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THE SKEPTICISM OF CRITICAL LEGAL STUDIES AND FUNCTION OF MORAL DISCOURSE

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THE FUNCTION OF MORAL DISCOURSE

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Nor can I suppose that when Mrs. Casaubon is discovered in a fit of weeping six weeks after her wedding, the situation will be regarded as tragic. Some discouragement, some faintness of heart at the new real future which replaces the imaginary, is not unusual, and we do not expect people to be deeply moved by what is not unusual. That element of tragedy which lies in the very fact of frequency, has not yet wrought itself into the coarse emotion of mankind; and perhaps our frames could hardly bear much of it. If we had a keen vision and feeling of all ordinary human life, it would be like hearing the grass grow and the squirrel’s heart beat, and we should die of that roar which lies on the other side of silence.

...  

[It is in these acts called trivialities that the seeds of joy are for ever wasted, until men and women look round with haggard faces at the devastation their own waste has made, and say, the earth bears no harvest of sweetness -- calling their denial knowledge.

GEORGE ELIOT, MIDDLEMARCH

The Skepticism of Critical Legal Studies and the Function of Moral Disclosure.

The legal movement known as Critical Legal Studies (CLS) has always been the focus of intense controversy in the legal academy. Indeed, the character of the controversy is qualitatively different from that surrounding other intellectual movements in law. CLS has been accused not only of being mistaken, but of being subversive of or hostile to the most basic principles and values underlying our legal system and our law schools.¹ The most widely-known expression of this hostility is Dean Paul Carrington’s article “Of Law and the River,” in which he

¹ I will use “CLS” as shorthand for “Critical Legal Studies” throughout this article. I will use “Critic” to refer to an adherent of CLS, in preference to the slang term “Crit.”
characterized CLS as a form of nihilism and proclaimed that “the nihilist who must profess that legal principle does not matter has an ethical duty to depart the law school.”

Because CLS has both presented itself and been seen as an extremely radical movement, challenging the law’s most deeply held presumptions, very few non-CLS writings are sympathetic to the movement. Books and articles about CLS tend to fall into one of two categories: they are either written from within the CLS framework itself, or they are attacks, sometimes quite polemical, on CLS in its entirety. In this article, I have tried to take both a sympathetic and critical approach to CLS. As a movement, CLS had its heyday in the 1980’s and ‘90’s. Now that the first wave of controversy surrounding CLS has passed, it may be time to examine its achievements and weaknesses in a cooler manner.

This article is an essay in jurisprudence, the philosophy of law, and in philosophy it is even more difficult than normal to set out boldly one’s conclusions in isolation from the considerations that support them. However, the following is a schematic account of the movement of this Article.

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3. A. ALTMAN, CRITICAL LEGAL STUDIES 8 (1990) (“In general, . . . liberal theorists and their CLS critics have been highly dismissive of one another’s work”); West, CLS and A Liberal Critic, 97 YALE L.J., 757-58 (1988) (“[U]nfortunately, hostile gut reactions have replaced guarded respectful responses; passionate political and cultural evaluations have supplanted balanced intellectual assessments”); Schlag, U.S. CLS, 10 Law & Critique 199, 204 (1999) (“In the 1980’s, the American legal academy reacted with furious hostility to CLS.”)
In Part I, I set out the basic tenets of the CLS movement. In doing this, I have tried to present CLS ideas as cogently as I can. I have tried to get the reader to feel the power, even the seductiveness, of the CLS approach to the law. As part of that process, I have tried to indicate what I take to be the core of CLS, its most critical and significant teaching. On my reading, the heart of CLS is neither the idea of indeterminacy nor of illegitimate hierarchies, but a certain idea of responsibility. CLS wants to show that we are responsible for things we do not normally recognize that we are responsible for.

This expanded conception of responsibility is the ultimate purpose behind CLS’ most central jurisprudential strategy: the attack on the distinction, which CLS sees as inherent in all liberal thought, between the public and the private realms. From this perspective, the most important of the famous CLS dichotomies or contradictions is not that between rules and standards, or between subjective value and objective value, which have been very prominent in the CLS literature, but that between freedom and determinism. In Part I of this article, I will show the interconnection between these two aspects of CLS: the fundamental contradiction between free will and determinism in liberal thought and the attack on the public/private distinction. I will also show that both of these facets of CLS serve the same purpose: bringing us to see the extent of our responsibility for what we think of as events in the “private” world.

Also in Part I, however, I will show that CLS fails to carry out this strategy successfully. CLS is itself plagued by certain internal inconsistencies and incoherences, and I will show how these undermine what CLS wants to maintain.
In Part II of the Article, then, I will go on to explore where and how CLS goes wrong, what the nature of its failure is. I will continue to focus on CLS doctrines concerning free will and responsibility, and show how and why the CLS position that there is a “fundamental dichotomy” between intentionalist and determinist discourses is misconceived.

In Part III, I will rehabilitate what I think are the valuable insights in CLS and also try to explain why those insights are expressed through a theoretical framework which so badly distorts them -- indeed, in a sense inverts them. This last is the most interesting question. Most abstractly put, my thesis is that CLS falls victim to the disease it is attempting to cure. By the end of the Article, I hope to show that CLS is a movement of deep moral seriousness but also a movement that is deeply misconceived, largely by its failure to understand the true nature and purpose of moral discourse.
I. Exposition: Hierarchies and the Indeterminacy Thesis

CLS presents itself as a philosophical extrapolation of things that all lawyers and law professors know (even if they are not wholly aware they know them), things that all law teachers teach their students. These things are that judges can decide cases whichever way they want to and that an argument can always be made for either side in a legal dispute. Given a certain perspective or “take” on these facts, the CLS indeterminacy thesis seems to follow quite inevitably.

The first people to be impressed by these facts, however, were not the Critics, but the legal realists. For that reason, it is useful to begin a description of CLS with a (necessarily brief and crude) account of twentieth-century American jurisprudence.

A. From Formalism to Realism

Oversimplifying, we can say that at one time (say, the late nineteenth and early twentieth centuries), law was viewed as a “brooding omnipresence in the sky.”4 Law had an independent existence “out there,” and judges were believed not to make law, but to discover it.5 This is not to say that the late nineteenth century was characterized by a belief in “natural law.”6 Far from

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4 Southern Pacific Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

5 “On one level the formalists were Platonists, believing that there exists a handful of permanent, unchanging indispensable principles of law imperfectly embodied in the many thousands of published judicial opinions, and that the goal of legal reasoning was to penetrate the opinions to the principles.” R. Posner, The Problems of Jurisprudence 14-15 (1990).

6 James Herget, American Jurisprudence: 1870-1970 (1990) 159-60 (moral paradigm of natural law theory “was largely discredited in the late nineteenth century”).
it. Indeed, the main influence on American jurisprudence in this period was the legal positivism of John Austin. It is to say that for late nineteenth century jurisprudence, law could be defined as a set of fundamental concepts and rules that could be distinguished from the rules of morality and custom, and that “correct” results could be reached in legal disputes by logical manipulation of those concepts and rules.

As is well known, this picture of law and the nature of legal reasoning was almost wholly rejected by the legal realists in the early twentieth century. This rejection of “legal formalism” or “positivism” can be summed up by saying the legal realists realized that who decides cases matters. Who decides matters because the law is indeterminate. To understand what the realists meant by this indeterminacy in the law, it is helpful to contrast legal realism to H.L.A. Hart’s more contemporary version of a positivist, even formalist, approach to law.

For Hart, law is a system of rules. Rules of law are valid (i.e., binding on those whose conduct they regulate)

7. Id. at 21.

8. Girardeau Spann describes this “formalist” approach to law:

Inherent in the law-as-science perspective of formalism was an inclination toward the analytical techniques of the scientific method. Accordingly, the meaning of legal principles was discerned through a process of observing, organizing and classifying the data provided by individual cases. The outcome of a case was determined by how prior cases had been classified and by which of the competing conceptual categories the facts of a case brought it into. If an agreement fell into the “mutual assent” category, it constituted a contract; otherwise it did not. If the motive of the parties for entering into an otherwise acceptable contract fell into the “consideration” category, the contract was enforceable; otherwise it was not. In this sense, nineteenth century legal analysis was “formalistic.” Relatively rigid conceptual categories, rather than flexible standards of reasonableness or fairness, determined case outcomes, and proper classification was all that mattered for proper resolution of legal disputes.


because they were enacted pursuant to further rules (Hart calls these “secondary rules”) which specify how legitimate legal rules are to be promulgated. These further rules, naturally, are valid only because they, in turn, were enacted in accordance with some further, higher level, rule. This process obviously cannot continue ad infinitum. Hart’s theory is that in every society that has the institution of law, there is a master rule, which Hart calls the “rule of recognition,” that is not itself valid (justified by other rules), but which is simply accepted as binding by the members of that society.  

It follows from Hart’s theory that rules of law can be distinguished clearly from other social rules - from rules of morality, custom, convention, etiquette, etc. Rules of law are distinguished from rules of morality or custom by possessing a certain pedigree. Legal rules are those that derive from the rule of recognition. Like the nineteenth century positivists, Hart believes that law can be understood as a more or less self-enclosed, autonomous realm of rules.

Hart does acknowledge that there is a certain indeterminacy in the application of legal rules to particular cases. Indeterminacy is caused by the fact that the concepts expressed by the

10 H.L.A. HART, supra note 9, at 92-93. For Hart, the United States Constitution can be seen as a very complex rule of recognition for this society. All other legal rules are valid because they derive their authority from the Constitution. As Dworkin explains it:

Thus a parking ordinance of the city of New Haven is valid because it is adopted by a city council, pursuant to the procedures and within the competence specified by the municipal law adopted by the state of Connecticut, in conformity with the procedures and within the competence specified by the constitution of the state of Connecticut, which was in turn adopted consistently with the requirements of the United States Constitution.

R. DWORIN, supra note 9, at 21.

The Constitution is not valid in the way that the New Haven parking ordinance is. It is simply accepted as binding. If Americans as a whole stopped accepting it, they would no longer have a system of law; at least, not one derived from the Constitution.
terms of legal rules have “fuzzy” edges. Therefore, it is not always clear whether a specific factual situation is or is not covered by the terms of the rule. Hart says that in such situations, legal rules reveal their “open texture.”¹¹ It is these borderline cases that give rise to disputed, controversial issues in the law. According to Hart, in these cases where the rule is indeterminate, the judge has discretion to create a new rule which resolves the dispute. This new rule is of course itself open textured in regard to its possible future applications, and so the process of rule application and creation goes on perpetually.¹²

For Hart, rules have a large core of noncontroversial applications. If a rule says, “No driving over 55 mph on the freeways,” then it is generally quite clear in the vast majority of cases whether the rule was violated. In Hart’s picture of the law, indeterminacy is marginal and

¹¹. Faced with the question whether the rule prohibiting the use of vehicles in the park is applicable to some combination of circumstances in which it appears indeterminate, all that the person called upon to answer can do is to consider (as does one who makes use of a precedent) whether the present case resembles the plain case sufficiently in relevant respects. The discretion thus left to him by language may be very wide; so that if he applies the rule, the conclusion, even though it may not be arbitrary or irrational, is in effect a choice. . . . When we are bold enough to frame some general rule of conduct (e.g. a rule that no vehicle may be taken into the park), the language used in this context fixes necessary conditions which anything must satisfy if it is to be within its scope, and certain clear examples of what is certainly within its scope may be present to our minds. They are the paradigm, clear cases (the motor-car, the bus, the motor-cycle); and our aim in legislating is so far determinate because we have made a certain choice. We have initially settled the question that peace and quiet in the park is to be maintained at the cost, at any rate, of the exclusion of these things. On the other hand, until we have put the general aim of peace in the park into conjunction with those cases which we did not, or perhaps could not, initially envisage (perhaps a toy motor-car electrically propelled) our aim is, in this direction, indeterminate.

H.L.A. HART, supra note 9, at 124-26. The philosopher W.V.O. Quine has argued that all empirical terms are open textured, or, as Quine puts it, vague:

Vagueness is a natural consequence of the basic mechanism of word learning . . . . Insofar as it is left unsettled how far down the spectrum toward yellow or up toward blue a thing can be and still count as green, ‘green’ is vague. Insofar as it is left unsettled where to withhold ‘muddy water’ in favor of ‘wet mud’, ‘water’ and ‘mud’ are vague. Insofar as it is left unsettled how far from the summit of Mount Rainier one can be and still count as on Mount Rainier, ‘Mount Rainier’ is vague.


¹². H.L.A. HART, supra note 9, at 138-144.
interstitial. It occurs only at the penumbra of fuzzy-edged rules. But Hart clearly believes that these sorts of cases are exceptional.\textsuperscript{13}

For the legal realists, however, it was not simply this (inevitable) open texture of legal rules at the edges that gave rise to indeterminacy in the law. Rather, the realists identified two further sources of indeterminacy.\textsuperscript{14} Taken together, these constitute the first formulation in American law of what can be called an “indeterminacy thesis.”\textsuperscript{15} The first is that legal disputes cannot be resolved by slotting them into the one correct conceptual box which determines the outcome. Rather, the realists saw, there is always more than one legal rule which is arguably relevant to any given set of facts. No judge could discover “the correct rule” to apply in a case -- there was nothing to discover. Rather, the judge had to select one from among many possibly appropriate rules to resolve a case.\textsuperscript{16}

\begin{addendum}
\item\textsuperscript{13} Hart says:

\begin{quote}
At any given moment judges, even those of a supreme court, are parts of a system the rules of which are determinate enough at the centre to supply standards of correct judicial decision.
\end{quote}

H.L.A. Hart, supra note 9, at 141-42.

\item\textsuperscript{14} Altman, “Legal Realism, Critical Legal Studies and Dworkin,” 15 PHIL. & PUB. AFF. 205, 208-09 (1986).

\item\textsuperscript{15} Legal realism, of course, was a complex movement that encompassed more than what I have called the indeterminacy thesis. For a concise summary of realism’s main themes, see id. at 206 n.4. For a thorough discussion of realism in the context of the American philosophy of its time, see R.S. Summers, INSTRUMENTALISM AND AMERICAN LEGAL THEORY (1982). For a discussion that relates realism to the progressive and populist political movements of the late nineteenth and early twentieth centuries, see M. Horwitz THE TRANSFORMATION OF AMERICAN LAW, 1870-1970 (1992), esp. Chap. 7.

\item\textsuperscript{16} As Andrew Altman describes it:

\begin{quote}
Thus, deciding whether an uncle’s promise to pay his nephew a handsome sum of money if he refrained from smoking, drinking, and playing pool was enforceable brought into play a number of rules, for example, rules regarding offer, acceptance, consideration, revocation, and so on. . . . In any single case, then there were multiple potential points of indeterminacy due to rule vagueness . . . .
\end{quote}

Altman, supra note 14, at 208 (footnote omitted). The facts in Altman’s example are from that case book favorite,
The second source of indeterminacy for the realists is the inherent manipulability of the distinction between the holding of a case and its dicta. Judicial decisions are not self-interpreting; the reader of an opinion actively selects one part of the opinion as “the holding,” as opposed to the dicta. Nothing in the opinion itself determines what must be taken as the holding. The malleability of the holding/dictum distinction undermines the determinacy of the legal process because it greatly reduces the ability of past cases to guide the reasoning in present disputes.

For the formalists, the determinacy of the law is ultimately based on the rule of *stare decisis*. The rules and categories of the common law are generated out of the data of the precedents, just as the rules of Copernican astronomy are generated out of the data of the observed motion of the planets. If the data could be varied by each observer of the motions of the planets, there would be no “rules of Copernican astronomy,” only a welter of conflicting rules varying according to the theorist’s view of the data. For the realists, this is the situation in which the law finds itself. As Altman says:

The upshot was that in almost any case which reached the stage of litigation, a judge could find opinions which read relevant precedents as stating one legal

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17. The classic realist discussion of this point is Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931).

rule and other opinions which read the precedents as stating a contrary rule. The common-law judge thus faced an indeterminate legal situation in which he had to render a decision by choosing which of the competing rules was to govern the case. In other words, while the realists claimed that all cases implicated a cluster of rules, they also contended that in any cluster there were competing rules leading to opposing outcomes.19

B. From Legal Realism to Critical Legal Studies

The two main tenets of realism discussed above are things that all lawyers and law professors know.20 What then do we imagine happens in judicial decision-making? If “the law” does not determine outcomes, how do cases get decided?

CLS provides a plausible answer to these questions. In his analysis of contract law, Critic Joel Feinman says:

One perception of mixed contract law is that it is simply an agglomeration of principles and policies which courts apply randomly in particular cases. It then appears that the only coherent method of organizing the law is to develop long lists of arguments derived from the principles and policies. Thus, we get

19. Id. at 209.

20. Anthony D’Amato, who is not a Critic, has recently said that “[t]he ability of judges to interpret facts and law to let either side win in any case is the way the world is . . . .” D’Amato, “Rethinking Legal Education,” 74 MARQ. L. REV. 1, 26 (1990)(emphasis in original).
arguments that contract law ought to promote certainty, be flexible, protect reasonable reliance, remedy the unjust use of bargaining advantage, penalize careless contracting behavior, protect the ignorant, force people to look after themselves, and so on and so on ad infinitum (or ad nauseam). ²¹

Furthermore, as Critics are at pains to point out, these principles themselves have a great deal of “play” in them. Any one of them can be used to argue for either side in a legal dispute. And in any given case, any principle can be opposed by another principle; this means that a plausible argument can always be made for each side in every case. ²²

Law students generally come out of the first year of law school believing very firmly that “judges can do whatever they like”; that is, they believe that most decisions (especially U.S. Supreme Court decisions) are result-oriented, with the rationale thought up later. (I am always impressed by the firmness of student beliefs on this issue when I teach my upper-class Jurisprudence course.) This is unsurprising, given the sorts of things that law teachers normally do in first year courses. As Duncan Kennedy describes what students learn in these courses:


²² D’Amato, again, has said:

[D]ejudge is free to interpret the rules of law that both parties serve up in briefs for her to choose from. Since the briefs will state opposing rules of law (or opposing interpretations of the same rule), the judge’s job is easy. She simply has to choose the brief of the side she has selected to win the case. That brief will contain a ready-made rationalization of the result that the judge has chosen to reach. Isn’t it ironic that we spend three years teaching our students to come up with the best brief on their client’s side of the case . . . when the net result of all this teaching and effort is to present the judge, on a silver platter, two utterly conflicting, but excellent, legal rationales for whichever side the judge chooses to win the case?

D’Amato, supra note 20, at 14.
They learn to retain large numbers of rules organized into categorical systems (requisites for a contract, rules about breach, etc.). They learn “issue spotting,” which means identifying the ways in which the rules are ambiguous, in conflict, or have a gap when applied to particular fact situations. They learn elementary case analysis, meaning the art of generating broad holdings for cases so they will apply beyond their intuitive scope, and narrow holdings for cases so that they won’t apply where it at first seemed they would. And they learn a list of balanced, formulaic, pro/con policy arguments that lawyers use in arguing that a given rule should apply to a situation despite a gap, conflict, or ambiguity, or that a given case should be extended or narrowed. These are arguments like “the need for certainty” and “the need for flexibility,” “the need to promote competition” and the “need to encourage production by letting producers keep the rewards of their labor.”\(^{23}\)

Therefore, when teaching a case like **Williams v. Walker-Thomas Furniture Co.**\(^ {24}\) the classic unconscionability case, the typical law school teaching method encourages students to

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23. Kennedy, *Legal Education as Training for Hierarchy*, in *The Politics of Law* 42 (D. Kairys ed. rev. ed. 1990). Kennedy goes on to add that one of benefits of learning these things is that “they show the indeterminacy and manipulability of ideas and institutions that are central to liberalism.” Id. at 43. Kennedy means here “liberalism” in its broadest sense, not as the opposite of “conservative” in our political lexicon.

