

# The Fake Revolution: Understanding Legal Realism

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## I. INTRODUCTION

Legal interpretation in the United States changed dramatically between 1930 and 1950. The Great Depression and World War II unleashed radical critique, particularly prior to the World War II. Legal realism proposed radical new methods of legal interpretation to try to meet the challenges of global depression and global war. The new legal methods proposed by realism at first seemed to indicate a new legal order. In fact, they only preserved the old order, protecting it from fundamental change. Thus, the same problem, cyclical economic downturn triggering war for resources and market share recurred in Vietnam. Just as the depression and world war triggered realism, so too did Vietnam spark the Critical Legal Studies movement. Once more, much radical discontent led nowhere. Yet again, economic downturn has triggered a war for resources and market-share—Iraq. New legal movements will arise out of this war too. If these movements are to be effective, the advocates must understand the efforts and errors of their predecessors. This essay presents a retrospective of past legal discourse intended to help contemporary scholars situate their ideas contextually as part of a recurring struggle.

## II. THE JUDICIAL “REVOLUTION”

Between 1930 and 1950, the United States underwent a major transformation.<sup>1</sup> A fundamental—and undemocratic<sup>2</sup>—redistribution of

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1. Kurt T. Lash described the transformation:

power occurred.<sup>3</sup> However, the “judicial revolution,”<sup>4</sup> which, at first, appeared to undercut the dominant old order, effectively worked to preserve that dominant system from a real revolution, and then was ultimately co-opted by that order. The co-optation was due to theoretical failure<sup>5</sup> and the practical reality of the reversal of America’s fortunes between 1935 and 1945.<sup>6</sup> Thus, the supposed revolution affirmed the dominant paradigm even more effectively than the most reactionary could hope. The fake revolution<sup>7</sup> influenced so much of contemporary

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Prior to 1937, the [United States] Supreme Court had broadly rejected both federal and state attempts to regulate the economy and provide for the welfare of workers. . . . Finally, in 1937, a single justice changed his vote and a new majority of the Supreme Court initiated the modern tradition of judicial deference to economic and social welfare legislation. . . . The same Court which abandoned liberty of contract also launched the second most significant doctrinal innovation of the twentieth century: selective “incorporation” of the Bill of Rights into the Fourteenth Amendment. . . . [The Court also] restored state autonomy over its own common law. . . . The New Deal Court not only abandoned liberty of contract, it also abandoned the parental rights jurisprudence of *Meyer v. Nebraska* and *Pierce v. Society of Sisters*. As of 1937, parental autonomy disappeared from the list of liberties protected under the Due Process Clause.

Kurt T. Lash, *The Constitutional Convention of 1937: The Original Meaning of the New Jurisprudential Deal*, 70 *FORDHAM L. REV.* 459, 459-61 (2001) (footnotes omitted) (mentioning *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and *Erie R.R. v. Tompkins*, 304 U.S. 64 (1968), as revolutionary decisions).

2. “The inescapable question of American constitutional law in the twenty-first century is, as it has always been, how to reconcile democracy and judicial review.” Michael C. Dorf & Samuel Issacharoff, *Can Process Theory Constrain Courts?*, 72 *U. COLO. L. REV.* 923, 926 (2001).

3. “[T]he realists were unable to produce an acceptable alternative to formalism that would enable judges and lawyers to engage in normative argument.” Joseph William Singer, *Legal Realism Now*, 76 *CAL. L. REV.* 465, 467-68 (1988) (reviewing LAURA KALMAN, *LEGAL REALISM AT YALE: 1927-1960* (1986)).

4. The usual view is that the fundamental transformation of the courts methodology and the implications of that for federal power were a metaphoric revolution. See, e.g., Rebecca E. Zietlow & James Gray Pope, *The Toledo Auto-Lite Strike of 1934 and the Fight Against “Wage Slavery,”* 38 *U. TOL. L. REV.* 839, 839 (2007). In fact, however, the transformation of the judiciary, and by consequence of the federal executive, was not a metaphoric revolution. It was an entirely successful reaction, an effort to shore up the political system against a real revolution, followed by postwar co-optation of all former radicals excepting the Stalinists who were thereafter completely isolated and marginalized.

5. “Current debates about legal reasoning are best understood as attempts to answer the central question that the realists left unresolved: How can we engage in normative legal argument without either reverting to the formalism of the past or reducing all claims to the raw demands of political interest groups?” Singer, *supra* note 3, at 468.

6. As Humes stated:

[Legal realism] was the work of a generation that came of age under the influence of Hitler, fascism, Pearl Harbor, Dachau, Hiroshima, the exhaustion of the western European democracies, the eastern European “revolutions,” and the simultaneous threats of communism abroad and McCarthyism at home—and under the influence of the distinctly 1950s belief that ours was a society that had moved, or certainly could move, “beyond ideology.”

Jeremiah C. Humes, *Macroeconomic Analysis of the Law: The Missing Piece of the Law and Economics Puzzle*, 42 *WASHBURN L.J.* 957, 962 n.65 (2003) (alteration in original). But is not the idea “beyond ideology” beyond the universalist narratives of modernism one aspect of postmodernism? So the idea was not so unique, was a foretaste of the future, and shows how the pre-war left became a post-war pseudo-left by abandoning normative discourse and universal narratives.

7. As Singer noted:

Laura Kalman ends her excellent history of legal realism at Yale by suggesting that legal realism failed. I have a different view. Legal realism has fundamentally altered our conceptions of legal reasoning and of the relationship between law and society. The legal realists were remarkably successful both in changing the terms of legal discourse and in undermining the idea of a self-regulating market system. All major current schools of thought are, in significant ways, products of legal realism.

Singer, *supra* note 3, at 467.

legal theory that we must understand what happened in the past if we wish to influence contemporary legal thought.

### A. *The Great Depression: The Judicial Revolution*

The first stage of the judicial revolution began with the threat of the United States Supreme Court's disempowerment in the 1930s.<sup>8</sup> When the Court realized it was truly threatened by the President's New Deal, it abruptly and decisively aligned itself with the federal executive,<sup>9</sup> accepting the reforms as a necessary bulwark against outright communism or fascism. To justify its substantive realignment, the Court reoriented its jurisprudence, turning away from formalism and natural law by embracing positivism and legal realism.<sup>10</sup> The problem with this shift is that it makes law morally vacuous.<sup>11</sup> Thus, Roosevelt's tactical victory in the 1930s resulted in the strategic defeat of his world-view by the 1980s. This tactical victory resulted from a jurisprudential reorientation allowing increased federalization of state power,<sup>12</sup> especially during the war.<sup>13</sup> The strategic defeat resulted from relativism that ultimately deprived the left of its moral force, and privileged objective market arguments over supposedly subjective views of justice.

What did the federal executive, newly empowered at the expense of both the states and the Congress, do? In the face of the greatest depression in history, even the ultimate in capitalist regimes was forced to react with a statist response to the problems of economic dislocation.<sup>14</sup> Roosevelt created his "alphabet soup"<sup>15</sup> of administrative agencies to do something, anything, to end the depression and prepare for the coming world war.<sup>16</sup> The Social Security Administration,<sup>17</sup> the Federal Deposit

8. "Roosevelt's use of the court-packing threat and the New Dealers' impressive electoral success in 1936 forced the Court to alter our higher law without formally amending the Constitution." J. Alexander Hershey, *Broad Reality, Narrow Words*, 67 GEO. WASH. L. REV. 432, 445 (1999) (reviewing BRUCE A. ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998)).

9. *Id.*

10. Of course it was not an overnight change and forewarnings had been happening since at least the 1880s. For an in-depth discussion of post-civil war roots of positivism, see Stephen M. Feldman, *From Premodern to Modern American Jurisprudence: The Onset of Positivism*, 50 VAND. L. REV. 1387, 1423 n.139 (1997).

11. Randall P. Peerenboom, *Rights, Interests, and the Interest in Rights in China*, 31 STAN. J. INT'L L. 359, 382 n.80 (1995).

12. Michael Wolf notes "the dramatic growth of federal power embodied in the Roosevelt administration's multi-front war on the Great Depression." Michael Allan Wolf, *Looking Backward: Richard Epstein Ponders the "Progressive" Peril*, 105 MICH. L. REV. 1233, 1247 n.54 (2007).

13. Kenneth Mack notes "New Deal and World War II-era expansions of federal power made more of these industries visible to civil rights advocates." Kenneth W. Mack, *Rethinking Civil Rights Lawyering and Politics in the Era Before Brown*, 115 YALE L.J. 256, 345 (2005).

14. "[C]apitalism adjusted during the Great Depression to incorporate a more statist, interventionist approach . . ." Martin D. Carcieri, *The South Carolina Secession Statement of 1860 and the One Florida Initiative: The Limits of a Historical Analogy and the Possibility of Racial Reconciliation*, 13 ST. THOMAS L. REV. 577, 599 (2001).

