized. Far more common than detached general renunciation though, is the tendency to embrace one or more aspects of institutional legitimacy, and to justify political opposition by positing a clash between these aspects and others. So, for example, people will identify with the president, but oppose taxes that make the president's government possible; they will be against big government, but favor the United States; they will despise bureaucracy, but respect the particular bureaucracy which is their employer. Reformist liberals do something like this when they champion civil liberties law, but criticize laws that sustain and exacerbate disparities in wealth. Radical indeterminists do it when they display a passionate attachment to legal academia's primary value of coherent, rigorous argumentation and set this value off against established forms of legal doctrine.

55. The renunciation, which has to some extent been presented under the banner of an "irrationalist" school of thought, is directed principally at attempts to formulate legal principles, illustrate the ordered nature of legal doctrine or mobilize political energies in support of specific legal reforms. For one of the clearest statements of the position, see Dalton, Review of the Politics of Law, 6 HARV. WOMEN'S L. J. 229 (1983); see also, Freeman, Truth and Mystification in Legal Scholarship, 90 YALE L. J. 1229 (1981).
In other words, the very thing that legitimizes and makes possible opposition to some aspects of the social order is the belief that these aspects are contrary to other aspects. This belief allows for the simultaneous satisfaction of desires for collective rebellion and identification with symbols of authority. In theory, one might satisfy the deep ambivalence by rejecting law and accepting other symbols of authority. But because law is so closely connected with the coercive power of the state, a consciousness that rejected it in more than a detached way would fail to satisfy the underlying self-protective need. Hence, any movement that is a serious contender for power and influence must either perceive itself as fundamentally lawful, or exist in the context of a near-total breakdown of the state's coercive power. Seeking to build an oppositional movement by rejecting all law would deprive the movement of a major source of its own internal legitimacy and collective identification. Hence critics of radical indeterminacy correctly assert that its renunciation of law risks “demoralizing” social movements.

Instead of rejecting legal authority in toto, social movements bringing change generally aggregate elements of legitimacy in the hope of ultimately being able to depict their opponents as outlaws. Thus, belief in a legal principle of free speech may be coupled with faith in the moral validity of the movement's cause and indignance at opponents' repressive tactics; all in an attempt to assert the movement's superior legitimacy. The greater the movement's success, the more it comes to be defended by interventions of the state; the more the lawful processes of legitimation become a vehicle of social change. To view legitimation as an inherently conservative force is to hypostatize a particular historical period where conservatism is ascendant into a universal condition.

If social change occurs principally by reorienting the dominant forms of legitimation in favor of a movement's program, then a broad strategy of across-the-board delegitimizing of legal authority can have only limited success. One might say that to facilitate social change it is not enough to reject the law, one must change the law—such change being the only potent way of delegitimizing society's repressive forces. But such change depends upon legitimation of progressive movements.

Existing law can plausibly be viewed as a sprawling amalgam of liberal social democratic and corporate or conservative ordering strategies, differentially reflected in various bodies of doctrine. If one believes that a

56. See Sparer, supra note 8.
useful way to reorient legitimacy in favor of social movements is to strengthen social democratic tendencies in the law while undercutting conservative ones, then one is likely to favor using renunciation only as a tactic against corporatist doctrines rather than as a general program applied even-handedly against corporatist and social democratic alike.

By conceiving of change in ways that are excessively voluntaristic, advocates of renunciation underestimate the importance of social structure in the process of change. They pay insufficient attention to the defensive aspects of progressive change and view legal principles simply as ends, rather than as means and ends both. They overlook or too quickly dismiss the political diversity that is represented in existing legal doctrine, and especially fail to see that different doctrinal areas may represent varying preponderances of divergent ordering strategies, some more progressive than others. Thus, some legal principles may be worth concretizing and defending because they are consonant with relatively desirable forms of political evolution. This is especially true during periods of reaction when society's conservative forces seek to undo past gains, and legal principles serve to increase institutional resistance to undesirable changes.

Radical indeterminists' ability to overcome this critique necessarily depends upon their having some theory of motivational psychology that translates the experience of discovering legal doctrine's apparent indeterminacy into a shared movement-generating passion for change. Merely arguing that legal rights sometimes give only illusory protection does not suffice for two reasons. First, no one in CLS has ever been able to demonstrate that legal rights are always unimportant—indeed to assert that First Amendment rights have no real significance for political organizing seems implausible. And even if rights were always illusory or unimportant, it is quite possible that the illusion of their efficacy would do more to foster radical political movements than would a belief in law being nothing more than a disguise for arbitrary exertions of power.

Any sort of political radicalism will necessarily confront certain disincentives. People's careers can be jeopardized, promotions imperiled by controversy, and if either the radicalism or reaction in society proceeds far enough, legal scholars may find themselves on the wrong side of the law. Given these possibilities, there must be some strong motivating force to make scholars want to brave the risks. Right away we are confronted with the task of articulating a theory of political motivation. We want

58. See Matsuda, supra note 8; Crenshaw, supra note 8.
our conceptual basis of radicalism, be it CLS or TLS, to guide us in directions that our theory of political motivation tells us will energize and expand radical activity.

Of course, it may not be clear whose motivation the theory must address, since one of the main ways political people are sustained is by finding a constituency of sympathetizers who perceive their own needs and aspirations as being promoted by their political activity. But regardless of whether motivation is seen as necessary only within legal academia or beyond it, some general points can be made.

Theories of political motivation are a sore spot for most CLS writers, so one does not often find them being articulated. Usually, they are either implicit in exhortations for change or altogether absent. One of the clearest and best statements of the motivational theory underlying the CLS-indeterminacy approach was authored by Clare Dalton several years ago.\textsuperscript{59} Having rejected the proposed motivational theory of two critics\textsuperscript{60} for being simply “convictions personal to the authors,” Dalton writes:

Imagine instead beginning with the premise that critique is itself a supremely constructive enterprise, exposing the constraints that inhibit us from reimagining our world in a way that is not dominated by the contradiction that it is our historical circumstance to see as fundamental. Imagine critique as a powerful device for stripping away from us, if we choose, the legal abstractions by which we order our perceptions, leaving us groping, to be sure, but forced to deploy whatever other means of decision are available to us, and with at least the hope of making something new of our experience. Imagine that instead of appealing to its audience in the name of “grand design,” the claim of critique is simply that, to the extent it influences the audience’s experience of and activity within society, in ways suggested by the critique, it stands validated. Imagine the possibility that those who embraced the experience and felt changed by it, would feel the desire to act with others towards social transformation in the name of a contingent commitment to association rather than isolation and conflict. (emphasis added)\textsuperscript{61}

Dalton asks why these imaginings are “any less convincing”\textsuperscript{62} than others. My answer is that the motivational theory implicit in them seems excessively rationalistic and abstracted from human experience to the point of being perhaps a bit naive.\textsuperscript{63} The implicit theory seems to be that

\begin{itemize}
  \item \textsuperscript{59} Dalton, \textit{supra} note 55, at 241.
  \item \textsuperscript{60} Hutchinson & Monahan, \textit{supra} note 8.
  \item \textsuperscript{61} Dalton, \textit{supra} note 55, at 241-42.
  \item \textsuperscript{62} Id. at 242.
  \item \textsuperscript{63} Conservatives periodically have attacked CLS scholars for being naive about human nature.
\end{itemize}
people, if free, one, would want to reimagine the world in ways that foster greater closeness ("association" rather than "isolation") among people; two, but they are prevented from doing so by embracing "legal abstractions" which order their perceptions and make them think of existing social relations as natural and necessary; three, because their embrace of these abstractions is conditioned on a shared belief in their intellectual cogency, critique aimed at showing the incoherence of legal doctrine can break the spell of the abstractions and empower people to begin transforming the world.

If this theory were valid, then exposing legal doctrine's philosophical incoherence would constitute effective radical political practice almost irrespective of the particular doctrine being exposed. However, there are some problems with the theory. First, the strong, principled commitment to intellectual cogency does not exist in the consciousness of most people, or even most law students. The primary reason that most people acquiesce in existing hierarchies and social relations is not that they believe no other forms are possible—a simple reading of National Geographic magazine would probably tell them otherwise—but that they face real threats and coercion if they do not conform, and receive actual rewards if they do. People sometimes adopt rationalizations about existing social relations being natural, necessary, or the best ones possible, as a way of guiding themselves to conform. But this is probably because conformity is seen as in their own best interests for other, more tangible reasons. To attack only the rationalizations and to do so in highly intellectualized fashion is not likely to break any spells since the underlying sources of the desire to conform are left intact.

The harder but also more important question is how to neutralize the capacities of those wielding power to administer the punishments and rewards that compel obedience. For this, collective action is undoubtedly necessary, since individuals who try to do it alone will almost certainly be sanctioned. If no mass support for their disobedience is forthcoming from others, then the lesson that all will learn is simply one of reinforcing the need to obey existing authority.

Sometimes this attack takes the form of claims that people are necessarily "selfish." See, e.g., Note, The Faith of "Crits": Critical Legal Studies and Human Nature, 11 Harv. J. L. & Pub. Pol'y 433 (1988). However, an important distinction should be drawn between selfishness in the sense of caring only about one's own personal gain or welfare and experiential groundedness, which sees people's political commitments coming out of things that are experienced as unjust or oppressive in their or their clients' daily lives. Because people are capable of generating gratification for themselves when they act altruistically, "selfishness" is a particular, historically contingent expression of human capacities rather than a fixed trait of human nature.
Some advantage is to be gained by delegitimizing rulers' familiar uses of symbols and ideologies that are commonly employed to cajole acquiescence. But such delegitimation requires that the rulers' rhetoric be rendered shameful and outrageous—ideally to the point of making them want to abandon it for fear of adverse reactions. Mere demonstrations of philosophical incoherence, or worse yet, mere showing of historical contingency and social situatedness, are not likely to turn the trick because such incoherence and situatedness are the normal ways that most human beings communicate with each other most of the time. To sustain outrage against these, we would have to embark on the difficult task of being perpetually at war with everything around us. To rely on such an approach immediately presents us with a dilemma. Either our audience is sophisticated, in which case they will probably know that we are simply calling on them to become enraged at the human condition, or they are not sophisticated, in which case the whole corpus of demonstrations of philosophical incoherence, fundamental contradiction and the like, are likely to either mean little or feed into stereotypes about bumbling, long-winded intellectuals.

A much more effective way of undercutting authority and weakening the hold of its favored ideologies is to show that its exercise is historically contingent not only in the abstract sense of being simply one possible way of ordering experience, but also in the very immediate sense of being poised on the verge of actual disintegration. The effects of such demonstrations can be powerful indeed, but they require large numbers of people acting in concert. Once they have been achieved, they are likely to be applauded by many people (as well as condemned by many others) but until then, the necessary mass participation is likely to be forestalled by fear. Thus, the key question is how to help people overcome their fear so that they may proceed in groups to bring about the desired change.

It is at this point that the human, mammalian, instinctual machinery of rage-inducing territorial and protective responses becomes pertinent. Unlike the computers they have invented, people are guided heavily by their passions. Foremost among these is the aggressive-defensive territorial response that in the state of nature arose only in response to immediate physical threats, but has since been sublimated into a capacity for outraged response to either perceived injustices, or perceived contingent future threats to a way of life.

65. See id.
This primitive anger response is an indispensable component of radical political energies. Once triggered in a sustained and recurring way, it helps to block out fear by affording politically activated people the strong gratification that comes from satisfying emotionally predominant aggressive impulses. Long-term conceptions of individual interest (for example, worrying about career advancement) are cast aside in favor of a commitment to either principles of justice or long-term conceptions of collective interest, because such cognitive maneuvers facilitate the pressing immediate interest of affording the desired gratification. It is this type of mass emotional turnabout that is roughly described by the term “radicalization.” The capacity of any critique to either inspire such a response, or defuse it once it is occurring is what I mean by the term moral force.

Not every type of critique or exposure of hypocrisy is likely to have the moral force needed to trigger shared outrage. Whether any given critique will be successful depends less on the all-encompassing, seemingly fundamental nature of its target than on the strength of people’s personal stake in what is being betrayed and the vitality of popularly held ideologies sensitizing people to notice and collectively respond to the betrayal.

Curiously, the same types of situations that will tempt many people to turn against an ideology and develop means of disassociating themselves from it are also likely to create circumstances where, if the ideology were used critically rather than abandoned, it would have significant moral force. For example, the spectacle of liberals in positions of power and authority betraying fundamental precepts of liberalism might make liberalism appear very unattractive and thereby spawn things like CLS attacks on liberalism. But what may be passing almost unnoticed underneath the polarization is the potential for widely held liberal ideas to serve as catalysts for outrage against the betrayal.

If the CLS-indeterminacy approach is to be a generator of political radicalism, then it must have the potential to foster and catalyze enraged responses to the perceived injustices of social order. It must show its metal not merely in establishing certain types of intellectual superiority, but in the highly passionate process of making the exercise of existing authority shameful, of stimulating rage at injustice, and thereby generating widespread symbolic disobedience. The critique must have strong moral force.

Will the mere showing of historical contingency or philosophical incoherence in legal doctrine have sufficient moral force to inspire mass radicalization? There are grounds for skepticism. Because we regularly tolerate incoherence and seldom condition our obedience on any careful
scrutiny of analytical cogency, demonstrations of the manipulability of legal doctrine and of the hypocrisy of those who speak in extreme formalist language will not provoke great rage. While such demonstrations may theoretically induce those who wield authority to speak in more sophisticated, carefully qualified ways, this is a far cry from inspiring the type of radical movement for which many CLS leaders have yearned. What then might be a better role for legal intellectuals wanting to promote radical change? Perhaps it would be to identify potential areas of enraged response, and to undertake the combined legal-factual investigations to help translate that response into some sort of intellectually and emotionally powerful critique. Such efforts must be guided by theory, but the question is, what kind of theory?

Following an effort to summarize several facets of the CLS-indeterminacy approach, I will argue that by the test just suggested, liberalism is worth a great deal and Critical Legal Studies-indeterminacy theory very little. Because people's propensities for enraged response to injustice are conditioned by prevailing ideologies, and because liberalism is the most politically promising of our widely-held ideologies, it makes sense for radicals to view liberalism not as something to be swept away, but as a guide for figuring out where popular anger and critiques with strong moral force may properly be forthcoming. The CLS-indeterminacy approach is an inadequate substitute for liberalism in two respects. Because it fails to focus on any particular form of injustice or oppression that would outrage anyone, it is left to rely on Dalton's inadequate theory of political motivation, and is not likely to be politically effective as a result. But even if it were, it might be counterproductive, since its main import could be either to further obscure the sources of rage, or to diminish their force by lowering people's expectations.

Six animating ideas have guided efforts to build a Critical Legal Studies movement around the idea of legal indeterminacy (hereafter the CLS movement). These are:

1. The idea of an intellectual-political practice built around a project of relentlessly exposing the incoherence or indeterminacy of legal doctrine. 66
2. The emphasis on law as legitimation of injustice. 67

3. The view of legal rights as primarily vehicles for the dissemination of false consciousness and political passivity.  

4. The idea of a political movement emanating from law schools, and the concomitant idea of legal intellectuals as initiating transformative processes by shattering repressive conceptual structures.  

5. The strategy of not articulating specific reforms or programs of transformation, but of endorsing either spontaneous, unguided local action and generalized opposition to hierarchy on the one hand, or abstract, intellectualized "total critique" on the other.  

6. The idea of law as intrinsically political and as properly shaped by extra-judicial, extra-legal action such as the various forms of civil disobedience that have catalyzed the emergence of contemporary civil rights and First Amendment protection.  

The last of these is shared by CLS, TLS and other approaches. From the perspective of trying to foster political radicalism it should be considered the least controversial of the six ideas since there is little reason to believe that important social change of any sort can be brought about without exerting significant political pressure. Because flagrant disobedience is a principal means of generating pressure on law makers, whose profession requires them to be concerned about both legitimacy and enforceability, extra-legal activities—whether of black people no longer willing to sit in the back of the bus or of millionaires slyly declaring campaign finance laws to be unworkable—are often indispensable for change. The important thing is to devise forms of disobedience which achieve more in the way of mobilizing support or weakening the exercise of hostile authority than they cost in producing backlash.  

Because the CLS movement has adopted theories which are naive about psychological processes of political change, it has been led to engage in types of disobedience which are misplaced and ultimately counterproductive. In committing the (fully lawful, but nevertheless jolting) disobedience of attacking the moral sanctity and intellectual cogency


69. See D. Kennedy, supra note 17; R. Unger, supra note 19.  

70. For CLS critique of the reformist or "instrumentalist" view, see Gordon, New Developments in Legal Theory, in The Politics of Law 281 (D. Kairys ed. 1982); see also Peller, The Metaphysics of American Law, 73 CALIF. L. REV. 1151 (1985); Boyle, supra note 36; Dalton, supra note 55; Freeman, supra note 55; for discussion and overview see Binder, supra note 12.  

of legal doctrine and law generally, the CLS movement has spread its disobedience too thin. The sheer immensity, and thus the abstractness and amorphousness, of its target has kept the movement from being able to inspire much political support. Hence, the disobedience has produced mainly backlash and has quickly placed CLS on the defensive as the movement has sought to protect the careers of its younger scholars.\textsuperscript{72}

The first five tenets can be likened to the proverbial primrose path. They have provided the directions that when followed faithfully lead to a kind of political futility. Viewed separately, each of the five has a somewhat different status in terms of truth value and validity as a focus for political organizing. The first tenet positing indeterminacy of legal doctrine has substantial intellectual validity, but so do arguments that its political significance has been vastly overstated by the CLS movement. All that is really achieved by this critique is a persuasive redemolition of antiquated versions of legal formalism, and a challenge to legal scholars to begin accounting for doctrinal regularities in more contemporary, sophisticated ways. While the indeterminacy of doctrine critique shows that it is highly unlikely that legal principles could ever be completely outcome-determinative—an insight that most legal scholars express using the category of “close cases”—it does not negate the prospect of partial outcome-determinativeness, and of stable patterns in law, which are really all that is necessary to sustain conceptions of legal principle and Rule of Law.\textsuperscript{73}

The second CLS tenet, which sees law mainly as legitimation of injustice, has undeniable validity as a description of one aspect of what law and legal systems do. But its value in generating political movement is cast into doubt by the fact that other aspects of law may furnish the more hopeful takeoff points for political movements, and a generalized denunciation of law and legal rights may impede people’s abilities to grasp and organize around these other aspects. Thus, the generalized notion of law as “cloak-of-injustice” may represent a poor strategic choice for legal intellectuals seeking to build a political movement.