24. 350 F.2d 445 (D.C. Cir. 1965). In **Williams**, Ms. Williams, a poor welfare recipient, bought a stereo on credit from the Walker-Thomas department store. The credit agreement contained a cross-collateral clause, which essentially entitled the store to repossess everything it had ever sold on credit to Ms. Williams if she defaulted on the payments for the stereo. When Ms. Williams did default, and Walker-Thomas applied to the court for a writ of replevin enabling it to repossess a lengthy list of Ms. Williams’ possessions, she raised the defense that the cross-collateral clause was unconscionable.
ring a series of changes on these “pro/con” arguments. So the class discussion will go something like this: “The law should protect Ms. Williams from Walker-Thomas’ unjust use of its bargaining power.” “No, the law should promote certainty of commercial relations by making people stick by contracts they freely sign.” “No, the law should promote personal autonomy by not allowing one party to take advantage of the ignorance and economic necessity of the other.” “No, the law should promote personal autonomy by making people take responsibility for their own actions and their own affairs.” “No, the law should promote commercial behavior by leveling the playing field between the parties.” “No, the law should promote commercial behavior by letting Walker-Thomas keep the economic incentive it needs if it is to do business with people like Ms. Williams at all.” And so on, and on. The more that the students can spin out these arguments, the better the class we deem it to be. We consider it to be a key part of legal education that we do not suggest to students that any one of these arguments is “correct” or is “the right answer.”

And yet -- our jurisprudential picture of what happens when judges decide cases usually rests implicitly on the assumption that courts do have some method of reaching a right answer. We are not shy about praising some decisions as “correctly decided” and damning others as “incorrectly decided.” Joel Feinman succinctly supplies the CLS explanation for this:

The underlying assumption . . . is that the courts have some means of balancing the arguments to arrive at the correct determination in each case . . . the result is
an image of the law as a reified form of pluralist politics, in which contending interests can be weighed and appropriately resolved.\(^\text{25}\)

CLS has developed a very specific response to this typical, post-realist, “liberal” picture of the operation of law, and this response is one of the very central CLS theses. As Feinman puts it, this typical picture is wrong in two inverse, but interlocking ways. First, “it grants too much coherence to contract law.” It presents too coherent a picture because the implied “balancing mechanism which the courts supposedly use to achieve just results simply does not exist.”\(^\text{26}\) There is no procedure, no black box, through which all the opposing arguments can be run to produce the right outcome, an outcome with which everyone must agree, as one must agree with “2+2=4” or forfeit one’s claim to rationality. There is no legal decision I must agree with in that sense.

Second, Feinman says that the typical picture of contract law grants too little coherence to contract law. This analysis of the structure of areas of the law is a distinctive contribution of CLS, and is the way in which CLS goes beyond legal realism.\(^\text{27}\) When Feinman says that the

\(^{25}\) Feinman, supra note 21, at 838. How many people today would defend the rule of Plessy v. Ferguson, 163 U.S. 537 (1896)? But it could be done, quite adequately and even powerfully, using the dichotomies and policy pairs listed above.

\(^{26}\) Feinman, supra note 21, at 838.

\(^{27}\) Mark Kelman has argued that legal realism was “fixated on the indeterminacy of language, or the difficulties any rule maker would have in restraining the discretion of those who apply her rules simply by abstract verbal directive.” M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 13 (1987). The “stronger CLS claim,” by contrast, “is that the legal system is invariably simultaneously philosophically committed to mirror-image contradictory norms, each of which dictates the opposite result in any case (no matter how “easy” the case first appears).” Id. at 14. Here we are getting to the heart of the difference between realism and Critical Legal Studies.
usual image of law grants it too little coherence, he means that law is not just a random collection or heap of principles all pulling in different directions.

Modern contract law is not composed of a myriad of independent policies. Instead, it embodies two general, contradictory patterns of analysis which organize the multitude of principles, policies and arguments.\(^{28}\)

The idea that the law (or, more broadly, liberalism or liberal thought, of which our legal system is one expression) embodies two general, but contradictory, patterns of analysis, is the fundamental thought of Duncan Kennedy’s extremely influential CLS article, “Form and Substance in Private Law Adjudication.”\(^{29}\) In that article, Kennedy argues that the problem of “the form in which legal solutions to . . . substantive problems should be cast” was pervasive throughout American private law, and that this problem of form oscillated around two contradictory “formal modes” which opposed each other everywhere. One mode favored “clearly defined, highly administrable, general rules; the other supports the use of equitable standards producing ad hoc decisions with relatively little precedential value.”\(^{30}\) Kennedy’s central claim is that the pervasiveness of this conflict over form in the law is neither accidental, nor purely about formal or procedural values. Rather, Kennedy argues, the debate over form has

\(^{28}\) Feinman, supra note 21, at 838.

\(^{29}\) Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685 (1976). Mark Kelman calls this article “one of the central works in the critical legal studies literature.” M. KELMAN, supra note 27, at 15.

\(^{30}\) Kennedy, supra note 29, at 1685.
“powerful overtones of substantive debates about what values and what visions of the universe we should adopt.”

Specifically, Kennedy shows that arguments in favor of the “rule” form are typically expressions of a moral attitude which takes “individualism” as its ideal. This attitude emphasizes self-reliance and the rational maximization of self-interest. Arguments in favor of the “standard” forms are typically expressions of a moral attitude which takes “altruism” as its ideal. This attitude emphasizes community, solidarity, sharing, and sacrificing for others.

Kennedy’s thesis is that indeterminacy in the law is not simply a function of “fuzziness,” linguistic vagueness and open-texturedness, as Hart argued, or of the difficulty in applying rules, as the realists argued, but is rather a function of a fundamental substantive contradiction between these two opposed moral ideals, both of which are inherent in what CLS calls “liberal thought.”

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31. Id. at 1710.

32. Id. at 1713. Kennedy emphasizes that individualism as he defines it is not selfishness or egoism, but contains a “strong affirmative moral content,” namely, that of respect for the rights and property of others and a renunciation of the use of force in the struggle for private satisfaction. Id. at 1714-15.

33. Id. at 1717.

34. Kelman says that Kennedy showed that:

[t]he fundamental contradictory impulses that led to formal instability, to an inability for any actor or the legal system to maintain an unambivalent commitment to either the rule or the standard pole, were substantive. An actor might experience himself as rehashing arguments about imprecision versus nonadministrability, but the arguments seem so unsettled because they are in fact experienced in part as stand-ins for arguments about individualism and altruism, and all actors face these political theoretical issues with a sense of the most hopeless contradiction.

M. KELMAN, supra note 27, at 54.
Liberal thought, for CLS, is a political and moral philosophy that tries, heroically but unsuccessfully, to reconcile the two opposed ethical ideals to which we find ourselves simultaneously committed.

The major device by which liberalism tries to effect the reconciliation is the distinction between the public and the private realms. The public/private distinction reconciles the individualism/altruism split by assigning each value to a separate sphere within which that value can be dominant. The private realm is the realm of individuals seeking self-satisfaction; in this realm, shared or community values do not impinge. The public realm is the realm in which individuals recognize that duties to others can legitimately be imposed on them, a realm in which community needs can and sometimes must override individual desire.

The crucial problem of liberalism is one of drawing the proper boundary between the public and private. In liberalism’s classic form (what we would today call “conservatism”), the public realm imposes just enough communal duty and consideration for others to guarantee the integrity of the private realm and to protect each individual’s search for maximum utility from forcible interference by others.

The thrust of CLS is that liberalism’s solution of the problem of individualism and altruism is internally incoherent and highly unstable. A large quantity of CLS analysis of specific areas of law is devoted to showing that the “fundamental contradiction” breaks out, again and again, in a very wide range of legal disputes. That a very diverse group of legal issues
can indeed be fruitfully understood as variants of the single conflict between individualism and altruism is one of CLS’s most interesting assertions about American law.

Some examples, taken from Kelman, of the way the rules/standards opposition appears in disparate areas of the law will illustrate this CLS point concerning the interrelation of formal modes and substantive values. A simple example is the problem of who is allowed to vote. The position embodying the “rule” approach would lay down a bright line test: “Only those who are 18 years of age can vote.” The “standard” approach yields a more context- and fact-sensitive approach: “Only persons who are sufficiently mature can vote.”

A second example is provided by the different approaches to the question: what agreements should be legally enforceable? The rule-like answer is that all contracts are enforceable when there is any consideration on both sides; when each party has received something, even a peppercorn, courts will not inquire further into the adequacy of consideration. The standard-like answer is that “courts should never enforce bargains that are substantively unconscionable, where the disproportion between the value of what one party received and what she gave is so great as to negate our sense that the underlying social purpose of contract (to facilitate mutually beneficial exchange) has been met.” The former position is generally taken as an expression of individualism, the latter of altruism.

35. Id. at 15.

36. Id. at 19 (emphasis in original) (footnote omitted).
A third example of the rules/standards dilemma is provided by the Supreme Court’s oscillation over what is required for the imposition of the death penalty to meet the constitutional requirements of the eight amendment’s cruel and unusual punishment clause. The Court first struck down state capital punishment statutes that gave too much discretion in levying the punishment to the jury, a discretion which had led virtually to arbitrariness in who got the death penalty. The Court thus forced “the legislatures to write statutes establishing ostensibly rule like aggravating circumstances that define capital murder.” The Court then almost immediately handed down another series of decisions that struck down such statutes because they invited application in a rigid, nondiscretionary fashion, “until there is a requirement . . . that the jury hear of practically everything that may mitigate punishment.” Kelman claims that this progression is “a particularly dramatic lesson in the instability of both the rule and standard form, with each pole rapidly and completely undercutting the other.”

A final example shows the operation of the rules/standards dichotomy in an area in which one might not have anticipated finding it: the law of welfare reform. In an article on welfare rights, William Simon has argued in CLS fashion that the dichotomy underlies two different conceptions of what a “good” welfare system would look like. One conception concentrates on severely limiting case-worker discretion (and thus arbitrariness and abuse) by structuring welfare laws as a system of clear, easily administered, bright line rules governing both the criteria for eligibility and the documents and methods that can be used to establish eligibility. The second

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37. Id. at 27.
38. Id. (footnote omitted).
conception, a more traditional professional social worker vision, gives caseworkers broad authority to grant or withhold benefits and to judge recipient eligibility, and credibility, on a case-by-case basis.40

Kelman summarizes very vividly one of Simon’s main points, which is that neither conception provides a model of a welfare system that we would find wholly morally admirable:

As Simon notes, the nightmare vision in the standards-based system was the welfare worker as intrusive despot, disciplining recipients for departures (particularly sexual departures) from stuffy caseworker norms; the nightmare vision of the “reformed” rule-bound system is the Kafkaesque bureaucrat sending the would-be recipient from line to line, ultimately to have her request for funds denied because she lacks some utterly meaningless, unattainable slip of paper. The welfare recipient without rights, without formal entitlements may feel that she has nothing to call her own; the welfare recipient with nothing but entitlements may never sense that anyone cares for her at all.41

All these examples illustrate the same problem of reconciling the rules model with the standards model. Each side has its characteristic pluses and minuses. Rules can always be criticized because they can never match perfectly with reality. Rules will always produce some

40. Id. at 1242-45.

41. M. KELMAN, supra note 27, at 33.
unjust results - unjust, that is, in terms of the very purpose of the rule itself. But standards also seem to lead to injustice because they lead to the rule of men not laws: they allow too much discretion, and thus too much power, to state officials; they are open to abuse and discriminatory application; and they give rise to problems of notice, since it is hard to tell in advance exactly what one’s legal obligations are going to turn out to be.

Earlier, I noted that one of Kennedy’s main theses is that the two opposed formal modes “typically express” opposed substantive values (individualism and altruism). “Typically express” is a deliberately vague phrase. CLS authors have struggled to specify exactly what the relation is between the formal modes and the substantive values. CLS writers have conceded that the relationship is not one of entailment. It is not the case that every argument in favor of a rule form must be based on the individualist ethical model, nor that someone who is under the sway of that model will invariably plump for the rule form in every and any legal context.

Indeed, the reversibility and manipulability of legal arguments manifests itself as much in the connection between form and substance as it does anywhere in the law. CLS authors

42. Kelman cites the particularly apt example of the rules of the income tax laws. Rules, such as those relating to deductions, are meant to stimulate productive economic activity, but are immediately used as “loopholes” to shelter income in a way that is economically wasteful. Id. at 42-43.

43. Kennedy gives a chart listing the good and bad things one could say about rules and standards. Kennedy, supra note 29, at 1710. For example, “rules are good because they are neutral, stable, precise, faster, efficient, etc.” “No, rules are bad because they are rigid, compulsive, over- and under-inclusive, etc.” “Standards are good because they are flexible, individualized, manifest concern and empathy, etc.” “No, standards are bad because they are sloppy, prone to bias, uncertain, etc.”

44. See M. Kelman, supra note 27, at 17 (“[t]he connection between form and substance has never been said to be one of either logical entailment or material necessity”).
acknowledge that “individualistic” arguments can be made in favor of “standard-like” positions in any given case, and likewise “altruistic” arguments can be made to support a “rule-like” position. Kelman provides a good example from tort law:

If . . . we focus on the plaintiff in a torts case where the issue is what standard of care the defendant owes, both the traditional rule and the traditional standard position correlate neatly with substantive individualism and altruism. The strict liability rule (with no standard like defense of contributory negligence) is seemingly subject to attack because it enables the plaintiff to be excessively individualistic. Assuming he can be fully compensated by tortfeasors, he need show no concern at all about avoiding harms that defendants cause, even if he could more readily and cheaply avert them than the defendant could. Yet one can see that the negligence standard demands seemingly excessive altruistic sacrifice by the plaintiff. Why should a person cede her entitlements whenever a defendant can’t reasonably avoid harm? . . .

But from the defendant’s point of view . . . the negligence standard seems to fit not the altruists’ but the individualists’ program. . . . The self-reliant individual’s obligations could come from two sources only: contract and fault. Now, of course, it is perfectly possible to construct a definition of fault that asserts that any diminution of another’s initial property rights without compensation is blameworthy, but is also perfectly plausible to do what the classicists did: to
define those acts that gave rise to duty to compensate in terms of the reasonableness of the damaging conduct.\(^{45}\)

The problem of the relation between form and substance is worth mentioning because it relates to a deeper, more interesting difficulty in the CLS literature. Although individualistic and altruistic justifications can be made for both outcomes in every specific legal dispute, CLS still wants to maintain that American law is heavily weighted toward the individualism side of the

\(^{45}\) Id. at 57-58. Jay Feinman provides a similar example on the question of whether courts should never provide relief from contract liability on the grounds of mistake (rule position) or whether courts should use discretion in sometimes releasing parties from the contract when the exchange is sufficiently vitiated by mistake (standard position):

One individualist argument is that a rule that provides no excuse for a party who mistakenly enters into a contract will encourage self-reliance and careful planning, thereby promoting efficient use of resources. Allowing court intervention to correct the mistake raises the spectre of judicial revision of parties’ agreements. A counter argument is that to impose the risk of exchange on the mistaken party may discourage exchange, thus diminishing social welfare. A collectivist argument is that the mistaken party may have reliance or expectation interests deserving of protection, so the burden of the mistake ought to be shared, and a decision is required to determine how to share it. A counter argument is that community and interdependence are furthered when parties take responsibility for avoiding harm to others, so the law ought to discourage the relief of mistakes.

Feinman, supra note 21, at 846.

A particularly interesting manifestation of this indeterminacy is found in Kelman’s description of the argument of Katz and Teitelbaum’s article, PINS Jurisdiction, the Vagueness Doctrine, and the Rule of Law, 53 IND. L.J. 1 (1978):

In their piece on PINS [Persons in Need of Supervision] jurisdiction, Katz and Teitelbaum note that there may be a hidden interplay between the procedure-based autonomy gained from a rule-bound form and the substantive loss of autonomy that results when overbroad rules proliferate in order to avoid a situationally sensitive judgment. The example they give is quite lucid: a judge may order a child to obey all reasonable parental commands. Because the word reasonable is open textured, classically vague, the child is placed in the position the rule advocate fears: ultimate judgment will be unpredictable, possibly biased; the child has no clear sense of what she may or may not do. But an effort to avoid the loss of autonomy inextricably caused by vagueness will significantly misfire if the judge feels impelled to establish an overbroad rule to reduce his subsequent discretion. If he tells the child to “obey all parental commands” (and if he really enforces the order), her substantive autonomy will decline, even though she will know far better when she will be subject to state supervision.

M. KELMAN, supra note 27, at 51 (emphasis in original). The point here is that a substantive value like “autonomy” can equally well support arguments for a rule position or a standards position, and vice versa.
dichotomy. In our legal system, according to CLS, individualism is the dominant value, while altruism is peripheral (i.e., freedom of contract is the norm, doctrines like unconscionability or mistake are the exception).\(^{46}\)

It is tempting to think that the target of CLS critique, and what makes it a specifically left wing political movement, is the excessive individualism of both American law and society.\(^{47}\) Seen in this light, CLS would be arguing for a replacement of the individualist-dominated paradigm of law by one dominated by the altruistic model. This would be a misinterpretation of CLS. It is true that some CLS writing attacks the excessive individualism of our legal system. It is also true that for CLS authors generally a predominantly altruistic society would be no more morally attractive than a predominantly individualistic one. Not only is individualism as much an expression of our ethical aspirations as altruism, but altruism in its pure form, which would wholly subordinate the individual to communal values, seems just as repugnant and dangerous to us as individualism in its pure form.\(^{48}\)

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\(^{46}\) Kennedy says that “[t]he rhetoric of individualism so thoroughly dominates legal discourse at present that it is difficult even to identify a counterethic. Nonetheless, I think there is a coherent, pervasive notion that constantly competes with individualism, and I will call it altruism.” Kennedy, supra note 29, at 1717.


Joel Feinman and Stephen Brill have argued that the contract law rule that advertisements are not offers, of all things, is an expression of the individualistic moral standpoint. Feinman & Brill, Is an Advertisement An Offer? Why It is and Why It Matters, 58 HASTINGS L.J. 61 (2006).