15. Melissa E. Murray, *Whatever Happened to G.I. Jane?: Citizenship, Gender, and Social Policy in the Postwar Era*, 9 MICH. J. GENDER & L. 91, 97 (2002).

16. "[T]he New Deal tried to create a system for developing sufficient human infrastructure to

Insurance Corporation (FDIC),<sup>18</sup> the Works Progress Administration (WPA),<sup>19</sup> and the Tennessee Valley Authority (TVA)<sup>20</sup> are just some examples of federal executive initiatives which would have been stricken by any prior court. Justifiably so, these programs were an unconstitutional extension of the executive power into the affairs of the legislature and of the federal power into fields reserved to the states. Thus, the real effect of the so-called revolution was the centralization of power in the hands of the federal executive, which was considered necessary to fight and to win the coming world war. Was it not obvious to the elites that the Great Depression would inevitably trigger a global war to destroy surplus production and employ the unemployed? It was obvious to the communists—for that is exactly what Marxism predicts<sup>21</sup>: cyclical economic crashes “corrected”—by war.

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facilitate the success of capitalism. The [Civilian Conservation Corp] was more than just a jobs program; it was a quasi-military socialization program that gave workers marketable skills.” Steven A. Ramirez, *The Law and Macroeconomics of the New Deal at 70*, 62 MD. L. REV. 515, 571 (2003).

17. See Social Security Act, Pub. L. No. 74-271, 49 Stat. 620 (codified as amended in scattered sections of 42 U.S.C.).

18. Ramirez, *supra* note 16, at 543.

19. Professor Ryan notes:

Between 1932 and 1938, New Deal regulatory reforms included such federally sponsored jobs programs as the Works Progress Administration and the Civilian Conservation Corps; the Agricultural Adjustment Act and other farm programs; the Emergency Banking and Bank Conservation Act; the establishment of the Securities and Exchange Commission and the Federal Deposit Insurance Corporation; the Federal Emergency Relief Administration that became the precursor to modern social security, and many others.

Erin Ryan, *Federalism and the Tug of War Within: Seeking Checks and Balance in the Interjurisdictional Gray Area*, 66 MD. L. REV. 503, 634 (2007).

20. Deborah Groban Olson, *Fair Exchange: Providing Citizens with Equity Managed by a Community Trust, in Return for Government Subsidies or Tax Breaks to Businesses*, 15 CORNELL J.L. & PUB. POL’Y 231, 241 (2006).

21. The temporal predictive nature of Marxism, its universal narrative of progress, and its belief in objective truth on materialist bases clearly separates Marxism from post-modernism.

This distance functions in two dimensions. Marxism inhabits a millenarian temporality, oriented toward a future of progressive political achievement and fulfillment. Jameson is therefore unsympathetic to postmodernism’s repudiation of time; he views it with considerable suspicion as “the sequel, continuation, and fulfillment of the old fifties ‘end of ideology’ episode.” Marxism also focuses on the relationship between objective social conditions and ideological cultural formations. From the outset, therefore, Jameson is hostile to postmodernism’s evisceration of nature and its tendency toward schizophrenic nominalism.

Robert Post, *Postmodern Temptations*, 4 YALE J.L. & HUMAN. 391, 394-95 (1992) (reviewing FREDRIC JAMESON, *POSTMODERNISM, OR THE CULTURAL LOGIC OF LATE CAPITALISM* (1991)).

*B. Legal Realism*<sup>22</sup>

“We are all legal realists now. Or are we?”<sup>23</sup>

The principle doctrinal maneuver needed to take the first step of the so-called “revolution” in judicial power<sup>24</sup> was a rejection of legal formalism.<sup>25</sup> Legal realism proposed that law is not what men in black robes say, but rather what happens in practice.<sup>26</sup> Legal realism had, in fact, a fairly strong Marxist streak.<sup>27</sup> It pointed out the vacuity of the statements of the ruling class<sup>28</sup> and attributed psychological or class

22. As Benditt stated:

In agreement with Bentham and against Blackstone the group of legal writers called American legal realists maintain that judges do in fact make law. But against Bentham they maintain that judges should take a hand in making law, and against both Bentham and Blackstone they maintain that judges must be makers of law—and by “must” is meant that judges necessarily make law, that this is intrinsic to the very process or activity of judging.

THEODORE M. BENDITT, *LAW AS RULE AND PRINCIPLE* 1 (1978).

23. Singer, *supra* note 3, at 467 (emphasis added).

24. Professor Ross noted:

The terms “switch in time” and “judicial revolution” refer to a series of judicial decisions in which the Court sustained the constitutionality of economic regulatory legislation. The so-called “switch” began on March 29, 1937, when the Court, by a vote of five-to-four, upheld the constitutionality of a Washington state minimum wage law for women in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), even though the statute was virtually indistinguishable from a New York minimum wage law that the Court had struck down by its five-to-four vote the previous June in *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936). In other decisions on March 29, the Court similarly signaled its amenability toward economic reform legislation, although the willingness of some or all of the Court’s most conservative Justices to join in these decisions helps to belie the concept of a “revolution.”

William G. Ross, *When Did the “Switch in Time” Actually Occur?: Re-discovering the Supreme Court’s “Forgotten” Decisions of 1936-1937*, 37 ARIZ. ST. L.J. 1153, 1153 n.1 (2005) (citations omitted).

25. Sidney DeLong stated:

[F]ormalism refers to an alleged philosophical view of law as being in its essence autonomous, objective, complete, coherent, and deductive. As a mode of adjudication, formalism refers to a judicial tendency to apply existing legal rules literally, mechanically, and without reference to their purposes or to public policy. Neither of these two versions of formalism is the sort referred to as the “new formalism” of contract adjudication; indeed, the new formalism conflicts with both these ideas.

Sidney W. DeLong, *Placid, Clear-Seeming Words: Some Realism About the New Formalism (with Particular Reference to Promissory Estoppel)*, 38 SAN DIEGO L. REV. 13, 18-19 (2001).

26. As DeLong noted:

Antiformalism, or “realism,” views law as a matter of purpose and policy. As a general view of law, realism is instrumentalism, law understood as a means to an end instead of an autonomous complex of norms governed by its own internal logic. As a mode of adjudication, realism is a tendency to make legal consequences turn on the court’s view of the social policies relevant to legal enforcement and of the anticipated effects that different rules will produce. Casting its eye more broadly than does formalism, realist adjudication introduces more uncertainties: fewer cases are resolved on summary judgment.

*Id.* at 19-20.

27. Morton J. Horwitz, *Mark Tushnet, Legal Historian*, 90 GEO. L.J. 131, 133 (2001) (stating “courts were part of the executive committee of the ruling class and that law was a mere reflection of the class interests of those who ruled”).

28. As Horwitz summarized:

The legal realists, Tushnet explained, demonstrated the indeterminacy of legal doctrine, which meant that rules and precedents could be manipulated to produce often contradictory legal outcomes. The result was, the realists argued, that the explanation for these outcomes must be sought outside of the system of legal doctrine, in the sociology of power.

*Id.* at 131-32.

based determinants<sup>29</sup> to judicial decisions. Case method learning was no longer used to illustrate systemic coherence, but to illustrate internal contradictions in critique of the system.<sup>30</sup> In place of the supposedly empty rationalizations<sup>31</sup> of the formalists,<sup>32</sup> legal realism proposed either—overtly—psychological critiques of the viewpoints of the ruling class or—almost always covertly—pointed and incisive critiques of the failures of the ruling class *as a class*. Lest we forget, the American ruling class in the 1930s presided over the unthinkable: starvation in *America*,<sup>33</sup> the granary of the world! The obvious implication of the ruling class's failure was the necessity and desirability of radical transformation.<sup>34</sup> These critiques were explicitly expressed by the legal realists<sup>35</sup> and, more cogently but with less effect, by their successors in critical legal studies (the crits).<sup>36</sup> After the war, the realists held state power by

29. See *id.* at 132-33.

30. Singer, *supra* note 3, at 467 (stating “realists could use the case method to show, not that cases were consistent applications of general principles, but that they were inconsistent applications of competing principles”).

31. Rather than reason, that is as rationale, realism sees legal reasoning as post-hoc rationalizations to justify power not as predictive statements of what will, or at least *should*, always happen. “[T]he rule-of-law [rational] arguments are indeterminate.” Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627, 1682 (1991).

32. As Sunstein stated:

[F]ormalist strategies . . . entail three commitments: to promoting compliance with all applicable legal formalities (whether or not they make sense in the individual case), to ensuring rule-bound law (even if application of the rule, statutory or contractual, makes little sense in the individual case), and to constraining the discretion of judges in deciding cases. Thus understood, formalism is an attempt to make the law both *autonomous*, in the particular sense that it does not depend on moral or political values of particular judges, and also *deductive*, in the sense that judges decide cases mechanically on the basis of preexisting law and do not exercise discretion in individual cases. Formalism therefore entails an interpretive method that relies on the text of the relevant law and that excludes or minimizes extratextual sources of law. It tends as well to favor judicial holdings that take the form of wide rules rather than narrow settlements of particular disputes.