The third tenet about legal rights functioning mainly as mystifiers and sources of political pacification is fundamentally mistaken in three


\textsuperscript{73} See Herzog, \textit{supra} note 6; Finnis, \textit{supra} note 8; Solum, \textit{supra} note 66.
respects. Stemming largely from Peter Gabel's "critique of rights consciousness," it embraces, somewhat unwittingly I suspect, the positivist conception of legal rights as being simply that which courts positively pronounce and accord people. So by definition, "rights consciousness" comes to mean adopting a stance of political passivity and waiting for courts to tell us what our rights are. However, if "rights" are accorded greater depth and viewed as existing among the people and as part of political culture, then there exists the possibility of contrary interpretations and claims of right becoming a focus of dispute between people and the government. Such disputes, which are necessarily premised on according rights a greater degree of moral seriousness than CLS leaders are wont, are likely to generate anything but passivity.

Similarly, the individual character of the rights that have been most fully developed in our legal system leads Gabel to believe that people focus on rights works primarily to divide them from one another. In actuality, a common deprivation or threatened deprivation of the individual rights possessed by members of a group can be an important basis of group solidarity, since it is the kind of thing that will trigger anger in many people simultaneously. Also, when government and courts reliably accord and protect rights this can help people to overcome the fear that is the strongest inhibitor of political action.

Finally, the old error of confounding correlation and causation seems to plague Gabel's analysis. He has observed movements in their declining phase when popular energies have ebbed and what has been left is a residue of movement lawyers trying to preserve (or expand) the movement's achievements through litigation. Since these efforts are likely to be decreasingly successful over time, they are apt to become a focus of demoralization. But probably other factors depleting movement energies are more responsible for the movement's decline. Rather than being the principal cause of decline, rights-oriented litigation efforts far more likely have become the most visible residue because movements have declined for other reasons. Rights-oriented litigation is one of the easiest aspects of movements to preserve during periods of decline.

The fourth and fifth tenets, which together portray law schools as...

74. See Gabel, supra note 68.
75. See, e.g., D. Bell, And We Are Not Saved: The Quest for Racial Justice in America (1987); Kairys, supra note 57; Letter to Colleagues, infra at 96-110.
76. See Matsuda, supra note 8. My own observation of the decline of 1960's movements includes the following: the Civil Rights Movement relied heavily on the rhetoric of rights and declined through the 1970's. The Antiwar Movement relied heavily on the rhetoric of duty and declined even more precipitously through the 1970's.
centers of initiative and eschew reformism, are where the politics of CLS go most awry. The anti-reformist tilt is related to the CLS rejection of liberalism; both stem from an understandable (and perhaps well-founded) desire not to be drawn into the highly degraded, corrupt forms of mainstream politics that have been prevalent in recent years. But they also have significant costs in precluding CLS scholars from developing any sort of political base in the wider society.

What then results is a looking inward to the micro-politics of law school teaching, and a detachment from other, broader struggles in society. Both the detachment and the rejection of reformism receive rhetorical justification from CLS slogans about fundamentally transforming the nature of social relations to produce community rather than isolation and alienation. But there is reason to suspect that the very dichotomy between “reformism” and “transformation” or “community” may be self-defeating because it is through shared struggle over common reformist aims that political community is most likely to be forged. To begin with, an aim of total transformation seems more like a way of routing oneself away from political involvement toward solitary intellectualization.

If CLS-indeterminacy theory achieved political ascendance as the primary form of radical political activity in law schools, what would emerge is neither nihilism nor authoritarian socialism, but simply foregone opportunities and critique without moral force. Ironically, the moral weakness of CLS criticism stems partly from proponents’ tendency to overlook some of the basic precepts of traditional law teaching. Four errors that I would highlight are: one, a lack of appreciation of the legal concept of standing; two, an abandonment of the metapriniciple that legal doctrine is meaningful only in relation to facts; three, an unwillingness to explore what traditionalists mean by the concept of arbitrariness; four, lack of interest in the concept of Rule of Law. Hence, critique should proceed by means of a continuous going back and forth between relevant doctrine and pertinent facts rather than take the form of being a global assault on doctrine generally.

The suggestion that such traditional concepts might have great

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77. People in CLS have correctly determined that development of emotionally engaged political communities is central to any radical’s task. Having termed the desired emotional engagement “intersubjective zap,” they tend to proclaim it as a good in itself and studiously avoid discussions about what types of political issues are likely to generate such feelings. For example, opposition to the Vietnam War was an instance of reformism, but the experience of opposing the country’s war machine in order to bring about an end to the war produced a lot of intersubjective zap.
value in guiding efforts to generate political radicalism should not be entirely surprising. For centuries, law as an institution has been heavily influenced by the goal of preserving political stability. It has developed conceptual ways of identifying where disruption is likely to occur so appropriate palliative responses can be designed. But it is at least plausible that some of these same diagnostic concepts can be employed by those wishing to promote radicalization. Consider, for example, the most basic idea of standing—that of injury in fact.

In litigation it has traditionally been assumed that cases are not to be adjudicated unless there is a specific, identifiable injury in fact, and persons who have suffered such an injury are themselves before the court. Disputes that involve an actual or an imminently threatened injury with ascertainable causes are more likely to generate strong moral feelings and thereby jeopardize social stability. It is an efficient allocation of scarce judicial resources to allow courts to focus only on disputes of this type. Similarly, if our goal is an efficient allocation of political organizing talent and radical theory-writing skill in order to foster political movements, it would make sense to orient one’s efforts around issues where we can identify the injury in fact, and use it as a basis for generating moral force. While we ought not to choose injuries that are highly unusual and thus of concern to only small numbers of people, the injury should, even if contingent and highly generalized, be specifically identifiable and amenable to analysis in terms of some model of causation.

Compare the totality of anomie and alienation in society that the CLS critique attributes to liberal legal social order with the risk of nuclear war that unfortunately has grown substantially in the last decade. Stated with extreme brevity, the nuclear story is one of the American people repeatedly being presented gross falsifications of the strategic situation by government officials and candidates in order to trick them into supporting massive arms buildup, deployment of strategically unstable “first-strike” weaponry, and further technological advance in the destructiveness and rapid deliverability of weapons.78 All of these developments substantially increase the risk of nuclear war by miscalculation, which is a far greater risk than that of premeditated Soviet attack as a result of American weakness.79 These facts have enormous implications for the meaning of “national security,” for discussion of the nation’s secrecy laws, and for the need to devise institutionalized means by which

78. See generally Search for Sanity, supra note 20; M. Kaku & D. Axelrod, To Win a Nuclear War (1987).
79. See T. Gervasi, supra note 50.
the people can effectively demand more truthful information from government. Given the magnitude of destruction that would be caused by nuclear war, the fact that the demonstrable risk is much greater than most people imagine, and the stark contradictions between prevailing liberal democratic theory and the ways in which public support has been gotten for arms buildup, there is an opportunity here to develop critiques possessing great moral force. These in turn might raise interesting questions of law reform, given people's universal interest in avoiding nuclear war.

Virtually no CLS leaders have shown any interest in moving in this direction or even supporting others who would. Radicalism rooted in CLS-indeterminacy theory has tended to focus instead on corporate capitalist social order as a whole, and on the ostensible role of legal doctrine in sustaining it by depriving people of the ability to think about radically different alternatives. However, the focus on totality mitigates against the discovery of any specific injury in fact, since the amorphous psychic costs of alienated social order may well not be perceived as specific injuries by those affected. Even if they were, the questions of causality would be so complicated as to preclude development of the type of finger-pointing theories that are likely to have substantial moral force.

If CLS proponents wrote from the perspective of seeing themselves not as abstract, universal transformers of social order, but as particular individuals aggrieved by and seeking to redress particular harms, then issues like the nuclear arms race might well find more of a place in proponents' universe of pertinent critical legal activity. Similarly, by adopting other social groups as clients for purposes of radical critique, CLS writers could invoke the suffering and injustice visited on these groups to generate moral force in their critiques.

Critiques of this type necessarily involve a close interplay between law and facts. Criticism cannot be of legal doctrine as a purely abstract, universal enterprise that is deemed socially harmful in one respect or another. Instead the focus must be on how particular bodies of factual evidence show particular areas of legal decisionmaking to be contrary to deeply rooted notions of justice or proper governmental functioning. It would thus be desirable to redefine legal education away from being a specialized discipline strictly organized around analysis of appellate opinions, toward including factual investigations pertinent to politically

80. One does, however, find some among participants at CLS conferences. See National Conference on Critical Legal Studies (Washington, D.C. 1988) (talk by A. Scales, on feminism and disarmament).
charged topics where injustice and irrationality have become extreme. Some of this is occurring among participants at CLS conferences, but it occurs in spite of, rather than because of, the efforts of CLS leaders to build a political movement around the idea of indeterminacy of doctrine.

A third way in which traditional approaches to law seem superior to CLS-indeterminacy theory is in the respective way that each group uses the term "arbitrary." Among CLS proponents, the strict dichotomy between formalism and formlessness results in the term "arbitrary" being deployed against any judicial outcome that is not strictly determined by formalist logic. Consequently, CLS proponents are able to argue that most judicial outcomes are "arbitrary." But what is obscured in the process is the more politically engaged way in which traditionalists use the term. "Arbitrary," for them, connotes decisions that are manifestly improper when seen in terms of either people's underlying expectations or principles that are generally understood to guide an area of decisionmaking. To grasp this more politically explosive meaning of the term we must see arbitrariness not as the usual course of most legal decisions, and we must take more seriously than most CLS leaders do, the possibility of using Rule of Law as a critical concept.

C. Liberal Legal Concepts as Bases for Effective Nihilism: Marijuana Laws and the First Amendment

The term "Rule of Law" frequently is contrasted with the idea of arbitrary, illegitimate exercise of power or naked use of force. Rule of Law's essence consists of two things. First, there must be sufficient doctrinal regularity that people may reasonably form expectations about what the law will or will not allow. This enables people to adjust their conceptions of fairness and justice to be largely in line with the outcomes prescribed by legal institutions. Second, exertions of state power must be connected with and based upon shared, underlying values or moral principles that help to frame compliance-inducing dialogue. By having this common starting point, people can come to view law as something that protects rather than oppresses or annoys them.

81. See L. FULLER, THE MORALITY OF LAW (1964). The regularity must be both of a procedural or formal sort, and of a substantive nature, so that clients and attorneys are not left with the belief that decisions are not wholly arbitrary or made without regard to weight of precedent. Id. For discussion of requirements of Rule of Law and failure of CLS critique to demonstrate that they cannot be met, see Bellioti, The Rule of Law and the Critical Legal Studies Movement, 24 U. WESTERN ONT. L. REV. 67 (1986).

82. The conservative philosopher most prominently associated with the "Rule of Law" idea is Friedrich Hayek. See F. HAYEK, THE ROAD TO SERFDOM (1944). While Hayek entertained a
To take the Rule of Law seriously as a critical concept we must recall that things are often not as they seem. If pronouncements of courts and other government officials are taken at face value, our legal order appears to be founded on certain basic principles, many of them embedded in our constitution. We are always being reassured by officials who reassert the basic principles by using them to justify policies. But what if the policies were really there not for their stated ostensible purposes, but because of a manipulated hysteria that confuses people and allows irrational prejudices to be used in furtherance of state tyranny?

What if the constitutionally legitimate bases of policy were connected with the actual policies purely by a series of lies? What if the government's action is such that if it were honestly portrayed by Congress, or the courts, it would clearly be unconstitutional, yet extreme forms of demagoguery and misinformation allow it to masquerade as law? Under these circumstances the action stands condemned as a fraudulent exercise of the Rule of Law, and the true rule coupled with adequate factual information will serve as a basis for exposing the imposter.

A typical first response to this scenario is that it must be unlikely because it presupposes government officials to be nefarious and conspiratorial. But that is not true. The same lapsing into mass delusion abetted by governmental manipulation can result from what we are now experiencing in several policy areas, which is an institutionalized breakdown in the societal processing and dissemination of information ("a failure of collective intelligence").

To the extent such breakdown occurs, people may be left with the same intuitive moral commitments that underlie our Constitution, but be led to support policies that are highly subversive of principles to which they themselves adhere. Under these circumstances, dialogue that emphasizes the importance of philosophical integrity in the Rule of Law and contrasts the underlying liberal principles with repressive laws resting on disinformation will be likely to provide one of the strongest vehicles for inspiring political resistance.

To propose using the Rule of Law as a basis for nihilism might at first sound absurdly contradictory. But if we face a somewhat urgent imperative of separating bona fide lawmaking from laws that are imposters

number of formalist fantasies of the sort which have been correctly criticized by CLS scholars, he also more intriguingly presented the idea of common law reflecting embedded customs and principles of a culture. See id.

83. See J. Blum, The Health of the State (unpublished manuscript) (comparing processes of intellectual breakdown in policies pertaining to the nuclear arms race and war on drugs).
in the sense previously described, then nihilism and the true rule may have a temporary, situationally determined, close affinity. Nihilism is the forceful unmasking and delegitimating of inauthentic, fraudulent and oppressive rule. If done well, it does not seek to undermine everything in a society. Rather it separates the noble, virtuous and true aspects from the illegitimate, using the former as a source of moral outrage to be deployed against the latter. Hence its destructive power has an implicit affirmative quality; either that, or it has very little power at all.

In criticizing the limited political potential of CLS-indeterminacy theory, I have argued that traditional liberal legal concepts offer a stronger basis for moral critique, even of a radical or nihilist nature, than does CLS. In order to demonstrate both the possibility of such critique, and the fact that it can have a moral force that dwarfs that of CLS, I will apply the traditional, nearly consensually held principles underlying the First Amendment—which is one of the main doctrinal foundations of our conception of Rule of Law—to the nation’s marijuana laws and recent governmental attempts to inspire stepped-up enforcement of them. I will present the argument in the form of a hypothetical letter to colleagues, since that presents a better vehicle for demonstrating moral force than does the typical law review format that favors detached, relatively passionless argumentation.

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Dear Colleagues,

I am writing to you as one of the nation’s approximately twenty-five million pot smokers. This is a group with which I feel an increasing sense of identification based on our facing a common threat of thinly veiled religious persecution. Our difficulties are partly legal—the newly enacted ten thousand dollar fines and federal loan cutoffs for possession of even a single joint—partly procedural—the government threatening to confiscate our automobiles and expel us from our homes without even the usual due process hearings, and partly political—the government conducting a gigantic “hate and fear” campaign against us over the airwaves, using a crude mixture of displaced racial stereotypes and pro-

84. See text accompanying notes 85-113.
86. See, e.g., Johnson, Vermont Ponders Spirit of the Law on Drugs, N.Y. Times, Oct. 24, 1989, at 18, col. 5. (neighbors protesting the confiscation of a farm where family grew pot for personal use). In the government publication, A NATIONAL DRUG STRATEGY (1989), which President Bush held up to his national audience, the proposal is made to extend asset forfeitures statutes to casual users of illicit drugs generally.
If the truth be told, we include in our ranks a disproportionate number of your brightest and most creative people, but like the scapegoated groups of various totalitarian regimes, we are slandered, disdained and reviled as shameful creatures. Most of you think our plight has nothing to do with religious persecution, but that is because you think about us very little. If you thought more, you would realize the root of our difficulties: we are veterans, descendants and beneficiaries of a cultural movement, commonly known as "the counterculture," which dared to put forth an alternative vision of the good life, and of salvation in the here and now. Many of us have shunned either quietly or openly the Calvinist anxieties by which you guide yourselves—the constant yearning for status, for recognition, for material advancement, all of which is nothing more than the four hundred year-old need for confirmation that one is among the elect destined for the kingdom of heaven.

We, by contrast, have discovered salvation to be a more genial and enjoyable pursuit—to be sought by getting high, through frolic and laughter, and by creative pursuits. By daring to seek momentary salvation with an herb you find Spanish and alien, we have offended many of your deep-seated religious feelings and have caused the more irritable among you to begin planning a reign of persecution.

You persecute us and force us to sign oaths because you believe that we have a fundamentally different relation to God than you do. But for a moment be fair: God is merciful and allows great diversity among his creatures. It is only when you in your human arrogance derogate to yourselves the task of enforcing what you believe to be his will, that we find ourselves on the verge of being victimized.

We, by contrast, wish only to be tolerated and to allow each his or her own preferred means of getting high. For this you deem us heretics who shall not only receive no protection for our inspiration and pursuit of spiritual uplift, but shall also bear the blame for most of the country's ills, and be made to pay under pain of imprisonment in the "user ac-

87. Compare the measured, realistic accounts of various alleged health risks in Hollister, infra note 96, with the following alarmist proclamations being distributed as part of the U.S. Customs Service "Drug Awareness Program." Marijuana is depicted as having "unpredictable potency" (despite impossibility of overdose), as being "addictive," as "lethal in lungs" (despite absence of any documented fatalities), as "genetic roulette" (despite absence of evidence of birth defects) and as "chang[ing] brain function" in ways that are "accurately" portrayed by terms such as "burn-outs," "air-heads," and "space-cadets." U.S. CUSTOMS SERVICE, MARIJUANA—THE GATEWAY DRUG (1987).
countability” programs of your tyrannical state.\textsuperscript{88} Perhaps you think your government’s attitude of “zero tolerance” and its plans to eradicate our culture have nothing to do with religious persecution. If so, there are two possibilities. One is that I am crazy, and the other is that you are stupid. Let us decide on the fair battleground of the facts.

Have you ever wondered why marijuana is illegal? Have you wondered why the courageous kids who bring us our contraband get “mandatory-minimum” sentences of fifteen and twenty years,\textsuperscript{89} and why our younger people are being forced to sign oaths disavowing any association with our practices?\textsuperscript{90} Have you wondered why our country is experiencing a four-fold increase in its prison population, principally because of “drug use” in a society where almost everyone is a drug user of one sort or another?\textsuperscript{91} Have you wondered why plans are being laid for elaborate surveillance schemes, including the hiring of informants, so that we may be more actively persecuted? What is the purpose of this war that is being waged, you think, against inanimate objects on behalf of purity and holiness, but in fact, is being waged against us?

“To protect you,” some of you will no doubt declare. But protect us from what? There are two possibilities—to protect us from medical harm and to protect us from sin. But this “sin” is nothing more than our determination to reach for the divine in our own way, and this “protection” is plainly nothing more than unjust persecution in disguise. So, either the medical harms you suppose are real, or you and the politicians you ally


\textsuperscript{89} See note 88, supra.

\textsuperscript{90} This is now common practice on most university campus’s as a result of the 1988 Act. See note 88, supra.

\textsuperscript{91} Apart from the twenty-five million regular pot smokers and fifty million Americans who have tried illicit drugs in recent years, it is estimated that the nation has about one hundred-twenty million alcohol drinkers, and fifty-six million people addicted to tobacco. A. TREBACH, supra note 22, at 3.
with are self-deluding barbarians who proclaim yourselves modern and rational while lacking the decency and manners to keep your worst aggressive upsurges in check.