\(^{48}\) Feinman says, “Notions of individualism still appeal to us, not only because of the power of our traditions, but also because such notions are, at least in part, a true description of human behavior and aspiration.” Feinman, supra note 21, at 833. He also says,

The critique of the collectivist arguments can be stated briefly because it is in many ways a
Understanding that neither individualism nor altruism is privileged for CLS raises the question: what is the vision of the good society that lies behind the CLS critique? If individualism and altruism together exhaust the set of our moral values, if both are shown to be partial and inadequate, and no synthesis or classically liberal “balancing” of these values is possible, then what values are left to us? CLS has frequently been criticized for being too negative, for engaging in “trashing” while offering no positive alternative to the institutions it attacks as contradictory and incoherent.\(^{49}\) The negative attack on “illegitimate hierarchies” runs

restatement in the negative of the elements of the individualist position. The goals of communal behavior and economic interdependence submerge the individual in the collective. Because no consensus exists on the content or proper implementation of social values, judges enforcing what they believe to be social values would be illegitimately invading individual autonomy. Even accepting the goals of collectivism, there is no proof that social welfare in either a communitarian or complex economic system is enhanced by regulatory and paternalistic contract law. Judicial intervention may discourage exchange because it encourages commercial carelessness, reduces certainty, and provides no assurance that the benefits of individual initiative can be retained. It may also foster self-centered behavior by allowing parties to reap the benefits of others’ initiatives when courts intervene into exchange transactions.

Id. at 843.


\(^{49}\) cont. In Back to the Future: From Critical Legal Studies Forward to Legal Realism, Or How Not to Miss the Point of the Indeterminacy Argument, 45 Duke L.J. 84 (1995), John Hasnas argues, as his title implies, that the inability of the Critics to specify a positive program argues for a return to the incremental, empirical, “pragmatic” approach of the legal realists.

I have characterized the public choice scholars as pursuing the realists’ project of pragmatic legal criticism in a contemporary setting. I have also suggested that they may be seen as admonishing the Critics that in the absence of empirical studies to determine whether the values they seek are more likely to be realized through the political process than through the play of market forces, there is nothing to recommend the Critics’ agenda over that of the classical liberals. At this point, a classical liberal might suggest that, to the contrary, there is much to recommend the classical liberal agenda over that of the Critics. The classical liberal might point out that there is really nothing new about the type of research called for by the realists and undertaken by the public choice scholars. He might point out that looking through the forms of the law to its actual effects on the human condition and criticizing political action for failing to recognize its empirical limitations has long been at the heart of
the classical liberal project.

Id. at 124. Hasnas’ article belongs to what Pierre Schlag calls “the it’s-all-contextual, neo-pragmatism strand” of mainstream legal thought’s efforts to assimilate and domesticate CLS thought. This strand says “Yes, law is …indeterminate… - so let’s reject formalism, grand theory and so on in favor of practical reason, pragmatism, etc.” Schlag, supra note 3, at 207-08.

What is troubling about Hasnas’ argument is that it suggests that CLS has an “agenda,” which can be compared to, or seen as a competitor of, the “classical liberal” agenda. I have argued that one of CLS’ central dilemmas is that its problematizing of the very idea of a non-contradictory “agenda” leaves it struggling to articulate where it wants to go.

Hasnas concludes as follows:

The Crits . . . have concluded from this that the law should be employed as a weapon in the political struggle to destroy the illegitimate hierarchies of liberalism and produce a more egalitarian and democratic society. To this end, they have advanced many novel proposals for the legal regulation of human conduct.

I have suggested that this greatly overstates what the indeterminacy argument actually implies. Rather, the proper inference to draw from a demonstration that the law is indistinguishable from politics is that the cases in which the law should be employed to reform society are limited to those in which the desired reforms can be effectively realized through political action. The insight the legal realists provided long ago was that to identify these cases, one must undertake the pragmatic examination of how the law works in practice relative to alternative methods of social control. Thus, there is a need for empirical investigation to determine how the expected outcomes of collective political action compare with those of politically unrestrained individuals functioning in a market environment.

Id. at 130. This suggests that Hasnas believes that the CLS agenda is one of ever-increasing legal and state power to regulate ever more aspects of life. I find nothing in CLS to support this conclusion.

Interestingly, Hasnas opens his article with just the type of example of which the Critics are so fond:

A woman living in a rural setting becomes ill and calls her family physician, who is the only local doctor, for help. However, it is the doctor’s day off and because he has a golf date, he does not respond. The woman’s condition worsens, no other physician can be procured in time, and as a result, she dies. Her estate then sues the doctor for not coming to her aid. Legal research discovers a rule of law that holds that in the absence of an actual contract for services, there can be no liability. However, further research discovers another rule that holds that in the absence of an explicit contract, the law will imply a contractual relationship when such is necessary to avoid injustice. Which rule will the judge apply? If the judge believes that physicians are ordinary human beings who are entitled to lives of their own and are not required to be at the beck and call of their patients, he is likely to apply the rule that there is no liability in the absence of an explicit contract. However, if the judge believes that by entering the practice of medicine physicians take on a special obligation to care for the sick that it would be unjust to violate, he will be more likely to apply the rule implying a contractual relationship.

Id. at 84-85 (footnotes omitted). I cannot see how careful empirical research could solve the clash between these two different ways of viewing the same facts. (Hasnas does not return to the hypothetical and never mentions it again in his article.) What would such research show?

What is noticeable is that Hasnas does not ask any of the questions relating to the specificity of this example which might help us to think about the moral issues at stake. Did the woman know that her illness might be fatal? Did the doctor? If the answer to either or both is, yes, would the doctor’s duty to respond to a dying woman accurately be described as “being at the beck and call” of a patient? As the “only local doctor,” is this the doctor’s first day off in six months, or does he play golf weekly? When we are told “he did not respond,” does that mean he
like a thread through CLS writings; one positive alternative that some CLS authors have
sketched is a replacement of the bureaucratic, liberal state and bureaucratic, corporate structures
with smaller institutions more susceptible to allowing “participatory democracy.”\textsuperscript{50} But this still
leaves the question: why is participatory democracy a good thing? What is it for?\textsuperscript{51} On what
philosophically based ethical or political theory is participatory democracy judged to be worth
achieving?\textsuperscript{52}

I raise these questions now in order temporarily to put them off; I will return to them at
the third and final section of this Article, when we will be in a better position to appreciate their
significance. The next section of this Article is devoted to a close examination of one particular
CLS dichotomy, one particular central aspect of the fundamental contradictions of liberal

think decisions about the future will be legitimate only if based on values generated by small-scale groups organized
as participatory democracies.”) For a skeptical view of the possibility of realizing this vision in contemporary
American society, see Macneil, Bureaucracy, Liberalism and Community--American Style, 79 Nw. U.L. Rev. 900,

\textsuperscript{51} For a good example of this problem, see Mark Tushnet’s TAKING THE CONSTITUTION AWAY FROM THE
COURTS (2000), which advocates the abolishing of judicial review and the handing of constitutional issues to
institutions that are more directly, democratically, in touch with the people, such as legislatures. The big problem
with such an ambitious suggestion is, as Louis Seidman has argued, that there is no way to guarantee that such a
constitutional system would yield progressive or leftist results. Louis Seidman, Can Constitutionalism be Leftist, 26
QUINNIPAC L. Rev. 557-78(2008). The outcome of various state referenda on gay marriage is not encouraging.

\textsuperscript{52} For a lengthy discussion of the CLS treatment of the subjectivity of values, see M. KELMAN, supra note 27, at 64-85.
thought. The one I have chosen is the intentionalism/determinism distinction. The reasons for centrality will, I hope, become clear.

C. Intentionalism and Determinism in Liberal Discourse.

In this section and the next, I hope to show two things. First, that the intentionalism/determinism contradiction is deployed by CLS for a specific purpose, i.e., as a weapon in the attack on the public/private distinction. Second, that the attack on the public/private distinction is itself a strategy deployed in the service of CLS’s ultimate purpose, which is to get us to see our responsibility for things for which we do not think of ourselves as responsible.

One of the contradictions plaguing liberal thought, according to CLS, is that between intentionalism and determinism. For CLS, liberal thought is simultaneously committed to two incompatible theories of human action.

Intentionalist discourse pictures human action in phenomenological, forward-looking, free will-oriented terms, emphasizing the indeterminacy of action and,

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53. I could have chosen any one of the CLS “fundamental contradictions” for the same purpose. I choose freedom/determinism because I think we can get the most philosophical mileage out of it in this context.

54. The most extensive discussion in the CLS literature is M. Kelman, supra note 27, at 86-114. For further CLS treatments of this theme, see Heller, Structuralism and Critique, 36 Stan. L. Rev. 591 (1981); Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591 (1981); Heller, Is the Charitable Exemption from Local Property Taxation an Easy Case? General Concerns about Legal Economics and Jurisprudence, in ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS 183 (D. Rubinfeld ed. 1979).
correlatively, the ethical responsibilities of actors. Determinist discourse
pictures conduct in structuralist, backward-regarding, amoral terms, holding that
conduct is simply a last event we focus on in a chain of connected events so
predetermined as to merit neither respect nor condemnation.\(^{55}\)

So far, so good. Once again, the distinctive CLS claim is that we can adopt one form of
discourse wherever we can adopt the other. (CLS dichotomies are all supposed to align with the
“fundamental contradiction” of individualizing altruism. It seems clear that the free-will
orientation aligns with the “individualist” pole, as it gives a very wide range of actions for which
individuals can be held responsible. The “deter ________” orientation aligns with the
“altruism” pole, as it gives a much wider scope for excuse and the relieving of individual
responsibility.)

Kelman argues that we are fundamentally committed to both blameworthiness and
responsibility, which presume intentionality, as conditions for punishment. We do allow
reference to determinism in to excuse certain conduct under the criminal law (insanity,
provocation, etc.) However, we try hard to confine determinism, to keep it shoved out to the
edges of the criminal law. Kelman argues that all such attempts to confine and domesticate
deterministic discourse are arbitrary, so that what criminal law calls “the excuses” continually
nibble away at the edges of responsible action.

\(^{55}\) M. KELMAN, supra note 27, at 86 (footnote omitted).
Kelman asserts the intentionalist and deterministic discourse are “in contradiction,” as are the other terms in CLS dichotomies. Again, CLS has often been criticized for using the term “contradiction” too loosely. That is, often CLS “contradictions” do not appear to involve contradiction in the strict, logical sense of simultaneously asserting p and not-p.56

I think the contradictoriness of our discourse about human action is supposed to be analogous to that in the physicist Arthur Eddington’s discussion of his “two tables.” Eddington wrote that one table at which he was writing “has extension, is comparatively permanent, is colored and above all is substantial.” The second table is “mostly emptiness,” interspersed by “numerous electric charges rushing about with great speed.”57 So is “the table” solid or empty? There appears to be no real answer to that question; it all seems to depend on which mode of discourse one wants to adopt, that of ordinary language or that of particle physics. The “same object” can be the simultaneous bearer of mutually exclusive predicates. Likewise, Kelman argues that any human behavior can be understood as intentional or determined, depending upon which framework of analysis one adopts.

A few examples, again, will illustrate Kelman’s point. As one might expect, some of Kelman’s most telling examples come from criminal law. One of his most extended discussions is devoted to two cases turning on “involuntariness” as a defense to a criminal charge. In the first

56. See, e.g., Kress, Legal Indeterminacy, 77 CAL. L. REV. 283, 306, 317 n.147 (1989) (CLS does not establish logical contradiction, either generally or in terms of the intentional/determined dichotomy).

case, Martin v. State, the defendant was arrested at home on a previous outstanding warrant while he was drunk and was then taken by the police to a public place, where the police arrested him for being drunk in public. He was held not guilty of the latter charge because his appearing in public, an element of the crime, was not voluntary. He had been involuntarily taken into public by the police.

In the second case, People v. Decina, the defendant was arrested for negligent homicide when he suffered an epileptic fit while driving a car. Here, Decina was found guilty. The court’s rationale was that his act was voluntary, because his decision to drive was voluntary and that decision was made in light of the possibility that he might have an epileptic fit while driving.

In regard to these two cases, Kelman argues that Martin could just as easily be decided in the same way as Decina. Martin no doubt did something voluntary to get himself arrested on the first warrant. (Although one might say that this assertion displays a very non-CLS naïveté about police practices.) When he got drunk, he did that “in the light of” the possibility that he might be at any time arrested on the first warrant. So his being arrested and taken into public follows from his own voluntary act (the act that caused the first warrant to be issued), in the same way that Decina’s car accident followed from his voluntary act, according to the court; Martin’s appearing in public can be seen as “not involuntary,” just as was Decina’s act.

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58 31 Ala. App. 334, 17 So. 2d 427 (1944).
60 M. Kelman, supra note 27, at 92-93. Kelman, of course, does not deny that the outcome of the two cases can easily be predicted from the “settled practice” of the criminal law. What he does deny is that settled practice has any coherent theoretical justification in a noncontradictory concept of “voluntariness.” Id. at 93.
In sum, according to Kelman, we are committed to blameworthiness as a condition for responsibility (and thus for punishment). We also rely on determinist discourse to excuse responsibility. We try to confine determinism, keep it in a peripheral position vis-a-vis the dominant intentionalistic discourse. But these attempts at confinement are arbitrary.

D. Coercion, Freedom and the Public/Private Distinction

The CLS literature gives the interchangeability of intentionalist and determinist discourse less attention than it gives the rules/standards pair, or the value subjectivity/value objectivity pair. However, I believe it is more central to CLS thought than has been recognized. It is central because of its connection to what CLS is trying to do with (and to) the public/private distinction.

61 Id. As Kelman says, the director “was certainly not simply taking steps inevitably incident to survival on earth,” when he assumed the directorship.
62 Id.
63 The intentionalism/determinism contradiction is not confined to the criminal law. Kelman argues that, like the rules/standards dichotomy, it is pervasive throughout the law. One example Kelman gives of its cropping up in an unanticipated area is the issue of the tax deductibility of medical expenses:

[T]he dispute between proponents of the deductibility of medical expenses and opponents of the deduction can in large part be seen as a controversy over whether the expenditures are intentional or chosen (hence, like most consumption expenditures, presumptively both pleasurable and taxable) or fundamentally determined, a necessary response to disease, an external fact.

Obviously neither position is descriptively complete. There are undoubtedly some medical procedures that people invariably seek unless resources are limited, and diseases that some tolerate and others don’t (that is, there are domains where one or the other description would seem especially inapt), but the controversy inevitably goes beyond the purely descriptive. The observer’s interpretive decision to emphasize the intentional aspects of behavior (such as risk taking) or the determined aspects (the unwanted, hence involuntary nature of diseases, once acquired) is difficult to defend or attack, given the availability of each discourse.

61 Id. at 101-02. To use what has become a somewhat well-known phrase: it all depends on how we “time frame” the events.
CLS takes it to be a, if not the, most fundamental tenet of liberal thought that there is a fairly distinct line between the public and private realms. This line separates the realm of choice and freedom (the private) from the realm of coerced choicelessness (the public). The private world is the world of the family, voluntary associations and the unfettered market. The public world is the world of mandatory law and the subjection to state authority and regulation.\(^6^4\)

\(^6^4\) Gary Peller provides this typical CLS account of the public/private distinction:

The dominant understanding of normal or noncoercive sexual relations is that women are entirely free to consent or not consent to sexual relations, regardless of the general distribution of power in gender relations. The connection between currently dominant notions of sexual consent and liberty of contract notions of contractual consent is captured by the term “private.” In each instance, the social relations are imagined to take place outside the context of public power, in a private realm in which the individual is self-present. In this private realm, the individual is at liberty to pursue private ends, no matter how arbitrary, so long as others are not harmed. This conjunction of freedom and privacy is contrasted with the “public” sphere, which connotes the absence of self-presence, where we are not free to simply “be ourselves,” but must conform to external demands. The public realm is thus to a certain extent “coercive,” regulated by “others.”

Richard Eldridge relates these same ideas to a fundamental strain in American philosophy:

America is understood as the place in which freedom is construed as a matter centrally, perhaps exclusively, of individual liberty (as opposed to the achievement of the power to do or be something in particular – for example, to be more fully human or properly faithful). Most Americans exercise their liberty by pursuing
The main point CLS wants to make about the public/private distinction is that it is wholly artificial. Indeed, one of the main goals of CLS doctrinal criticism is the thorough undermining of this distinction. CLS achieves this goal by arguing that all “private” exchanges take place against a necessary background of state action. That is, it shows that public coerciveness, the force of law, infiltrates what we typically think of as the private realm, and that the specific relations existing in the private realm are traceable to the form into which state power shapes them. Thus, Kelman argues:

happiness and satisfaction in the private spheres of family life, consumption, and enjoyment. Larger workplace and public identities are taken to be instrumental to satisfactions in these more private spheres, unless, of course, some people just happen to enjoy political work or quasi-familial workplace friendships or workplace activities. The business of politics in America is the fair reconciliation of competitive individual and factional interests. There are not enough goods to go around to enable everyone to satisfy every preference. Government hence properly sets up rules of fair competition, including centrally the laws of property and person and the laws of contract, fair trade, workplace safety, and nonexploitativeness.

Philosophy is understood in relation to this picture of America as committed to the overcoming of merely personal interest. People do have idiosyncratic interests. Some people devote themselves to fly-fishing; others to cello playing; others to cooking; still others to building bridges. Some people are Methodists; others are Catholics, Jews, Episcopalians, and nonbelievers. But no set of commitments, practical or religious, works for everyone. Older, premodern philosophies were quasi-theologies that attempted to install a favored set of practical or religious commitments as mandatory. They were failed efforts to make a particular form of devotion rationally obligatory. Happily, we are, in philosophy, beyond that project and its potential and actual tyrannies. Whether as the analysis of concepts, as a defense of the achievements of science (in yielding understandings that anyone might make use of or not, as anyone wishes), or as an outline of fair terms of justice and the rule of law that favors no one set of personal interests, philosophy is, above all, neutral.


A considerable amount of CLS work is devoted to showing that the public/private distinction originated in American law in the late nineteenth century, coterminous with the rise of formalism and the classic “freedom of contract” period of contract law represented by cases such as Coppage v. Kansas, 236 U.S. 1 (1915), and Adair v. United States, 208 U.S. 161 (1908). See, e.g., M. HORWITZ, supra note 15, at 10-11 (“One of the most powerful tendencies in late-nineteenth-century law was the move to create a sharp distinction between what was thought to be a coercive public law – mainly criminal and regulatory law – and a non-coercive private law of tort, contract, property, and commercial law, designed to be resistant to the dangers of political interference”); Mensch, The History of Mainstream Legal Thought, in THE POLITICS OF LAW 13, 18-21 (D. Kairys ed. rev. ed. 1990).
In every contract, for instance, it is an open question both whether the more informed party ought to have shared more of his information with his trading partner (that is, a question of “fraud” arises, in some sense, in every case) and whether the contract would have been made had each party had other physically imaginable though socially unavailable options accessible to him (that is, a question of “duress” arises in every case).  

Let us focus for a moment on the example of duress. Kelman wants to show that a question of duress “can be raised in every case,” because the law, in its most basic function of protecting property rights, always permits some form of coercion of one party by another. This coercion is largely invisible because the way that liberalism deploys the public/private distinction makes it seem “natural.”

Kelman argues that there is no adequate, neutral way to distinguish legitimate contract offers from illegitimate, coercive threats. Robert Nozick has made a well-known attempt to distinguish them in this way: an offer is a proposition the promisor would choose to receive whether he accepts it or not; a threat is a proposition the promisor would as soon never have

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65 M. Kelman, supra note 27, at 21.