Cass R. Sunstein, *Must Formalism Be Defended Empirically?*, 66 U. CHI. L. REV. 636, 638-39 (1999).

33. Lisa Guerra, *Modern-Day Servitude: A Look at the H-2a Program's Purposes, Regulations, and Realities*, 29 VT. L. REV. 185, 189, 197 (2005).

34. William J. Aceves, *Critical Jurisprudence and International Legal Scholarship: A Study of Equitable Distribution*, 39 COLUM. J. TRANSNAT'L L. 299, 312 (2001) (“[C]ritical jurisprudence suggests there must be a fundamental transformation of existing norms, rules, and institutions to remedy the consequences of marginalization.”).

35. As Benditt stated:

The realists (or some of them, at any rate) maintain that by approaching the study of law from the direction of the judicial process, we can gain insights that will yield a view of law quite different from the picture presented or implied by such writers as Blackstone and Bentham.

BENDITT, *supra* note 22, at 2.

36. As Aceves noted:

[The dominant] norms, rules, and institutions consciously and unconsciously perpetuate the interests of dominant groups at the expense of marginalized groups. . . . [S]ubstantive positions may be covertly privileged in several significant ways. “We can structure our discourse so that the privileged position is the (normative) *rule* and the departures are the *exceptions* . . . once any position is covertly normatively privileged, it *becomes* descriptively privileged because we regularly conflate the ideal and the actual in legal thought, treat legal principles both as *imposed* on the social order and as observed, as derivative from or immanent in the order.” . . . [T]he privileged position of white America is embedded within the formal and informal institutions of American society and that such institutions perpetuate the subordination of racial minorities.

Aceves, *supra* note 34, at 312 (citations omitted).

compromising their pre-war radical principles. Their successors, the crits, never held state power—but, they also never compromised their principles.

Realism is a functionalist theory.<sup>37</sup> According to functionalism, ideas and institutions form and are best understood as a function of their roles.<sup>38</sup> Functionalism is true as far as it goes, but it does not go far enough. Realism was also a pragmatic theory,<sup>39</sup> attempting to unify law and the other social sciences.<sup>40</sup> Functionalism and pragmatism are two of the reasons realism was so easily co-opted into the system it had, apparently, so radically critiqued. A third reason for the rapid and complete co-optation of this once radical theory is that realism is a nuanced intermediate position that simultaneously reflects two complementary poles of legal thought—positivism and naturalism.<sup>41</sup> Realism has descriptive power that cuts both ways. So, these 1930s radicals became 1950s reactionaries; seize state power—and go on to lead America to wars for resources in Korea and Vietnam. Hardly a revolution. This is why the “new left” decisively rejected the “old left” (from 1930 to 1945)<sup>42</sup> and part of why it has not seized state power. Progressive state power, however, can and must be used to stop reactionary state power. The “new left” of 1968, entirely marginalized by the collapse of Soviet socialist imperialism in 1989 and by the 9/11 terrorist attacks, can be criticized for failing to take state power and failing to prevent wars like Iraq. The sin of the old left was compromise. The sin of the new left is impotence. Whatever sins the *next* left causes, it can and should, both see and avoid, the errors of its parents’ and grandparents’ generations. Those who forget history are condemned to repeat it.<sup>43</sup>

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37. Legal realism “is a form of functionalism or instrumentalism. The original realists sought to understand legal rules in terms of their social consequences.” Singer, *supra* note 3, at 468 (citation omitted); Craig Allen Nard, *Empirical Legal Scholarship: Reestablishing a Dialogue Between the Academy and Profession*, 30 WAKE FOREST L. REV. 347, 358 (1995).

38. Nard, *supra* note 37.

39. “The life of the law has not been logic; it has been experience.” OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* 5 (Mark DeWolfe Howe ed., Harvard University Press 1963) (1881).

40. The realists “attempted to unify law and the social sciences. They believed that this knowledge would enable them to reform the legal system to achieve efficiency and social justice.” Singer, *supra* note 3, at 468-69 (citation omitted).

41. Positivism and naturalism are usually juxtaposed as contradictory. They are not. See ARISTOTLE, *POLITICS*, available at <http://classics.mit.edu/Aristotle/politics.5.five.html> (last visited May 20, 2008).

42. See, e.g., Philip P. Houle, *Eminent Domain, Police Power, and Business Regulation: Economic Liberty and the Constitution*, 92 W. VA. L. REV. 51, 109-10 (1990); Francesca Polletta, *The Structural Context of Novel Rights Claims: Southern Civil Rights Organizing, 1961-1966*, 34 LAW & SOC’Y REV. 367, 398 (2000). The “old left” refers to the radical thinkers of the 1930s who became the establishment after the war. The “new left” refers to the radicals of 1968 and thereafter who broke from the “old left” over the Vietnam War, desegregation, and the women’s rights movement.

43. GEORGE SANTYANA, *THE LIFE OF REASON* 9 (Dover 1980) (1905), available at <http://www.gutenberg.org/files/15000/15000-8.txt>.

### C. *The Realist Rejection of "Formalism"*

The principal target of legal realism was formalism—that universal<sup>44</sup> centerpiece of modern American legal thought.<sup>45</sup> Formalism as a talisman could include anything.<sup>46</sup> In the strictest sense, it included the idea of platonic idealism. Platonic idealism is the idea that the world of things is a reflection of the world of ideas, that thoughts create reality and that reality is a reflection of rational forms (syn. archetypes; eidos) in the mind of God. When the law steps out of line with that rationality, natural forces will strike it down.<sup>47</sup> Criticizing “formalism” is a way to attack the method of natural law theories<sup>48</sup> without having to address the fact that there are compelling arguments for a qualified theory of natural law and natural justice.<sup>49</sup> By focusing the debate not on positivism versus naturalism, but rather on formalism versus realism, the old left ignored the ultimate questions and set itself up for reactionary backlash.

44. Universality is a key feature of modernity, and natural law is a universalist theory and thus open to the post modern critique of modernity:

[T]he radical self-conception of postmodernism arises from its claim that we must break with the kind of “big” questions which have traditionally motivated the intellectual projects of the previous epoch. It is not so much that modernism arrived at the wrong answers, but that its questions were unanswerable; they have been too broad, too abstract, riddled with a distinctive mix of naive humanism, an unwarranted faith in science and an over-optimistic view of the capacity of language to capture and share knowledge.

Alan Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 MCGILL L. J. 508, 509 (1990).

45. As Schlag noted:

Sometimes it seems as if there is only one story in American legal thought and only one problem. The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it's never been part of the story.

Schlag, *supra* note 31, at 1628. And the idea of an existing center is anti-postmodernism, for post-modernism denies the idea of any center's existence.

46. As DeLong illustrated:

[F]ormalism can also mean “textualism,” the tendency to make legal obligation depend upon express language occurring in specified circumstances. To a textualist, contract formation and content depend upon the performance of specific speech acts, such as “offer,” “acceptance,” and “promise.” It is this sense of “formalism” as textualism that is enjoying a judicial vogue. But textualism is a strategy rather than a philosophy and as such is equally compatible with what is usually called “realism.”

DeLong, *supra* note 25, at 19.

47. See, e.g., SOPHOCLES, ANTIGONE, available at <http://classics.mit.edu/Sophocles/antigone.html> (last visited May 20, 2008).

48. As Benditt explained:

Blackstone thought that anything that is properly thought of as human law is in accordance with the law of nature, which is dictated by God and “is binding over all the globe, in all countries, and at all times.” A judge's task, thought Blackstone, is to ascertain what this law is and to apply it to the case before him. Judges in no sense make the law.

BENDITT, *supra* note 22, at 1 (footnote omitted).

49. As Olivecrona expressed:

The notion of positive law presented no great problem. [Hugo] Grotius is very brief on this point. The *ius voluntarism* is so named because its origin is in the will of men or God. The *ius civile* stems from the will of the sovereign. It consists of the sovereign's prohibitions and precepts. Its duration is dependent on his will.

[Samuel] Pufendorf is more explicit. Every positive law is grounded on the authority of a superior. Human positive law consists of the commands of the sovereign. It is, indeed, nothing but his will through which he prescribes how the subjects are to act.

KARL OLIVECRONA, LAW AS FACT 9 (Stevens & Sons 1971) (1939).

This, however, is not the only sense of “formalism.” It can, among other things, be seen as a synonym for legalism, which is much more easily critiqued than theories of natural justice, and without the nagging question that positivism<sup>50</sup> raises—if there are no theories of morality, how can there be any justice?<sup>51</sup> Indeed, post-modernism,<sup>52</sup> which grew from the same relativist roots as realism, is criticized and rejected<sup>53</sup> for that same reason.<sup>54</sup> Not only does post-modernism fail to tell us how to properly proceed with normative inferencing, it says normative arguments are impossible. So while it may allow us to ask pointed questions, post-modernism gives us no answers. Identity politics, individualist and subjectivist, doomed the new left to incoherence, both in theory and in practice.