What do the facts tell us? If you bother to consult them, a surprising constellation will emerge. We are being persecuted for essentially the same set of reasons that the French Monarch Louis XIV revoked the Edict of Nantes and unleashed waves of renewed persecution of French Protestants. We are associated with change, with the prospect of a new world emerging, and for those who are defenders of the old, our peremptory shackling is a matter of national security. Partly for this reason our devotion is thought to be heretical.

But beware—at this very time that you build your apparatus of enforcement and oppression, a plague is preparing to descend upon your land. In your mania and your ignorance, you will be unravelling some of your proudest achievements. Major civil liberties, particularly the Sixth Amendment right to counsel and Fourth Amendment right against unreasonable search and seizure have been drastically curtailed. Wide-spread urine testing aimed mainly at detecting us, the pot smokers, is

92. Decisions upholding profile searches are part of a continuing pattern. Throughout the 1980's, the Supreme Court has been significantly reducing the scope of the Fourth Amendment in drug cases.

See, eg., Maryland v. Garrison, 480 U.S. 79 (1987) (officer's failure to realize the overbreadth of a search warrant will not invalidate evidence otherwise illegally seized if officer's miscomprehension was objectively understandable and reasonable); United States v. Montoya de Hernandez, 473 U.S. 532 (1985) (warrantless search of sealed packages held valid after 3 day delay from time of arrest); United States v. Leon, 468 U.S. 897 (1984) (enunciates "good faith" exception to exclusionary rule, upholding evidence obtained by officers acting in reasonable reliance of search warrant which is later found to be issued without probable cause); Illinois v. Andreans, 463 U.S. 765 (1983) (upholds search of vessels on inland waterways even when no suspicion of wrong-doing exists); Illinois v. Gates, 462 U.S. 213 (1983) (dispenses with two-prong Anguilar-Spinelli test to determine whether informant's lead creates probable cause for search warrant, effectively presumes veracity of anonymous informant's tip); Florida v. Royer, 460 U.S. 491 (1983) (airport profile valid to detain, detention may be soley for the purpose of investigating possible crime, not for protection of officer); United States v. Knotts, 460 U.S. 276 (1983) (surveillance of suspects through use of radiotracking beepers upheld); United States v. Ross, 456 U.S. 798 (1982) (in warrantless search of car, no reasonable expectation of privacy in closed container in trunk, where police officer's estimation of probable cause to believe drugs are present anywhere in vehicle exists); United States v. Mendenhall, 466 U.S. 544 (1980) (validates drug courier profile as reason to detain); United States v. Ramsey, 431 U.S. 606 (1977) (warrantless search of international mail by custom agents upheld where drugs are suspected); Ker v. California, 374 U.S. 23 (1963) (no-knock warrantless search of dwelling upheld where police believe threat of immediate destruction of evidence is present); United States v. Place, 462 U.S. 696 (1983) (canine sniff tests valid means to detect drugs).

93. Marijuana metabolites are easily detected in urine tests for up to four to six weeks. Cocaine, by contrast, can only be detected within forty-eight to seventy-two hours after use. See generally A. Hoffman & J. Silver, STEAL THIS URINE TEST (1987). LSD cannot be detected at all. I have now
now being imposed on large portions of the population, many of whom will then face the threat of loss of employment. The President and National Drug Czar have both called on school children to turn in their parents, relatives and friends to the police for possession of pot or other drugs.\textsuperscript{94}

Such drastic enforcement measures, coupled with the fact that so many of us love to smoke pot and view it as our right, would create a kind of constitutional crisis even if your government had a \textit{bona fide}, compelling state interest in greatly reducing our use of marijuana. The reason that serious enforcement of marijuana laws constitutes an utter abandonment of constitutional principles, as opposed to a mere constitutional crisis, is that your government scarcely has even a legitimate, let alone a compelling, interest in doing this. The laws are arbitrary, tyrannical action—the kind of thing that would surely have repulsed the father of our country even had he not been one of us.\textsuperscript{95} Typically, the reason given for upholding the invasions of personal liberty that come from laws prohibiting use of recreational drugs is that people need protection from the adverse health and safety effects of addictive or highly dangerous substances. Marijuana, however, is far less addictive, considerably safer, and significantly less harmful in long-term degenerative effects than either alcohol or tobacco.\textsuperscript{96} Because it lacks any addictive substance like the nico-

\textsuperscript{94} When President Bush gave his television address on Sept. 5, 1989, he called on Americans "not to look the other way" but to aid forces of law enforcement when they discovered drugs being used or sold. Drug Czar William Bennet was quoted as encouraging children to turn in parents and siblings to the police for using or possessing drugs. \textit{See Drug Czar Urges Pupils to Turn in Parents, Say It's Not Snitching}, L.A. Times, May 18, 1989, at A2, col.1.

\textsuperscript{95} \textit{See Klinger, Who was our First Pothead President?}, Weekly World News, Oct. 4, 1988, at 21 (reporting publication of a book by two historians from Barbados documenting George Washington's practice of growing and using marijuana).

Washington's habit of getting stoned had previously received strong circumstantial documentation in an appendix to R. \textsc{Shea} \& R. \textsc{Wilson}, \textit{The Illuminatus! Trilogy} 735-37 (1975). This included Washington's letter to his doctor thanking him profusely for the marijuana seed and pamphlets on how to use them, repeated admonitions to his gardener not to waste any of the valuable seed, and his diary entry of August 7, 1765, about separating "the male from the female hemp," something that would not usually have been done for rope manufacture, but probably for getting high. As President, Washington appears not only to have continued smoking, but possibly to have engaged in some dealing as well. In the spring of 1796, he wrote to his gardener, "What was done with the seed saved from the India hemp last summer? It ought, all of it, to have been sewn [sic] again; that not only a stock of seed sufficient for my own purposes might have been raised, but to have disseminated the seed to others; as it is more valuable than the common hemp". \textit{Id.} at 736.

\textsuperscript{96} For a summary of health effects of marijuana documenting its favorable comparison with alcohol, see Hollister, \textit{Health Aspects of Cannabis}, 38 \textsc{Pharmacological Rev.} 1 (1986). Hollister notes that:
tine in cigarettes, it is overused or abused by only a very small percentage of users. Even with them, the harms stemming from the abuse are probably quite mild compared with the corresponding harms from overuse of alcohol.

Although your government and Partnership for a Drug-Free America attempt to propagate scare stories and misinformation about pot, review of the actual scientific literature confirms that forty years of research have come up with nothing to implicate marijuana on a scale of health or safety risks anywhere near those posed by tobacco and alcohol. The Chief Administrative Law Judge of the Drug Enforcement Agency (DEA), has recently called pot, “one of the safest therapeutically active substances known to man,” and noted that whereas tobacco and alcohol are responsible, respectively, for 360,000 and 150,000 American deaths annually, marijuana has not been unequivocally shown to be the cause in even a single death.

Very few people know of this statistic, or of the Chief ALJ’s comments. Politicians and media have tended to conceal the glaring injustice of marijuana laws by placing pot in the same category with all illicit recreational drugs, and speaking of the different substances as though they were uniform. But even at this level there seems to be a kind of engineered hysteria being spread by misinformation. Though illegal drugs are portrayed as causing “a plague of death and destruction,” only about 3,500 die each year from all illicit drugs combined—compared with the over 500,000 dying from tobacco and alcohol.

So the question remains—why is pot illegal at all, let alone being made the target of stepped-up enforcement? The reason most commonly given by those in government is that marijuana is a “gateway drug.” Trying it leads people, and especially the young, to move on to harder drugs.

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The most definite health hazard [found in the study] was contamination of cannabis, largely of Mexican origin, by the herbicide, paraquat. After the experience with paraquat in Mexico, its use was temporarily discontinued. Recently, the possibility that it may be used against cannabis crops in California and Hawaii has resurfaced. One would hope that overzealous law enforcement would not once again pose a serious health risk to marijuana users.

Id. at 11.

97. Id.


99. Id.; A. TREBACH, supra note 22, at 80-81.

100. Id.
therefore it is best to stop everyone before they start. The extent of this "gateway" phenomenon is open to doubt because after twenty years of widespread pot smoking in our society, the number of pot smokers remains vastly higher than the number who use hard drugs. Also, the only craving that pot induces is not for heroin, cocaine or anything else illegal—but for sugar.

So why should pot serve as a gateway drug? The most likely explanation is that it is provided by the same distributors as other, more dangerous drugs. Hence those who smoke it are put in contact with opportunities to use other drugs. In other words, the gateway phenomenon comes not from marijuana itself, but from marijuana prohibition. When the Netherlands legalized pot and allowed it to be sold openly about fifteen years ago they found only a small increase in marijuana use, but a very large drop in rates of heroin addiction among the young.101 Conversely, in the United States, stepped-up enforcement of marijuana laws gave organized crime a monopoly on distribution and allowed them to temporarily withhold pot from the market in order to push the newly synthesized form of cocaine called "crack."102 Since then crack has remained a drug of choice in inner cities because it is more profitable, more concentrated and less detectable than pot.

If marijuana is an essentially safe drug and the "gateway argument" seems most persuasive as an argument against prohibition, why does pot remain illegal? If we go back to 1937 when it was first made illegal, we find that racial prejudice has a great deal to do with the current state of our laws. In 1933, alcohol prohibition had just been lifted, but a federal enforcement bureaucracy was still in place and some of its members had begun searching for an alternative form of prohibition that was more politically sustainable. The primary users of marijuana at this time were the politically disenfranchised Mexican-Americans, so pot became an easy target in Congress. A propaganda campaign was initiated which took the racial stereotype of Mexican-Americans as hot-blooded, irrational and violent, and transferred it onto pot smokers as a group. Hence, the infamous government-sponsored movie, "Reefer Madness." When marijuana caught on in black inner-city ghettos a few years later, pot smokers acquired a new racial stereotype—that of the lazy, shiftless black person; a stereotype that is now dignified with the term "amotivational syndrome." Reputable scientific studies performed by the City of New York disproved both of these stereotypes, but they were largely ig-

101. See Kupfer, What to do About Drugs, FORTUNE, June 20, 1988, at 39.
102. See Cowan, supra note 22, at 2.
nored in favor of scare stories and stereotyping. While displaced racial prejudice can account for the emergence of marijuana prohibition, it does little to justify its continuation. Similarly, the fact that pot may serve as a focus for lingering prejudice against the counterculture and 1960's radicalism can help to explain why the government continues to target it, but again no real justification is provided.

I thought I was going to hear a justification last summer when I presented a paper entitled, "The War on Drugs as Social Psychosis" at a scholars' conference last summer. The commenter was to be someone who had introduced himself to me as former head of narcotics enforcement for a major state, and as someone who had been invited to be deputy director of the federal DEA. But when it came time for him to comment, he expressed complete agreement with my paper and even privately chided me for understating the irrationality of government policies regarding drugs like heroin and crack. With both pot and harder drugs, current policies were "expressive rather than instrumental;" meaning, they provided opportunities for people to vent their hatreds and prejudices, but were not aimed at rationally achieving any defensible social objective.

I next thought of speaking with career DEA officials who were still with the agency. I was fortunate in having the head of the Western New York DEA come to my seminar. He at last cleared up the mystery, but he did so in a manner that most of us should find constitutionally troublesome.

"I make no bones about it," he began, "I'm a Puritan." He then proceeded to explain that marijuana's lack of addictiveness or serious health risks were not salient as far as his agency was concerned because people use marijuana for only one purpose—"to get stoned." This, he


104. I have never been a strict absolutist on questions of separation of church and state. The public display of a Creche, for example, has always struck me as reasonably harmless. But if the government seeks to propagate certain types of religious views—for example, collective pursuit of national redemption through creation of "a drug-free America"—while using threats of substantial criminal penalties to suppress others' religious attitudes and practices and the lifestyle activities associated with them, then I suspect that the First Amendment's ban on religious establishment is being rendered a dead letter regardless of the euphemisms employed, or the absence of visible protest from large numbers of First Amendment scholars.
explained, was "an offense against society no different in principle than armed robbery." The reason it was an offense was (according to his religion) that each of us is born with a perfect mind which we can only defile or despoil by ingesting mind-altering or mood-altering substances. Although this view has no basis in any sort of scientific reality, it is, as he pointed out, a central tenet of Puritanism.

At first, the regional director attempted to draw a distinction between alcohol, which could be consumed in minute quantities without debasing oneself, and "drugs" of which even the most miniscule sampling was a serious offense. After being questioned by students, he abandoned the distinction and began saying that alcohol and cigarettes were basically the same as drugs, except that it was not politically feasible to outlaw them. A little while later he added coffee to the list, which provoked an outburst from me since coffee is my second favorite drug and I had never anticipated that anyone from the government would tell me I shouldn't use it. I blurted out, "But I use coffee to work!" He earnestly replied: "I feel sorry for you."

Later in the seminar, I attempted to explain the Establishment and Free Exercise Clauses of the First Amendment. The regional director of the DEA was not impressed. He said he understood what I was saying, but this didn't matter if law enforcement was what a majority of the American people wanted. I then asked, "So you're saying we should go out and get a majority of the American people?"

"Absolutely," he replied, "it's the only thing you can do." Failing that, we were destined to live under the yoke of his Puritanism.

Personally, I am not a Puritan, or even a Christian for that matter. When I was growing up, my parents told me that there was no way I could be forced to become a Christian, or adopt any religion not of my own choosing. The United States government, they believed, would not allow that sort of thing to happen because our Constitution strictly prohibits it. My parents did not foresee that religious persecution could be inflicted _sub rosa_ by judges and legislators invoking the word "drugs" as a code word for "devil" and "user" as a term meaning "infidel." They assumed that the First Amendment would be as strong in actuality as it was in theory.

Ideally, I would prefer that the Establishment Clause be taken seriously and that we not be forced to embrace tenets of any state-approved religion. But I am a reasonable person who understands the importance of compromise when faced with duress. Therefore, I propose the following: in lieu of forcing us to embrace a harsh Puritanism under threat of
forfeiture of all we own, at least let us choose among the forms of Christianity, in return for our embracing one willingly.

Should we not at least be allowed to adopt a more loving and gentle version of the Christian faith—since Christ, whatever else he was, was a loving and gentle person? Then accord us the option of protection from government marauding in return for our agreement to carry crucifixes at all times. That way whenever a DEA or other police agent shows up he can be driven backward by the power of the crucifix held up in his face.

If no crucifix is available, perhaps we can give the agent a finger—a lone index finger, raised to say, “Approach no further, we are protected by the power of the mighty First Amendment.” Even when invisible to judges and courts this doctrinal fount of liberty is a force deep in people’s hearts. And it is offended by the marijuana laws in every respect.

Though the disguised religious establishment problems of marijuana prohibition are surely grave, it should not be thought that they are the only infirmity. Problems of “free exercise of religion” and “freedom of expression” are present as well. Because pot often produces a trance-like state that is frequently accompanied by inspiration, and does not usually cause the same lethargy of cognitive processes experienced with alcohol, many people use it for private contemplative activities. For some people this is part of a creative process aimed at producing works of art, literature or music—each the kind of self-expressive activity traditionally thought to be at the core of the First Amendment. For others, the contemplation has a religious cast. The solitary drug experience provides enhanced opportunities for communication with inner voices of the sort involved in religious revelation.

Finally, there is “freedom of association.” Many friendships are enhanced by the common activity of getting stoned together. Humor, discussion and feelings of identification with one another are sometimes stimulated; sensory experiences are enhanced. Even marital relationships are often benefitted by the use of pot.\(^{105}\)

Each of these activities ought to be receiving First Amendment protection if there is no compelling governmental interest to justify infringement. But what is the interest—other than in seeking to establish neo-Puritanism as a national religion, or in kowtowing to the phobias of people uninformed about pot?

But, alas, other than the brave and lonely Supreme Court of the

\(^{105}\) See Herrer, supra note 103 at 60 (reports that “by the 1890’s the most popular American marriage guides recommended cannabis as an aphrodisiac of extraordinary powers.”).
State of Alaska, no courts have used the First Amendment in this area. Surely, this is a blind spot of astounding proportions. Even in circumstances most favorable to the assertion of "free exercise" claims, courts' prejudice against pot has caused them to deny protection. In one recent case before the United States Circuit Court of Appeals for the District of Columbia, Rastafarians, who have used pot in their religious ceremonies for centuries, were denied an exemption that would have enabled them to do so legally. The holding, sustained by two fine liberal judges, is difficult to square with prior decisions granting exemptions for the use of more dangerous drugs in religious services, these being peyote by the Native American Church, and alcohol by the Roman Catholic Church during prohibition. Though the reputations and liberal credentials of the judges in question suggest that racism could not possibly have played a part in the decision, it is difficult to imagine how the majority could have reached its result in light of the minimal risks of smoking pot without their having tacitly assumed that the black Jamaicans in question lacked souls, and thus were not entitled to religious freedom in any ordinary sense.

But perhaps we are wrong even to search for a rationale for this decision. The problem may be that a type of institutionalized insanity has rendered courts and other government agencies incapable of knowing the difference between reason and prejudice whenever issues pertaining to marijuana are raised. As a result of this breakdown, many judges may now have a diminished capacity to control deep-seated aggressive impulses that propel them toward barbarism and religious persecution.

To test this hypothesis, we should present a factually analogous situation in a context free of prejudice. Imagine a traditional form of religious practice that uses implements posing the same degree of health risk as marijuana—the community of worshippers become ecstatic and contemplative by wearing silver necklaces with conch shells. Then imagine two different responses from our legal system: in one instance tolerance is

107. Olsen v. DEA, 878 F. 2d 1458 (1989). In this case, the Court acknowledged that the Coptic Zionist Church's use of marijuana was an authentic religious practice, but declined to accord protection because of "the immensity" of the nation's marijuana control problem. It thereby created a novel legal principle that freedom of religious practice, as distinguished from belief, can be revoked by the government if the nature of the practice is something that large numbers of people find desirable outside of its specifically religious context.
108. Initially, the conservative judge on the panel, James Buckley, dissented based on his being "troubled" by the holding's discriminatory aspects. However, by the time of publication, his brief dissent had been eliminated.
accorded, in the other worshippers are subjected to heavy fines, property confiscation and other forms of persecution for possessing or wearing a silver necklace with conch shells.