66 Ian Macneil, certainly a non-Critic, recognizes this same point:

The concept of social control [of contracts] . . . runs throughout contract law. One form of social control is the power of contract itself – the power society confers on each party to a contract to invoke legal sanctions and protections. So indoctrinated are we in thinking of this form of control as freedom of contract and as a fundamental firmament of our social structure, that we easily fail to recognize its fundamental character: control of human behavior imposed by human institutions.

received. "Your money or your life" is a coercive threat because although I would want to have
the option of giving up my money in exchange for my life, the choice itself is one which I would
rather not have been presented with in the first place. But if you are starving to death and
someone says to you, “I’ll sell you food for ten times the market price,” you would at least want
to consider the proposition, so that this is a legitimate offer.

As Kelman points out, Nozick’s argument depends on an already legally constituted
system of property rights, or, as Kelman puts it, on a politically charged theory of initial
entitlements in the public realm.

The argument is hopelessly confused. Nozick acknowledges how difficult it is
to apply to “hard cases,” but he fails to see that all cases are hard. X, secure on
his boat, tells the man overboard Y, “Pay me $10,000, or I’ll let you drown.”
Nozick notes that one cannot tell whether this is a threat or an offer unless one
knows if X has the right to let Y drown: if he has such a right, Y would want to
hear X’s proposition. Of course, though, if certain forms of violence are
acceptable, then the proposition “Give me your money or I’ll (exercise my right
to) shoot” is an interesting one for the recipient. But “pay me ten times the
market price for food or I’ll (impermissibly) let you starve” is clearly a threat if
allowing someone to starve is not a privileged act.  

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67 This argument is spelled out in Nozick, Coercion, in PHILOSOPHY SCIENCE, AND METHOD (S. Morganbesser, P.

68 M. KELMAN, supra note 27, at 23. Kelman also says:
What looked like a purely private transaction, involving two freely willing individuals seeking to maximize their satisfactions in a free market, can now be seen as an act of coercion backed by, and made possible by, the property-enforcing power of the state. What we normally describe in intentionalistic discourse, can also be described in deterministic discourse.

The Critics are making an important philosophical point about the organization of society, namely, that there is no such thing as a realm of pre-collective, pre-existing “natural” relationships, on top of which the public, coercive, legal power of the state is imposed. “What is more particular to liberal thought is the dream of an order that fundamentally simply protects or replicates some natural pre-collective set of relations.” CLS is concerned to show that the dream really is merely a dream.

A choice to give a mugger the money he asks for is perfectly intentional once the background conditions are settled. The price I am willing to pay you for shoes likewise depends on your state protected right to withhold the shoes from me. The Realists’ greatest contribution in this area was to point out the degree to which the basic background conditions we tend to take for granted (like the state’s regulation of physical force) represent coercive decisions with vital distributive consequences (altering the power those more capable of mustering force can wield).

Id. at 103. Elizabeth Mensch develops the same theme:

Hale made a similar point about the supposed private right of free contract: state enforcement of a contract right represents, like property, a delegation of sovereign power. Moreover, he also pointed out that coercion, including legal coercion, lies at the heart of every “freely” chosen exchange. Coercion is inherent in each party’s legally protected threat to withhold what is owned; that right to withhold creates the right to force submission to one’s own terms. Since ownership is a function of legal entitlement, every bargain is a function of the legal order. Thus, there is no “inner” core of free, autonomous bargaining to be protected from “outside” state action. The inner and outer dissolve into each other.

Mensch, supra note 64, at 23 (footnote omitted).

69 Kelman, supra note 27, at 107 (emphasis in original).
The CLS goal is to make us see coercion, lack of freedom, choicelessness, in what we normally think of as “private life,” especially in the family, the workplace and the “free” market (to which conservatives like to assimilate the employment relation, with the only difference being that the good being exchanged happens to be the labor of a person.) This is the reason that CLS is generally “anti-rights.” A good deal of CLS writing specifically rejects the idea that a focus on legally guaranteed individual rights is the way to win a measure of true autonomy for most people. 70 Indeed, CLS takes the exact opposite tack, claiming that the recognition of individual rights actually fosters a society full of domination and hierarchy. This is because “rights” form the wall by which liberalism seals off the public realm from the private. A grant of a legally enforceable right to a person gives that person autonomy vis-a-vis the state, but it also gives him a state sanctioned realm of power within which he can act arbitrarily, a space in which he has the power to exploit others. 71 The right to a free market in fishing is a right to overfish sharks to death. (And there are people who will say that this is exactly as it should be. The only restraint on my overfishing of sharks should be my fear of killing the golden goose, the fear that

70 In his critique of Ronald Dworkin’s theory of rights, Critic Peter Gabel denies in the strongest terms that rights can function as a solution to the real problems of unfairness and inequality in American society:

If we were to take Dworkin with complete seriousness by applying his value-system to the facts of the hard cases discussed in the book, we would have to assume that the sort of goods and opportunities that people really want from their lives can be captured by such phrases as the right to collect damages for injuries, the right to go to law school, the right to get an abortion . . . the right not to be jailed for touching someone passionately, and so on. However important these limited powers may be to the litigants who assert a claim to them, they are largely irrelevant to the truly serious problem that these litigants share with almost everyone, an everyday life of operating machines, disseminating clerical knowledge, and ingesting televised images. Yet from the legal-distributive point of view, they express the full meaning of “human dignity” and “equal concern and respect.”


71 Elizabeth Mensch argues that the legal model of “bounded rights and powers” “conveys [the message] that actual power relations in the real world are by definition legitimate and must go unchallenged.” Mensch, supra note 64, at 20-21.
I will fish sharks to death and thus lose my profits. My desire to make money off sharks, on this view provides much more effective protection to sharks than any governmental regulation.)

CLS is thus repelled by the spectacle of liberal philosophers of law who spend their time worrying over the issue of the legitimacy of judicial decision-making. What is repellant is the idea that the biggest theoretical problem in the law is the possibly illegitimate authority wielded by unelected individual judges, the coercion and arbitrariness inherent in judicial rule-making if that activity cannot be somehow justified or constrained. For CLS, this form of coercion is so remote from the actualities of ordinary people’s lives as to be close to the vanishing point when compared with the typical, everyday forms of oppression and domination that pervade daily life. Speaking about gender hierarchy, Kelman puts it this way:

72 Dworkin provides a typical statement of typical liberal concerns:

Lawyers lean heavily on the connected concepts of legal right and legal obligation. We say that someone has a legal right or duty, and we take that statement as a sound basis for making claims and demands, and for criticizing the acts of public officials. But our understanding of these concepts is remarkably fragile, and we fall into trouble when we try to say what legal rights and obligations are. We say glibly that whether someone has a legal obligation is determined by applying ‘the law’ to the particular facts of his case, but this is not a helpful answer, because we have the same difficulties with the concept of law.

These eruptions signal a chronic disease. Day in and day out we sent people to jail, or take money away from them, or make them do things they do not want to do, under coercion of force, and we justify all of this by speaking of such persons as having broken the law or having failed to meet their legal obligations, or having interfered with other people’s legal rights. Even in clear cases (a bank robber or a willful breach of contract), when we are confident that someone had a legal obligation and broke it, we are not able to give a satisfactory account of what that means, or why that entitles the state to punish or coerce him.

Routine subjection to sexual violence is central in and constitutive of women’s lives, in their daily disempowerment . . . I don’t mean to be purely rhetorically manipulative . . . when I suggest that few women felt nearly as disempowered by the extramajoritarianism of Roe v. Wade as by the pervasiveness of sexual violence.  

In devoting themselves to worrying about domination by unelected federal judges, liberal theorists strain at the gnat and swallow the camel.

I think it is a mistake to see CLS as primarily a theoretical movement, if by that one means a movement whose primary purpose is to convince its readers of the truth of various theoretical propositions about the law. Indeed, as I will show in Part III of this Article, it is part of what CLS is trying to tell us that simply dumping more theories into the world can only contribute to the disease, not to its cure. Rather, CLS is primarily addressed to people who are

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73 M. KELMAN, supra note 27, at 199. Kelman goes on to put this point very strongly:

To focus on the problem of judicial tyranny – as if the alternative were the fabulous empowerment we all get by voting for our Congressmen, as if any degree of empowerment wholly within the traditional public sphere were adequate – is simply, as I have noted, a blinding deflection.

Id. at 200.

74 Duncan Kennedy has said that CLS began as a “movement,” and then declined (mostly in the late 1980’s) into a “school.” A Critique of Adjudication, infra note 80, at 9. The difference is that while the CLS school is a “strictly academic project,” the CLS movement’s project was “transforming society by transforming legal education.” Id. The movement, therefore, involved not just scholarly analysis, but the transformation of the concrete relations between law professors and colleagues, students, research assistants, secretaries, support staff, custodial staff, etc. The locus classicus of CLS as a movement is Kennedy’s Legal Education as Training for Hierarchy, supra note 23. See also Schlag, supra note 3 at 202-204. The purpose of Kennedy’s early work was to counteract the demoralizing effect of the day-to-day law school experience on idealistic students.
involved with the law, as lawyers, judges, law professors, legislators, administrators, and so on, and it is an attempt to get them to see what one is responsible for when one is implicated in the legal system. CLS wants to show us that we are responsible for more than we thought, that certain pervasive forms of human suffering make a claim on us that we cannot acknowledge without acting. It does this by getting us to see that the unfairness and injustice of the “private” world is more deeply dependent on the legal system than we had thought. Insofar as we are part of that system, we have a responsibility to change it, or we acquiesce in its effects and benefit from its injustices. CLS’s aim is not to convince us of certain propositions but to render us capable of action by showing us our place in the world, and the nature of our connections and commitments to others within it.

The CLS redescription of the “intentionalist” private world as a “determined” or “coerced” world goes beyond simply pointing out the relations of hierarchy and domination between real persons within that world. CLS attacks the intentionalist model of the private world on a second level, namely, that on which we seem, on the surface, to be acting free of domination by others. An important strand of CLS thought is that the desires we act on and try to fulfill in the private realm are themselves imposed upon us from without. As a result, even when we appear to be engaged in the purest rational, utility maximizing behavior, we are neither free nor autonomous, because we have not chosen what satisfactions maximize our utility.  

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75 Id. at 130. Peter Gabel sounds the same theme in his review of Dworkin:

What is missing from this treatment of the problem of substantive justice is an evaluation of the human quality of these goods and opportunities, of the extent to which the social system has been able to satisfy the true needs of the human heart as opposed to the distorted needs which have emerged from the operation of a market organized for profit. The emphasis which the book places on distributive justice – on the “moral” distribution of whatever goods and opportunities the social
This theme is in turn related to the CLS conception of law as “ideology,” that is, as one of the symbolic systems that functions to make us really believe in the naturalness and justice of the liberal world. To the extent that this ideologizing function succeeds, our beliefs, wants, and desires are not our own. We lack real autonomy. We are not free, but determined by social forces. (The CLS use of the Marxian concept of “false consciousness” is connected to this use of the intentional/determined opposition.) Even the dominators and the oppressors are not free and autonomous.

The problem of determinism on this level is reproduced in CLS discussions of law and the legal process, in which CLS usually tries simultaneously to maintain two theses which are difficult to reconcile. The best discussion and acknowledgement of this tension is in Karl Klare’s article, “Critical Theory and Labor Relations Law.” Klare explains that critical approaches to law “have always been caught in a tension between the critique of formalism and an aspiration to provide systemic analyses.” By the “critique of formalism,” Klare is referring to system produces – has the attraction of a superficial appeal to values, but it assumes that people’s true needs are a collection of hypostatized “wants” that can be satisfied through the legal apparatus of a state-regulated market – that is, through the parceling out of various “rights” and “obligations”.

Gabel, supra note 70, at 314. Gabel suggests that what we think of as our desires, what an economist would call our tastes and preferences, do not represent “us”, and to the extent that we act upon them, we are actually determined by forces outside of us. Conversely, our true needs are not acted upon, because we aren’t aware of them. So Gabel concludes: “In our world this production process operates very destructively, separating us from ourselves and from each other so efficiently that we forget what our true needs are by driving our memory of them into an oblivion which psychoanalysis calls the ‘unconscious’.” Id., at 314-15.

Two comprehensive critical discussions are found in Feinman and Gabel, Contract Law as Ideology, and Gordon, New Developments in Legal Theory, both in THE POLITICS OF LAW (D. Kairys ed. rev. ed. 1990). See also, Dalton, A Deconstruction of Contract Law.

Klare, supra note 47, at 61.
the CLS demonstration that “the prevailing rules are not preordained by the nature of things, nor are particular case results required by legal logic,” but that on the contrary, “legal rules and decisions are contingent and conventional -- they are products of human choice.”78 The point of this demonstration is to show that all instances of rule formation and rule application involve moral and political choice. By “systemic analysis,” Klare is referring to the opposite CLS demonstration, that legal outcomes are not unpatterned but “systematically reflect, generate and/or reinforce poverty, class inequality, and patriarchal, homophobic, and racial domination.”79

Klare is acute enough to realize that these two perspectives on the law conflict, that “antiformalism collides with and erodes systemic explanation.” This is because systemic theories “seem to require some version of formalism, some claim or assumption that legal orders have an inbuilt, determinative structure that steers routine decision making.”80 In other words, the contradiction is again the one between intentionalism and determinism, between seeing legal decisions as free choices by the decision maker and simultaneously as determined by the systemic content or ideology of the legal system as a whole.

78 Id. at 65.

79 Id. at 66. CLS does not believe that judges are knowing tools of the hierarchy, a secret society working in a Machiavellian manner to protect its power and authority. Rather, the CLS critique of law as ideology is meant to show how men of good will, indeed, all of us, who see themselves as working for justice and fairness can continually replicate structures of hierarchy. In a real sense, they are determined to do so.

Duncan Kennedy’s, Critique of Adjudication: Fin de Siecle (1997), is an excellent study of the way in which the functioning and structure of our legal system leads even the most conscientious judges, trying their hardest to “follow the law” and to be neutral, to allow ideological considerations to seep into their opinions. That is the point of Kennedy’s book, in fact: that ideology is not imposed from the highest levels like the U.S. Supreme Court, so that it “matters” who gets elected president before which justice dies or retires, but is built into the system down to its lowest levels.
This internal difficulty in the CLS critique of law is replicated in, and can be read back into, the CLS critique of social relations itself. We have seen that CLS is concerned to show that what the law paints as a private world of freely acting individuals is really a world of domination and unfreedom. Kelman puts it this way:

Most of our daily experiences of thorough disempowerment, of subjection to the kinds of power we associate with truly totalitarian imagery, are in relation to people who are in the liberal imagination’s private sphere, whether teachers, husbands, or . . . bosses. The disempowerment one faces at work, though, goes so far beyond the scope of what is usually comprehended by Process-analyzed pleas for formal democratization of the workplace that all election-centered talk seems utterly beside the point. In the Critical picture, disempowerment is not peripheral, a result of the exclusion of workers’ representatives from some nominally powerful board or other, but is enacted in innumerable daily battles. . . Most Critics probably believe that it is in honing the capacity to resist that the greatest gains will lie, not in altering state protective functions. . . Whatever the route, the struggle for fuller empowerment in that critical sphere seems so skew to the issue of, say, overreaching courts that one wonders whether the Critics and those in the mainstream are observing the same world of powerlessness. 81

81 M. KELMAN, supra note 27, at 198-99.
Now, CLS has prepared us for what seems like the inescapable response to this: they don’t see the same world of powerlessness. Both CLS and the Chicago School of Law and Economics see the world through their own equally plausible “universes of discourse.” There is no “world of powerlessness” to be seen. There are only phenomena describable in the “deterministic” discourse; the same phenomena could be just as easily, and just as “correctly,” be described in the “voluntaristic” discourse of economic analysis. The entire point of CLS analysis has been that these two modes of discourse are both equally plausible in every case.

According to Kelman, “if there is both an available determinist account and an intentionalist account of every human action, there is no truth about conduct, just paired rhetorical stories.”82 If we take this seriously, then we must conclude that Kelman’s “world of powerlessness” is just one more rhetorical story. CLS’s theoretical approach to liberal society undercuts its own moral authority. If CLS does deserve to be labeled “nihilistic,” it is not because it rejects the fundamental principles of conventional or mainstream legal analysis. It is because its skeptical epistemology undermines its own moral pretensions.83 This self-destructive

82 Id. at 111. This is a standard CLS theme, appearing in many CLS works. See, e.g., Abel, A Critique of Torts, 37 U.C.L.A. L. REV. 785, 785 (1990) (“any account of the social world is partial and imbued with values”).

83 Martha Nussbaum has revealingly pointed out that the deconstructive skepticism of someone like the literary critic Stanley Fish, who has become theoretically allied to CLS, strikingly resembles the arguments deployed in Robert Bork’s The Tempting of America. Nussbaum draws attention to the ease with which “progressive” post-modernism collapses into the reactionary: “To give up on all evaluation and . . . on a normative account of the human being and human functioning [is] to turn things over to the free play of forces in a world situation in which the social forces affecting the lives of women, minorities and the poor are rarely benign.” Nussbaum, Human Functioning and Social Justice: In Defense of Aristotelian Essentialism, 20 POL. THEORY 202, 212 (1992).

Here is what Nussbaum specifically says about Bork:

Bork begins by demanding universal agreement as the criterion of acceptability for an ethical principle. No principles, of course, pass the test. Without further ado and without any search for other criteria of evaluation, Bork concludes that all moral evaluation is altogether
aspect of CLS is very disturbing to anyone who is sympathetic to CLS criticisms of the specific contours of contemporary law and society.

Is this dead end necessarily the end of the CLS journey? Is there any way to capture the insights of CLS without having to accept the radical subjectivism and skepticism inherent in the “indeterminacy” and “fundamental contradiction” theses? These are the questions I ultimately hope to answer.

I want to begin by retracing our steps to where CLS goes astray, namely, to the idea that we are fundamentally committed to two irreconcilable modes of discourse, intentionalism and determinism. I want to show that this is not true, that we are not in fact so committed. Getting past that error will put us in a position to see what is of value in CLS without succumbing to its failings.

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Id. at 212. The first several pages of this article are highly recommended; they recount Nussbaum’s experiences at two academic conferences at which this problem arose in stark form. The anecdotes would be hilariously funny if they were not so disheartening.
II. Critique: Fundamental Contradiction and the Problem of Free Will

A. CLS and the Compatibility Thesis

The CLS argument concerning the contradiction between intentionalism and determinism depends on a certain way of interpreting ordinary human activities. Sometimes we hold people responsible for what they do, sometimes we excuse them and decline to hold them responsible for what they do. CLS maintains, to put it as bluntly as possible, that to hold persons responsible they must be free, but to excuse them, their acts must be determined. The CLS problem is that attributions of responsibility depend on seeing persons as voluntary actors, but the exculpation of persons depends on seeing them as determined by causes. These two “ways of seeing” are incompatible. Moreover, both are inherently universalizable, capable of application to all human conduct. Therefore, any attempt to limit one by the other is inherently unstable.