Legalism,<sup>55</sup> which the realists quite correctly criticized, is the rigid inflexible application of black letter law without regard to the practical consequences. Legalism was seen, only somewhat accurately, as one of the aggravating factors of the economic dislocation caused by the Great

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50. As Benditt noted:

Bentham . . . maintained that a good deal of law is in fact made by judges, though he thought that it should not be. All law that regulates the behavior of man in society, he held, is of human creation, and it should all be made by the legislature in accordance with the principle of utility. So according to Bentham, too, judges are to find the law—in legislative enactments only—and not make it.

BENDITT, *supra* note 22, at 1.

51. Witness Catharine MacKinnon’s alarmist pronouncement: “I do know this: we cannot have this postmodernism and still have a meaningful practice of women’s human rights, far less a women’s movement.” Stephen M. Feldman, *An Arrow to the Heart: The Love and Death of Postmodern Legal Scholarship*, 54 VAND. L. REV. 2351, 2357 (2001).

52. As Murphy stated:

Postmodernism assumes that different logics or paradigms, that is, different systems of discourse with their distinctive value axioms can co-exist in the same social space. It is this, above all, that distinguishes postmodernism from enlightenment modernism. The enlightenment modernist speaks of knowledge (in the singular) rather than discourses (in the plural). The Enlightenment view rests on temporal rather than spatial metaphors. That is to say, the Enlightenment view sees knowledge as a succession of paradigms through time. One system of knowledge succeeds another in a progressive developmental sequence. This is the march of reason in history from . . . theology to metaphysics to positivism. Meaning arises from the relative positions of the fragments in the constellation.

Peter Murphy, *Postmodern Perspectives and Justice*, in POSTMODERNISM AND LAW 117, 118-19 (Dennis Patterson ed., 1994).

53. As Dennis Arrow explained:

Given law-school postmodernism’s epistemo/ontology of juvenile anti-realist agnosticism, its commitment to Gadamerian and/or Derridean notions of linguistic indeterminacy, its monomaniacal dedication to centrifugal end-justifies-the-means Lefty politics, its abhorrence of commonly recognized conceptions of neutral principle, its concomitant disrespect for the very notion of truth, and its inextricably intertwined obsession with names and propensity for linguistic doublespeak . . . . Arrow also offers speculation about the way in which the postmodernists’ ultimate contribution to American law schools is likely to be assessed—but cautions (as is appropriate under the circumstances) that you’ll have to find it in a footnote.

Dennis W. Arrow, *Spaceball (Or, Not Everything That’s Left Is Postmodern)*, 54 VAND. L. REV. 2379, 2379 (2001).

54. “[P]ostmodernism engenders political quiescence.” Feldman, *supra* note 51, at 2357 (Listing critiques of post-modernism and trying, unsuccessfully, to meet them).

55. “Legalism is the mentality that insists on precise definitions and operationalized norms . . . .” Jeremy Waldron, “Dead to the Law:” *Paul’s Antinomianism*, 28 CARDOZO L. REV. 301, 326 (2006). Legalism equates justice and law.

Depression. Rather than call into question the capitalist *system*, the ruling class decided to deflect criticism toward the *institutions* that arise out of and administer capitalism. Administrative reforms<sup>56</sup> prevented political revolution, as the judiciary ceded on issues preventing federalization of power. The attack on legalism was exaggerated to direct attention toward reformation of the system rather than its overthrow. Communists<sup>57</sup> were not the only threat: populists, such as Huey Long—who today would be considered fascist<sup>58</sup>—were probably the greater threat to the liberal republic.

The critique of the legal realists, that the “old guard” judges<sup>59</sup> were using rigid or manipulable<sup>60</sup> formalism,<sup>61</sup> and unscientific “natural law,”<sup>62</sup> had two effects. First, it allowed federalization of power through reinterpretation. Second, legal realism empowered judicial interpretations which permitted the New Deal, and in turn, preserved the capitalist system from both communism, e.g., the Communist Party, U.S.A., and fascism, such as Huey Long, both real risks in the 1930s.<sup>63</sup>

Just as critiques of positivism have—wrongly—conflated it with realism and formalism,<sup>64</sup> realists have conflated natural law, natural jus-

56. See, e.g., Sandra B. Zellmer, *The Devil, the Details, and the Dawn of the 21st Century Administrative State: Beyond the New Deal*, 32 ARIZ. ST. L.J. 941 (2000); Jamison E. Colburn, *Habitat and Humanity: Public Lands Law in the Age of Ecology*, 39 ARIZ. ST. L.J. 180, 181 n.155 (2007).

57. Inevitably the system’s reformers were accused of being either fascist or communist.

In the 1930s Llewellyn produced no fewer than six cutting-edge, legal realist, law review articles devoted to contract. In the 1940s legal realism, in light of the twin threat of fascism and communism, was under attack as moral relativism and a threat to the idea of the rule of law.

Curtis Nyquist, *Llewellyn’s Code As a Reflection of Legal Consciousness*, 40 NEW ENG. L. REV. 419, 421 (2006).

58. For example: “Huey Long created anxiety about fascism in the American South, Father Coughlin’s radio broadcasts seemed to inspire many listeners, and in 1939, 22,000 Americans rallied in Madison Square Garden in support of the German-American Bund.” Joannie Chang, Jennifer I. Goldberg, & Naomi J. Schrag, *Cross-Border Charitable Giving*, 31 U.S.F. L. REV. 563, 569-70 n.36 (1997).

59. “For the Old Guard majority of the Supreme Court, creating obstacles to national power remained the central obsession; Hand, by contrast, was ready to accept national control of the national economy well before the justices were ready to loosen the chains on Congress.” GERALD GUNTHER, *LEARNED HAND: THE MAN AND THE JUDGE* 460 (1994).

60. “Without recognizing how power-ridden and manipulable these materials are, formalists grant them an authoritative and determinative status.” David S. Caudill, *Disclosing Tilt: A Partial Defense of Critical Legal Studies and a Comparative Introduction to the Philosophy of the Law-Idea*, 72 IOWA L. REV. 287, 310 (1987).

61. “Where most observers of the Socratic method have associated it with the indoctrination of students into a formalist legal ideology . . . just as with the Socratic manipulations of Langdellian formalism, to the students, the game appeals precisely in the way it ‘feels’ like law.” Annelise Riles, *A New Agenda for the Cultural Study of Law: Taking on the Technicalities*, 53 BUFF. L. REV. 973, 1026 (2005).

62. “[C]onceptualist common-law jurists like Langdell and Williston gave no support to constitutional ‘liberty of contract,’ which they associated with an outmoded and unscientific natural law jurisprudence.” Thomas C. Grey, *Judicial Review and Legal Pragmatism*, 38 WAKE FOREST L. REV. 473, 502 (2003).

63. “In the 1930s and 1940s when the [Administrative Procedure Act] was debated, much in the United States was uncertain. Many believed that communism was a real possibility, as were fascism and dictatorship.” George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 NW. U. L. REV. 1557, 1559 (1996).

64. Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2054 (1995).

tice, and formalism.<sup>65</sup> The critique of natural law as formalism allowed for a re-conceptualization of law's interpretation and a federalization of power. There are solid arguments, however, for scientific theories of natural law and natural justice.<sup>66</sup> Moreover, positivism is amoral and did serve fascism in Europe.<sup>67</sup>

Yet, the methodological critiques of the old left legal realists were eventually shown to be inapposite because the realists did not inquire deeply enough into the sources and nature of power. The old left did not dare to reach the ugly conclusion that late capitalism regularly goes to war for resources,<sup>68</sup> market-share, to keep Third World labor cheap, and to occupy and distract the unemployed. Not daring to reach those conclusions, they asked the wrong questions, focusing on futile reforms with the effect of paralyzing and anaesthetizing real resistance. They

65. See, e.g., Grey, *supra* note 62, at 506.

66. See, e.g., ARISTOTLE, *supra* note 41 (explaining that natural law and positive law are complementary; positive law is law by convention, natural law is that law which logically cannot be other than it is); THOMAS HOBBS, *LEVIATHAN* available at <http://oregonstate.edu/instruct/phl302/texts/hobbes/leviathan-contents.html> (last visited May 20, 2008) (explaining that natural law as law of the jungle, natural justice as moral law, positive law as convention established by social contract). Hobbes and Aristotle each point out the complementary character of positive and natural law but in somewhat different ways.

67. "Ever since H.L.A. Hart's famous debate with Lon Fuller over the charge that German legal positivists were partly responsible for the rise of Hitler, positivism has been the target of frequent attacks by American lawyers." Sebok, *supra* note 64.