What would one say about a legal system that followed the latter course while being firmly committed in principle to the idea of free exercise of religion? No doubt its officials would have some series of rationalizations about the necklaces being basically tools of the devil and a gateway to ever greater sin, but we would, I hope, judge them harshly. Religious persecution is always based on the belief that those persecuted are not exercising a "true religion," but instead, some sort of shameful hedonism and deviance. Nevertheless, for our courts to be indulging in this sort of nonsense at this point in our history—is this not a clear instance of breakdown and of triumph of prejudice over reason? Even if marijuana had no religious use at all, I believe we pot smokers would be entitled to protection under the Fourteenth Amendment Equal Protection Clause. That clause at least ostensibly protects cultural minorities from being unfairly stigmatized and affirmatively persecuted by the government. But look at what has happened during the last decade: tax dollars have been used to sponsor vicious campaigns of prejudice against marijuana users, portraying them as lazy, disgusting and frivolous—in short, the types of people who deserve to have their property confiscated. Despite the ludicrous quality of the commercials, they appear to be having some effect through sheer saturation of the airwaves. Due to Congress' repeal of the fairness doctrine and massive funding of anti-marijuana campaigns, the Partnership for a Drug-free America is able to put on one misleading commercial after another. These commercials, which seldom have the least iota of truth value, either promote scare stories about fictitious medical effects or nakedly seek to instill prejudice by portraying pot smokers as lazy, contemptible and stupid. But like the equally ridiculous commercials that were used by Nazis to instill prejudice against their targets, these commercials have had some effect. Whereas in 1977, only 41 percent of people polled expressed the view that possession of small amounts of marijuana should be a criminal offense and 53 percent disagreed, a decade later 67 percent had come to feel it should be criminal and only 27 percent felt it should not.110


Typical of the types of propaganda activities that have secured this result are the following: In one commercial a surgeon, who is smoking a joint, giggles as the patient protests to him that he is about to perform the wrong operation. In another, pot-smoking teenagers talk about loafing for the rest of their lives. In a third a father badgers his son for possessing marijuana and shouts, "Who
Given the combination of governmental cultivation of prejudice and extreme, oppressive laws on the books, it would appear that a dangerous situation is developing—the very type of situation where an honest and even-handed application of First Amendment principle is most urgently needed. So far though, neither courts nor others in government have been willing to step forward.

All this raises serious questions about the proper role of law professors when the country’s government and legal system are malfunctioning in ways that contravene our most basic constitutional principles. In general, I can think of three cardinal rules of duty that should guide us in preparing the next generation of lawyers. First, we should ideally seek to be unfailingly intelligent; second, we should under no circumstances allow ourselves to become wilfully ignorant; and third, we should take seriously our duty to uphold the United States Constitution. In doing so we must concern ourselves with the Constitution’s spirit as well as its letter, and we must be ever vigilant about the risks of demagoguery and tyranny posed by majoritarian rule.

If these three rules are followed, then it should be clear that each of us has an obligation not to let the scapegoating and oppression of pot smokers proceed any further. If personal liberty means anything beyond the contorted definitions offered by biased judges and demagogic politicians, it means that people should have the right to smoke pot. If our constitution is to retain more integrity than that of a bicycle thief, surely you will set yourself to work on giving us the protection to which we are rightfully entitled.

One of the proudest moments in the generally dismal experience of the Second World War occurred shortly after the Nazis had occupied Denmark and issued orders requiring all Jews to wear the Star of David. The next day the King of Denmark rode through the streets, himself wearing the Star of David. Largely as a result of this demonstration, and the protective behavior it inspired, the persecution of Danish Jewry turned out to be miniscule compared with what occurred in other countries.

Now, as a result of the breakdown of intelligence in our governing institutions, you have an opportunity to be that King of Denmark, and to place your own prestige and security on the line against those who would
transmute our legal system into an abomination and render basic First Amendment principles nugatory. Are there not some appropriate rituals of noncompliance that can be practiced— the potluck dinner with exotic herb; the culturally deviant party with students in private homes; the open and frank discussion in class; even the signing of statements that we will not cooperate in the enforcement of these absurd laws against any of our students? Is it not worth making at least some effort to foster the integrity of our legal system rather than have to live, perhaps for decades, with an overriding sense of shame and hypocrisy rooted in the knowledge that a little courageous behavior, carefully deployed at the right time, could have made an enormous difference?

Should not law schools, acting as a kind of fifth estate, attempt to remedy the breach in our constitutional fabric that is being caused by the opportunism and ignorance of those in government and media? Well-positioned elites who have the capacity to make a difference have the obligation to do so once the arbitrary and unjust nature of governmental action has become apparent. Just as the Nazis depended on slaves to load poison gas cannisters onto trains, so do the would-be architects of an American police state depend on us for the production of prosecutors and agents. They also depend on us to look the other way and pretend that our Constitution is still intact when in practice it is being grossly eviscerated.

So how about it, Ronald Dworkin,111 are we taking rights seriously? Or are we not?112 What do you say, Owen Fiss, about really trying to establish a public morality?113 If you like the idea, how about beginning with our long-held constitutional values of personal liberty, enlightened tolerance, and separation of church and state? Larry Tribe— should deceitful manipulation and prejudice mongering by the state and corporate media be allowed to govern us in perpetuity? Or might the people acting locally, and in solidarity with one another, have some role?114 And you, John Hart Ely, what do you say about trying to improve our democratic

111. Neither simple possession nor consumption of marijuana is a criminal offense within the territorial boundaries of New York State, the situs of this article. Insofar as any of the particular liberal scholars addressed below reside in states which have not decriminalized pot, the theoretical possibility of an interstate conspiracy to commit a misdemeanor (which is itself a felony) is posed. However, the author has not contacted anyone to arrange for or encourage performance of the activities in question at any specific time and place. The exhortation remains theoretical rather than imminent and for this reason is protected by the First Amendment. See Brandenburg v. Ohio, 395 U.S. 444 (1969).


There is a problem with how they are now being practiced in the corridors of Washington and the boardrooms of New York. Might it not be time for some helpful input from the fifth estate?

If all this falls on deaf ears and listless eyes, there is still an important lesson to remember: the failure of liberalism to come through in this instance where it is being seriously tested is not a failure of liberalism as a series of philosophical premises. It is a failure of courage on the part of particular people who are either not very serious about the constitutional ideas they profess or not very generous in their willingness to take even the slightest of personal risks in order to help large numbers of other people. If so, then surely disgust is warranted. But the disgust should be aimed at such liberals, not at the liberalism they betray. The mistakes of CLS-indeterminacy theory should not be repeated, even if the spinelessness that gave rise to them is.

Very sincerely,
The Author

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Now, whatever the reader may think of this exhortation and its author, at least the response is not likely to be the bland, "So what?" that frequently accompanies demonstrations of the indeterminacy of legal doctrine. The exhortation, for better or for worse, does have a kind of moral force that stems from its orientation of Taking Liberalism Seriously and using the concept of Rule of Law critically. The force of the argument can be gauged by the diverse reactions of readers—most will probably be either outraged or painfully frustrated, if not at the government, then at least at the author. It is difficult to imagine any set of comparable feelings coming from any specific political argument based on CLS-indeterminacy theory. After all, what is to be said? Throw away your contracts book because either outcome can be reached in any case? Judges lie when they pretend that doctrine necessitated a certain decision? So what, should we lock them up?

The attack on marijuana laws has greater moral force because it is written from the perspective of one conceivably aggrieved by a specific injury in fact, it focuses on both law and facts to frame political issues, and on governmental action that is arbitrary in the sense of contravening basic principles. This, much more than the highly abstract meanderings

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of indeterminacy theory, is the stuff of which political movements are made.

III. PART TWO: CRITICAL LEGAL STUDIES AS A CONTRIBUTION TO JURISPRUDENCE

The first half of this article has argued that attempts to build a political movement around the goal of proselytizing Critical Legal Studies-indeterminacy theory make little sense. The major contribution of CLS is not to the building of any sort of radical movement, but to the evolution of jurisprudential thought. This contribution can be more precisely delineated if radical pretensions are abandoned, and CLS is seen as a force for redefining the nature of legal principles in ways that allow them to be designated without reliance on outmoded formalist conceptions.

Some CLS writers attempt to straddle the issue of political movement versus jurisprudential contribution by calling Critical Legal Studies "a jurisprudential movement." This allows the "movement's" practitioners to continue making unfounded political claims about the ostensibly superior radicalism of their enterprise compared with liberalism, without asking the question of whether CLS-indeterminacy theory really has the political force they attribute to it. But their jurisprudential contribution can be better made if pretensions of movementhood are abandoned, and CLS scholarship is seen as part of an ongoing dialogue with others in the profession.

By setting aside their antipathy to the very ideas of legal principle and Rule of Law, CLS writers will become better able to express and develop the implications of one of their most important discoveries—namely, that instead of looking for a single type of morally-grounded, outcome-determinative legal principle, we are really looking for two different things. One, which I will call "doctrinal ordering principles" or "legal principles," is outcome-determinative and accounts for the stability of patterns of legal doctrine. Because law is neither static nor capable of achieving complete internal consistency, legal principles are only partially outcome-determinative. They specify ranges of expected or plausible results, and provide grounds for saying decisions outside these ranges are anomalous or legally incorrect. They do not eliminate the category of close cases that could be decided either way; they merely limit its size and distinguish it from other types of cases where legal correctness seems ascertainable and outcomes are readily predictable.

116. Minda, supra note 11.
When one gets down to actually mapping patterns of case outcomes, one is likely to discover that patterns do not closely comport with any abstract ideal or fundamental moral principle. Legal principles that account for ordered patterns of doctrine are better seen as strategies of maintaining social stability by calibrating redistributions of political and economic power, and reinforcing the forms of ideology through which power is exercised and popular consent is obtained. Though such strategies can be validated by certain kinds of normative argument, they are not themselves the fount of moral legitimacy upon which the law depends.

The underlying sources of law's moral legitimacy may be described as "moral" or "ethical" principles that are embedded in the country's shared political culture and have a reach and range of applications that are shaped by common custom, practice and expectations. The Rule of Law requires that both moral and legal principles be present and incorporated into legal doctrine to some degree. Legal institutions strive to maintain a reasonable degree of alignment between law's underlying popular moral basis and its positive doctrine; they do this largely by relying on outcome-determinative legal principles that are best described as legitimation strategies. Legal principles must be incorporated sufficiently to make the pursuit of doctrinal regularity a reasonably cogent and intelligent activity. Popular moral principles must be adhered to sufficiently to generate the social stability that allows the legal principles to remain in force.

The Rule of Law exists in varying stages of perfection or breakdown. When relatively successful, it inspires seemingly voluntary popular consent, social stability and a masking of state coercive power. When unsuccessful it yields widespread noncompliance based on shared feelings of law's absurdity, immorality or inappropriateness; with this comes either a reduction of government's capacity to control behavior or a heightening of state terror.

The Rule of Law concept can be invoked critically as an ideal, and used as a reference point to criticize particular instances of lawmaking that fail to sustain the necessary degree of connection with underlying moral principles that furnish the basis of law's legitimacy. Such laws are likely to inspire widespread noncompliance and rebellion, and thus a breakdown in the Rule of Law. Or they may present a latent possibility of breakdown because popular support is being maintained through manipulation or demagogy; so that if the truth were known (as it might soon
come to be), the law as propounded by courts and other agencies would be seen as greatly out of alignment with its popular moral basis.

The relation between law and politics should likewise be clarified to avoid the dichotomy that law is either separate and apart from politics, or it is the same thing as politics. If politics is defined as the totality of human behavior involved in ordering society, then law can be viewed as the subset of politics marked by having aspirations toward doctrinal regularity on the one hand, and alignment with popular morality on the other. We thus would no longer ask whether something is "law" or "politics," but would distinguish among political behavior that is purely ad hoc or unconcerned with moral legitimacy on the one hand, and behavior that seeks to articulate established law, or behavior aimed at changing or establishing some new form of law on the other.

With these clarifications in mind, we can turn to the argument that CLS-indeterminacy theory does not negate all conceptions of legal or doctrinal ordering principle, but rather undercuts conceptions that are formalist in nature while favoring those that have a realist or functionalist character.

A. Realist and Formalist Conceptions of Legal Principle

Legal principles must have three attributes regardless of how they are conceived. These are: feasibility, at least partial outcome-determinativeness and normative validation. The attribute of feasibility is simply that the principle must be capable of being enforced. Because society evolves historically, ideas not feasible in one historical period may become so in another. To formulate legal principles requires at least an implicit awareness of what is feasible at the time, and a conceptual way of guiding one's formulation to stay within this range. Realism and formalism both accomplish this, but do so in different ways.

Satisfying the requirement of feasibility may be implicit in meeting the second requirement of outcome-determinativeness. By showing that a legal principle accounts for patterns of case outcomes, one demonstrates that the principle has been enacted into law. Assuming that the law has been followed, the principle is shown to have been feasible, and barring substantial change to the contrary, may be presumed to be feasible still.

Being codified into law is the *sine qua non* of a legal, as opposed to moral, principle, and being outcome-determinative is necessary for legal principle to perform its essential function of making argument from precedent a meaningful exercise. The whole enterprise of arguing from precedent makes sense only if one presumes the existence of normatively
valid principles which ought to be followed, and which account for the patterns of outcomes; so that by following precedents, courts implicitly are guided by a morally defensible principle. Since the primary task of legal principles, as distinct from moral or philosophical ones, is to sustain the meaningfulness of legal argument, it does not suffice merely to have attractive moral precepts. The precepts must account for the pattern of case outcomes; they must be outcome-determinative. Although they need not specify an outcome in every case, they must narrow the range of plausibly correct outcomes, and then provide a way of structuring debate over alternatives within the plausible range. When principles have such a prescriptive, outcome-determinative character, this enables their proponents to show linkages between principles and prior case outcomes; thereby supporting their claim that the principles are grounded in existing law and ought to be followed because they are the law.

The third requirement is that the principles must be amenable to some persuasive form of normative validation. Realism and formalism offer different ways of validating principles, the credibility of each being rooted in the philosophy’s background assumptions about the nature of the social world.

The essential difference between realism and formalism can be approached by asking the question—how does one view an ice cube in a freezer? One who thought in the language of formalist discourse would concentrate on the exterior surface appearance of the ice cube, note its solid form, and identify it with the ideal form of “ice cube.” The formalist would also assume that its continuation as a solid structure is the natural state of affairs, and thus assert that so long as the cube is “undisturbed,” it will continue its existence as direct embodiment of a universal ideal. The formalist disavows interest in comprehending either the ice cube’s interior crystalline structure or the impacts of its surrounding environment on it, both of which sustain the cube’s solidity and seeming permanence.

The realist, by contrast, sees the solidity as only a momentary appearance; the fixed identification with a universal form of “ice cube” as illusory, and focuses instead on the motion and potential for change within the cube, as well as on the surrounding freezer’s input of energy which sustains the solid form. The ice cube is seen as a conglomeration of rapidly moving molecules which, if their motion is accelerated, will melt or partially melt the crystalline structure of the cube, thereby allowing the cube to be reformed. Awareness of the prospect of reform and of the multiplicity of potential ice-cube shapes vitiates any close identification
of the particular cube with the ideal form of 'ice cube.' Hence, deducing the one from the other is a futile and fallacious exercise.

Translating the ice-cube metaphor back into a discussion of law, the realist and formalist differ fundamentally in their interpretation of popular consent to existing social arrangements. The formalist sees it as an irreducible fact akin to the ice cube's solidity. Consent is deemed to be authentic and rational because the existing arrangements are seen as embodying liberal ideals embraced by the populace generally. Thus, consent is a natural state of affairs that will remain so long as the social order is undisturbed by alien influences.

The realist views popular consent and perceptions of the social order's legitimacy as only a surface appearance that could change. He or she assumes that voluntary submission to the will of dominant forces is brought about by an underlying (or latent) coercion; the existence of which generates a need for consciousness that prevents destructive conflict by inspiring ready compliance. The realist assumes that consent and stability exist only in relation to the latent coercion, just as the ice cube exists only in relation to the freezer.

Just as the realist focuses on the motion and potential for change within the ice cube, so does he look upon society as a whole. He is thus precluded from viewing society as a stable, unitary entity, as the formalist does, but rather sees it as a conglomeration of contending forces, akin to groups of moving molecules. To identify the relevant groups and understand their interaction is of critical importance for the realist, but of little or no interest to the formalist. The latter seeks to portray existing social arrangements as static and universal, and for this portrayal, descriptions of latent conflict and coercion are not useful.

Thus, the realist views law as intrinsically political in the sense of being a result and residue of omnipresent political conflict. The formalist sees law as having been elevated above politics by the unified society's consensual commitment to principles that shape the legal order. Formalist discourse, which is the form of discourse most frequently encountered in judicial opinions, describes this commitment in terms that connote universality and immutability. Thus, we read of the fundamental rights of (abstract, universal) individuals, and of the needs and interests of social order—meaning not simply this social order during a given historical period, or in the midst of an ongoing strategy of governance, but of every social order, or at least of the type of social order to which we collectively are indefatigably committed. To the realist, the terms "fundamental rights" and "societal needs" lack any fixed meaning, but rather are
used as symbolic expressions of the imperatives of historically specific
strategies of governance. For example, individuals’ current right of free
speech, viewed by a realist, is seen to have become law during the New
Deal, and to have been instrumental for perpetuating the New Deal coa-
lition and thereby facilitating the changes in governance which it has
brought. Because the realist wishes to translate legal doctrine into the
language of practical politics, he is apt to be more interested than the
formalist in understanding law as reification. "Reification" refers to the
process by which individual and collective choices, to accept prevailing
social arrangements come to be seen as law, which has an existence and
integrity that are independent of the political choices that produced it. 117
By overlooking or denying reification, one comes to believe that law is
above politics in the sense of not being shaped by political choice. Ac-
knowledging reification leads one to view legal doctrine as either an ac-
cretion of inconsistent political choices, or as a manifestation of
sustained, underlying choices that are implemented by patterns of case
outcomes.

Because reification is a psychological process of justifying and facili-
tating submission to the dominant coercive forces, focusing on it leads
one to consider how ways in which latent threats of coercion generate
seemingly voluntary consent. Thus, the concept of reification serves as a
gateway to realist insights. Only by obscuring reification may one con-
tinue to speak of law as having an existence, integrity and logic all its
own, that can be understood without reference to politics or social con-
{}flict. Formalist approaches to constructing legal principles generally have
the following common characteristics. They deny, either explicitly or im-
plicitly, that legal principles are comprised of political choice; explicit
denials take the form of claims that legal principles are “neutral,” or
“consensual” or “above politics;” 118 implicit denials consist of treating
the political-choice aspect of principles as a forbidden topic and deeming
any discussion of it superfluous for understanding or validating legal
principles.

Because legal doctrine generally is comprised of formalist discourse,
formalists are apt to be willing to take doctrine on its own terms. They
tend to view it as a free-standing, self-sufficient conceptual structure that
exudes its own moral justification, is glued together by its own inner logic

117. See G. Lukacs, History and Class Consciousness (1971); Gabel, supra note 68.
118. See, e.g., R. Berger, Government by Judiciary: The Transformation of the
Fourteenth Amendment (1977); Bork, Neutral Principles and Some Problems of First Amend-
(as distinct from political choice or strategy) and thus contains legal principles within it. A non-formalist version of legal doctrine sees it as held together by the strategic requirements of a political program that needs to be openly expressed in order to articulate legal principles coherently.