Kenneth Kress has criticized Kelman’s version of this argument on the ground that Kelman accepts “the popular notion that determinism is incompatible with free will in spite of most current philosophers’ preference for the compatibility thesis that human actions can be free even if they have antecedent, external causes.”84 Kress’ argument, in so far as it rests on what “most philosophers” think, (or worse, prefer) remains on the level of an appeal to authority, to power. Appeals to “what most philosophers prefer” have no weight in philosophical argument. Is the compatibility thesis so noncontroversial that simple reference to it is sufficient to defeat the CLS claim?

84 Kress, supra note 56, at 316.
Compatibilist theories generally maintain that attributions of responsibility are possible (i.e., “voluntary” actions can be distinguished from “involuntary” actions) even though all human actions are ultimately wholly determined (i.e., caused). For compatibility theorists, the outstanding issue is: within the realm of determined actions, how do we distinguish those for which persons are to be held responsible, from those for which they will not be held responsible?

One compatibilist approach, I suppose the simplest, is purely pragmatic. It holds that the line between voluntary and involuntary acts is to be determined by the answer to the purely empirical question: what sorts of acts should we hold people responsible for if we want maximally to deter undesirable behavior? We discover that punishing the insane and those who act under duress does very little to deter such behavior and so we hold these persons “not responsible” for their acts.\footnote{P.F. Strawson puts it, these compatibilists “point to the efficacy of the practices of punishment, and of moral condemnation and approval, in regulating behavior in socially desirable ways. In the fact of their efficacy, they suggest, is an adequate basis for these practices; and this fact certainly does not show determinism to be false.” P.F. Strawson, Freedom and Resentment, in Studies in The Philosophy of Thought and Action 2 (1968). Susan Wolf makes the same point: “The philosophical inquiry that is required, on this view, is, in the last analysis, not a theoretical investigation at all, not ultimately a matter of discovery. Rather, it is a practical inquiry involving forward-looking considerations, the ultimate goal of which is to arrive at the best system of rules to govern the practices associated with responsibility in ways most satisfactory to our needs.” S. Wolf, Freedom Within Reason 17 (1990).}

It should easily be recognizeable that this type of analysis is inadequate as an account of human responsibility. Indeed, it does not yield a concept of responsibility at all. If our concern is solely with developing a system of rewards and punishments for the purpose of deterring

\footnote{For a good example of this sort of compatibilist theory, see M. Schlick, When Is a Man Responsible? in Problems in Ethics 143-56 (O. Rynins trans. 1939).}
unacceptable and encouraging acceptable behavior, then attributions of responsibility are wholly irrelevant; The notion of “responsibility” can just be dropped as a needless middle term between “action” and “efficacious response.” Whether someone deserves to be punished doesn’t matter, all that matters is whether it would be useful to punish him.\textsuperscript{86} Indeed, it is not even clear that the word “punish” would make sense in this context. Isn’t it only possible to punish someone when they “deserve” it, in some sense, not just when it improves social order?

A more sophisticated form of compatibilism argues that an agent is “free” if he or she acts in accordance with his or her own will, as opposed to being compelled by external forces.\textsuperscript{87} A free agent is not one who is uncaused, because the will itself is caused. A free agent is one who is acting not under compulsion, but rather on the basis of choices made in accordance with his or her own beliefs and desires, although this choice is itself ultimately the product of some causal process.\textsuperscript{88} As Susan Wolf points out, this model of free action implies that the kleptomaniac’s act of theft is a free act, since he has the desire to steal and the beliefs necessary to satisfy that desire. This runs counter to our normal moral intuitions about people in the position of the kleptomaniac, people who are not under compulsion in any normal sense but who are driven by desires that in some sense are not their own.

\begin{footnotes}
\item[86] S. Wolf, supra note 85, at 18-19.
\item[87] “Under normal conditions of freedom (for a compatibilist), an agent is able to govern her behavior on the basis of her will, which in turn can be governed by the act of the agent’s desires.” \textit{Id.} at 28.
\item[88] Michael Moore has defended this version of a compatibility theory. Moore, \textit{Causation and the Excuses}, 73 Calif. L. Rev. 1091 (1985). Moore claims that we are excused from responsibility from our acts not when our actions are caused but only when some condition or event interferes with our ability to reason practically. Moore defines “practical reason” as the ability to: 1) form an object we desire which will be the good of our actions; 2) form beliefs about how to go about achieving the object; 3) act on the foregoing desires or belief. \textit{Id.} at 1148.
\end{footnotes}
Gary Watson argues that compatibility theory can deal with these sorts of cases through a slight adjustment. Already, we see that compatibility theory’s general strategy is to maintain responsibility in the face of a wholly determined causal universe by separating “causes” into two kinds: causes which are in some sense “ours” or “part of us” and so which it would make sense to hold you responsible for (I almost said, “You would deserve to be held responsible for,” but I stopped myself) and causes “outside of us,” in the sense in which the two billiard balls are not part of each other at all and the second has no responsibility for being struck by the first.

Specifically, Watson suggests that an action should be regarded as free if it is produced not only by the agent’s own desires, but his own values as well. Some things an agent desires because he thinks they are good or worthwhile or valuable. Other desires that an agent has he does not value (to eat ice cream, smoke cigarettes, sleep with one’s best friend’s spouse, smash in the face of one’s victorious racquetball opponent with one’s racquet). For Watson, an action is free if it accords not just with one’s “motivational system” (one’s desires), but one’s “valuational system” as well. When the kleptomaniac steals or when the drug addict takes drugs, they act on the basis of their own desires but not on the basis of desires that are part of their valuational systems. Therefore, they act not on desires that are part of their “real self,” but rather on desires from which they are alienated. As Wolf says, this form of compatibilism can accurately be called the “Real Self” view of free action.

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89 Watson, Free Agency, 72 J. Phil. 205 (1975). Watson leaves it unclear how a “value” can function as a cause.

90 Id. at _______.

91 The stealing and the drug taking might be things for which the actors will be held responsible if they are part of
Yet, the compatibilist “Real Self” view of voluntary action and responsibility is also ultimately unsatisfactory. For one thing, it also does not completely accord with our moral intuitions as to the limits of responsibility. As Wolf says,

all that is required for responsibility on this view is . . . that an agent have a real self, and that she be able to govern her behavior in accordance with it. But it does not matter where her real self comes from, whether it comes from somewhere else or nowhere at all.93

But sometimes we feel an agent should not be held responsible for what he did because he is not responsible for his real self. In such cases, the “Real Self” form of compatibility theory tells us that the agent should be responsible for his acts, but our intuitions tell us he should not be responsible.

92 S. WOLF, supra note 85, at 34-35.
93 Wolf, supra note 85, at 35.
For we sometimes have reason to question an agent’s responsibility for her real self. That is, we may think it is not the agent’s fault that she is the person she is—in other words, we may think it is not her fault that she has, not just the desires, but also the values she does. There may be forms of insanity that give rise to these thoughts. For although many mental disorders may, like kleptomania, leave a large part of a person’s independently identifiable real self intact, and others may undermine a person’s capacity to have any unified real self at all, there is no reason to think it impossible for mental illness to take the form of infecting someone’s values in such a way that the self with which the victim completely and reflectively identifies is a self that other persons reasonably regard as being drastically mentally ill. (The Son of Sam murderer who made headlines some years ago might be an example of this sort.) . . .

Finally, and perhaps most disturbingly, there are persons whose values we are apt to explain as resulting from deprived or otherwise traumatic childhoods—persons who have fully developed intelligences and a complete, complex range of psychological structures, levels, and capacities for judgment, but who nonetheless do not seem responsible for what they are or what they do.\textsuperscript{94}

\textsuperscript{94} Id. at 37. I’ve seen people, and so have you, in the highest echelon of society, treat each other with the most sadistic cruelty, and I just know that at some level they are not fully responsible for what they are doing, that they are “acting out.”
In other words, someone who has been brought up in parentless or one-parent environment, perhaps with drug-addicted parents, in deep poverty, with few or any positive role models, no or little education . . . .

Wolf concedes that the claim that the people I have just described are not responsible for their acts is controversial. It may be possible for the compatibility theorist to deny what I claim are our intuitions and simply claim that the people Wolf and I describe are responsible, period.95 But even if we set these examples aside for this reason, there are still difficulties with the compatibilist “Real Self” view.

The main difficulty, again, is that the compatibilist view, no matter how sophisticated, reduces moral responsibility to causal responsibility.96 Since for the compatibilist all human action is caused, the only difference between voluntary and involuntary action is where the cause is located, whether within or without the set of beliefs, desires and values of the actor (however

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95 This is Michael Moore’s approach. Moore recognizes that the category of “excuse” in the criminal law might arguably be expanded to include conditions like brainwashing, possession of an extra Y chromosome, premenstrual tension, and, most relevantly, adverse environmental background. Moore, supra note 88, at 1139. He then just denies that persons subject to any of these conditions in any way act involuntarily or deserve to be excused for their acts. Id. at 1145-48. “The fact that what a person desires or believes is caused by his environment in no way makes it difficult for him to reason practically.” Id. at 1131.

Kelman has replied to Moore on just this point:

[Moore] must explain away parts of our practices of negating blame or responsibility as resulting from guilt, suppressed resentment, or elitist condescension . . . while, for no good nonrhetorical reason, failing to give parallel explanations, like egotism, suppressed smugness, and self-satisfaction or elitist contempt for the blame-assigning positions he favors.

M. Kelman, supra note 27, at 318n.12. Of course for Kelman, Moore’s inconsistency just here illustrates liberal thought’s tendency to privilege free will (blame assignment), while cutting back determinism (blame negation) as much as possible. The “individualism” pole dominates over the “altruism” pole.

96 For Moore, people act freely when they have “opportunity to exercise their causal powers.” Moore, supra note 88, at 1135. I’m not sure what this means; I’ve never really been aware of having an opportunity “to exercise my causal powers.”
those metaphorical “within” and “without” are ultimately to be described). We do use the term “responsibility” to refer to causal responsibility; we say “the bent axle was responsible for the accident” or “the beautiful weather was responsible for the picnic’s success.” This sense of responsibility is different from the moral sense of responsibility, yet compatibilism reduces the latter to the former. A human being is “responsible,” for the compatibilist, if he is the locus of a cause that produces certain effects in the world. Wolf calls this form of causal responsibility, “superficial responsibility,” and contrasts it to “deep responsibility.” As she says, when we hold someone deeply responsible, “we are doing more than identifying her particularly crucial role in the causal series that brings about the event in question.”

Recall that we began this discussion of compatibilism only because that theory has been put forward as a tool with which to refute CLS. If we find this type of compatibilism, which concedes that all action is determined, to be unsatisfactory as an account of what it means to be a responsible agent, then we have to look for another strategy to defeat the CLS argument which claims intentionalism and determinism are incompatible and in conflict. I will try to provide one in the next section.

B. Dissolving the Dichotomy

When we look at the world without philosophical preconceptions, what do we see? We see that to be a “responsible person” is to be regarded as an appropriate object of a certain range
of attitudes and judgments, and as a legitimate participant in a certain range of practices. These attitudes and judgments include pride, shame, gratitude, resentment, respect, contempt, forgiveness, love, hurt feelings. In considering this range, we should keep in mind how much the esteem and goodwill of others matters to us, and the extent to which it is important that we have opportunities to express gratitude, receive respect, show contempt. We should also keep in mind the many different kinds of relations we have with others -- as family members, lovers, colleagues, sharers of mutual interest, chance parties to an enormous range of encounters.

In this world of what P.F. Strawson calls reactive attitudes we also find excuses. We find things that modify or mollify natural reactions of resentment, indignation, or hurt feelings stemming from another’s act. There are two broad categories of excuse. The first kind consists of excuses such as the following:

“He didn’t mean to do it.”

“He didn’t realize what he was doing.”

“He had no alternative.”

“He was pushed.”

97 The following account of responsibility is greatly indebted to P.F. Strawson’s analysis of the problem of free will. See P.F. STRAWSON, supra note 85.

98 If someone treads on my hand accidentally, while trying to help me, the pain may be no less acute than if he treads on it in contemptuous disregard of my existence or with a malevolent wish to injure me. But I shall generally feel in the second case a kind and degree of resentment that I shall not feel in the first. If someone’s actions help me to some benefit I desire, then I am benefited in any case; but if he intended them so to benefit me because of his general goodwill towards me, I shall reasonably feel a gratitude which I should not feel at all if the benefit was an incidental consequence, unintended or even regretted by him, of some plan of action with a different aim. Id. at 5.
Strawson notes that none of these excuses demands that we suspend towards the agent in question our normal reactive attitudes toward him. These excuses do not require, or even invite, us to view the agent as one towards whom our ordinary reactions and attitudes are inappropriate. We do not see the actor as anything less than a responsible agent. Rather, we see the injury as one for which he was not (fully) responsible.  \(^9\) The offering of these pleas is in no way opposed to or outside of our ordinary interpersonal relationships and attitudes.

Strawson’s second group of excuses includes the following:

“He wasn’t himself.”

“He’s been under a great strain lately.”

“He was under post-hypnotic suggestion.”

“He’s only an infant.”

“He’s a hopeless schizophrenic.”

“His mind has been systematically perverted.”

“That’s purely compulsive behavior on his part.”

These pleas do ask us to suspend our ordinary reactive attitudes, either at the time of the action (the first three) or all the time (the last four). If we are asked to suspend our reactive attitudes to

\(^9\) Id. at 7.
someone all the time, it is because they are psychologically abnormal or in some way morally undeveloped.\textsuperscript{100}

The contrast between these two groups of excuses turns on the difference between the attitude of participation and involvement in a human relationship, on the one hand, and what Strawson calls the objective attitude, on the other. To take an objective attitude to someone is to see him as an object of social policy or treatment, someone to be managed or handled or cured or trained. The objective attitude might encompass some forms of human emotion (pity, repulsion, fear, some, but only some, kinds of love) but it could not encompass others (resentment, gratitude, anger, forgiveness). If one’s attitude towards someone is wholly objective, one cannot quarrel or reason with that person; at the most, one can only pretend to do so.\textsuperscript{101}

The objective attitude is not necessarily confined to cases where participant, reactive attitudes are inhibited by abnormality or immaturity. We can look with an objective eye on normal, and mature persons. We can resort to this attitude as a relief from the strains of involvement, or as an aid to policy or just out of curiosity. Normally, however, we cannot do this for long, or completely.\textsuperscript{102} To do so would be to take the position of a detached outsider as our normal relation to our fellow humans, as if our only interest in others was to know them.

\footnotesize
\begin{itemize}
\item[\textsuperscript{100}] Id. at 8.
\item[\textsuperscript{101}] Id. at 9.
\item[\textsuperscript{102}] Their spouses say that law students often adopt this attitude. Who hasn’t felt the temptation to retreat to the objective attitude in the middle of a stressful personal situation? I think we would all admit, however, that this is a strategy of avoidance, not a stance we can adopt consistently in our dealings with others.
\end{itemize}
Now, what if we decided that determinism is true? That is, what if we decided that it is the case that all human behavior is caused and could not have been otherwise? Would or should all our reactive attitudes, all gratitude, all resentment, all forgiveness, come to an end?

Look back to the sorts of excuses that we saw inhibit resentment or blame. It would not follow from the truth of determinism that one or another of these considerations is present in every case of human action. It doesn’t follow from the truth of determinism that, for example, every injury was done by someone who was ignorant of causing it, or had good overriding reasons for reluctantly doing it or who acted inadvertently or . . .

The participant and reactive attitudes are suspended in cases of abnormality. But it cannot be the case that abnormality is the universal condition. It literally cannot be the case that we could consider everyone to be abnormal all the time. We suspend our normal reactive attitudes in cases which must be defined in opposition to the vast bulk of unexceptional cases in which those attitudes are appropriate.103

103 This is a purely general philosophical point about the operation of our concepts. Another revealing employment of this type of argument, which may throw light on my use of it here, is by the philosopher O.K. Bouwsma, discussing Descartes’ famous “evil demon.” Descartes used the notion of an evil demon, who might be deceiving us at any time, to prove that we never can really know anything, if by “know” we mean, “be certain of.” Bouwsma tries to make sense of the evil demon in this way:

Accordingly I have tried to imagine the evil genius engaged in the practice of deception, busy in the creation of illusions. In the first adventure everything is plain. The evil genius employs paper, paper making believe it’s many other things. The effort to deceive, ingenuity in deception, being deceived by paper, detecting the illusion – all these are clearly understood. It is the second adventure, however, which is more crucial. For in this instance it is assumed that the illusion is of such a kind that no seeing, no touching, no smelling, are relevant to detecting the illusion. Nevertheless, the evil genius sees, touches, smells, and does detect the illusion. He made the illusion; so, of course, he must know it. How then does he know it? The evil genius has a sense denied to men. He senses the flower-in-itself, Milly-in-her-self, etc. So he creates illusions made up of what can be seen, heard, smelled, etc., illusions all because when seeing, hearing, and smelling have seen, heard, and smelled all [i.e., all the human senses have been
Our question is, could the truth of determinism lead us to look at everyone in an objective way all the time? I want to maintain that this is literally inconceivable for us. It would mean that there could no longer be any interpersonal relations as we know them. If that happened, we would cease to be human, cease to be the kind of creatures that we are. The persistence of these types of relationships and attitudes is a necessary truth for us. It is not necessary in the analytical sense, the sense in which “2 + 2 = 4” is necessary. Rather, our relation to these particular attitudes is what Wittgenstein calls a “grammatical” or “conventional” truth -- something which is both contingent, in the sense that it logically might have been different, and necessary, in the sense that we can’t imagine changing it while remaining the kind of creatures, the kind of human beings we are.

We do take up the objective attitude toward the insane, for example, because they are incapacitated in some way (they are living in a fantasy world, or are acting out unconsciousness). The special sense senses nothing. So what human beings sense is the illusion of what only the evil genius can sense. This is formidable. Nevertheless, once again everything is clear. If we admit the special sense, then we can readily see how it is that the evil genius should have been so confident. He has certainly created his own illusions, though he has not been deceived. But neither has anyone else been deceived. For human beings do not use the word “illusion” by relation to a sense with which only the evil genius is blessed.

O.K. Bouwsma, Descartes’ Evil Genius, in PHILOSOPHICAL ESSAYS 98-97 (1965). That is, for “illusion” to have a clear sense, it is a grammatical requirement that it be possible to use the word in the plural and to have a coherent sense of reality against which illusions can be ranged. Any illusion I might be afflicted with is one of a number of possible illusions that might interfere with my perception of reality. The illusion fostered by the evil genius, including as it does everything, all possible illusions as well as the reality against which we normally identify illusions, is necessarily a singular term with no plural usage, since there is only one “everything.” But since this distinction between “illusion” and “reality” must therefore take place outside of human experience, it has no relevance to what humans count as knowledge.

Likewise, it cannot be the case that the condition of being abnormal can be applicable to all persons all the time. There must be a “normal” world against which the “abnormal” can be contrasted.
We do not take up this attitude because we believe determinism to be true. In fact, we deploy our whole array of excuses and our entire language of praise and blame without relying on either the proposition that in general people are “determined” or that they are free. We can see this if we look carefully at the way we actually employ our concepts of responsibility. In many of the cases in which we excuse people, the actor is not unfree in any clear sense. People who act in ignorance, for example, are free. Whether someone is excused often does not have any connection to whether the actor acted “freely” or not. Ignorance in serving my guest poison when I thought it was sugar from the supermarket is excusable. But ignorance that the powder I took down from the pharmacist’s shelf is poison is not excusable. But it is hard to see in what sense the actor is less “free” in one case than in the other.