68. The War in Iraq should make this obvious though an examination of Vietnam, Korea and both World Wars yields the same conclusion. Economic downturn sparks wars. The U.S. went to war in Iraq for economic reasons: (1) to maintain the monopoly of the dollar as reserve currency particularly in international oil contracts; since international oil contracts are denominated in dollars, if the U.S. wants to reduce the price of oil, it can do so anytime it wants by devaluing the dollar; (2) to keep the price of oil low, which it had been thanks to the Iran-Iraq war; (3) to secure guaranteed access to Iraqi oil fields; and (4) to obtain military bases for operations against other regional oil producers.

[T]he United States Dollar has served as the global reserve currency. "This has given the United States enormous power and special privileges, which it has been using ever since to advance its own interests; it has given the United States the power to manage the global economy, establish the rules, dominate the [International Monetary Fund] in which an 85% vote is required for action to be taken and with 17.5% of the votes the United States can effectively veto any action, and on that basis the United States dominates and practically owns the [International Monetary Fund], they have the last word and have achieved the imposition of the global economic order which we now must suffer."

Larry Catá Backer, *Ideologies of Globalization and Sovereign Debt: Cuba and the IMF*, 24 PENN ST. INT'L L. REV. 497, 529 (2006).

A few years ago Iraq started selling its oil in Euros instead of U.S. dollars, resulting in the rise of the Euro against the dollar. Another allegation, made by the New York Times, was the fact that France's military complex had been selling military equipment to Iraq and was poised to expand those sales.

Sophie Clavier, *Contrasting Perspectives on Preemptive Strike: The United States, France, and the War on Terror*, 58 ME. L. REV. 566, 582 (2006). That is, not merely oil extraction, but also arms export fuel gulf wars. "The possibility that the oil pricing system might be shifting towards the euro appears to have been foreclosed by the invasion of Iraq." Alan W. Cafruny, *A Ruined Fortress? Europe and American Economic Hegemony*, 9 CONN. J. INT'L L. 329, 333 (2004).

The deciding factor was when Saddam Hussein pegged the dinar to the dollar bloc's commercial rival, the euro. Something more drastic had to occur: a land grab, 21st century-style. However, it could not look like a land grab. Bombing Iraq to get rid of the imminent threat of Iraqi [Weapons of Mass Destruction] became the excuse du jour. When the [Weapons of Mass Destruction] couldn't be found, another excuse was offered: bombing Iraq into democracy.

Philippa Winkler, *The War Against Iraq: Whose Ends, Whose Means?*, 9 NEXUS 163, 167 (2004).

saw the symptoms of pre-scientific theories of law, but did not see that those symptoms were only a possible and not a necessary outcome of normative legal theory. They were thus ousted by the New Left, but that ouster resulted in the New Right, seizing power by 1980 at the latest.

The new left's post-structuralism<sup>69</sup> allowed it to question power and hierarchy, but did not allow it to present a cogent, broad, and united-front challenge to power and hierarchy, because mass movements were almost instantly atomized through post-modern individualism or deprived of normative impetus by relativism. Rather than uniting and fighting as a group, the crits splintered apart into feminists, critical race theorists, lat-crits, and even irrelevancies such as "law & literature."<sup>70</sup>

### III. POST WAR: CO-OPTING RADICALISM TO SERVE GLOBAL HEGEMONY

With the end of World War II, the overtly fascist powers, with the exception of Spain<sup>71</sup> and Argentina,<sup>72</sup> were defeated, which put positivism in a bad position.<sup>73</sup> Positivism, which enabled the middle class to loyally and unquestioningly serve the interests of the élites as cogs in a Weberian bureaucracy<sup>74</sup> of war, became an embarrassing liability to the victorious powers, but also served as a potential lever against the interests of the working class. Because the capitalist powers themselves had also rejected naturalist theories of law,<sup>75</sup> it was not possible, or necessary, for them to perform a second about-face so quickly and reject the positivism, which had earlier justified and empowered the executive federalization of the American Constitution.

How was the vacuum created by the *supposed* death of naturalist

69. For the best understanding of the relation of (post) structuralism and law, see generally MICHEL FOUCAULT, *The Eye of Power*, in POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS (Colin Gordon ed., 1980), available at <http://foucault.info/documents/foucault.eyeOfPower.en.html>. See, e.g., JACQUES DERRIDA, WRITING AND DIFFERENCE 278-94 (Alan Bass trans., University of Chicago Press 1978) (1967).

70. See Jane B. Baron, *Law, Literature, and the Problems of Interdisciplinarity*, 108 YALE L.J. 1059, 1083 (1999).

71. MSN Encarta argues Spain was only quasi-fascist. Facism-MSN Encarta, [http://encarta.msn.com/encyclopedia\\_761568245\\_5/Fascism.html](http://encarta.msn.com/encyclopedia_761568245_5/Fascism.html) (last visited May 20, 2008). That argument ignores overt and covert Spanish aid to Nazi Germany along with the fact that General Francisco Franco was known as "*El Caudillo*" (the leader, a direct translation of *Führer*, *Duce* into Spanish). Francisco Franco-MSN Encarta, [http://encarta.msn.com/encyclopedia\\_761572941\\_2/Franco\\_Franco.html](http://encarta.msn.com/encyclopedia_761572941_2/Franco_Franco.html) (last visited May 20, 2008).

72. Paul H. Lewis, *Was Perón a Fascist? An Inquiry into the Nature of Fascism*, 42 J. POL. 242 (1980).

73. "It seemed quite natural to Fuller to attribute the rise of fascism to the European embrace of positivism: '[Legal Positivism] played an important part . . . in bringing Germany and Spain to the disasters which engulfed those countries.'" Sebok, *supra* note 64, at 2059.

74. MAX WEBER, WIRTSCHAFT UND GESELLSCHAFT, 650-78 (1956). See generally David M. Trubek, *Max Weber's Tragic Modernism and the Study of Law in Society*, 20 LAW & SOC'Y REV. 573 (1986).

75. See, e.g., H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593, 594 (1957).

theories of the law and the failure of positivism to provide moral points of resistance within the formerly overtly fascist states filled? Given the global dominance of the United States, the covert Marxism of the legal realists was no longer apposite to the interests of any segment of the ruling class. A theory that had permitted the executive to aggrandize the power needed to prosecute a global war, now needed to adapt itself to permit that executive to dominate the globe: and it did so with an astonishing alacrity.

The first doctrinal move, which occurred in the 1950s, as the last of the die-hard crypto-Marxists failed or were isolated by McCarthyism, consisted in the elaboration of a doctrine of legal process<sup>76</sup> in conjunction with interest balancing.<sup>77</sup> Rather than rigidly adhering to supposedly useless<sup>78</sup> and inflexible or manipulable<sup>79</sup> rules of black letter law preordained by an archaic legislator, the lawyer and judge were seen as engaged in a cooperative task of elaborating standards and guides.<sup>80</sup> The law consisted of competing interests, sometimes expressed as rights, sometimes as privileges, which needed to be balanced against each other. The task then was simply one of determining the correct “factors” to be balanced and the correct “weight” to be given to them, taking into account policy objectives. Thus, the bar could execute its functions efficiently, and ignore the uncomfortable pre-war question—how and why had capitalism failed catastrophically, necessitating a second global war in as many generations? That was the central question of the last century.

So, instead of challenging the system, the bench and bar became the technocrats servicing the machine.<sup>81</sup> The mechanization of the industrial age had created enormous wealth, at least to the first world. Mechanization would be applied to judging disputes via jurimetrics<sup>82</sup>—

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76. “The ‘Legal Process School,’ as Bruce Ackerman has termed it, was concerned with the institutional structure of government, and emphasized that judges often should defer to the policy choices made by other governmental actors in deciding cases.” Rodger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, the Revival of Natural Law, and the Development of Legal Process Theory*, 2006 Mich. St. L. Rev. 385, 387.

77. See, e.g., Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1987); Notes, *Specifying the Procedures Required by Due Process: Toward Limits on the Use of Interest Balancing*, 88 HARV. L. REV. 1510 (1975). Legal process and interest balancing were compatible and allowed the pre-war radicals to become post war administrators of global hegemony.

78. “[T]he realists proclaimed the uselessness of both legal rules and abstract concepts. Rules do not decide cases; they are merely tentative classifications of decisions reached, for the most part, on other grounds.” Singer, *supra* note 3, at 469 (citations omitted).

79. “[J]udges, far from being bound by rules, are free either to choose among rules where more than one applies—perhaps not arbitrarily, but by their own lights—or to decide cases on their own where there are no applicable rules at all.” BENDITT, *supra* note 22, at 4.

80. That is the theory of constructivism applied to law. See generally Gunther Teubner, *How the Law Thinks: Toward a Constructivist Epistemology of Law*, 23 LAW & SOC’Y REV. 727 (1989).

81. Ward Churchill, *Some People Push Back: On the Justice of Roosting Chickens*, RATVILLE TIMES, Sept. 12, 2001, <http://www.ratical.org/ratville/CAH/WC091201.html>.

82. The furthest advance of the technocratic vision in the law schools was jurimetrics, which proposed that quantitative analysis of judgments would lead to a better understanding of the correct

and then, to dropping napalm on poor, brown-skinned people.