For the realist, all attempts to portray specific legal outcomes as mandated by a neutral logic above politics are illusory because legal reasoning can have no sustained direction or coherence other than that provided by an underlying political commitment. Because all lawmaking and adjudication are intrinsically political, the process of deriving legal outcomes through reasoning grounded in legal doctrine is simply a reified way of reproducing the underlying political choices. For the realist, lawmaking and adjudication are oriented toward the realization of shared ideals of human association only secondarily. Their first commitment is legitimizing and stabilizing existing patterns of social relations which include pervasive inequalities of power and privilege, that are sustained by legal principles.

As has been explained, realist insights about law are linked by a common underlying vision of social order. Society is viewed as rife with latent conflicts capable of evolving toward divergent patterns of association, and held to existing patterns by underlying coercion. Thus, in formulating legal principles, one is obliged to identify antagonistic groups in order to understand the latent conflicts. By contrast, the vision that underlies formalist discourse portrays society as a unitary whole governed by a purely voluntary consent. The unity is expressed by doctrine that ascribes legal rules either to the needs of society as a whole or to the rights of an abstract, universal individual. This obviates the need to identify antagonistic groups, and sustains the illusion that law is above, rather than subsumed within, political conflict.

Both the formalist and realist visions depict lawmaking as legitimation, but differ in whether it should be seen as a static or dynamic process. The formalist sees existing law as directly embodying immutable ideals of liberty and rationality. Hence, existing social relations are portrayed as the culmination of historical development, and they are imbued with a legitimacy that exists irrespective of whether social movements seek to challenge them. By contrast, legitimation for the realist is a process of adaptation to constellations of power and custom which themselves can change. Because the realist views the prevailing popular consent to existing relations as based upon underlying coercion, insurgencies seeking to reform these relations may be justified, as may be the legal system’s attempts to coopt and legitimize the movements by incor-
porating their demands into law. Thus, there is an affinity between real-
ism and reformism on the one hand, and between formalism and conser-
vatism on the other. If one assumes that the only possible concep-
tions of legal principle are formalist ones, then embracing realism will
lead us to view law as unprincipled. For this reason, realists often im-
pugn the enterprise of legal reasoning as having no serious intellectual or
moral integrity. They assert that legalistic argument is unprincipled,
first because it is simply a mask or mystification of underlying political
choice arrived at for reasons other than those expressed in legal doctrine;
second, because any close scrutiny of doctrine will show it to be incoher-
ent, incapable of rationally determining legal outcomes, and thus unable
to support any analytically defensible conception of principle; and third,
because patterns of legal outcomes comes insofar as they reflect intelligi-
ble ordering at all, do not approximate full realization of any widely
shared value or ideal. Rather, they promote the morally dubious enter-
prise of perpetuating and legitimating existing patterns of power and
privilege, and strive to achieve values or ideals only insofar as they are
consonant with that enterprise. Thus, in the typical realist view, at least
two requirements of legal principle—normative validation, and an ana-
lytical scheme capable of determining case outcomes—are unattainable.

To formulate realist principles, we must change the rules of the
game so as to allow that the political choices to which many officials
conform might thereby become legal principles. If fundamental political
choices are not made spontaneously or instantaneously, but entail collec-
tive commitments to political ordering strategies having durations of de-
cades or longer, then encompassed within a political choice maybe a
stable, analytical scheme that implements the choice.

Wishing to remain conscious of reification, and to explain how legal
document signifies strategies of governance, the realist is apt to describe
principles as having two parts, a conceptual overlay, composed of logi-
cally interconnected doctrine the application of which prescribes cases
outcomes in accordance with the principle, and a practical under-layer,
which explains in realistic, social science terms how and why law-makers
have made the political choice to constitute this particular principle and
to codify expressions of it in decisions, orders and statutes. The overlay
and the underlayer will be contradictory in the following sense: the for-
mer will speak of conceptual necessity and of correct results arrived at
objectively through the application of a principle which is universal; in-

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119. See, e.g., R. UNGER, supra note 19.
Indeed, the overlay is comprised of the mental processes of operating within the universe of a principle, while the underlayer contains a frank admission that the entire principle itself is the product of political choice made on behalf of social arrangements and interests which are particular.

This contradiction does not invalidate the principle either as scientific construct or as moral endeavor, but only the attempt to present the conceptual overlay as the principle in toto and to claim that the existence of the overlay constitutes law as something entirely separate from politics. Because lawmaking and the forming of legal principles are reified activities in which political choices come to be reconceptualized as external, objective necessities, realistic descriptions of legal principles seek to capture the process of reification by revealing the principles in both their incarnations. This necessitates maintaining the full format of overlay and underlayer, and thus requires us to tolerate the contradiction.

Realist and formalist conceptions of principle seek different ways to satisfy the three requirements of feasibility, outcome-determinativeness and normative validation. Both may attempt to show feasibility and outcome-determinativeness by positing some conceptual structure of legal doctrine. Insofar as doctrine can be depicted as a coherent array where case outcomes and patterns of rhetoric have some systematic relation to one another, explicating the purposiveness that underlies the coherence can yield principles with demonstrated feasibility and sufficient outcome-determinative power. In seeking to divine this purposiveness, realists look downward into the realm of political conflict and strategy; formalists look upward to the shared ideals of liberalism. By positing ideals as the basis of legal principles, and sometimes explicitly equating principles with ideals, formalists create the risk that their principles will not be feasible. They attempt to overcome this problem by an intellectual strategy that Herbert Marcuse has described as one-dimensional thought.120

Ideals are merged conceptually with existing patterns of social relations. Thus, "liberty" is equated with unregulated contractual, market transactions, the idea of "democracy" with existing political institutions, and that of "majority rule" with particular acts of legislative majorities, and so forth. Thus, one hears that our shared commitment to the ideal of majoritarianism creates a strong argument against judicial decisions that overrule Congress by proclaiming constitutional rights, and that the ideal of a universal individual's liberty of expression prohibits government

120. See H. MARCUSE, ONE DIMENSIONAL MAN (1964).
from attempting to regulate private contractual transactions involving speech.

Realists, by contrast, conceive of legal principles as strategies of governance. Since principles cannot be presumed valid merely because they are strategies, advocates of realist principles are obliged to seek normative validation in two stages—by first narrowing the range of feasible alternative strategies, and then arguing that a given legal principle constitutes a strategy (or part of a strategy) that is preferable to the other alternatives. Liberal ideals can furnish a reference point in choosing among alternatives, but cannot be equated with the legal principles themselves.

B. The Anti-formalism of the Critical Legal Studies Movement

The Critical Legal Studies movement has generated a powerful three-stage critique of legal formalism and of formalist conceptions of principle. Its first stage, which is commonly referred to as “demonstrating the incoherence of doctrine,” gives us a strong reason to move away from the predominance of formalist discourse in judicial opinions. The critique does this by showing that the statements of liberal ideals and of abstract societal needs that are called “principles” in judicial opinions cannot be true legal principles because, their oppositional character, combined with their failure to account for their own boundaries, deprives them of outcome-determinativeness. Thus, if they were the operative legal principles, doctrine would be incoherent, and thus unprincipled.

This sets up the second stage of the critique which challenges formalism’s partialling out contrary aspects of liberal ideals (for example, individual autonomy versus collective well-being) and using them as would-be principles. According to this critique, the relevance of liberal ideals to legal argument must be in their setting forth a unified, positive vision of social relations which furnishes a reference point from which to judge the desirability of particular outcomes in specific, concrete situations. Once liberal ideals are used in this way, as opposed to having their polar aspects abstracted from the unified vision and made contradictory, it becomes clear that established legal doctrine cannot plausibly be depicted as a consistent effort to apply liberal ideals.

The third stage of the critique uses historical awareness to undercut formalism’s attempt to construct legal principles out of universal needs of an abstract social order. Generalized theories of “the needs of industrial society,” or “the imperatives of bureaucracy” fail to account for anything as specific as patterns of legal outcomes because the same functions can
be served by divergent principles and case results.\textsuperscript{121} This critique of large-scale functionalist determinism forces the formalist claim of necessity to be reconceptualized as a specific, historically contingent circumstance rather than a universal first principle of societies. By conceding necessities to be historically specific and contingent, the formalist incurs the burden of having to account for their emergence in a given setting and period. Serious attempts to meet this burden are likely to lead down a path toward greater understanding of societal conflict and realist insights, thereby undercutting formalist conceptions.

1. The "Incoherence of Doctrine" Critique: The Problem of Unbounded Complementarity of Rationalization Formats. If legal opinions are read superficially, they appear to reveal a deductive process by which courts reason from shared values, ideals and societal needs to arrive at results in particular cases. Courts appear to fashion principles out of values, and, after checking to see that their applications are in line with what other courts have done, they apply the principles. But if one looks more deeply and contemplates not merely each opinion in isolation, but the process of opinion-writing as a whole, then a different picture emerges.

The statements of "principle" contained in opinions, which I will call rationalization formats rather than "principles," tend to exist in opposing pairs. Unless their range of applicability is carefully bounded, they create opportunities for infinite manipulability. A court wishing to reach one result may characterize a fact situation one way and invoke the appropriate rationalization format. If it wishes to reach the opposite result, then it characterizes the facts differently and invokes the opposing format. If the principles guiding courts consist only of the two formats, then the claim that principles determine case outcomes is belied by the fact that neither format specifies the boundaries of its applicability, and that by choosing between the two formats, a court can reach opposite results.

For example, two familiar opposing formats are those of contractual freedom (that courts should uphold and enforce privately agreed upon bargains manifesting the free intentions of the parties) and of fraud or duress (that courts should look behind the outer appearance of consent in order to invalidate bargains arrived at through unfair trickery or one side's exploitation of inordinate, unjustified inequality of bargaining power). Applying the rationalization format of duress, virtually any

court will refuse to enforce a parent’s promise to pay a kidnapper money in exchange for the safe return of his or her children. Likewise, most courts will invoke the format of fraud to invalidate a consumer’s obligation to a merchant who falsely represented that a given commodity was worth $1,000 when in reality the consumer could have purchased the same item from any number of other merchants for less than $200. However, when alien migrant agricultural workers (also known as “temporary workers”) are paid less than the minimum wage to harvest crops under impending threat of deportation, most courts are likely to invoke the format of contractual freedom in order to enforce an agreement specifying the low wages. A worker who took more than the contractually set amount would be guilty of theft.

Of course, these agreements could plausibly be deemed the product of duress, given the relative bargaining positions which have enabled the employers to negotiate such favorable contracts. Likewise, one could even argue that the contracts were the product of fraud. By deceiving the laborers into thinking that they were receiving a fair wage, and by concealing from them the knowledge that if they unionized they could get more, the employers have tricked the laborers into signing contracts to their detriment, just as the merchant who sells the overpriced item for $1,000 has deceived the consumer by not revealing that he could purchase the same item elsewhere for less than $200. Although this application of “duress” seems improbable, and the application of “fraud” far-fetched, each is logically possible if our conception of legal principle contains nothing beyond the formats themselves. We know that they are improbable or far-fetched because of our implicit knowledge, often perceived as “common sense,” which tells us when a format’s logical application to facts is to be embraced or dismissed. Our intuitive conception of legal principle contains an array of application codes as well as rationalization formats.

These codes tell us when arguable injustices are to be taken as given, and when they will be deemed reprehensible and open to correction by the law. The uneven bargaining power of employers and alien laborers, including the threat of deportation, is taken as given, hence, the laborer’s resignation to it and their willingness to accept wages below minimum wage are deemed the exercise of rational free will rather than the product of fraud or duress. Logically, the same exercise of accepting injustice as given could be performed on behalf of the kidnapper. One could reason that although the normal rule is that parents do not have to pay to keep their children, when they negligently release children under circum-
stances where seizure is foreseeable, their inadequate supervision becomes the proximate cause of the seizure. The law will not provide free return of the children because in general it provides no compensation for one who is the victim of his own negligence. This being so, the loss of the children is accepted as given, and the parents must then decide how to get them back.

One vehicle might be to seek a declaration of custody from a court, but another, and generally preferred one, is free contractual arrangements among consenting parties. Thus, courts should validate and uphold the consensual agreement between parent and kidnapper provided neither party deceives the other about the nature of the bargain and neither exploits its superior bargaining power to demand a price greatly at variance from the going rate for safe return of a child.

Of course, this is ridiculous. Everyone knows that the proper format to apply with a kidnapper is "the state shall intervene to prevent injustice regardless of the parties' consent," rather than, "courts should let stand the results of freely negotiated contracts." But again, the source of our knowledge is the application code that bounds the two formats rather than the formats themselves.

Can we not then define our outcome-determinative principle as simply the formats and codes in their totality? If such a conception seems indigestibly massive, it can be brought to proper proportion by convenient treatise-like summaries. And putting aesthetics aside for the moment, we will have warded off the "incoherence of doctrine" critique by showing its error in mistaking for "principle" the rationalization formats which are merely parts of legal principles. Moreover, we will have postponed the onerous task of constructing a practical under-layer that dwells in the messy world of political choice. Both the rationalization formats and application codes are contained within legal doctrine itself, and might plausibly be portrayed as parts of a unified, self-sufficient conceptual overlay. This would be true but for two things. First, legal doctrine does not adequately account for its application codes. It concentrates on making the application of a format appear reasonable once that format has been selected. Without articulating the rationality implicit in the codes themselves, it is open to the charge of being arbitrary. And secondly, without revealing its essential purposes, it is not amenable to cogent forms of normative validation. Arguments about legal rules' moral validity should depend upon an assessment of their purposes under the circumstances. If doctrine is taken at face value, realization of liberal ideals might appear to be its underlying purpose. But
doctrine cannot be taken at face value because the purposive ordering of application codes which gives doctrine its coherence is not explained in the doctrine itself. Thus we must ask, "Why are the codes and formats arrayed as they are?" Only when this question has been answered can we begin to reach a judgment as to whether the principle that shapes the array is morally defensible.

2. The Problem of Inauthenticity That Emerges When Existing Application Codes Are Viewed as Attempts to Actualize Liberal Values. Without fixed application codes, legal doctrine would be a meaningless morass of contrary premises. These codes, although rarely described systematically in legal doctrine, represent the heart of legal principles. Thus, if principles are to be shown to have normative validity, the validation must apply to the codes as well as to the rationalization formats they summon. Although the formats have the intuitive appeal of being expressions of shared values, the codes do not.

Because the rationalization formats tend to exist in opposing pairs, the codes which set boundaries cannot derive their justification from the moral appeal of the formats. Any application which takes the opportunity to implement one desirable format (for example, contractual freedom) thereby foregoes the opportunity to implement another (governmental protection from injustice). Even when an application code can be expressed as the manifestation of a rationalization format, it still faces the charge of having failed to manifest the opposing (and equally desirable) format. Thus, the body of doctrine comes to appear as a vast playing-out of tensions between competing values of community and autonomy, of security and freedom, of equality and individuality, and so forth, in which no doctrinal formulation is inherently more legitimate than any other. All express our shared values.

At this point, Critical Legal Studies reaches a fork in the road. One path is to reject liberal values as guidance for decisionmaking by asserting that they are simply expressions of deep human ambivalence over needing and fearing others. By viewing legal doctrine as a continuing attempt to mediate the universal human contradiction between desires for community and autonomy, one leans toward a renunciation of involvement in doctrinal disputes because neither community nor autonomy is inherently more desirable than the other. 122

An alternative path is to reformulate liberal ideals into some unified

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122. This is the notion of a "fundamental contradiction" which was put forth in Kennedy, The Structure of Blackstone's Commentaries, 28 BUFFALO L. REV. 209 (1979).
vision of a just society where previously opposite desiderada converge (where authentic individuality and autonomous development are realized through the creation of supportive community). This then furnishes a reference point for evaluating legal principles and case outcomes, but it does so by contrasting the affirmative ideal with the results of particular applications of rationalization formats in specific, concrete circumstances. The emphasis can no longer be on the desirability of rationalization formats in the abstract, but on the application codes which dictate when they are applied and with what substantive effect.

We do not attempt to assess the moral status of the formats in general, but only when they are applied to particular, concrete, factual circumstances; the basis of the assessment being the particular effects under the circumstances. Freedom of contract, although worthy in the abstract, becomes evil when applied to strike down minimum wage and maximum hour legislation for bakers. In other words, legal doctrine becomes meaningful and eligible for normative validation through a series of confrontations with the actual social world. However, as soon as those confrontations are reported with any degree of accuracy and consistency, the proposition that established doctrinal patterns are shaped by ideals is swiftly undercut.

Although the opposing rationalization formats in legal doctrine express liberal values and ideals in the abstract, this expression does not itself conform social relations to the ideals. To make legal outcomes even approach the ideal, we would first need some concept of authenticity that allowed us to register which of the two opposing formats' application in the particular circumstances moved society closer to the ideal.

We would then need to construct application codes that were authentic in this sense. For example, in the transaction between parent and kidnapper, any attempt to apply the ideal of voluntary, mutual exchange would be inauthentic whereas applying the ideal of communal protection would be authentic. Conversely, where the contractual transaction is between a bookseller and a person desiring to read some political or literary achievement, the authenticity of the two formats of liberal and communal protection would be reversed.

Unfortunately, many of our settled, legally correct application codes would fail this test. Consider how the law operates when a non-unionized employee-at-will is laid off from his job because demand for his labor has slackened. The consequences for the employee may be catastrophic and

lead him to destitution; whereas requiring the employer to provide him with another job would affect the employer's well-being only marginally. An "authentic" application of our affirmative liberal ideal might well deem the ideal of contractual freedom inapposite, and favor the contrary ideal of paternal, governmental protection of welfare. Yet, established legal principles do the opposite. The employer is required to provide another job only if it has voluntarily contracted to assume that obligation.

Nearly everyone knows that this is the law and accepts it as the law, but as an application of ideals it seems perverse. The definition of the employer-employee relationship as one of contractual freedom fails to take account of the corporate employer's vastly greater wealth and power, and of the employee's willingness to accept termination being the product of duress, (she will be forcibly removed from the premises and blacklisted or imprisoned if she defies the employer's order).

Viewed superficially the law appears to be a direct application of liberal ideals because legal doctrine is composed of rationalization formats that articulate these ideals. However, as explained previously, the formats exist in opposing pairs which taken together, but in isolation from concrete factual situations, merely express contradictory human yearnings for autonomy and community. If the formats themselves were the law in toto, then the law would indeed be inchoate and incoherent. It becomes ordered and coherent by maintaining consistent application codes which choose between opposing formats in predictable ways in the context of applying them to types of real situations. The shaping of these codes theoretically provides an opportunity to realize liberal ideals by favoring the format (and the corresponding result) which is more authentically applied in each situation. But in practice, this opportunity is frequently foregone because the less authentic application is chosen.