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104 As Strawson says:

First, we must note, as before, that when the suspension of such an attitude or such attitudes occurs in a particular case, it is never the consequence of the belief that the piece of behavior in question was determined in a sense such that all behavior might be, and, if determinism is true, all behavior is, determined in that sense. For it is not a consequence of any general thesis of determinism which might be true that nobody knows what he’s doing or that everybody’s behavior is unintelligible in terms of conscious purposes or that everybody lives in a world of delusion or that nobody has a moral sense, i.e., is susceptible of self-reactive attitudes, etc. In fact no such sense of ‘determined’ as would be required for a general thesis of determinism is ever relevant to our actual suspensions of moral reactive attitudes.

Id. at 18. Moore is absolutely right on this point; he says, “It is not because crazy people are caused to do what they do that they are excused; rather, crazy people are excused because they are crazy.”

105 For an excellent discussion showing the irrelevance of the metaphysical notion of “free will” to the contract doctrine of duress, see Note, Economic Duress After the Demise of Free Will Theory: A Proposed Tort Analysis, 58 IOWA L. REV. 892 (1968). This note shows that the presence or absence of “free will” matters much less in the way duress cases come out than factors like relative bargaining position, adequacy of alternative remedies, fairness of the resulting bargain, ratification, etc.

106 Hunter, Acting Freely and Being Held Responsible, 12 DIALOGUE 233, 237-238 (1973). In the same vein, Hunter says,

Cruel words in a fit of justifiable anger may be excused, while in the same fit savage acts may be inexcusable, -- not because the agent was not free to refrain from the cruel words and was free to refrain from the savage acts, but because the graver the act, the greater the incumbency we place upon people to refrain from it.

Id. at 238.
Indeed, if a person charged with some untoward behavior simply pleaded as an excuse that he was “unfree,” we would not accept this plea (indeed, we couldn’t be even sure what he meant) without our hearing the details. The details can make a big difference. If a person is so angered by litter on his carpet that he attacks the litterer, we will not excuse him. But we excuse the same actions if he sees his child being attacked. We would react differently in these two cases even if we were fully persuaded that in both cases the attack, as a subjective matter, was psychologically equally provoked.  

Is this the sort of example to which a CLS type of analysis might be applied? I have argued that whether we excuse you on the basis of your ignorance for serving poison to your guests depends on whether you took that white powder from the sugar pot or from your medicine chest. A CLS response to this might be: You see! The same act can be described as free or determined, we can hold you responsible or not, can manipulate the language of responsibility however we wish.

I do not think we can “easily” see these examples in one of two incompatible ways. Can we really imagine ourselves excusing the person who attacks the litterer in the same way as we excuse the person who attacks in defense of his child? It is one thing to say, as CLS adherents do, that we “can easily see” one case as like the other. But can we really? Or, once again, would

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107 Id. Hunter adds, “No amount of evidence as to how profoundly the former person hates litter is likely to change our verdict about him.” Why not?
really being able to see these two cases as the same involve such profound changes in our attitudes to our fellow humans that really imagining such a case is beyond our powers? What sort of people would we be, what sort of world would we live in, if we found it routinely acceptable violently to assault people who got our carpet dirty?

What I am arguing is that we cannot see ourselves as generally adopting a purely objective attitude toward others, and that when we do adopt such an attitude in particular cases, which is the only way we can adopt it, we do not do so because we think determinism is true. More generally, the question of responsibility is prior to, and independent of, questions of freedom and determinism. That is, we usually do not feel the need for “theories” like “free will” or “determinism” in order to raise or resolve questions of the responsibility of specific persons for specific actions. These questions are raised and resolved internally to our ordinary moral discourse.

But can’t we coherently imagine that we are never free because our very desires, wants, beliefs, attitudes, etc. are shaped by social forces over which we have no control? As we have seen, it is a theme for at least some Critics that we are determined in this way. Kelman, for example, says that “each of us making ordinary economic decisions . . . can be pictured as will-less objects of social forces far beyond us.” He expands on this thought as follows:

108 One can imagine cases in which one might accept an excuse in such a case. Perhaps the litter is radioactive. Or we live in some ghastly future world like those imagined by Philip K. Dick, in which littering has very serious ecological consequences. But now all we have done is change the hypothetical.

109 M. KELMAN, supra note 27, at 132.
Neither particular momentary desires nor stated aspirations can define all of a person’s possibilities. Any set of desires is learned, not so much through the sort of explicit demand creators that left-liberal critics often focus on (like advertising) but by adapting one’s needs to the whole fabric of social life (learning to value what is available in one’s culture). Thus, any particular revealed preference might clash not only with an explicitly stated metapreference but with ones we could readily imagine having developed if a given individual had been formed in a somewhat different setting. . . . The desires of the concrete self can never exhaust our underlying desires.  

This idea of a pervasive social determinism is absolutely central to CLS because it is the even more basic CLS idea which underlies the “fundamental” contradiction between individualism and altruism. As Duncan Kennedy realizes, the simultaneous attraction to these two ethical models is based on a simultaneous attraction to and repulsion from relations with other persons. We know that we cannot do without others if we are to be fully human, yet we also fear relations with others because we fear the loss of our unique self, our individuality, through imposition of group norms or demands, or even through submersion of ourselves in the collectivity. As Kennedy sums it up, “relations with others are both necessary to and . . .
incompatible with our freedom.” What Kennedy expresses most deeply here is a fear of “determinism” in the sense in which Kelman describes it.

Roberto Unger expresses the same fear when he describes humans as both context-dependent and context-transcendent beings. As Andrew Altman has noted, I think accurately, “Unger appeals to the subjective experience an individual has of himself and of his social world. . . [E]ach individual experiences himself as an infinite personality trapped within the finite boundaries of his social world.” Unger’s image is actually one of two selves, one a determined, contingent self of socially imposed attitudes and desires, the other a free “infinite self,” full of unrealized possibilities and potentialities trapped within the contingent self.

This picture of a pervasive social, economic, and cultural determinism has an undeniable appeal. We can easily come to feel that there is a basic incompatibility between the autonomy necessary if we are to be free and responsible actors, and the fact that all of our desires and

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with others, in groups of two or even two million, and it is a good rather than a bad experience.

But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good . . . numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. And the price is a high one. Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment.


112 Id. at 213.
114 A. ALTMAN, supra note 3, at 160-61.
attitudes, everything on which our choices are based, seem to be traceable back to sources outside ourself. Wolf gives a particularly eloquent summary of these feelings:

But if our desires are a result of heredity and environment, they come from something external to ourselves. And if, in conjunction with our desires, the situations in which we find ourselves dictate which actions we will ultimately decide to perform, then our behavior is completely explained by forces that originate outside of ourselves. . . . The cases of hypnosis and coercion now seem exceptional only in being cases in which the agents’ lack of autonomy is dramatically evident. But if a lack of autonomy that is dramatically evident excludes agents from responsibility, a lack of autonomy that is less easily perceived will exclude agents as well . . . for it seems that about any agents and any act whatsoever we can ask for an explanation of why that agent performs that act. And though we may begin to answer this question in terms of features internal to the agent, we can always press beyond these beginnings and ask why the agent possesses these features. If this question in turn is answered by reference to still other features internal to the agent, we can press further and ask why the agent possesses these additional features. Eventually, we will reach a set of features that must be explained by facts external to the agent, or our explanation will simply come to an end, with the understanding that the agent’s
possessing these features is either a random occurrence or a brute, inexplicable fact.  

In the face of these feelings, I want to raise this question: is this way of thinking about ourselves really intelligible? I want to argue that it is not. Wolf says that “about any agent and any act we can ask for an explanation of why that agent performs that act.” I will show that in fact we can not intelligibly ask that question.

I begin with the idea that the problem of free will and determinism is similar to the problem of skepticism in epistemology. Both problems are generated by arguments that have the same structure. In both cases, the argument brings us to see that questions I can raise about any specific claim to know or any specific attribution of responsibility can be raised about the possibility of knowledge or responsibility altogether.

For example, I am looking at a perfectly ordinary object, say, an envelope. I believe I know that I see the envelope in front of me. The skeptic asks, “But do you see all of it?” Well, faced with this question, I am forced to admit I do not; I only see the side of it turned toward me; I cannot see the whole envelope. The sceptic then asks, “Then how can you really know there is an envelope in front of you? How can you be really certain?” I can quickly be brought to admit that I do not really see an envelope, but only a whitish patch of a certain shape. The real world

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115 S. Wolf, supra note 82, at 12-13.

116 Wolf has pointed out this similarity. Id. at 6, 149n.1.

117 For a good adumbration of this argument, see G.E. Moore, Some Main Problems Of Philosophy 43-45.
of objects that I thought I knew has been replaced by a world of what philosophers like to call “sense data.”

In like fashion, Descartes begins the skeptical argument of his Meditations with the assertion that he knows that “I am here, seated before the fire.”\textsuperscript{118} Yet Descartes then remembers that he has often slept and dreamed that he was in that particular place, seated before the fire. He recalls that “on many occasions I have in sleep been deceived by similar illusions.”\textsuperscript{119} Descartes quickly comes to realize that he can never be sure that he is awake and not dreaming. Therefore, he can never really be certain that he does know any of the things about “the world” that he thought that he knew. Now the Cartesian philosopher is faced with the problem of getting the world back – if he can.

The skeptic about our freedom argues in the same way, makes an argument with the same general structure. We generally see ourselves as autonomous agents, but we also realize that in certain specific cases, cases of compulsion, for example, we are not autonomous, and we are not responsible for our actions. We then can be brought to see that we can raise the possibility of compulsion in every case (for, as Kelman argues, don’t even our own desires compel our will?) and conclude that we never really are free.


\textsuperscript{119} Id., at 146.
Is this argumentative move, from the specific to the general, legitimate? (“Because I realize that sometimes I did not know when I thought I knew, I never do know.”) I argue that it is not. I will rely on and develop here the argument that Stanley Cavell has deployed in his book *The Claim of Reason* against skepticism concerning the external world, and then apply it to our problem concerning autonomy and free will.¹²⁰

Cavell finds that the skeptical argument generally begins with an appeal to a certain kind of example, the postulation of a certain situation in which we can be persuaded that the validity of human knowledge as a whole is at stake in the example of knowing under consideration. Cavell characterizes this situation as one in which I am to be imagined as having no reason for making a claim to know that, e.g., I see an envelope here, or that I am seated before the fire. In other words, the epistemological sceptic’s classic examples are kept so bare of context that there is no point to his saying, “I know I am sitting here before the fire,” except that it is (happens to be) true that I am sitting before the fire. The fact that the knowledge claim in question has no point (is used to perform no speech act) deprives that claim of all the usual criteria by which we can ordinarily assess such claims.

The sceptic’s argument must begin with an example that asserts a claim to knowledge which looks ordinary enough; this is the basis of its plausibility. But the sceptic’s argument also requires that his example not assert a genuine claim to knowledge, since if it did, doubts cast upon this particular claim would not undermine the status of human knowledge as a whole.

¹²⁰ *Id.* at 146.
Ordinarily, the advancing of a claim to knowledge carries its own specific possibilities of doubt with it, as it were: if I say, “I know there was an envelope on the desk,” it must be possible for us to flesh out the context of that speech act in such a way as to make clear why I assert this knowledge, in the face of what possible doubts my claim is justified, and I must be able to provide a justification of my claim.\textsuperscript{120a} Perhaps you claim I can’t have known an envelope was there because the light in the study was poor, and I counter by claiming I got up to within a foot of the desk, looked carefully, etc. If my claim to know is discredited here, if I increase the light and realize that I was wrong, that that object was not an envelope, and so I didn’t know, this casts no shadow upon human knowledge as such. It’s just an ordinary case of making a mistake. The sceptic needs his example to look like an ordinary claim to know (in fact, like a paradigmatic case of claims to know) in order to seem plausible, but he needs not to be advancing an ordinary claim to know if his argument is to have the desired generality.\textsuperscript{121}

That the examples from which the sceptic’s argument begins are what Cavell calls “non-claim” accounts for the fact that these examples seem somewhat odd, an oddness of which even the sceptic himself is aware. The sceptic realizes there is something peculiar about his saying, “I

\textsuperscript{120a} That is, why and under what conditions do we say, “I know there is an envelope on the table,” rather than simply, “There is an envelope on the table?” The sceptic’s argument depends on these two assertions being equivalent in every way.

\textsuperscript{121} Id. at 217-21. To repeat the example, the skeptical assertion “I know there is an envelope on the table,” when the envelope is plainly lying in full view, in good light, etc., is not an ordinary claim to know because it does not meet the criteria for something being an assertion, namely, that it informs someone of something. Why do we imagine that our hypothetical philosopher is asserting, “I know there is an envelope on the table?” Just because there is one there? What is the point of the assertion? That it is “obvious” is not a reason for making it. If it has a real point (because the envelope is in fact partly hidden, so only a corner of it is visible, or it is in poor light, etc.), we will know how to resolve any doubts I may raise about it without raising any general skeptical conclusions; at most, we’ll find you made a mistake, something we do many times every day.
know there is a piece of paper on my desk in front of me now," and he tries to explain this peculiarity away by saying that this statement is one we would ordinarily never bother to make, because it is so obvious. The truth of the assertion is so obvious that there would never be any practical reason for making it. That the context of his examples is defined in such a way that the assertion made in it will have no pragmatic component or aspect at all, is precisely what allows this assertion to function for the sceptic as what Cavell calls a “best case” example of knowledge; if knowledge turns out not to rest on a firm foundation here, it is insecure everywhere. It is the obviousness of the claim to know which makes the example so powerful. The sceptic implicitly assumes that the fact that his assertion has no pragmatic dimension does not affect in any way the meaning of that assertion. But this is precisely where the sceptic is mistaken.

So, to revert to our earlier example, if you say that there is an envelope on the desk and I ask, “But do you see all of it?”, what will you take me to mean? That question cannot meaningfully be asked unless I have some specific reason for asking it. Perhaps it is that the envelope is partially covered by other papers and there is some question as to whether what is protruding from under them is the corner of an envelope. But what could I mean by asking that question when the envelope is manifestly sitting in a good light in plain view on your desk? What could I be getting at, what could be the point of that question? In the former case, the question cannot generate any sceptical conclusion; we know perfectly what procedures to use to resolve the doubt raised by that question. In the latter case, we can generate a sceptical conclusion. But we can do so only by means of a question that attempts to escape the conditions of human speech, namely, that we are beings inextricably in the world and that to speak is
always necessarily to act. The sceptic’s question, “Do you see all of it?” is a question which
purports not to be an act; it has no point.

Cavell’s ultimate reply to the sceptic thus takes this form:

Perhaps one feels, “What difference does it make that no one would have said, without a special reason for saying it, that you knew the green jar was on the desk? You did know it; it’s true to say that you knew it. Are you suggesting that one sometimes cannot say what is true?” What I am suggesting is that “Because it is true” is not a reason or basis for saying anything. It does not constitute the point of your saying something; and I am suggesting that there must, in grammar, be reasons for what you say, or be a point in your saying of something, if what you say is to be comprehensible. We can understand what the words mean apart from understanding why you say them; but apart from understanding the point of your saying them we cannot understand what you mean.122

Cavell’s argument is derived, in spirit, from J.L. Austin’s discussion of the concept “voluntary” in his famous essay, “A Plea For Excuses,” and turning briefly to Austin’s argument will allow us to make the transition to the problem of free will and determinism.123

122 Id. at 205-06.

For Excuses,” Austin showed that the term “voluntary” cannot be applied to all human acts. We tend to think that all human acts must be either voluntary or involuntary, must be one or the other. (This sets up the idea that all acts must be either free or determined.) But this is not right. In fact, the very question, “Was this action voluntary or not?” can only be raised in situations in which the act in question is somehow undesirable, or peculiar, or untoward. To ask whether an act was voluntary or not is necessarily to imply that it is somehow, as Cavell puts it, “fishy.”

“If a person asks you whether you dress the way you do voluntarily, you will not understand him to be curious merely about your psychological processes (whether you’re wearing them `proceeds from free choice . . .’); you will understand him to be implying or suggesting that your manner of dress is in some way peculiar . . . [H]e wouldn’t (couldn’t) say what he did without implying what he did: he must MEAN that my clothes are peculiar.” This is part of what Wittgenstein calls the “grammar” of “voluntary.”

It follows that the question of the voluntariness of one’s actions cannot be intelligibly raised about all of one’s actions. I go to the supermarket to buy dinner, go to the store to buy a CD player, go to the theater to see a movie. About none of these actions can it usually even be asked if they are voluntary. Not unless, that is, we are willing to suggest that everything we do is

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124 S. CAVELL, Must We Mean What We Say?, in MUST WE MEAN WHAT WE SAY? 6-7(1969).

125 Id. at 9. A fascinating philosophical question is, what is the nature of the “must” in this sentence? What is the nature of the necessity that connects “voluntary” and “fishy?” It is not that “fishy” is part of the meaning of “voluntary” as “unmarried male” is part of the meaning of “bachelor;” it is not analytic in that sense. But neither is it a purely contingent, empirical connection, like “All swans are white.” Wittgenstein called these connections “grammatical,” and would say that an action be “fishy” is part of the “criteria” according to which “voluntary” is applied.
somewhat suspicious, unusual, untoward, etc. To ask of all our actions whether they are “compelled,” in the absence of a specific reason to raise that question, is to do the same thing that the skeptic does when he asks, of the envelope in plain view, “Do you see all of it?” It is to ask a question that is empty, a question that pretends to escape the constraints of human speech, one of which is that not only must what you say be meaningful, you must mean something by it. In this case, the determinist is using the word “voluntary” apart from its normal context and without the presence of its normal criteria. CLS’s generalized sense of compulsion by social forces is not something that can intelligibly be thought.

In fairness to CLS, it must be said that it sometimes seems that it indeed does want to suggest that all our ordinary, everyday, unremarkable actions are fishy, suspicious, peculiar, untoward, in need of explanation in some way, etc. Kelman says:

Child beaters can be pictured as having some capacities for self-control, while each of us making ordinary economic decisions (picking a good for its status

126 We can no more do this than we can treat everyone “objectively,” as if everyone were somehow abnormal.

127 Anthony Flew has made very much the same point:

Hospers protests: “We say, for example, that the person is free to do so-and-so if he can do so if he wants to – and we forget that his wanting to is itself caught up in the stream of determinism, that unconscious forces drive him into wanting or not wanting to do the thing in question . . .”