### A. Law and Economics

The second and more important doctrinal move in the taming of legal realism as an instrumentality of the very capitalism, which it had only recently, if briefly, questioned,<sup>83</sup> was the rise of economic analyses of the law. Legal process interest balancing is the root of law and economics: if there are no valid universal moral standards—a position with which I disagree—how are judges to determine the “weight” of the “factors” which they balance? The answers are simple: the use of “cost benefit analysis” or utilitarianism.<sup>84</sup>

The application of law and economics as a resolution to the problem of legal indeterminacy created by legal realism lends itself to criticism as an over-simplification; however, economic arguments can be a compelling legal rationale—especially in the face of supposed linguistic indeterminacy. It is not at all surprising, though rather disgusting, that the leading capitalist state equates justice with market transactions.<sup>85</sup> The rise of law and economics seemed to seal the doom of the few remaining realist crypto-Marxists. Yet that did not happen. Instead, a new generation of critical scholars drew some lessons from realism and came back with radical critiques. Why?

The great flaw in combining legal process interest balancing with law and economics is the inability to comprehend that *capitalism has predictable cyclical downturns that generate unemployment and result in war*.<sup>86</sup> Marxist legal perspectives in America would almost certainly have died a quiet shameful death were it not for the Vietnam War. The business élite expected Vietnam to be another World War II, or at worst

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decisions. See, e.g., Julius Stone, *Man and Machine in the Search for Justice*, 16 STAN. L. REV. 515, 515 n.1 (1964).

83. As Singer stated:

A major goal of the legal realists was to undermine laissez-faire ideology by attacking the idea of a self-regulating market system based on free contract, which operated largely outside state influence and control. In the preclassical period during the first half of the nineteenth century, almost all of law was incorporated into the contractual model. But freedom of contract was a dim dream; rather, the market was heavily regulated by custom and law. All private relationships included implicit obligations that were enforceable by the state.

Singer, *supra* note 3, at 477.

84. Singer noted:

The legal realists claimed that judges could not decide cases by logical deduction from general principles of liberty and property; law and legal decisions require social policy judgments. But, as unelected figures, what tools can judges use to make those policy judgments? Most realists recommended that judges adopt some form of utilitarianism or cost/benefit analysis. As Holmes explained in *The Path of the Law*, judges have a duty “of weighing considerations of social advantage.” Felix Cohen referred to this method, as does Professor Kalman, as “functionalism.”

*Id.* (footnotes and citations omitted).

85. See, e.g., RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981).

86. But see D.W. MacKenzie, *Does Capitalism Require War?*, DAILY ARTICLE, Apr. 7, 2003, <http://www.mises.org/story/1201>. Unfortunately, MacKenzie ignores that arms sales are profitable and that wars regularly happen at the trough of the business cycle.

another Korea. The supposedly neutral theories either of “pure” positive law, such as Kelsen,<sup>87</sup> or law and economics,<sup>88</sup> or of legal process interest balancing<sup>89</sup> found themselves confronted with legal challenges that they could not address or comprehend within their own terms. This was due largely to the advancement of the civil rights movement,<sup>90</sup> the women’s movement, and the anti-war movement.<sup>91</sup> Economically speaking, the Vietnam War was a marvelous profit making opportunity, as shown by trade union support for that war.<sup>92</sup> Yet global communication sparked mass protest, not only within the U.S., but also among its supposed allies. How could legal process<sup>93</sup> or law and economics propose responses to the civil disobedience,<sup>94</sup> protest marches,<sup>95</sup> and assassinations<sup>96</sup> that characterized America in the 1960s? They could not and did not. And thus, a second generation of realists, the critical legal studies movement, arose.<sup>97</sup> The Marxist influence on critical legal studies is far more evident, and even occasionally overt,<sup>98</sup> as compared to legal re-

87. See, e.g., HANS KELSEN, *PURE THEORY OF LAW* (Max Knight trans., University of California Press 1967) (1934).

88. See generally R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

89. See, e.g., Henry M. Hart, Jr. & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law*, in *THE CANON OF AMERICAN LEGAL THOUGHT* 255 (David Kennedy & William W. Fisher III eds., 2006).

90. Stanford Encyclopaedia of Philosophy, *Civil Rights*, <http://plato.stanford.edu/entries/civil-rights/> (last visited May 20, 2008).

91. Mark Barringer, *The Anti-War Movement in the United States*, in *ENCYCLOPEDIA OF THE VIETNAM WAR: A POLITICAL, SOCIAL, AND MILITARY HISTORY* (Spencer C. Tucker ed., 1998), available at <http://www.english.uiuc.edu/maps/vietnam/antiwar.html>.

92. Lane Kirkland, President of the AFL-CIO, staunchly supported the U.S. war in Vietnam. William Serrin, *Lane Kirkland, Former A.F.L.-C.I.O. Head, Dies at 77*, N.Y. TIMES, Aug. 15, 1999.

93. As Tsuk explained:

“[P]luralism” is often associated with process theories of democracy, which scholars like Robert Dahl articulated during the 1950s and 1960s. Rooted in models of equilibrium drawn from economics, process theories sought to create a conception of a neutral political process, free of any substantive commitment to particular values such as the celebration of diversity, in which different groups interact, compete, or trade ends. This common association of “pluralism” with process theories is misleading. In the first half of the twentieth century, theories of pluralism often recognized diversity not merely as an empirical fact, something that we must tolerate grudgingly or try to reduce, but as a constitutive element of American democracy.

Dalia Tsuk, *The New Deal Origins of American Legal Pluralism*, 29 FLA. ST. U. L. REV. 189, 190 (2001) (footnote omitted).

94. See e.g., Toonari, *Montgomery Bus Boycott*, AFRICANAONLINE, <http://www.africanaonline.com/montgomery.htm> (last visited Apr. 12, 2008).

95. See, e.g., J. Gregory Payne, May 4 Archive, <http://may4archive.org/index.shtml>; The New York Times on the Web, *Past Convention Coverage*, <http://www.nytimes.com/library/politics/camp/whouse/convention-ra.html#1968> (last visited May 20, 2008).

96. Famous political assassinations of the 1960s include President John F. Kennedy, Senator Robert Kennedy, Martin Luther King Jr., Malcolm X, and Medgar Evers, among others. See, e.g., JFK Lancer, <http://www.jfklander.com/Political.html> (last visited May 20, 2008).

97. As Aceves noted:

Critical jurisprudence engages in a deconstruction of law’s empire—the monolithic set of norms, rules, and institutions that constitute the domestic legal system. It challenges the formalism and essentialism that permeate the liberal paradigm. This movement has revealed the indeterminacy of law as well as the manner in which power asymmetries have marginalized countless groups. Proponents of critical jurisprudence call for the development of national policies to remedy the consequences of subordination politics.

Aceves, *supra* note 34, at 301-02 (footnote omitted).

98. See generally, Tushnet, *infra* note 119.

alism.<sup>99</sup> What follows is a discussion of how the challenges presented by critical legal studies influenced the doctrinal methods of legal process interest balancing.<sup>100</sup>

### B. Legal Process Interest Balancing

The principle method of legal process<sup>101</sup> is the balancing of competing interests of the plaintiff and the defendant, and possibly also of third parties. Balancing tests are generally proposed as the method of decision by realists because of the legal realists' rejection of binary<sup>102</sup> "bright-line" categorical analyses in favor of multivariate standards.<sup>103</sup> However, the realist critique of bright-line rules was in fact overstated. Bright-line tests are at times ill-suited and at other times well-suited to achieve substantive justice. The realists' rejection of "bright-line" tests was ill-conceived. Likewise, balancing tests are at times ill-suited and at other times well-suited to achieve substantive justice. In other words, the pre-war realists overstated their critique of formalism, and the post war realists overstated the efficacy of the supposed remedy.<sup>104</sup> The fact that the pre-war realists' epistemology led them to a well founded general methodological rejection of categorical analyses, which was usually correct, is not equivalent to finding the methodology proposed by the post-war realists, interest balancing tests, to be necessarily, or even generally, well-founded. Balancing tests, like bright-line categorical analy-

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99. Aceves explains:

Critical jurisprudence is based upon the various critical approaches to the study of law and legal process, including Critical Legal Studies, Critical Race Theory, Critical Feminism, and LatCrit Theory. This movement reveals the indeterminacy of law as well as the manner in which power asymmetries have marginalized countless groups.

Aceves, *supra* note 34, at 299.

100. "Through deconstruction, critical jurisprudence reveals that power asymmetries, marginalization, and subordination permeate the international system." *Id.* at 308.

101. "[L]egal-process theory [is] a jurisprudential movement emerging from teaching materials developed by Harvard Law School Professors Henry M. Hart, Jr. and Albert M. Sacks, with important contributions from their colleague Lon L. Fuller." Joseph A. Page, *Torts Teaching: From Basic Training to Legal-Process Theory: Dominick Vetri, Tort Law and Practice*, 25 SEATTLE U. L. REV. 127, 131 (2001) (footnote omitted).