Inauthentic applications are pervasive because the existing social relations maintained by law are far more hierarchical and egalitarian than those implicit in the positive social vision behind the liberal ideals. One of the central ironies of liberal democratic, capitalist societies is that their deepest shared values and ideals tend to be those that were forged in an assault on feudalist hierarchies, but their actual social relations which they seek to legitimate with reference to these ideals resemble more the feudalist hierarchies themselves. Thus, the law continuously faces a choice between moving toward an affirmative liberal ideal and maintaining what exists. Most often its choice is the latter.

Two things keep it from becoming completely obvious that legal principles are not shaped by shared values and ideals. The first is that
most instances where principles embody inauthentic applications are so
traditional, familiar and uncontroversial that they are virtually never
questioned or litigated, and hence are conveniently invisible when legal
doctrine is discussed. The second is that law schools focus attention al-
most exclusively on judicial opinions. Thus, factual situations are viewed
only through the lens of opinion writers, and the only aspects of the situ-
ations likely to be viewed as salient in opinions are those that are conso-
nant with the writer's effort to apply a rationalization format.

Nevertheless, awareness of the divergence between existing social re-
lations and liberal values and ideals is difficult to escape. Since it is gener-
ally conceded that law operates to maintain these relations, it follows
that law works to maintain something quite different from underlying
values and ideals. Legal principles, which reflect and shape case out-
comes on a daily basis, must therefore have an identity different from
that of liberal ideals. Otherwise there would be no way of accounting for
the pervasive forms of injustice that are left standing by, and are even
reinforced by, decisions that are legally correct applications of estab-
lished principle. Such pervasive injustice can be downplayed and at times
ignored, but it cannot be denied altogether.

Persons who imagine that legal outcomes can be deduced from lib-
eral ideals must contend with the fact that departures from liberal ideals
occur throughout the economy, which are pervasive and constrain all
other forms of social activity. Hence, the efforts of idealist formalism to
separate practical areas of law, such as contract and labor law, from ar-
eas where ideals govern, such as freedom of speech and due process, is
futile. Economic organization is of paramount importance in every area.

For example, the First Amendment free speech guarantee limits cer-
tain types of governmental interference with citizens' use of resources
(paper, podium, billboard, printing press, radio transmitter, news media
conglomerate) to disseminate ideas. Among the types of interference that
are not limited is the normal enforcement of property rights and protec-
tion of resource acquisitions through commercial market transactions.
Thus, the citizen who wishes to use instrumentalities of speech which he
neither owns nor is able to get the owner's permission to use may be
barred from such usage. Tremendous suppression of speech and constrict-
tion of the flow of ideas is implicit in the normal enforcement of property
rights. Such suppression is usually seen as unproblematic, but it shapes,
to a considerable degree, the concrete situations in which free speech
doctrine is applied. By shaping these situations, it affects the circum-

stances under which application of a rationalization format, such as “no governmental interference with the flow of ideas,” will appear authentic.

Thus, when all government regulation of access to instrumentalities of speech is barred, the importance of private wealth and market transactions as determiners of access is heightened. If the distribution of wealth and of market-based access to facilities is extremely unequal, then prevention of all government interference, including that which would have a redistributive effect, may effectively result in heightened domination of the populace by elites. Hence, the rationalization format of “unimpeded individual liberty” comes to stand for protecting the liberty of the few at the expense of the many—an application which most people would view as inauthentic.

In other words, attempts to imagine freedom of speech being shaped by a liberty ideal or an ideal of uninhibited self-expression fail because free speech doctrine implicitly incorporates established economic organization, and insofar as such organization parts from underlying liberal ideals, then established First Amendment principle will also diverge from the ideals.

Proponents of idealist formalism must distract attention from such vulgar economic realities in order to maintain the credibility of their enterprise. Sometimes their efforts to do so involve a sleight of hand. For example, after positing an ideal principle (government may do nothing to limit the flow of ideas) which they assert will or should determine the totality of First Amendment doctrine, they may turn around and act as though a particular doctrinal category (the state action requirement) has elevated itself above the principle in order to limit the principle’s reach.

Thus the argument goes, “government may do nothing to limit the flow of ideas; true, the flow of ideas is limited by private ownership and contractual transactions which determine who may control a newspaper or purchase time on the broadcast media, but such forms of ‘private censorship’ do not involve state action and are thus outside the purview of the First Amendment; even though they limit the flow of ideas and depend upon government’s enforcement of property and contract law, they do not undermine the free speech principle that government may do nothing to limit the flow of ideas because the First Amendment only applies where there is state action.”

In reality, “state action,” like all doctrinal categories, is malleable and can be shaped to accord with the principle governing the doctrine as a whole. There is nothing inherent in the concept of “state action” which says that it cannot be interpreted to include the state’s action in main-
taining normal property and contract laws. Indeed, if the reigning First Amendment principle were really "government may do nothing to limit the flow of ideas," then "state action" would have to be interpreted in this very broad way. The fact that "state action" is not defined so broadly is evidence against the claim that the reigning First Amendment principle is "government may do nothing to limit the flow of ideas."

To use existing "state action" doctrine as an explanation of why an ideal principle fails to deliver the doctrinal results it promises involves a sleight of hand. The proponent simultaneously asserts that legal doctrine is shaped by ideal principles and that legal doctrine can transform principles into something other than what they are by limiting the range of their applicability. This sleight of hand is possible because existing doctrine is shaped by something different than ideals, and having been so shaped, it can stand apart from the ideals and limit their applicability.

3. Historically Contingent Necessity and the Claim of Radical Indeterminacy. Due to the residual effects of legal realism's ascendancy during the New Deal period, formalist attempts to argue that legal outcomes embody liberal ideals are met with skepticism. Contemporary formalists usually prefer to don the outer trappings of realism by admitting that harsh necessities deter courts from fully realizing ideals. But they remain true to formalism's deeper agenda by portraying the necessities as universal needs of any modern, liberal industrial order. Hence the needs are elevated above politics by being cast as needs of society itself, rather than of any particular societal group or political agenda. They are portrayed as inherent needs that any rational person would accept.

Critical Legal Studies' historical and comparative examinations of legal systems subvert the formalist conception of abstract, universal necessity. Studies show that even when conceivably universal needs of modern industrial societies are identified, widely divergent legal forms and rules appear capable of satisfying the same needs. Thus, the formalist's desire to derive existing patterns of doctrine from abstract societal needs is frustrated.

Moreover, studying the history of legal doctrine in this country shows that legal concepts, which at any given point in time are portrayed as having a fixed, uncontestible meaning, evolve over decades to take on different meanings in accordance with the prevailing politics of the

125. See Gordon, supra note 121.
Thus, counterpoints to contractual freedom like "fraud" and "duress" will expand or diminish their range of applicability depending upon whether laissez faire political positions are in retreat or ascendance. Such seemingly universal imperatives as the need to protect private property and keep public order were once seen as justifying prohibition of assemblies in public parks, activities which forty years later had come to be seen as essential for liberty, fully compatible with order, and an absolute right "from time immemorial."

The historical insights of Critical Legal Studies can be interpreted either of two ways, both of which undermine formalism. An approach of radical indeterminacy rejects all claims of necessity, saying that such claims are nothing more than ideological assertions marshalled in support of actors in contingent power struggles. It also rejects all attempts to posit any kind of functional determinism. Thus, the very assertion that a body of legal doctrine is held together by its serving some underlying societal function is suspect, regardless of how the function is depicted.

Radical indeterminacy's stark rejection of concepts of "function" and "necessity" places it in opposition to efforts to construct realist conceptions of principle, which necessarily depend on such concepts. Since doctrine cannot be portrayed as the outcome of any purely logical determinism, attempts to impute coherence and purposiveness to it must be based on some sense of social function. Since normative validation of realistically-defined legal principles depends on defining a "feasible" range within which alternative principles may be compared, some concept of necessity is needed to sustain the boundary given the wide range of conceivable social outcomes that fall outside it. The alternative to radical indeterminacy is provided by concepts of historically contingent necessity and scaled-down functional determinism. To say that a social need is historically contingent is to assert on the one hand that it exists only within a specific historical context, but on the other, that once its context is set, it has the quality of necessity. Thus, if one asks, "Must projectiles always fall to earth?" The answer is, "No, some projectiles are outside the earth's gravitational pull; other have rockets that will propel them beyond its pull." But if one asks, "Must a projectile situated in the earth's atmosphere without any means of propulsion fall to earth?" Then the answer may be, "Yes, this is necessary." The fact that other contexts are imaginable, or even under certain circumstances achievable, does not negate the possibility of necessity in a given context.

Since legal rules, decisions and orders are all exercises of state power, one may infer that their feasible range is bounded by the limits of such power in a given historical context. Because the state is by no means omnipotent, and may even at times be surprisingly fragile, state power must be exercised cautiously and with enough deference to civil society’s dominant, organized forces to avoid provoking exertions of private power that would frustrate or sabotage major programs of governance. The fact that constellations of private power depend upon political consciousness and may be transformed by political organizing does not deprive them of the capacity to create necessity in a given context where the transformative organizing has not yet occurred. It merely means that such necessity is always historically contingent.

Likewise, even though a given societal function will not necessitate any specific pattern of legal outcomes for societies in general, once a specific pattern has developed in a particular society and context, the pattern may be viewed as an intelligible, coherent strategy for serving the function. The fact that other ways might have been developed to serve the same function does not deprive the chosen way of its functional character. Since the particular strategy that has been adopted will be facilitated better by some types of case outcomes than others, its strategic, functional character may provide the basis for an outcome-determinative legal principle. But the starting point for the principle is not the abstract, universal needs of social order; it is the particular historical contingency of this strategy having been adopted.

Radical indeterminists sometimes challenge the idea of historically contingent necessity by arguing that it is a false appearance generated by the inertia of existing power relations. Since power cannot long be exercised without the consent of those subjected to it, and such consent is a manifestation of subjects’ consciousness, indeterminists argue that subjects’ freedom to alter their consciousness belies all historical necessity, leaving only an inertia that can be spontaneously altered at any time.

The fallacy in this argument lies in its curious reliance on the formalist conception of legitimacy as pure, voluntary consent divorced from underlying coercion. But if one adopts the realist mode of consent being a self-protective response to latent coercion, then one would say that human beings are not free to change their consciousness without first or simultaneously altering the material basis of power. Since the historical circumstances under which this may be done are limited and to some degree predictable, one can envision historical periods free of such circumstances. Within any such period, a domain of politically feasible gov-
erning strategies retains its historically contingent necessity, which in turn provides the normative basis of legal principles.

Arguments in favor of radical indeterminacy are sometimes based on the CLS "incoherence of doctrine" critique. Proponents assert that legal doctrine is so infinitely malleable as to be incapable of supporting any type of outcome-determinative principle. However, the "incoherence of doctrine" critique does not really go so far. It can as well be read to state that doctrine is an ordered, symbolic representation of governing strategies which are not fully explicated in doctrine. Although doctrinal use of symbols changes over decades, in at least most periods, there are some shared meanings that attach to the symbols. Hence, what is incoherent is not the very idea of ordered doctrine or legal principles, but the formalist attempt to depict principles as fully articulated within doctrine itself. Radical indeterminacy's rejection of all conceptions of legal principle relies upon formalism in a curious way: it rejects formalism, but adopts formalist criteria for deciding what might constitute valid legal principles. Failure to meet these criteria of political neutrality and pure analytic verification, is then used as a basis for dismissing realist conceptions of principle. Doctrine which purports to derive decisional outcomes from the radical indeterminists argue that "principles" which are presented as rationalizations for decisions are incoherent because these "principles" do not account for the boundaries of their application. Thus, any legal system that truly restricted itself to the formalist project of logically deriving outcomes from rationalizations would wind up with seemingly random applications of principle and counter-principle, and would be in effect unprincipled, while claiming to be principled. Thus, it would be incoherent.

In actuality, most CLS scholars acknowledge that law is not so random as this argument might suggest. They admit that some regularity is imported through a somewhat uniform process of articulating "factual" distinctions which define separate domains of principles and counter-principles. Thus, we all know that "discrete and insular minority" means a racial or ethnic minority, and not a socioeconomic class or a group with sexual preferences that are seen as deviant. We know that "duress" means one contracting party using explicit threats of force to achieve results that are abnormally oppressive, rather than simply employing superior bargaining power and implicit threats of force to secure forms of oppression that are customary in the trade.

These seemingly common-sense meanings of terms supply what coherence and regularity exists in the application of legal doctrine. How-
ever, as soon as any close or interesting question is examined, it becomes apparent that the “factual” categories are neither simple sensory perceptions nor neutral, logical categories of human association. Rather, they are conclusory terms susceptible of a variety of meanings. They acquire their specific meanings that allow them to generate reproducible legal outcomes by incorporating the prevailing political conclusions of the period. Thus, Blacks and Puerto Ricans, and not gays, pot smokers or unemployed, come to be seen as suspect classes within the meaning of the Equal Protection Clause even though all four groups are stigmatized and disadvantaged minorities in fact. The difference is that the judiciary has embarked upon a program to protect the former and not the latter.

At this point, the Critical Legal Studies critique must shift its focus. It can no longer assert that outcomes are random as they would be if only logical deduction based on “principles” were employed, but that the criteria generating reproducible outcomes are neither fully explicated in judicial opinions nor politically neutral. That which is presented as simply “factual” really incorporates conclusions reached through thought processes intended to reflect the prevailing politics of the period. Thus, the “incoherence” consists of the pretense that legal principles and reasoning are above politics when even a moderate amount of thought shows that they are not. This critique would invalidate all functionalist, realist-based conceptions of legal principle only if one of three things were true: first, that such principles were predicated upon a differentiation of law from politics or ideology; second, that such principles could not legitimately be based upon anything beyond the four corners of printed judicial opinions and thus had to be constructed by a literal repetition of “principles” as they are expressed in opinions; or third, that politics were so open-ended and constantly shifting in fundamental ways as to lack the necessary stability to support any legal principles that endured long enough to be meaningful. The first is by definition false. The second is a requirement only of the formalist mode of legitimation. Principles need be fully stated in judicial opinions only if opinions are viewed as a process of arriving at results through an objective process of logical deduction, the objectivity of which is attested to by its being contained within opinions. Being contained in such a manner makes them reproducible, like the results of a scientific experiment, and this reproducibility is taken as the hallmark of objectivity. Since realistic, functionalist principles are admittedly shaped by the prevailing politics or ideologies of the period, they need not display any ritualistic demonstration of objectivity. There need merely be shared ideological determinism which defines pre-
ferred strategies of governance with sufficient clarity that they may be applied consistently. As long as there is an intelligible connection between the strategies themselves and reasoning in opinions, the strategies need only be reflected partially or symbolically in the opinions.

From a realist's perspective, statements of "principle" contained in opinions are only parts of legal principles. They are the rationalization formats employed by courts to express decisions arrived at through applications of principle that are only partially articulated. Because legal principles encompass application codes as well as rationalization formats, the fact that the formats do not specify their own boundaries in no way invalidates the functionalist conception.

The third contention that politics is too open-ended to sustain conceptions of legal principle furnishes ground for debate, and may even be defensible empirically for some areas of law in some periods. But when it is elevated to the level of first premise and asserted to be generally and always true it begins to seem unlikely.

Both the experience of those trying to radically alter existing society, and the common-sense perception of politics as constrained within a relatively narrow ideological range suggests that the process is less open-ended than advocates of radical indeterminacy would like to believe. Indeed, the fact that judges and scholars see themselves as applying determinate legal principles may reflect a reality of sufficient political stability to support such principles. But the continuing commitment to outmoded formalist conceptions may have retarded attempts to concretize and articulate actual principles, which will be better understood and show a closer correspondence with decisional outcomes if we search for coherent strategies of managing conflict rather than close approximations of ideals.

C. Critical Functionalist Reconstruction of Legal Principles

To fairly reject both radical indeterminacy and formalism, one should be able to posit conceptions of legal principle that comport with realist insights. Another way of saying this is that once law has been subsumed within politics, we may still preserve the idea of lawfulness by depicting at least some facets of politics as an ordered process. But an ordered process of doing what? Not of maximizing values, but of preserving the legitimacy of evolving patterns of social relations. The approach which I term "critical functionalism" provides a background analytical framework for generating such conceptions of principle. Since this approach is avowedly a way of synthesizing realism and principle, its con-
tours are shaped by its needing to incorporate realist insight while satisfying legal principles’ three requirements of feasibility, outcome-determinativeness and normative validation. A commitment to realism encompasses two closely related goals — a capacity to cogently depict and explain actual legal patterns, which includes the ability to account for historical change, and a willingness to portray social relations as involving domination and latent conflict, rather than as a basically consensual process of actualizing shared values.

To achieve this synthesis, critical functionalism views legal principles as strategies for maintaining the legitimacy of the social system. But it concedes this consent of the governed does not occur “naturally” based on shared values. Rather, this consent is manufactured partly by an ongoing manipulation of the populace, using threats of coercion and disseminating forms of consciousness that extol acquiescence. Legal doctrine generates and amplifies such consciousness, but it also dictates how the state’s coercive power is to be distributed and applied. Doctrinal patterns embodying legal principles are held together by their strategic value in managing social conflict, which in turn involves sustaining networks of institutions that legitimize and reproduce established power relations. Described in this way, principles cannot lay claim to normative validity simply because they are principles; rather, normative validation must occur in two stages. First by bounding the range of feasible, alternative strategies, and then, by choosing those alternatives which are preferable from the standpoint of underlying ideals.

This process of setting political boundaries and acknowledging alternative ordering strategies within their confines is realized by operationalizing the abstractions of “system” and “strategy.” Both terms connote patterns of social relations; those that constitute the “system” are imbued with an historically contingent necessity that makes their fundamental alteration unfeasible in a given historical period. Social relations that constitute “strategies” are seen as mutable, and hence the focus of political-legal debate. As social movements emerge and decline, and prevailing political moods and prospects change accordingly, the precise formulation of which relations are “strategies” and which comprise “the system” may be altered. But the process of change is usually slow enough, and major shifts are infrequent enough, that one may meaningfully define boundaries that will apply over a duration of several or more decades.127

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127. See id.
Because critical functionalism stresses the integrated, interrelated functioning of institutions, it is likely to portray the deeper meaning of doctrinal patterns less in terms of discrete goals pursued by a given area of law in isolation, than in terms of the patterns' contribution to the ascendance or dismantling of broader strategies of governance that encompass many areas of law and define society's principal political cleavages. Thus, many areas of law may appear as theaters of conflict in a multi-fronted contest between basic corporatist and social democratic ordering strategies.

Alternatively, certain areas may appear as the consistent, secure sanctuaries of one strategy or the other. For example, I have argued that First Amendment "free speech" doctrine has maintained a structure of core-absolutist and broader discretionary protection that has favored social democratic strategies of governance. Comprehending this structure allows us to argue that particular First Amendment decisions favoring corporatist strategies of governance are anomalous. Conversely, the complex of statutory and constitutional anti-discrimination law may best be understood as a clash between two alternative strategies—one seeking a racial homogenization of the class structure in order to minimize risks associated with interaction of latent class and racial conflicts; the other seeking stability in the context of current levels of racial inequality by preventing racial identities from developing into a type of class consciousness. This has involved protecting the presently small, non-white middle class from effects of institutional racism and requiring that systematic reproduction of racial inequality be accomplished without open animosity or expressions of discriminatory intent that could likely provoke collective opposition.