Certainly someone may set about acquiring a liking for beer or extinguishing a craving for tobacco; and in time, if only he persists intelligently, succeed. Yet it is absurd to presuppose as part of an ideal of responsibility that all likes and dislikes should have been in this sort of way achieved. For a being totally without preferences must be incapable of any choice at all, and hence incapable of setting himself to acquire preferred preferences. So if and in so far as this is part of an idea of responsibility the moral is: not that that ideal is frustrated by the lamentable facts; but that it is an ideal internally incoherent.

associations, picking a high-paying, meaningless job because we have become habituated to having access to certain goods we had earlier lived without comfortably) can be pictured as will-less object of social forces far beyond us. Certainly there is no “empirical” case that goods addiction -- that is, powerful habituation to a particular lifestyle -- is “cured” more often than a predilection to engage in child beating or drug dependency, “choices” traditionally filtered through determinist lenses.\(^\text{128}\)

Kelman is suggesting that aspects of my life that I might consider wholly ordinary (going to work at a large, corporate law firm, going to the store to buy an IPod, watching the latest TV situation comedies) are in need of specific explanation and justification. It is to suggest to me something like this: “The ordinary choices you make, the things you normally find interesting, amusing, gratifying, etc. are so debased, so far from what we would expect a fully realized member of the human race to choose, that it legitimately raises the question, whether you are doing any of these things voluntarily.”\(^\text{129}\)

\(^{128}\) M. Kelman, supra note 27, at 132.

\(^{129}\) Peter Gabel gives the most powerful expression of this thought in CLS literature comes:

Here in the concrete we do not find a group of abstract “citizens” engaging in lively moral discourse, but rather a group of dispersed and isolated persons impotently linked through the cycle of production and consumption that determines their social existence. We find the mechanical functioning that most people call work, the packaged emptiness of fast food, the obsessive manipulation of appliances that occupies the boredom of leisure time, and the sort of “love” that attempts to realize desire through ambivalent dependency and pornographic fantasy. The unhappiness and sense of hopelessness embedded in these processes are not simply the consequence of “psychological problems” as popular culture keeps insisting in despair; these concrete processes constitute the social totality within which the psyche is formed and finds itself in difficulty.

Gabel, supra note 70, at 311-12.
What I have shown, however, is that these CLS criticisms of our behavior do not rely on any “theory” about determinism, freedom, autonomy or responsibility. Rather, the reverse is true; any questions of our freedom or responsibility for our actions depend on our first accepting the validity of the specific criticisms of those acts. (E.g., I will only accept the relevance of the question, “Do you dress the way you do voluntarily?” if I already accept the idea that there is something funny, weird, unusual, etc. about the way I dress. Otherwise, I can’t even know what your question means. Would you?) You cannot even ask whether all our actions are voluntary or involuntary unless you already accept Kelman’s and Gabel’s characterization of our lives.

The conclusion I wish to draw from this lengthy discussion is that there are no “two modes of discourse” upon which our normal activities of allocating responsibility and excuses depend. There is only one discourse, our complex ordinary language of praise and blame. The language of responsibility and that of excuse do not contradict each other. The language of responsibility is inherently normative. Whether people are considered to have acted voluntarily or not depends not on whether they were “free” or “determined” but on the extent to which they conform to standards of proper, appropriate, moral behavior. My point is that we do

\[\text{\textsuperscript{130}}\] Susan Wolf has correctly said:

[W]hat we need to know if we are to find out whether we are free and responsible beings is . . . whether we have the ability to think – and on the basis of our thought, to act – well rather than badly. That is, we need to know whether we have the ability to choose and to act on the basis of the right reasons for choosing and acting . . . the question of whether we have this ability is not so much a metaphysical as a metaethical, and perhaps also an ethical, one. For we cannot answer it unless we know what counts as doing the right thing and having the right reasons.

S. WOLF, supra note 85, at 70-71.
not need a language of “determinism” or “causation” to excuse people’s conduct when we feel it deserves excuse; all we need is the ordinary language of excuse, justification, palliation, aggravation, mitigation, extenuation, etc. which we apply every day to human actions. If actions really were caused, they wouldn’t be human actions and one could neither be held responsible nor excused for them. (You can neither blame nor forgive your cat from taking the salmon off the kitchen counter.)

Kelman’s own example, of the two criminal defendants Martin and Decina, illustrates this. Kelman believes that the crux of whether Martin or Decina acted voluntarily is whether either caused the criminal act by a “free act of will” of their own, and this question has no answer because it all depends on where we decide to draw the boundary cutting off the sequence of causes leading up to the crime. But what seems like the obvious difference between the cases is that we just reasonably expect the epileptic Decina to anticipate an accident when he drives but do not reasonably expect Martin to anticipate being arrested and taken to a public place while drunk when he commits the original crime which gets him arrested. Kelman treats this difference as if it were a purely post hoc, “political” manipulation of the cases unrelated to the real issue of voluntariness. But Kelman has it backwards: the issue of the voluntariness of Decina’s and Martin’s actions depends on the resolution of the question of the reasonableness of their actions in their specific context, not the reverse. The question of whether their actions were “causally determined” is irrelevant. When Martin committed the original crime he would not reasonably have expected to be arrested (When? eight months later? when drunk?) and dragged into a public place and be charged with another crime. This is what makes us judge his “being drunk in a public place” involuntary, not the other way around. (It is my sense that most people
who read Kelman’s analysis of Martin find it clever and ingenious, but not really persuasive. My impression is that everyone believes the original decisions were correct.)

In our (single) ordinary discourse about responsibility, we are held responsible for acts to the extent that we were able with respect to them to exercise our practical reason. Michael Moore has maintained this, but Moore understands practical reason as the ability “to give effect to one’s own desires.”¹³¹ This is too limited a view of practical reason. Practical reason is not the ability to do what you (really) want, but the ability to be guided by reason, to do the right thing for the right reasons.¹³²

¹³¹ Moore, supra note 88, at 1143. For a lengthy discussion of this issue, see Gudel, Beyond Causation, 70 Texas L. Rev 17 (1991).

¹³² Wolf explains that according to this view, which she calls the Reason view, “one’s freedom and responsibility are diminished insofar as one’s values and choices are determined by things that interfere with or prevent the exercise of one’s ability to appreciate and act in accordance with the True and the Good.” S. WOLF, supra note 85, at 145.

This account of the concepts of freedom and responsibility captures most closely our ordinary employment of these concepts. First, it explains why we do refuse to hold (fully) responsible persons who suffer from severely deprived childhoods or who come from extremely deprived social circumstances, an intuition which Moore is forced simply to reject. These persons may be well able to reason practically on the basis of their own beliefs and desires, but unable to understand they are acting badly, unable to “know better.”

[L]et us first imagine a man who must choose which of two switches to pull. It seems obvious that, if he does not and cannot know that one of them will turn on a light while the other will send an electric shock through a young boy in the next room, the man is not morally responsible for which of these effects he brings about. But what if he does know of these effects, and he also knows that electric shocks are horribly painful, but he does not know and cannot know that there is anything wrong with shocking people? . . . [W]hen we do imagine someone who is so incapacitated, whether as a result of severe mental retardation or extreme sociopathy, we readily conclude that this mental deficiency removes him from the sphere of moral responsibility as much as does more narrowly defined (nonculpable) factual ignorance. Id. at 121.

I would go even further than Wolf. People from extremely deprived backgrounds, especially emotionally deprived, which unfortunately tends to go together with material deprivation, “know” in some sense that shocking people is “wrong,” but can’t bring themselves to care about the wrongness of their conduct if it stands in the way of their desires. (The abstraction of the light switch hypothetical tends to hide this. What do we imagine he is turning the switch for?) But this is a very delicate and difficult area, about which, however, one
Practical reason in this sense has no place in the CLS account of responsibility. CLS instead presents us with two warring philosophical theories, one of a pure, unfettered autonomy, the other of a pure causal determinism. Neither is either a necessary or sufficient condition of the attribution of responsibility. Within the general structure or web of human attitudes and responses, there is endless room for modification, redirection, criticism and justification. But the whole neither calls for nor permits any external justification in terms of “theories” like free will or determinism.  

thing is certain: if we partially excuse the extremely deprived 16-year-old convenience store hold-up man it is not because we think his act was caused in the way one billiard ball strikes another and causes it to move. For another example, consider why a seven-year-old is held less responsible for unkind conduct than a seventeen-year-old. It is because the younger child doesn’t know as well that unkindness is wrong. Id. at 133.

Second, the Reason View explains why our language of responsibility is asymmetrical. That is, we normally hold that people who are psychologically determined to do the right thing for the right reason are responsible for their acts and do deserve praise for them, but that people who are psychologically determined to do bad things are not held responsible and don’t deserve blame.

If we suspend our tendency to think of responsibility as a wholly metaphysical issue and examine our intuitions regarding particular cases, the air of paradox surrounding the asymmetry between good actions and bad ones disappears. For if phrases like “I couldn’t help it,” “he had no choice,” “she couldn’t resist” typically count as excuses intended to exempt the agent from blame for an action, they do not ordinarily serve as grounds for withholding praise. “I cannot tell a lie,” “he couldn’t hurt a fly,” are not exemptions from praiseworthiness but testimonies to it. If a friend presents you with a gift and says she “couldn’t resist,” this suggests the strength of her friendship and not the weakness of her will. If one feels one “has no choice” but to speak out against injustice, one ought not to be upset about the depth of one’s commitment. And one has reason to be grateful if, during times of trouble, one’s family “cannot help” coming to one’s aid.

Id. at 80. Remember Martin Luther: “Ich kann nicht anders.” What these examples show is that the freedom we need to be responsible beings is not a pure autonomy, a freedom from being determined by anything, but a freedom to be determined by reasons, by what reasons there are for doing the right thing.

P.F. STRAWSON, supra note 85, at 23.

133
III. Reconstruction: Seeing, Knowing and Doing in Critical Legal Studies

I have shown that our ordinary concept of responsibility, on which our legal notions of punishment are based, does not embody a contradiction between two incompatible modes of discourse. As a result, our allocations of responsibility are not indeterminate or arbitrary or “political” in any interesting sense. (Although our ordinary use of these notions of responsibility certainly can be manipulated for political ends, as Kelman himself demonstrates.) CLS is mistaken about this. But to see this only raises the more interesting issue: what has gone wrong? In philosophy, it is never adequate just to show that someone is “wrong.” One’s responsibility to the other has not been fully discharged until one has accounted for the error, shown why the mistaken position could seem plausible or compelling. This is what I want to do for CLS.

Commentators have often treated CLS as if it had two distinct parts: a “philosophical” or “jurisprudential” theory of law, centering on the notion of indeterminacy, and a “political” part, centering on notions of hierarchy and domination. These parts are often treated separately, and it is rare that commentators on CLS are equally interested in both parts, with the result that treatments of CLS tend to be skewed toward one or the other part. Andrew Altman has noted this:

It is often pointed out, correctly I believe, that there is no necessary connection between CLS claims regarding legal indeterminacy and its egalitarian political vision. But this simply means that the one does not logically stand or fall with
the other. There is, however, a kind of strategic connection: CLS’s political vision requires that one see the current legal order as essentially illegitimate. CLS’s claims regarding legal indeterminacy serve to delegitimate that order by undercutting that order’s own conception of why it is legitimate.\(^{134}\)

As I have already argued, CLS is concerned not with legitimacy but with responsibility. I want now to show what the connection is between the CLS concern with responsibility and its emphasis on indeterminacy and incoherence.

**A. Moral Judgment and Human Response**

Duncan Kennedy has summed up CLS’s critique of traditional legal reasoning by saying, “There is never a `correct legal solution’ that is other than the correct ethical and political solution to that legal problem.”\(^{135}\) Ronald Dworkin, writing about the Senate hearings to confirm Clarence Thomas’ appointment to the Supreme Court, has likewise criticized what he calls the “neutrality thesis,” a thesis which Dworkin says that no person with any experience in constitutional law really believes. The neutrality thesis is that “a Supreme Court justice can reach a decision in a difficult constitutional case by some technical legal method that wholly insulates his decision from his own most basic convictions about political fairness and social justice.” Dworkin calls this neutrality thesis “preposterous.”\(^{136}\)

\(^{134}\) Altman, *supra* note 14, at 215n.27

\(^{135}\) Kennedy, *supra* note 74, at 45.

Now, what is the difference between Kennedy and Dworkin? On this central issue, they seem to be in complete agreement. Yet CLS considers Dworkin a paradigm of that liberal thought that it wholly rejects.\(^{137}\) It is important to realize that the important difference between CLS and Dworkin is not the content of their political views. It is not that Dworkin has a traditional, “rights-based,” liberal view of social justice and CLS has a more socialist view -- although I think that this is true. It is that Dworkin believes that there is a “right answer” in every legal (which means moral) dispute, even though reasonable persons might disagree about what it is.\(^{138}\) CLS, on the other hand, is committed to indeterminacy and fundamental contradiction. But doesn’t Kennedy’s own statement presuppose there is a “correct” ethical and political solution?\(^{139}\)

Our question is, why does CLS constantly seem to be vacillating on this issue? Why does it not just assert that the world is full of coercion and that this is bad?\(^{140}\) Why does it

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139 Kennedy is driven to statements such as this: [The insight into the fundamental contradiction does not] render . . . political practice impossible, or even problematic: we can identify oppression without having overcome the fundamental contradiction, and do something against it. But it does mean proceeding on the basis of faith and hope in humanity, without the assurances of reason.

Kennedy, supra note 111, at 212-13. This has a certain ring to it, but we face now the task of unpacking exactly what it means.

140 Kennedy does so in his Sexual Abuse, Sexy Dressing, and the Eroticization of Domination, in D. KENNEDY, SEXY DRESSING, ETC. (1993), which is a straightforward criticism of sexual abuse and domination. Kennedy argues convincingly that men who are not sexual abusers or harassers, men who would even be horrified at the thought of abusing a woman, benefit from the (toothless) legal regime we have in regard to sexual abuse. This is a beautiful example of Critical Legal Studies at its best: showing us our position within a legal/social world.
continually undercut the ground on which it wants to stand? We want to understand why CLS is
drawn to attack not just certain unjust social forms, but moral reasoning itself. It is not because
our reasoning is contradictory and indeterminate. I have tried to show that, in regard to the
intentional/determined dichotomy, it is not. Why does CLS then find it necessary to find
contradiction and indeterminacy in reasoning itself?

We can begin to understand this by looking briefly at Herman Melville’s story, *Billy Budd*, one of the greatest of all literary depictions of legal issues. In this story, the innocent
“handsome sailor,” Billy Budd, is accused of conspiring mutiny by the “naturally depraved”
master-at-arms Claggart. His stutter makes it impossible for Billy to reply at once to this
accusation, and in a fit of frustrated rage, he strikes and kills Claggart. The H.M.S. Bellepotent’s
commander, Captain Vere, convenes a drumhead court to try of Billy aboard ship for this killing.
Ultimately, the summary court, composed of three naval officers, condemns Billy to hang, but
only after great hesitation, since clearly there is a sense in which Billy does not deserve
condemnation, especially if we believe Claggart’s accusations to be false, which all the judges

Joseph Singer is one Critic who has clearly recognized the centrality of responsibility to CLS:

[W]e hope to engage in normative argument in a way that acknowledges our responsibility for the
decisions and value choices we make. This means that we cannot accept forms of normative
argument that characterize decisions as the product of merely applying decision procedures. We
hope to rely more on “making” than “finding” metaphors. To put it somewhat cantankerously:
value choices cannot be made by applying a formula and seeing what comes out; morality is not
like geometry. Instead, it requires active judgment.

Singer, Legal Realism Now, 76 CAL. L. REV. 465, 533 (1988). See also Singer, The Player and the Cards:
(and Vere) do. As the court hesitates, Captain Vere sways them to a guilty verdict with a lengthy speech. In part, Vere says:

But your scruples . . . make them advance and declare themselves. Come now: do they import something like this: If, mindless of palliating circumstances, we are bound to regard the death of the master-at-arms as the prisoner’s deed, then does that deed constitute a capital crime whereof the penalty is a mortal one? But in natural justice is nothing but the prisoner’s overt act to be considered?

How can we adjudge to summary and shameful death a fellow creature innocent before God, and whom we feel to be so? - Does that state it aright? You sign sad assent. Well, I too feel that, the full force of that. It is Nature. But do these buttons that we wear attest that our allegiance is to Nature? No, to the King. Though the ocean, which is inviolate Nature primeval, though this be the element where we move and have our being as sailors, yet as the King’s officers lies our duty in a sphere correspondingly natural? So little is that true that, in receiving our commissions, we in the most important regards ceased to be natural free agents . . . For suppose condemnation to follow these present proceedings. Would it be so much we ourselves that would condemn as it would be martial law operating through us? For that law and the rigor of it, we are not responsible. Our vowed responsibility is in this:
That however pitilessly that law may operate, we nevertheless adhere to it and administer it.\(^{141}\)

The officers do not condemn Billy but the law operating through them condemns him. This is what CLS sees: that we are all turning into Captain Vere, that legal reasoning itself has, for us, become a way of evading our responsibility for legal decisions. It is wonderful to have a government of laws and not men, but the idea of law can’t be used to deny our ultimate responsibility for applying the law. (That this denial is coming even to be expected of us, just see the charades of the last several Supreme Court justice confirmation hearings, as each nominee tries more than the last to minimize his or her personal role or values in the adjudicatory process and to present his or her function as passive as possible.\(^{142}\))

I want to expand on this point by discussing a case which has taken on an almost talismanic status in CLS literature, *Local 1330, United States Steelworkers v. United States Steel Corp*.\(^{143}\) At least four CLS articles have discussed this one case at some length.\(^{144}\)

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\(^{141}\) [H. Melville, Billy Budd, in Selected Works 754 (1984).](#)

\(^{142}\) For a discussion of the increasing meaninglessness of congressional hearings on Supreme Court nominations, see Dworkin, *Justice Sotomayor: The Unjust Hearings*, 56 NEW YORK REVIEW OF BOOKS 37 (Sept. 24, 2009).

\(^{143}\) 631 F.2d 1264 (6th Cir. 1980), affirming, 491 F. Supp. 1 (N.D. Ohio 1980).

In Steelworkers, the Union brought a claim based on promissory estoppel to prevent United States Steel from closing down two large steel plants in Youngstown, Ohio. The court recognized that the closing of the plants would bring economic devastation to Youngstown and the surrounding area, and also recognized that for decades, all growth and development in Youngstown had been predicated upon the presence of the plants. Nevertheless, the court held against the Union, on the grounds that it had not made out the technical elements of a promissory estoppel claim.