102. "Whereas postmodernists often attempt to deconstruct binary oppositions, such as objectivity versus subjectivity, modernists tend to accept such opposed pairs." Feldman, *supra* note 51, at 2366.

103. Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 578-79 (1988) (contrasting bright-line rules against muddy standards).

104. Singer illustrates the struggle between these two positions:

For all its realist aspects, the legal process school creates a new kind of formalism. First, it presumes that it is possible to identify, in a relatively objective fashion, the sorts of issues that courts are, and are not, competent to decide. Yet there is no reason to suppose that the elaboration of institutional roles is any more objective or determinate than the formulation of substantive principles. For example, . . . it is impossible to define what constitutes a legitimate contracting process without taking a position on the proper legal response to economic duress or unequal bargaining power. The more one wants to protect the integrity of the contracting process by regulating the ability of more powerful market participants to impose their will in the marketplace, the more the courts must regulate the substantive terms of contracts in order to prevent coercion.

Singer, *supra* note 3, at 518.

ses, depend on terminological certitude and empirical verifiability. The realists' critique was generally, though not universally, correct, but the solution that they offer is generally, but not universally, as open to critique as the supposed problem that they purport to solve.

Current legal epistemology incorrectly rejects "bright-line" categorical tests (e.g. *A* or *not A*) on the following grounds: While categorical analyses are unambiguous they are at best teleologically blind and at worst teleologically vicious. When teleologically vicious, formal manipulations are nothing more or less than the mask of class dominance.<sup>105</sup> When teleologically blind formal manipulations ignore whether substantive outcomes are in fact just, and elevate the procedural form over the substantive result. The realists' conclusion is a methodological rejection of a categorical bright-line analysis in favor of "balancing tests." This rejection is ill-founded.

Categorical analyses require an exact methodology, i.e. terminological and empirical certitude, and strict application of formal logic. Since the realist so-called revolution of the 1930s linguistic determinacy and propositional logic are criticized and generally rejected in American jurisprudence, wrongly, as rigid formalism. The realists' rejection of formal logic is overly-simplistic: they ignore that formal logic and empiricism are perfectly compatible as methodological tools in the search for truth. If balancing tests, favored by the teleological interpretation realism prescribes, can be evaluated and determined according to objective empirical evidence, then so too can "bright-line" categorical analyses. There is no empirical difference between determining the "weight" of a "factor" in a multi-variant balancing test, and determining whether a "bright-line" "threshold" is met. At the empirical level, the realist argument that flexible "balancing tests" are better than "formalist," "bright-line tests," is not necessarily true. Thus, the realist critique is overly-simplistic.

The realist critique of logic also goes too far. Realists argue that formal logic is at least abused if not misused.<sup>106</sup> Of course logic can be

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105. As Aceves stated:

[C]ritical jurisprudence posits that the underlying norms, rules, and institutions of society are socially constructed and shaped primarily by dominant groups. . . . "[P]ast or contemporary doctrine as the expression of a particular vision of society while emphasizing the contradictory and manipulable character of doctrinal argument." . . . Critical Race scholarship as an effort "to understand how a regime of white supremacy and its subordination of people of color have been created and maintained in America, and in particular, to examine the relationship between that social structure and professed ideals such as 'the rule of law' and 'equal protection.'"

Aceves, *supra* note 34, at 311 (footnote omitted).

106. Sebok discusses realist objections:

Cohen and Pound claim[ed] that formalism was committed to a deductive model of legal reasoning. It is not clear what this claim really meant. It probably could not mean, as is often claimed, that the "top-level" concepts used by the conceptualist are presented as objective, or true *a priori*. If we understand Langdell to have been committed to discovering legal principles through induction, then the realists must be charging the formalist with using

abused, however, the realists appear to ignore that formal logic is only contingently and not necessarily manipulable.<sup>107</sup> The manipulability of formal logic is contingent upon a combination of terminological inexactitude and dishonesty: it is not inevitable. If all formal logic were merely a manipulation designed to mask the raw exercise of power, then no logical argument would be admissible. That is, of course, a nihilist position. That premise, however—that logical argument is merely a mask for the exercise of raw power—is self-contradictory. It leads to a conclusion that voids most nihilist discourse. And it is also empirically untrue: even tyrannies seek to justify their exercise of power,<sup>108</sup> and in some cases the justification is valid. Just as no regime is entirely just, no regime is entirely unjust.

The above described logical contradiction defuses most nihilist discourse—whether such discourse is presented as legal realism or post modernism.<sup>109</sup> Many post-modernists raise irrationalist<sup>110</sup> arguments similar to that of the realists': Members of both schools of thought assert

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logic incorrectly either in discovering the original “top-level” concepts or deriving the conclusions that follow from those concepts. But the realist objection cannot mean, on a trivial level, that the formalists “obeyed” the canons of logic or reason, in the sense that the realists flouted those canons. The realists respected and employed simple operations of rational method, as their own self-styled attempts to develop a legal science attest. In truth, the “abuse of logic” claim was not really about the method of reasoning employed by the formalist, but about the number and types of legal concepts the formalist found useful or acceptable.

....

It is also easy to understand why the realist would think that the formalist was guilty of the “abuse of logic.” The command theory and the sources thesis required that valid legal principles—however identified—generate legal conclusions; otherwise legal results could not be traced back to the sovereigns that commanded them. But, the realists’ real objection to the role of logic in legal reasoning was not that deductive logic was used to produce results from *a priori* principles, but was rather to the claim that practical reason of any variety—deductive or inductive—could be used to constrain the results that legal reasoning generated.

Sebok, *supra* note 64, at 2091-93 (footnotes omitted).

107. Karl Llewellyn discussed manipulability:

[Arguing] that although precedent is highly manipulable, it substantially constrains judges in decisionmaking. A judge can almost always construct arguments for a ruling “on *either* side of a new case.” At the same time, the judge must construct an argument based on existing principles of law, and “*there are not so many that can be built defensibly.*”

Singer, *supra* note 3, at 472 (footnotes omitted).

108. For example:

Hitler justified his military objectives in the Sudetenland on the grounds that “Germans as well as the other various nationalities in Czechoslovakia have been maltreated in the unworthiest manner, tortured, . . . [and denied] the right of nations to self-determination,” that “[i]n a few weeks the number of refugees who have been driven out has risen to over 120,000,” that “the security of more than 3,000,000 human beings was in jeopardy.”

Ryan Goodman, *Humanitarian Intervention and Pretexts for War*, 100 AM. J. INT’L L. 107, 113 (2006).

109. “[P]ostmodernism cannot be reduced to a simple concise definition, it nonetheless is animated by several themes that can be specified and explained.” Feldman, *supra* note 51, at 2365. This is known as the logical flaw of vagueness—an ambiguous proposition is by definition irrefutable.

110. “Schizophrenic nominalism is most evident in the writings of Postmodern academics. Jameson illustrates the point by reference to Paul de Man’s implacable commitment to exposing ‘the artificial emergence of metaphoric abstraction and of the conceptual universal from the real of particularity and heterogeneity.’” Post, *supra* note 21, at 394 (footnote omitted).

that there is no truth or that all truth is relative or inter-subjective.<sup>111</sup>

That position leads, however, to the self-defeating conclusion that one must reject logical argument! The contradiction in either case—legal realism or post modernism<sup>112</sup>—is that using logic to argue that one cannot or should not use logic, is illogical. If “there is no truth,” or if “all truth is relative,” then these statements are logically empty of meaning. The antinomic conclusion is the inevitable conclusion that most postmodern and realist epistemology must lead to, if we take their assertions of truth nihilism or relativism seriously, and not as a mere sensationalist foil for a healthy truth skepticism, which they generally are.

Although this position of realists and post-modernists taken to its logical conclusion does in fact lead to an impermissible contradiction,<sup>113</sup> a qualified realism is admissible. The statement “The abuse of formal logic leads to some injustice” is perfectly admissible i.e. that statement is formally valid—and is in fact empirically true and possibly even necessarily true. The statement “The use of formal logic always leads to injustice” is, empirically untrue and logically antinomos. The first statement, a qualified realism, is admissible and does not overstate the realist critique. The second is not: it goes too far. Truth skeptics and realists have some points—logic can be, and sometimes is, manipulated. But truth skeptics and realists should be careful not to take their points too far lest their nihilism also destroy their own discourse, via the antinomy described. That destruction necessarily occurs whenever realists or post modernists assert a truth statement purporting to negate the existence of truth statements—for example, when they attempt to simultaneously assert that “all moral values are relative” or that “no truth exists.” Those two statements are in fact logically incompatible. They cannot be asserted simultaneously in logical discourse. They are antinomos—the former heterologically the latter autologically. This leads to the conclusion that the linguistic indeterminacy<sup>114</sup> and supposed flaws of formalism

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111. For an example of the debate about truth and knowledge:

[M]odernists often declare that *either* we have objective knowledge—that is, knowledge grounded on some firm foundation—or we are relegated to free-floating subjectivism and relativism. Likewise, some modernists maintain that *either* we must be independent subjects with freedom of will or we must be no more than completely determined automatons.