Of course, such formulations admit that law is highly political. However, critical functionalism does not seek to elevate law above the clash of ideologies, as do formalist principles. Rather it seeks to illuminate the complex ways in which doctrine is a continuing manifestation of this very clash. The grounding of legal principles in political conflict, rather than in consensual values, is the logical outgrowth of a basic realist orientation. Conceiving of principles in this way does not invalidate them normatively, but it exposes the political nature of attempts to validate them.

The extent to which normative debate over legal principles may be "open-ended" and concern the basic terms of social life is historically

128. See Freeman, supra note 67.
contingent and depends upon the strength of the inertia of power in a given period. Such inertia in turn depends upon the extent to which power is concentrated in groups that are fundamentally allied with one another, and upon social institutions success in keeping major conflicts latent. Constellations of power generate for each historical period its plausible range of alternative models of governance. With a critical functionalist approach, this range is reflected in the way concepts of "system" and "strategy" are operationalized. One asks which alternative strategies can or have been explicitly set forth as legitimate possibilities, as opposed to those which are rejected out of hand by being depicted as contrary to the (temporarily) unalterable requirements of the "system". Thus, one may look to the legitimate political spectrum as providing a range of feasible strategies, and to those things which are never seriously challenged as constituting the system. While one might argue that such an approach crystalizes temporary political hegemony into a conception of fixed system, the response is that the "system" abstraction merely pragmatically incorporates limitations stemming from the historically contingent necessity imposed by established power. The fact that it is temporary or historically contingent, does not negate the possibility of actual, albeit time-bound, necessity.

D. Critical Functionalism as Synthesizer of Realism and Principle

There are as many different types of functionalism as there are of politics. Many people associate the term "functionalist" with the relatively conservative and formalist-leaning functionalism of Talcott Parsons which stresses the independent role of shared values in sustaining a static and fundamentally consensual social order. But functionalism is equally evident in the work of Karl Marx who views legal and other cultural institutions as parts of an integrated system designed to perpetuate domination by the capitalist class. Because Marx saw the capitalist class's very existence as antithetical to the primary values of liberalism, which he espoused, Marx produced a type of inverted, radical functionalism which conceived of the system's very success as a collective misfortune. Because critical functionalism is designed to synthesize realism and conceptions of legal principle, it must eschew both Parsonian and Marxist extremes. It cannot conceive of the social system as fundamentally anti-social because to do so would deny normative validity at the outset

130. 1 K. Marx, Capital (1906); see also N. Poulantzes, Social Classes (1975); L. Althusser, For Marx (1970); J. Connor, The Fiscal Crisis of the State (1973).
to all strategies of system maintenance, and thus to all functionalist legal principles. But it also cannot view existing social relations as a manifestation of shared values operating independently of power. Doing that would reinforce legal formalism, thereby precluding realism and defeating the purpose for which functionalism was being used in the first place.

Critical functionalism's middle ground is defined by five basic postulates. These are:

1. all existing social relations, including expressions of shared values, are the product of existing forms of power and domination;
2. power and domination *per se* are neither good nor bad because they are in some form necessary and inevitable;
3. the existing social system has a capacity for adaptation and thus can be reproduced by a variety of strategies, all of which maintain its basic infrastructure of power relations;
4. some of the strategies and their associated distributions or exercises of power are more desirable and less odious than others;
5. because it is possible to comprehend patterns of governmental decisions as comprising coherent strategies, and the range of feasible strategies within a given historical period is limited, one may formulate alternative legal principles and validate them normatively through a competition among feasible alternatives.

A critical functionalist approach does not construe legal doctrines abstractly in a way that is divorced from the total societal context. Thus, it does not ask how a given doctrine by itself realizes a given value. Rather, it asks how the doctrine operates in conjunction with others to reproduce the system of power and social relations as a whole. Hence, courts are seen as the loci of power in an integrated system of governance which includes both legislative and executive branches as well as the various "private governments" that wield power throughout civil society. In this sense, all governmental decisionmaking is equally political.

By choosing one strategy of system maintenance over others, decisionmakers implicitly favor or disfavor shared values. But this difference is always incremental and the strategies never approach being *bona fide* efforts to realize values fully. The coherence of bodies of legal doctrine stems from the strategies, not from any deeper or inner meanings of the values themselves. Strategies, by definition are meaningful only in particular historical contexts marked by specific imperatives that necessitate and guide strategic responses. Since the distribution of power determines which social groups will be capable of pressing imperatives with sufficient effect to command the state’s attention, the legitimation and stabilization
of social relations involves, above all, accommodating the demands of the powerful. This accommodation generally results in the reproduction of power relations themselves.

That the judiciary strives generally to implement strategies of system maintenance and of legitimation can be seen by comparing definitions of these concepts with commonplace observations about the judicial role. "System maintenance" denotes a continuing attempt to preserve patterns of social relations by alleviating the strains — or contradictions, or conflicts — that threaten the patterns and their legitimacy.

Thus, judicial decisionmaking is addressed to social conflicts. It seeks to produce a stable resolution of such conflicts and to the threats to stability that are thereby posed. Judges want and expect to have their orders obeyed, and they aspire to prescribe rules of conduct that will be adhered to generally, not just by the particular litigants before them. Hence, courts seek to dictate patterns of social behavior for the social system as a whole.

The fact that they are reproducing patterns rather than creating them anew is reflected in their concern with following precedents. Courts believe that the validity of their decisions depends heavily on their consistency with prior decisions of other courts dealing with similar matters. As between recent precedents and ancient ones, it is the recent ones that are considered more important. For courts to overrule ancient precedents when social circumstances have changed is viewed as entirely proper. But to overrule recent precedents is considered bad form. The concern is not with preserving tradition, but with avoiding abrupt shifts. Accordingly, judicial opinions often appeal to settled expectations and to customary ways of doing things. The fact that something is customary will often be thought to make it legally correct unless the custom undermines something else which is customary. In other words, the concern is with facilitating a slow and orderly evolution of existing patterns.

The definition of society as a social system assumes that the different agencies which exercise power are at least loosely coordinated with one another. Critical functionalism leaves open the question of the extent to which decisionmakers have a conscious awareness of coordination, but it views legal doctrine and consciousness as symbolic systems designed to facilitate coordination.

Thus, doctrine reveals courts perennially striving to defer to other agencies which exercise power. This tendency is reflected in numerous legal doctrines such as, "the business judgment rule," which defers to corporate directors; the concept of "federalism," which defers to state
legislatures and agencies; the idea of discerning legislative intent, which
defers to legislatures, state or federal; the "political question" and "separa-
tion of powers" doctrines, which defer to the federal executive and leg-
islature; the concept of "majoritarianism," which defers to whatever
group is sufficiently powerful to have acquired predominant influence in
Congress; the concept of "not inquiring into the mental processes of the
decisionmaker," which defers to administrative agencies; the concept of
respect for "marital privacy," which defers to the most powerful (and
sometimes violent) member of the family, and so forth.

Consistent with the general pattern of deference to power is the fact
that major judicial reforms, such as occurred with free-speech doctrine in
the 1930's\textsuperscript{131} and post-World War II anti-discrimination law,\textsuperscript{132} tend to
occur when the other branches of government are moving in parallel to
implement similar kinds of reforms. For example, the New Deal trans-
formation of labor law and the series of post-war civil rights acts and
orders (integrating the armed forces by executive order to the Civil
Rights Act of 1964). Likewise, in the late 19th century when other
branches of government were engaged in policies to promote the ac-
cumulation of capital, the judiciary was effecting a transformation of the
common law for the same apparent purpose. It assumes that except dur-
ing rare historical moments the coordination is sufficiently successful
that power relations are reproduced and perceived as legitimate. The
fruit of this success is an inertia of power which makes social change
difficult. Legal rules are seen as devices for reproducing power relations
which are shaped in return by exercises of power and of coordination
among powerful agencies.

In any given historical period, there are strains in the social system
which inspire functional adaptation that entails changing some patterns
of social relations in order to restabilize and relegitimate the power rela-
tions that remain. That such change is possible within the context of an
evolving social system necessitates a distinction between the system itself
and strategies of system maintenance, which are efforts to devise social
patterns for the benefit and stability of the system as a whole.

Insofar as legal rules evolve over decades, they are presumed to em-
body strategies of system maintenance. Those that rest unchanged may
be characterized as constituting either a consistent strategy of govern-

\textsuperscript{131} See Kairys, supra note 57; Gabel, The Mass Psychology of the New Federalism: How the
Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life, 52 GEO. WASH. L.

\textsuperscript{132} See PIVEN & CLOWARD, supra note 57.
An essential aspect of system maintenance is legitimation. By legitimating the patterns of social relations that comprise the social system, ruling authorities both enhance the stability of these patterns and affect the quality of experience of the people involved. Thus, to legitimate existing patterns of social relations is to generate mentalities among subject populations which lead them to perceive their servitude as something they voluntarily accept, either because it is "freedom" or because it is "necessity." This allows the underlying threat of violent coercion to remain latent, and for the society to enjoy a higher level of security and nonviolence than would otherwise be the case. Because underlying coercion supports popular perceptions of legitimacy, one cannot properly speak of a society ordered by legitimacy as opposed to coercion. Thus, to pose the question: "Is society governed by consent and legitimacy, on the one hand, or by force and coercion on the other?" is to fundamentally misunderstand the concept of legitimation. It is like asking: "Is the human body supported by its skeleton or its muscles?" The more muscles a body has, the more easily it stands and walks. But it is difficult to imagine how muscles would function without an underlying skeleton to which they could be attached.

Legitimation involves not only the manufacture of appropriate consciousness, but also the readjustment of social relations to curtail or diminish exercises of power, the acceptance of which would undercut the legitimacy of the social system as a whole. It would be a gross mistake to perceive the legitimation process as simply a setting forth of models of consciousness. Thus to argue, as some CLS scholars appear to do, to the outcomes of court cases are unimportant because judicial decisions are nothing more than legitimation of the existing system is incorrect insofar as it overlooks the possibility that the choice of one legitimation strategy over another can make a substantial difference in people's lives.

To speak of "legitimation strategies" is essentially the same as to speak of "strategies of system maintenance". The terms have connotations that emphasize different aspects of the process. The former emphasizes the generation of consciousness and the striving toward voluntary acceptance; the latter focuses on the fact that legitimation is in the service of, and constrained by, the most fundamental, well-fortified forms of established power. These typical patterns of judicial behavior — the con-

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133. See, e.g., Peller, supra note 70; Dalton, supra note 55; Freeman, supra note 55.
cern with stability and general compliance, with precedents, with de-
ference to power, and with coordination between the judiciary and other
governing entities — reflect the judiciary's primary commitment to main-
taining a smoothly functioning, slowly evolving social system. Indeed,
the metaphor of society as a social system connotes little more than sta-
bility, slow evolution, and coordination among influential agencies; all
oriented towards preserving the authority and dominance relationships
that comprise the infrastructure of existing social relations. The judici-
ary's commitment to legitimation is reflected in its continuing efforts to
appeal to liberal ideals, especially to the ideal of governance based on
rational consent of the governed. Virtually all judicial opinions that at-
tempt any substantial justification of their results will in one way or an-
other appeal to this idea. The opinions may speak of social necessity and
of compelling interests, which suggest that anyone who seriously consid-
ered the situation would accept the result voluntarily. They may portray
their results as being dictated by "reason", or as necessary for "a free
society", all of which make the same essential point.

This appeal to "governance by rational consent", although consis-
tent and seemingly earnest, generally takes place within a carefully cir-
cumscribed context of not disrupting society's established coercive
relationships, except insofar as those are seen as illegitimate because they
either are out of line with established practice or are thought likely to
destabilize other coercive relationships. In other words, although the
professed goal of lawmaking is voluntary consent, little is done to inter-
fere with ongoing coercion. This combination suggests that its real pur-
pose is to inspire forms of consciousness which encourage voluntary
compliance with social patterns that would be generated by direct coer-
cion in the absence of such compliance. This is what is meant by "legiti-
mentation of an existing order." Critical functionalism views legitimation
and system maintenance as background conceptions that are encoded
into a shared conception of judicial role. Courts routinely interpret prece-
dents and pronouncements in ways that allow them to remain faithful to
these underlying purposes. Viewing precedents as ways of achieving these
purposes allows courts to perceive reasonably definite meaning in re-
ceived doctrine. Such perceptions constitute an intuitive grasp of legal
principles and channel decisionmaking to produce reasonably consistent
application codes. However, due to the prevalence of formalist discourse,
the political-strategic nature of the enterprise cannot be acknowledged.
So the coherence and purposiveness, which are real, are mistakenly por-
trayed as formal or logical; a characterization which is unreal.
To grasp the actual coherence one must conceptualize patterns of related doctrine and then ask what latent or manifest conflicts they have been designed to address, which power relations have been reproduced or delegitimized, and why. One must ask what types of institutions have been perpetuated or altered by the doctrinal patterns' selective reproduction of power relations. Critical functionalist interpretation views key phrases in judicial opinions as symbols of aspects of governing strategies; the orderly repetition of such phrases is seen as constituting a symbolic reflection of the strategies themselves.

E. The Political Tilt of Critical Functionalism

Notwithstanding the history of antagonism between CLS and liberals, the CLS-indeterminacy critique may actually favor the cause of social democratic liberalism. This is because legal formalism implicitly favors political conservativism, usually in the form of corporatist ordering strategies, whereas a merger of realism and principle would incline toward a social democratic, or progressive reformist, strategy of governance.\textsuperscript{134} The political leanings of realism and formalism are not absolute; either sort of political agenda can be articulated through the medium of either philosophical approach. But there is a tilt in the sense that each approach has a greater congeniality toward one strategy or the other. Legal realism tends to highlight, and legal formalism tends to obscure, those aspects of social life that reveal glaring divergence between pluralist corporatism and underlying liberal ideals. Thus, realism amplifies and formalism downplays the intellectual predicates of the strongest arguments in favor of social democracy. Consequently, arguments in favor of corporatist strategies appear cynically elitist and morally dubious when expressed in a realist framework, while proponents of social democracy tend to become intellectually incoherent when forced to use the language of formalism. This thesis will be developed in the article's remaining segments.

1. One-Dimensionality of Formalist Reasoning. To begin with, there is something intrinsically conservative in the formalist's attempt to link legal principles with ideals. The implicit message is that the existing social relations, the maintenance of which is encoded into established legal principles, are virtually ideal. Even when imperfection is acknowledged, the very methodology of attempting to deduce the legal order from shared values and ideals discourages formalists from attempting to

\textsuperscript{134} This argument is illustrated in the First Amendment context in Blum, \textit{supra} note 43.
use ideals critically as a reservoir of desirable possibilities. In order to sustain the plausibility of efforts to equate legal rules and liberal ideals, sensibilities must be dulled at both ends. Coercive, inegalitarian aspects of the existing order must be overlooked; ideals are required to retain a vague, hazy quality that prevents them from being sharply concretized in ways that would highlight the imperfection of present social arrangements. The conservatism of formalist thought derives not only from its one-dimensionality, but also from the particular substance of what is being idealized. Most frequently, this is the relations of the market, which are depicted as an aggregation of free choices by universal abstract individuals. Since the principal distinction between pluralist corporatism on the right and social democracy on the left concerns the extent to which government, rather than markets, will control the production and distribution of goods, the glorification of market relations that is implicit in formalism's idealization of contract law undoubtedly favors the right. The idealization of market relations can be expressed directly and affirmatively, as in formalism's rendition of free contracts between assenting individuals, or indirectly and residually, as with the libertarian's backhanded glorification of private, market-based coercion that is implicit in his principled rejection of governmental coercion. In constitutional law, legislative decisionmaking is frequently idealized and construed to represent an authentic register of majority will. While realists would view the creation of legislative majorities as an expression of prevailing power relations, or hegemony, formalists assume that the mere form of representative democracy suffices to authenticate the substantively democratic character of the outcomes. Hence, legislative action is presumed democratic in the same a priori way that contracts are presumed free. The result of this is to sanctify the programs of dominant governing coalitions. Since such a coalition may be by definition either center left or center right, the formalist concept of "majoritarianism" is less inherently conservative than its libertarian, contractual counterpart. Nevertheless, recent decades have seen "majoritarianism" invoked most frequently against the relatively progressive civil rights and civil liberties initiatives of the federal judiciary.

Formalism also idealizes existing customs and patterns of association generally. To the extent that they are portrayed as natural or freely chosen, rather than as shaped by power, the groundwork is laid for claiming that any attempt at reform impinges on people's freedom to

associate as they choose. Thus, when federal authorities supported the Civil Rights Movement’s efforts to dismantle the southern states’ caste-like system of racial segregation, conservatives were able to argue that forced integration violated freedom of association. To the realist, however, forced integration merely involved a more benign system of coercive power supplanting a less benign one.

2. The Implicit Conservatism of “Neutrality” and “Consensus”. The belief that legal principles can be politically neutral is central to the formalist’s effort to separate law from politics. However, from the perspective of a realist or critical functionalist it is unclear what meaning, if any, “neutrality” can have with regard to ordered patterns of legal doctrine. Every legal principle at least implicitly favors or supports some types of social relations and disfavors others; hence, it maintains some distributions of power and precludes others. Since actual neutrality is achievable only when outcomes are trivial or irrelevant, the question for the realist is: “What substantive agendas are furthered by a quest for, or pretense of, neutrality?”

Such agendas tend to be conservative because they further concentrate power in the hands of political and economic elites by discouraging the formation of diverse political identities and refusing to legitimize ongoing political conflict. Because the claim of neutrality is readily belied by the existence of conflict, attempts to preserve the appearance of neutrality are likely to generate rules that suppress conflict, and by so doing, enhance existing forms of hegemony. Similarly, attempting to portray existing social relations as authentically consensual involves a denial of conflict and a tendency to support the denial by keeping conflicts from becoming manifest. Conversely, realism’s conception of law as conflict-management transfers some of the inherent legitimacy of law to expressions of underlying conflicts, which are seen as part of, rather than extrinsic to, the legal process. This is likely to broaden political participation by favoring rules that allow expressions of conflict to be manifest. To the extent that social structure is denied, and the only conflict recognized as legitimate is between individuals, political participation tends to be narrowed because only elites have sufficient power and resources to affect society by acting individually. Realism, by contrast, favors collective action both by recognizing the imperfect, implicitly coercive nature of existing relations, and by acknowledging the legitimacy of cleavages between social groups. Critical functionalism’s concept of

136. See Tushnet, supra note 13.
system maintenance through ongoing alteration of power relationships favors social democracy by asserting that class conscious challenges to existing domination are assimilable within the democratic political system. This assertion justifies a renunciation of political violence and imbues class conscious movements of non-elite groups with some of the legitimacy associated with substantive democratic governance. Indeed, realism's attempts to comprehend social structure make it possible to discuss social stratification and class consciousness in a way that formalism's portrayal of society as universal individuals and consensual unity does not.

Formalism's denial of social structure obscures contradictions contained within the structure.\textsuperscript{137} Insofar as the acknowledgment of such contradictions furnishes strong support for social democratic meliorist policies, denial and obscurantism favor corporatist ordering strategies. The most fundamental contradiction in this regard is between formal equality of right, and substantive inequalities of power and privilege. Because the liberal political theory that defines the horizons of mainstream American political consciousness was first forged in a struggle against feudalism, it has as its first premise a rejection of legally defined hereditary privilege in favor of the idea of formal equality before the law. All people are assumed to have the same basic legal or political rights by virtue of their sharing the role as free and equal citizens. At the same time however, the bureaucratized market economy generates vast inequalities of power and privilege which are continuously in tension with the concept of formal equality. It is the task of the legal system to reproduce, with occasional alterations, these patterns of power and privilege. Yet the law cannot transparently favor one societal group over the others because to cast aside all pretension of neutrality would violate the underlying premises of formal equality. Because of the lurking tension between formal equality of right and substantive inequality of outcomes, normative validation is always problematic and legal doctrine must be oriented toward ameliorating the tension.

Two conceptual strategies are available for this task, and it is politically significant which of the two is followed. The one that I will call "incrementalism" is associated with critical functionalism and favors social democratic, reformist liberalism; "obscurantism," by contrast, epitomizes legal formalism and tends to favor corporatist strategies, or intransigent conservatism. Incrementalism focuses on inequalities of

\textsuperscript{137}. See Fiss, \textit{Free Speech and Social Structure}, 71 IOWA L. REV. 1405 (1986).
power and asserts that because of an underlying stability of power relations, changes in existing relations can only occur within a fairly narrow range. It then restricts itself to considering the range of politically feasible outcomes, assessing them in terms of their incremental amelioration, or exacerbation of the tension between formal equality of right and substantive inequality of outcomes. Once questions are framed in this way, they will tend to suggest incrementally egalitarian, welfare-oriented reforms as correct legal outcomes. Incrementalism recognizes the contradiction between formal equality and substantive inequality and then harnesses it to propel a drift toward progressive, welfare-oriented reforms.

Obscurantism avoids this drift by not recognizing or acknowledging the contradiction. It makes the tension between formal equality and substantive inequality disappear from view by downplaying the importance of specific social identities and confining legal analysis to an examination of the exterior manifestations of social relations. Hence, all contractual transactions having an exterior form of mutual assent, are presumed to signify relations which are free and voluntary, and thus, are not seen as the proximate result of exercises of power. By treating social relations as being between abstract, generalized "free" persons, rather than expressions of particular historically embedded power relations, obscurantism effectively declares inequalities of wealth and power "off limits" for legal analysis. It thus superficially resolves the tension and deprives liberal reformism of a major source of justification.

The principle of "strict color blindness," currently being invoked by the right wing to undo affirmative action programs, is an illuminating example of obscurantism at work. Nowhere is the tension between formal equality of right and substantive inequalities of wealth and power more acute than in antidiscrimination law. Although racial equality has been strenuously affirmed at the formal level of legal rights, substantive inequalities of income and employment opportunities for blacks and whites have been abated only minimally. Opponents of affirmative action seek to resolve the tension by confining analysis to the exterior forms of discrete interracial transactions viewed in isolation. Hence, any transaction will be viewed as either lawfully color-blind or invidiously prejudiced. By declaring "off limits" the matter of unequal power relations between races and confining analysis to whether external indicia of


139. See D. BELL, supra note 75, at 26-50.
bigotry are present,\textsuperscript{140} obscurantism accomplishes two things: it deprives proponents of affirmative action of the sources of justification that stem from awareness of how superficially color-blind transactions can perpetuate effects of past discrimination (also known as institutional racism) and it allows the opponents to assert that intentional racial preference in favor of blacks is as bad as intentional preference in favor of whites. By contrast, reformist liberals generally favor affirmative action on the ground that it incrementally reduces substantive racial inequalities of power and privilege. In other words, it ameliorates the tension between formal equality of right and substantive inequality of condition. Thus, it is the acknowledgment of inequalities of power that makes compensatory discrimination in favor of minorities qualitatively different than discrimination against them.

Beyond the incrementalist approach to the contradiction between formal equality and substantive inequality, realist legitimation favors social democratic policies by elevating values of non-violence and power sharing to positions of primary importance. By acknowledging that law stabilizes and legitimizes coercive, imperfect relations, realists portray the legitimation process as a tradeoff in which people forego radical possibilities of improved social relations in return for a guaranteed high level of nonviolence. The more state violence is employed to maintain order, the less rational basis there appears to be for the populace to consent to the stabilization of existing forms of association. By rejecting the formalist's claim that existing relations are optimal — either because they comport with ideals or because they are transcendentally necessary — realists construe the state's legitimacy to depend crucially on its ability to maintain order with a minimum of state violence. This then limits officials' prerogatives to use repressive strategies in lieu of liberal accommodationist ones. Similarly, the defensibility of popular consent comes to depend increasingly upon claims of the existing social system's political elasticity. Stabilization of imperfect patterns is more easily justified as rational if its main effect is to gradualize change so as to make it orderly and nonviolent rather than if change is thwarted altogether. Hence, those legal rules that enhance the system's capacity for peaceful accommodation and change acquire an overriding importance in realist legitimation. Such rules tend to be principal elements of social democratic ordering strategies.

\textsuperscript{140} See, e.g., Washington v. Davis, 426 U.S. 229 (1976) (establishing an intent requirement under Fourteenth Amendment).
3. The Political Significance of Framers' Intent. In Constitutional law, the formalist's quest for neutral principles leads to attempts to derive contemporary constitutional doctrine from analyses of what the framers intended in 1789. To the extent this exercise is pursued earnestly as opposed to being used as a mantle under which more serious policy analysis is undertaken, the message is that constitutional law, which today plays a vital role in the allocation of political and economic power, ought to be shaped in accordance with the wishes of a group of gentlemen who represented the American upper classes some two hundred years ago.

To the realist or critical functionalist, such a proposition borders on the absurd because legal doctrine is seen as a dependent variable shaped in response to cultural change and the recent formalism of social movements. The proposition is plausible only to the formalist who sees doctrine as an independent variable that hangs as a connected whole above ongoing political disputes and connects the present with the past by reducing both to a consistent abstract conception. Whether the concern with "framers' intent" is truly reactionary or merely a way of preserving deep-seated liberal values necessarily depends upon how it is applied. However, the formalist's reliance on such intent to provide determinate outcomes for actual cases leads to literal, ahistorical applications that disproportionately favor corporatist ordering strategies of the right wing. A brief historical consideration of social structure tells us why.

The United States, like all developed liberal market societies, has evolved from being a predominantly agrarian economy with a plethora of independent enterprises, to being a complex, industrialized bureaucratic economy where the majority are employed by enterprises controlled by a few. The intrinsic tendency in capitalist development toward a centralization of wealth and power has created a potential for effective political disenfranchisement and widespread impoverishment of the majority of the population. This potential, with its serious destabilizing consequences, has been kept from coming to fruition by increasing state intervention and regulation of the economy and polity during the twentieth century. Such regulation has been designed to mitigate the most destructive aspects of competition, and thus to preserve a large, although increasingly bureaucratized and dependent, middle class; thereby insuring that only a minority is at any given time impoverished. The society thus has evolved into an amalgam of two ordering conceptions: a market-based private economy, and with it, an overlay of pervasive regulation by a democratically-controlled, partially welfare-oriented capitalist state.

The major political conflicts within the established system of gov-
ernance, and hence the major clashes of competing legal principles during this century, have turned on the extent to which the overlay of welfare-oriented state regulation should be expanded or curbed. Thus, concern has focused on "freedom of contract" as a pretext (or principled basis) for invalidating welfare legislation, on freedom of speech and equal protection as ways of expanding the political base of the welfare state, on the meaning of "property" within the Due Process Clause as a symbolic battle over whether welfare-state entitlements shall be constitutionally guaranteed. The meaning of a concern with "framers' intent" and of formalist conceptions of principle should be understood with reference to the role they play in this larger political question. Two things are then clarified. First, the framers of the U.S. Constitution existed at a much earlier point in the historical process of capitalist accumulation. Thus, they witnessed, comprehended, and favored a lesser degree of welfare-oriented state regulation than most people would now favor. However, this relative lack of regulation at that historical period corresponded to a less extreme centralization of wealth and power than it would if transplanted into the twentieth century. From a functionalist perspective, such an absence of correspondence in social consequences totally invalidates attempts to invoke the framers' political choices with sufficient literalness and exactness to derive legal principles from them. Nevertheless, if the framers' choices are invoked with any attempt at historical accuracy, they will tend systematically to favor entrenched conservatism because they will reflect the ideological underpinnings of a predominantly unregulated market society.

So it is not surprising that the Warren Court's attempt to base reformist liberal decisions upon "the framers' intent" resulted in an intellectual embarrassment of significant proportions. Some contemporary reformist liberals argue that the framers should be seen as having established a political theory which furnishes a normative basis for evaluating legal results, but should not be conceived of as having elaborated outcome-determinative principles that shape specific legal outcomes for future generations. This qualified use of framers' intent accords nicely with a critical functionalist conception that sees legal principles as embodying contemporary strategies of system maintenance, and then looks to longstanding, widely-shared liberal ideals to assess the relative desirability of competing strategies. However, if invoked within a context of continued commitment to formalist principles, the reformist liberal's qualified use
of "framers' intent" becomes incoherent. For if the framers' intent does not determine outcomes of constitutional adjudication, then what other source could there be with the necessary grounding in tradition and consensual validity to generate the appearance of constitutional principles being "above politics?"

4. Realist Principles and the Incorporation of Civil Disobedience into Legitimate Resources of Lawmaking. By asserting that legal principles reflecting existing relations are "above politics," the formalist approach presumes that they are and ought to be immune to alteration by pressure from political movements. This underlying opposition between principle and political change poses a dilemma for reformist liberals. If formalist principles are not to be intransigently conservative, they either must be so vague and open-ended as to no longer be outcome determinative, which then undercuts their value as legal principles, or they must suddenly and inexplicably become open to change when social conditions make possible progressive reforms that conflict with earlier principles. When established principles conflict with change, the reformist liberal must either disavow the change in favor of the principle, or admit that the legal system is properly shaped by something more fundamental and entitled to greater respect than its principles. This then discredits the formalist conception which asserts that immutable ideals fashioned into principles constitute the most fundamental authority for legal outcomes.

This quandary is particularly acute for reformist liberals because the legal doctrines that they most value and wish to see enshrined as principles have emerged as the national elite's accommodating responses to progressive social movements. Thus, equal protection doctrine and anti-discrimination law have emerged in response to the domestic civil rights movement and the world-wide movement against apartheid. Freedom of speech became the law of the land two decades earlier in conjunction with New Deal labor law reform. The formalist assumption that legal principles are above politics and should not be affected by political pressure runs counter to the easily demonstrable historical facts that civil rights and civil liberties have developed in response to the pressures generated by political movements. This fact poses less difficulty for functionalist conceptions of legal principle because these conceptions assume that constitutional rights develop in response to societal strains and thus are the result of political pressures.

141. See Tushnet, supra note 13.
142. See M. SHAPIRO, FREEDOM OF SPEECH (1966); Kairys, supra note 57.
To justify formation of new principles, political pressures must be of sufficient magnitude to warrant changes in legal structure, and the changes must be amenable to being codified into an ordering strategy that enhances legitimacy and ensures nonviolence as well or better than the earlier strategy that had come under attack. To the extent that a functionalist model of society allows a significant role for conceptions of latent contradiction or strain, it will recognize the propriety of fashioning legal principles to accommodate social movements, and will justify retention of the principles even after the challenges posed by the movements have passed their acute phase. Thus, the functionalist conception is able to, if not predict, at least comprehend and endorse the surges of law reform that generate the preferred doctrines of reformist liberals. Moreover, the functionalist conception of legal doctrine as seeking to rationally order the social system as a whole has an underlying progressive message. It undercuts conservative attempts to sharply limit the range of prerogatives of state policy planners by positing a clear, unalterable division between the state and civil society. By reconceptualizing state and civil society as related, interdependent parts of an integrated social system, the functionalist approach diminishes the salience of the distinction between private and public sectors, thereby reducing resistance to incremental shifts in the line of demarcation. The idealist-formalist approach by contrast perpetuates the illusion that the state is qualitatively different from the private sector by depicting social relations in the latter as by exercises of liberty. Intransigent conservatives wisely rely upon legal formalism and upon formalist conceptions of principle in order to keep attention focused on exterior forms of social relations, and to divert attention from underlying inequalities of power and privilege.

The more perplexing phenomenon is that of reformist liberals who remain committed to formalist conceptions of principle. This commitment places them on the intellectual defensive by generating a series of conundrums, some examples of which are: why it is that the libertarian conception of free speech should not be adhered to absolutely? How it is that the death penalty could be declared unconstitutional when the framers of the Constitution so clearly favored it? Why it is that nowhere in the constitutional text can we find the rights to abortion or privacy? And this being so, how can they exist? Why it is that several of our most cherished rights come from the New Deal rather than from the signatories of the Bill of Rights? This being so, how is it that these rights can nonetheless be portrayed as the product of principles that are above politics? If they cannot be so portrayed, then why are they not a form of civil
disobedience by courts, which we should endorse only reluctantly and with a sense of shame?

The formalist mode places reformist liberals on the defensive in two ways. Not only are they precluded from relying upon the need to accommodate social movements as a basis for legal principles, but they also are likely to have the very conditions against which movements rebel depicted as embodiments of a legitimating ideal—for example, liberty of contract is used to represent the pre-New Deal economy; freedom of association, the neo-apartheid system of racial segregation that was prevalent prior to 1954.

In practice, reformist liberals who engage in formalist discourse transcend some of the difficulties by sporadic, inconsistent usage. Thus, the idealist-formalist linkage of ideals of human association with existing patterns of social relations is invoked on some occasion and not others, depending upon whether the status quo is deemed to be in need of reform. When reform is seen as necessary, then ideals shed their one-dimensional character and serve as reference points from which social change and criticism of the old order are justified. This inconsistency exacts a price on the coherence of reformist thought since the conceptions of principle are represented to be fundamental, but no explanation is offered as to how and when principles will sometimes be a crystallization of what is, and at other times be comprised of ideals on a separate plane that stands above existing social relations.

The reformist might argue that ideals become critical tools when social relations are oppressive and tyrannical. However, to use ideals in this way on some occasions, while merging ideals with existing social relations on others is to overlook the substantial degree of exhibition, needless suffering, and dictatorial rule that are implicit in any class-based, bureaucratized industrial society. It is difficult to say, on the one hand, that treatment of racial minorities is reprehensible and stands condemned by our shared ideals, and on the other that the legal principles which sustain social class relations directly embody these ideals. It is too obvious that the treatment of minorities is at least partially a manifestation of such class relations.

Although the hierarchical and exploitative aspects of our essentially bureaucratic social order do not compel persons professing liberal values to reject the legitimacy of the social system, they do cast doubt on how anyone could simultaneously espouse such values and view existing social relations as the direct embodiment of ideals. Thus, by using ideals critically on some occasions, the reformist imposes on himself the diffi-
cult task of explaining how it is that ideals can ever be used in any way other than critically.

The "real life" answer, which reformist liberals may or may not be willing to articulate, is that it is a question of politics when the ideals or "principles" ought to be used to defend or to attack what exists. However, from the pure formalist perspective, this selection reformulation of principles for the sake of political goals defeats the purpose of having principles in the first place; it invalidates any attempt to place law above politics.

The reformist liberal's way out of this morass lies in internalizing the major insights of the Critical Legal Studies movement in order to then be able to ground conceptions of legal principle in descriptions of law that are more realistic than those afforded by contemporary remnants of legal formalism. As to why this has hardly yet been done, there may be differing explanations. Reformist liberals' hostility to Critical Legal Studies may stem partly from taking certain CLS scholars at their word when they make inflated claims about the inherent radicalism of their message. I have tried to show that CLS attacks on formalist conceptions of principle can serve as a vehicle for expressing a radical rejection of existing patterns of legal outcomes, but that the attacks themselves do not compel such a rejection. Rather, the CLS critiques can be viewed as an invitation to shift from formalist to critical functionalist conceptions.

On a deeper level, reformist liberals' continued adherence to formalist conceptions, notwithstanding the deleterious effects of such, may reflect a prevailing hegemony of politically conservative forces in the country at large. Many liberals view the attempted separation of law from politics as a rule of discourse to which they must adhere, even though they at other times admit that the distinction cannot sensibly be maintained. Their belief that the distinction is essential to maintain any underlying conception of principle or of the Rule of Law is erroneous. The sources of their perceived compulsion, although amorphous, may stem more from the strength and directness of connection between legal academia and dominant private sector institutions seeking to contain expansion of welfare-state, reformist liberalism.

There may be yet another explanation. Fashioning realistic accounts of the role of law in society would cause reformists to feel ambivalence and insecurity, the contemplation of which discourages them from attempting such a project. Fashioning realistic principles would place a premium of bodies of historical knowledge and forms of intellectual competence beyond those taught in the traditional law school curriculum. It
would also impel reformist liberals to confront a pivotal, yet possibly painful, issue of their political existence. If it is true, as this article has suggested, that most of the legal doctrines highly valued by reformist liberals have been generated by elites’ accommodating responses to popular movements; that the accommodations have come in response to the tension of challenges to the existing order, and that law reform works in the main to stabilize and to reduce tensions between movements and the established order; then a distinct possibility is raised that reformist liberals live a parasitic existence, working to defuse the very thing that intermittently elevates them to positions of power and provides the energy to propel those achievements for which they ultimately take credit.

The issue can be addressed, and the reformists’ position redeemed, by a theory of the social system’s limited political elasticity—a theory which asserts that movements may demand only so much, and then repression will be triggered and will likely succeed. Armed by such a theory, reformist liberals may justify their existence by arguing that they successfully channel movements toward the best outcomes that can realistically be obtained. However, such a theory has not been developed because reformists’ commitment to formalist conceptions has largely placed questions of power and its systematic exercise off limits. By tenaciously refusing to address questions of the organization and inertia of power relations, reformists incapacitate themselves from developing the theory of limited elasticity which would be necessary for a realistic justification of their political role. Having disarmed themselves in this way, they conclude it is safer to avoid realism altogether and to use the formalist mode, in spite of its tilt against them.