Feldman, *supra* note 51, at 2366 (footnote omitted). However natural phenomena clearly are not inter-subjective. They are objective. And since thoughts are a reflection of the world social phenomena too are objective and not merely inter-subjective.

112. For example:

[P]ost-modernism . . . subsuming post-structuralism and deconstruction: poststructuralism identifies the ground-clearing theoretical critique of both Marxist structuralism and linguistic structuralism while deconstruction names the method employed in opening up “the text,” whether legal judgment, news story or novel, to reveal both what it contains and what it blocks or excludes. But the label postmodernism, even if it does not define the project, at least has the merit of projecting something of its flavour.

Hunt, *supra* note 44, at 508-09.

113. “[P]ostmodernism has become an academic joke even before the dawn of the millennium.” Feldman, *supra* note 51, at 2357 (citing Arrow’s criticisms of postmodernism).

114. As Aceves explained:

which led to the replacement of “bright-line” categorical tests by interest balancing tests were not as grave as realism proposes. Thus, realism is an imperfect solution to an ill-defined problem: interest balancing is just as manipulable<sup>115</sup> as “bright-line” categorical hermeneutics. What factors are chosen? What weight are the factors given? How is that weight measured?

Despite flaws in the relativists’ positions, their arguments are so successful that contemporary axiology generally limits itself to market values and ignores “subjective” moral values. Contemporary legal epistemology is at least skeptical toward the existence of truth and rejects the existence or at least the cognizance of objective moral values.<sup>116</sup> Thus, economic analyses are ascendant because they can claim scientific objectivity and legitimacy; economic arguments are, or at least appear to be, empirically quantifiable, therefore verifiable, and thus objective. Legal realism, searching to attain substantive justice, has given judges the necessary tools to allow the deployment of their subjective will<sup>117</sup>—without, however, any moral telos to guide that will.<sup>118</sup> So the realist critique, which is ultimately a critique of formalism’s supposedly absent teleology, falls apart for lack of foundation. The teleological critique of formalism presented by realism depends upon an axiology which realism helped destroy. If all moral values are merely subjective then only economic values are scientifically objective—quantifiable and verifiable. Thus the judicial willpower realism unleashes is now exercised to serve the interests of the wealthy. If “no truth exists” or “all values are relative”—illogical statements which are, however, in vogue because they are shocking, sensational and their less extreme versions can be well founded—then economic empiricism is the only remaining scientific ar-

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In the tradition of postmodern scholarship, critical jurisprudence engages in a deconstruction of the monolithic set of norms, rules, and institutions that constitute the domestic legal system. . . . The law is not pure; it is a socially constructed network of “prepackaged categories, clusters, reified systems.” This movement has revealed the indeterminacy of law as well as the manner in which power asymmetries have marginalized and subordinated countless groups.

Aceves, *supra* note 34, at 310 (footnote omitted).

115. Edwin J. Butterfoss, *A Suspicionless Search and Seizure Quagmire: The Supreme Court Revives the Pretext Doctrine and Creates Another Fine Fourth Amendment Mess*, 40 CREIGHTON L. REV. 419, 464 (2007).

116. “[P]ostmodernists maintain that they have explained, as discussed above, how we actually have truth and knowledge. Truth and knowledge exist not because of correspondence with objective reality, but rather because we exist within communal and cultural traditions that enable us to communicate with each other.” Feldman, *supra* note 51, at 2363. A *reductio* demolishes that nonsense: In the inter-subjective nazi universe summary execution without trial is permissible. So much for intersubjectivity.

117. Per the realists, “rules of law do not play the kind of central role in legal reasoning that is claimed by the deductive model. For it is a notorious and noteworthy fact that different judges, employing their own reasoning processes, reach different results in similar cases and even in the very same case.” BENDITT, *supra* note 22, at 3.

118. “Postmodernists generally refrain from making such explicit proposals for social and legal change and thus repudiate this type of normative scholarship.” Feldman, *supra* note 51, at 2360. Just what the world of war, starvation, and disease needs: spineless indifference in the guise of objectivity.

gument. That explains the contemporary ascendancy of economic analyses.

Rather than arguing within the presumption that economic value is the only value or the only objective value, methodological critiques of balancing tests would best question the epistemology upon which balancing tests, such as fair use, are founded. An epistemological critique of the realists and post modernists is possible because truth negationist epistemology is incorrect. True statements do in fact exist. It is true that not all arguments are verifiable, and that not all arguments are falsifiable. It is also true, however, that some arguments may be verified, or at least falsified, and that not all arguments which are falsifiable necessarily imply a verifiable contrary position. Having established the objectivity of its epistemological foundations, the best critiques will then attack the methodology of balancing tests. First, question the (pseudo) empirical foundations of balancing tests generally. The questions, “which factors are chosen”<sup>119</sup> and “what weight are they given,”<sup>120</sup> are almost always determined by judicial willpower—which negates the supposed objectivity of “value free” empiricism. Next, the critique should point out that balancing tests are as vague and manipulable<sup>121</sup> as categorical analyses—and possibly more so—after all there are more terms to play with. Finally, the critique should point out that not all goods are fungible nor do they all have markets. Some goods really are irreplaceable, others have too few buyers and sellers to create a market, and, of course, not all actors are economically rational maximizing profits. Then too, transaction costs and externalities can undermine markets. All present good reasons to forget economic analysis as the panacea to legal indeterminacy.

Despite these possible attacks, balancing tests can be epistemologically and methodologically speaking, well-founded. The realists’ epistemology can be defended, though only in a qualified manner: (1) Though truth negationism is inadmissible truth skepticism is permissible; (2) The realists’ methodology, balancing tests, is no more, or less, objective than categorical bright-line analyses; (3) The realists’ methodology is not capricious, or no more capricious than categorical analyses, if grounded upon data that is quantifiable and verifiable, which economic values are. But in practice, judges usually do not quantify interests numerically. Rather, judges merely state that one interest is greater than another. By consciously enumerating chosen factors, explaining whose interests are chosen and how those interests are weighted, bal-

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119. See Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 YALE L.J. 1225, 1254 (1999).

120. *Id.*

121. Don Herzog, *The Kerr Principle, State Action, and Legal Rights*, 105 MICH. L. REV. 1, 34 (2007).

ancing tests can be rescued from the very indeterminacy the legal realists criticize.

#### IV. CONCLUSION

The so-called revolution of the 1930s, brought about by the judiciary, did not in fact lead to fundamental change in the United States. Rather, it presented the illusion of change; this illusion had the effect of sustaining the power structure of the United States in the time of its greatest crisis averting revolution and *coup d'état*.<sup>122</sup> Following the Second World War the formerly radical lawyers of the 1930s suddenly became the administrators of the global empire. Their ideas never really recovered any radical impetus. Thus, realism never completely replaced formalism, luckily, because formal logic is the foundation of the rule of law. The realists' critical ideas, however, never truly developed further. The economic analysis of law arose, in part, because of the epistemological failings of realism. Critical legal studies, stemming from the war in Vietnam and attendant domestic unrest,<sup>123</sup> starts from some of realism's propositions, follows them more consequently to logical conclusions. Postmodernism, in contrast, merely questions everything and provides no answers.<sup>124</sup> But critical legal studies never took state power.

We are now living through a third war and crisis, the so-called War on Terror. Just as realism and critical legal studies<sup>125</sup> were born out of economic and military crises, I expect the so-called War on Terror to spark serious dissent, including legal dissent. This article exposed some of the intellectual history of critical legal thinking in order to help that process. It is only by understanding different viewpoints that we can obtain the best understanding.

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122. Deborah M. Weissman, *Law As Largess: Shifting Paradigms of Law for the Poor*, 44 WM. & MARY L. REV. 737, 792 n.293 (2002); Leslie Deak, *Customary International Labor Laws and Their Application in Hungary, Poland, and the Czech Republic*, 2 TULSA J. COMP. & INT'L L. 319, 320 n.3 (1995).

123. "Critical Legal Studies blossomed in 'the post-Vietnam era.' Although moving vigorously on to the jurisprudential stage several years after the days of Vietnam and Watergate, Critical Legal Studies, in all probability, draws its vigor from the field of forces that energized the American New Left." John Batt, *American Legal Populism: A Jurisprudential and Historical Narrative, Including Reflections on Critical Legal Studies*, 22 N. KY. L. REV. 651, 752 (1995).

124. For a satirical expose (and scathing critique) of postmodernism's essential methodological incoherence, see generally Arrow, *supra* note 53.

125. "[Critical Legal Studies] attempt[] to 'demonstrate that a doctrinal practice that puts its hope in the contrast of legal reasoning to ideology, philosophy, and political prophecy ends up as a collection of makeshift apologies.'" Caudill, *supra* note 60, at 310 (quoting Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 573 (1983)).