As through the 1970’s, the two Youngstown plants become less profitable, rumors ran through the city that U.S. Steel was going to close the plants. Through mailings, flyers, handouts, leaflets, speeches in the plant, etc., the management told the unionized workers over and over that if they made the plants “profitable,” U.S. Steel would keep them open.\footnote{631 F.2d at 1269-70.} In response, the Union made a great deal of changes in the way they allowed U.S. Steel to run the plant, such as being more flexible as to work rules, safety regulations, etc.\footnote{631 F.2d at 1274-77.} After a series of such concessions by the workers, all to their detriment, the Union claimed, and the company conceded, that the two plants were profitable.\footnote{Id. at 1272-74.} In a well-publicized letter to the Wall Street Journal, U.S. Steel’s executives vehemently denied rumors that U.S. Steel was going to close the two Youngstown plants and implied that both plants were running at a profit.\footnote{Id. at 1275.} U.S. Steel then announced its plans to close the plants.
Local 1330 sued U.S. Steel, requesting as a remedy that the plants be kept open or, in the alternative, sold to the workers. Its cause of action was in promissory estoppel:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promise and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.149

The Union claimed that U.S. Steel’s plants, by its own admission, became profitable, and therefore the company was bound to keep the plants operating. The 6th Circuit summed up the workers’ case:

As we read this lengthy record, and as the District judge read it, it does not contain any factual dispute over the allegations as to company statements or the responsive actions of steelworkers in relation thereto. It is beyond argument that the local management of U.S. Steel’s Youngstown plants engaged in a major campaign to enlist employee participation in an all-out effort to make these two plants profitable in order to prevent their being closed. It is equally obvious that the employees responded wholeheartedly.150

149 Restatement (Second) Contracts § 90 (1981).
150 631 F. 2d, at 1277-78.
So what went wrong with the workers’ case? The definition of “profitable” they used in claiming in their complaint that the plants were “profitable” was simply that the market value of the steel produced by each plant exceeded the cost of producing that steel at that plant (raw materials, labor, energy, etc.) Now, as the District Court pointed out, you cannot use this definition of “profitability” when judging whether one plant of a multi-plant company is profitable. The Youngstown plants must cover not only their own direct costs but the costs of parts of the company – such as the U.S. Steel Legal Department in Pittsburgh -- which incur costs but make no steel. Every steel plant must cover its pro rata share of this “overhead” cost. \(^\text{151}\) The Youngstown plants never generated enough excess revenue to cover their share of the costs. Therefore the promise on which the promissory estoppel claim rested was never fulfilled.

The workers had one seemingly powerful weapon left. In all of its communications with the workers, the flyers, e-mails, news releases, etc., U.S. Steel used the workers’ definition of profit (value of product produced minus total plant production costs).

We believe that this record demonstrates without significant dispute that the profitability issue in the case depends in large part upon definition. The plaintiffs wish to employ the direct costs of operating the two plants, compared to the total selling price of their products. The difference, they contend, is “profit.” This formula would eliminate such charges as corporate purchasing and sales expense allocable to the Youngstown plants, \(^\text{151}\) Id. at 1279.
and allocable corporate management expenses including, but not limited to marketing, engineering, auditing, accounting, advertising. Obviously, any multiplant corporation could quickly go bankrupt if such a definition of profit was employed generally and over any period of time.

Plaintiffs-appellants point out, however, that this version of Youngstown profitability was employed by the Youngstown management in setting a goal for its employees and in statements which described achieving that goal.\footnote{Id. at 1279.}

However, both District and Appellate courts held that Restatement (2d) of Contracts (§ 90) requires reasonable reliance on a promise, and that U.S. Steel’s promise to measure profitability by gross profit margins of the plants was one that the workers could not have reasonably relied on. The courts basically said to the workers: “U.S. Steel fed you an unreasonable definition of ‘profit’ and you were dumb enough to rely on it, you poor schlemiels.” This is the shabbiest treatment of the workers imaginable.

Needless to say, all three of the CLS commentators disagreed with the result in steelworkers. But it is important to understand exactly why they did.

I am going to approach this topic, once again, through what looks like certain esoteric issues in the philosophy of mind. This will seem to take us light years away from the specific
issues in Local 1330. But, I hope that by the time I have done, the connection between these
issues and the jurisprudential issues arising out of our consideration of CLS will become clear.

I want to begin with another problem of scepticism, this time scepticism not about the
existence of material objects, but about the existence of other minds. How do we ever know
what anyone else is feeling or thinking? All we ever have is the indirect evidence of what they
do and say. I know what I am thinking and feeling by introspection: I know my own mental
states directly. But I can only know the mental states of others indirectly, which means that I can
never really know that other persons aren’t all, say, very cleverly built robots.

Ludwig Wittgenstein’s approach to the ancient philosophical problem of other minds
depends on denying one of its crucial assumptions, i.e., that I know my own feelings.
Wittgenstein begins from the seemingly paradoxical assertion that, in regard to an internal
sensation like pain, it cannot be said of me that I know that I am in pain. Somewhat less
paradoxically, Wittgenstein claims that “I am in pain,” cannot intelligibly function as an
expression of knowledge (largely because I cannot possibly be mistaken about whether I am in
pain).

Wittgenstein claims that “I am in pain” is not a claim to knowledge but rather an
expression of pain:

A child has hurt himself and he cries; and then adults talk to him and teach him
exclamations and, later, sentences. They teach the child new pain-behavior.
“So you are saying that the word `pain’ means crying?” On the contrary: the verbal expression of pain replaces crying and does not describe it.\textsuperscript{153}

The upshot of this view is that we do not learn the meaning of “pain” by introspecting a certain feeling in ourselves, attaching the label “pain” to it and then applying it to others. This is the sceptic’s implicit assumption about how the word “pain” is learned; if the sceptic were right, the only way I could learn if others were in pain would be to note what sort of behavior I exhibit when I am in pain, observe when others exhibit that same behavior, and then infer that “behind” their behavior was the same sensation that I have. This inference would be weak at best.

Wittgenstein denies that it is possible to learn what “pain” means by learning through introspection to attach it as a label to an inner sensation of mine.\textsuperscript{154} Indeed, language learning is not primarily a matter of learning to affix labels to things at all. As Wittgenstein says, “The speaking of language is part of an activity, or of a form of life.”\textsuperscript{155} We learn what “pain” means by learning how to apply the word in accordance with its criteria. “Criteria . . . are the things by which we tell whether or not something is the case, which give us occasion to say that something is so, which justify us in what we say.”\textsuperscript{156} Thus, we can only learn what “pain” is by learning

\textsuperscript{153} L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 244 (1954).

\textsuperscript{154} The argument by which Wittgenstein shows this is called the Private Language Argument, and it appears in §§ 254-270 of the PHILOSOPHICAL INVESTIGATIONS. Its basic point is that we cannot learn what “pain” means by applying it to our own inner sensations because, since we would have no external standard of whether we were consistently applying the term to the same sensation, nothing would count as a “correct use” or a “mistaken use” of “pain” in this situation. Wittgenstein’s general point is that language can only be learned publicly.

\textsuperscript{155} Id. at § 23.

\textsuperscript{156} H. PITKIN, WITTGENSTEIN AND JUSTICE 126 (1972).
what it is to writhe in pain, what it is to suppress pain, what it is to comfort someone in pain.

Wittgenstein defeats the sceptic by showing that it must be possible for us to “know others are in pain” if we are even to have the concept of pain. Our knowledge of what “pain” is, is bound up with our knowledge of how it can be applied to others.¹⁵⁷

What Wittgenstein’s analysis of a concept like “pain” shows is that the human activities in which the concept plays a part, the “language games” that we play with it, would not be possible without certain underlying natural human regularities. We could never learn to use words like pain (and anger, and love, . . .) if there were no characteristic expressions of, and situations for the use of, these concepts. We could not employ any of these concepts unless there were certain natural ways in which pain, anger, love, etc. are expressed and responded to.

The moral we draw from Wittgenstein’s treatment of the problem of other minds scepticism is that the world in which we find ourselves is ineluctably a world of action and interaction, not a world toward which we could ever take up the status of a detached observer.

Hannah Pitkin expands on this idea:

¹⁵⁷ With respect to pain, Wittgenstein argues that the characteristic behavior and demeanor of someone who is hurt serve as criteria for his being in pain. They are not merely symptoms experientially correlated with something else, which is his pain itself. From these criteria we learned what “his pain” means, what his pain is. Thus, “when we learnt the use of the phrase ‘so-and-so has a toothache’ we were pointed out certain kinds of behavior of those who were said to have toothache,” for instance, holding one’s cheek. We may correlate other phenomena with this criterion, for instance, the appearance of a red patch on his cheek; these are related to his having a toothache only by hypothesis. But his holding his cheek is not just empirically correlated with something else, which is his toothache; it defines his toothache. Wittgenstein might have said, it is part of the grammar of “toothache” that this is what we call “his having a toothache.”

Id. at 127 (emphasis in original).
Why does Wittgenstein say we attribute pain only “to human beings and what resembles them,” rather than “to animate creatures”? . . . His reference to human beings here has a point, which shows still another sense in which grammatical conventions are not arbitrary. What it suggests is that the concept of pain did not originate in our detached observation of animal behavior, as a label for referring to what animate creatures sometimes are observed to do, but in our human need to communicate about our own pain or that of the person to whom we speak. It suggests that we don’t talk about pain primarily out of scientific curiosity, just commenting on the passing scene, but in order to get someone to take some action. Talk about pain occurs among human beings who experience and express pain and respond to it, in contexts involving such activities as comforting, helping, apologizing, but also warning, threatening, punishing, gloating. Part of what we learn in learning what pain is, is that those in pain are (to be) comforted, gloated over, and the like, and that we ourselves can expect such responses to indications of our pain . . . . To change our conventions here, we would have to change what we do, how we live; we would have to change the links between pain and comforting, pain and threatening, pain and fear, pain and pity--not just between these words but between these ways of being and acting together. These patterns of action and response, too, are part of what Wittgenstein means by “forms of life.”

158 Id. at 137-38.
If you do not respond to pain in the normal ("conventional") ways, you don’t know what pain is. It is not the case that one first comes to recognize, to know, pain and then ("emotively") respond to it.

My reactions to others, therefore, are not (could not be) normally mediated by my beliefs about them. Stanley Cavell gives this example of this fact:

That couple over there, drinking coffee, talking, laughing. Do I believe they are just passing the time of day, or testing out the field for a flirtation, or something else? In usual cases, not one thing or another; I neither believe nor disbelieve. Suppose the man suddenly put his hands to the throat of the woman. Do I believe or disbelieve that he is going to throttle her? The time for that question, as soon as it comes to the point, is already passed. The question is: What, if anything, do I do? What I believe hangs on what I do or do not do and on how I react to what I do or do not do.159

I may sit there motionless and watch the couple, examining them very closely to try to figure out whether he is actually throttling her. But that then is what I do, that is my reaction, out of a possible range of reactions. It is not that my actions follow on my beliefs; rather, to treat the situation as a problem of what to believe, a problem of finding a correct interpretation, is one possible action, one possible mode of response.

What CLS sees is that today all mainstream jurisprudence treats legal disputes as part of a world of knowledge and belief rather than a world of action and response. This is something that thinkers who are disparate at the level of political content as Richard Posner and Ronald Dworkin share: a commitment to the idea that the ultimate task of the law is to find the “correct” or “right” result where correctness is defined in terms of the application of a theory to the facts under consideration, not a response to a situation demanding action.160

The Steelworkers case is an exemplary one for CLS not because it presents a particular political issue (capital v. labor) but because it presents a telling example of the way in which categories of law can be used to distance the decision-maker from his or her own actual responses to the facts of the situation, as if those had become irrelevant. (Like Captain Vere in Billy Budd.) The judges seemed to acknowledge the pain of the residents of Youngstown, but did not respond. This means that the pain of the steelworkers and their families was not really acknowledged, because to acknowledge it would demand a response.161

The courts just cited to the elements of consideration and promissory estoppel in the barest way possible. As we saw, the district court explicitly recognized that the Youngstown

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160 Posner’s jurisprudence is built upon the economic theory of wealth maximization, which, Posner is proud to claim, is a scientific theory. R. POSNER, ECONOMIC ANALYSIS OF LAW 15-17 (3d ed. 1986). (When I refer to “Posner’s jurisprudence, I am of course referring to what we might call “early Posner.” The “late Posner” rejects the economic theory of favor of a nihilistic theory of “pragmatism.” R. POSNER, THE PROBLEMS OF JURISPRUDENCE (1990).) Dworkin’s analysis of judicial decision-making stresses the need for the judge to rely on “the soundest theory of the settled law.” R. DWORKIN, The Model of Rules II, in TAKING RIGHTS SERIOUSLY 66-68 (1978). Dworkin concedes that such theory could be formulated only by a superhuman judge, whom he names Hercules. R. DWORKIN, Hard Cases, in id, at 105.

161 It would not have been a tremendously aberrant extension of the law if the court had given the Union relief. For an only slightly more expansive interpretation of the promissory estoppel doctrine that would have justified a ruling for the Union, as the authors themselves argue, see Farber and Matheson, Beyond Promissory Estoppel: Contract Law and the “Invisible Handshake”, 52 U. CHI. L. REV. 903 (1985).
community would be badly hurt by the mill’s closure, and the appellate panel agreed completely. The circuit court ended its opinion by again citing back to the district court:

Everything that has happened in the Mahoning Valley has been happening for many years because of steel. Schools have been built, roads have been built. Expansion that has taken place is because of steel. And to accommodate that industry, lives and destinies of the inhabitants of that community were based and planned on the basis of that institution: Steel, . . . we are talking about an institution, a large corporate institution that is virtually the reason for the existence of that segment of this nation [Youngstown]. Without it, that segment of this nation perhaps suffers, instantly and severely. Whether it becomes a ghost town or not, I don’t know. I am not aware of its capability for adapting. 

But what has happened over the years between U.S. Steel, Youngstown and the inhabitants? Hasn’t something come out of that relationship, something that out of which not reaching for a case on property law or a series of case but looking at the law as a whole, the Constitution, the whole body of law, not only contract law, but tort, corporations, agency, negotiable instruments taking a look at the whole body of American law and then sitting back and reflecting on what it seeks to do, and that is to adjust human relationships in keeping with the whole spirit and foundation of the American system of law, to preserve property rights . . . ¹⁶²

¹⁶² In 1987, 47% of the former Steelworkers were still unemployed. HILLMAN, THE RICHNESS OF CONTRACT LAW 270n.8 (1997).
In these words, four members of the federal bench seemed tremendously empathetic to the workers. Yet nothing changed. The court threw the problem to the legislature, which established the weakest protection possible for the Ohio workers and others in a similar position. This is not acknowledging what is really happening. My question is: if you do nothing, have you acknowledged the steelworkers’ pain?

President Bill Clinton got a certain amount of grief for his use of the expression to dispossessed Americans, “I feel your pain.” Why? What about it made that statement seem to some people fatuous or even cruel? Not, I think, that Clinton himself lived in a beautiful house with servants, made a high salary, etc. (Although that is a common enough form of hypocrisy.) Rather, it was because what President Clinton was prepared to do was totally out of proportion to the pain that he allegedly felt. Did he feel their pain? I think that what upset so many Critics about Local 1330 was the fact that the courts seemed to acknowledge the suffering of Youngstown but in the end threw the whole mess back into the private realm of the free market. (That is always the ultimate effect of the admonition that “this” problem is for the legislature to solve.) I think the combination of the explicit recognition of Youngstown’s pain and the

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164 Singer has put it about as well as one can:

Although the judges [in Local 1330] felt that the company owed moral obligations to the workers and the community, they argued that “formulation of public policy on the great issues involved in plant closings and removals is clearly the responsibility of the legislatures of the states or of the Congress of the United States.”

This formulation of the institutional roles of the court and the legislature assumes that the court could resolve the dispute without “formulating public policy.” This assumption is based on the
refusal to act was particularly bitter to the Critics and I have suggested a philosophical reason why: the acknowledgment of pain must go together with action to alleviate it (whatever you can do) or it is not truly acknowledgement of pain, because these two things are grammatically (in Wittgenstein’s sense) linked.

One might feel like replying here that although the pain of the steelworkers demanded a response, it did not necessarily demand a response from a court, but from some other appropriate body, such as a legislature. This would be to miss the point. What is disturbing about

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court’s belief that it was not making a decision, but rather, simply deferring to decisions made by others, including the legislature (through its failure to regulate plant closings) and the company (in deciding what to do with its property). The belief that the court is not implicated in the decisions made by the legislature and the company rests on the assumption that the public sphere of government regulation is fundamentally separate from the private sphere of market transactions. From the standpoint of the legal realists, by ruling for the company, the court was actively defining and enforcing contract and property rights. It authorized the company to use its property as it pleased even though the company’s actions would have substantial detrimental effects on other property owners in the community. It held that a collective bargaining agreement granting the employer full discretion over plant closings was sufficiently voluntary to be enforced in accord with its terms, despite the fact that, as the single largest employer in the city, the company had enormous bargaining power relative to the workers to dictate the terms of the contract between the parties. It also held that prior cases granting employers full power to control the disposition of factories were indistinguishable from the case at hand, even though a plausible argument could be made that the tremendous social effects of major plant closings in single employer communities were absent, or were never addressed in prior case law, making this a case of first impression in which the court had no alternative but to formulate and implement public policy.

By ignoring all these considerations, the court convinced itself that it could resolve the case without defining and implementing public policy decisions about the distribution of power in the marketplace. The court pretended that it was not implicated in, or responsible for, the company’s decision to abandon the workers, and therefore it was not exercising power when it failed to protect them. This constitution of the problem recreates the public/private distinction with a vengeance; it assumes that, in the absence of specific legislation, the state is not fundamentally implicated in the outcomes of the market.


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165 Joseph Singer has caught this point perfectly:

[T]he realist attack on the public/private distinction is frightening because it seems to imply that nothing is private; if nothing is private, moreover, nothing is free from the risk of government regulation, involvement, and oversight. This is part of what we mean by tyranny. However, from
Steelworkers is that the attitude it represents -- a failure to respond masked as a lack of power or ability to act -- is absolutely pervasive throughout our society. Stanley Cavell has called this phenomenon the theatricalization of society: a condition in which we progressively see ourselves as passive observers, unable to see our connectedness to what happens around us, unable to see the connectedness to me of what is happening around me, unable to respond to needless suffering which I can prevent, and which so makes a demand on me. In such circumstances, we are in danger of losing the concept of the suffering of others altogether. For CLS, this is the most destructive effect of the public/private distinction -- it establishes the private world as a stage upon which we only observe events take place. The suffering and oppression and injustice we see there seem inevitable, not in the same way that the events of a tragic drama seem inevitable, but in the way an earthquake or tsunami is inevitable.

CLS wants to call a decision like Steelworkers wrong. Kennedy, Fineman and Singer all say that they would have had the case come out differently. The problem is that the

the standpoint of the critical theorists, the pretense of an autonomous private sphere conceals the fact that the market is defined by legal rules chosen and enforced by government; that other market structures are possible; and that the kind of market we create should be a function of considerations of policy and justice, not of formalistic deduction from abstract concepts. Moreover, the idea of an autonomous market focuses our attention solely on the potentially oppressive power of government intervention in private affairs. It thereby blinds us to the potentially oppressive power of “private” actors exercising their market entitlements. These private exercises of bargaining power are backed up by the coercive machinery of the state. The distribution of wealth and power in society is partly the result of individual decisions in the marketplace. But to a very larger extent, they are determined by law. Only if we can see the role that public power plays in the “private” sphere, can we judge whether it has been used wisely. To make these judgments, we cannot pretend to always defer to individual, free transactions. We must confront directly our definition of a good society.

Id. at 535.
indeterminacy thesis combined with the fundamental contradictions makes it difficult for CLS to find a position from which to level the charge of “wrongly decided.”

This brings me to the most important point I want to make in the paper. I believe that the most important CLS insights are not captured by even trying to say that Steelworkers is “incorrectly decided.” Indeed, I want to suggest that the “correct/incorrect” distinction is not the ultimate tool of criticism of judicial decisions at all. Rather, a more telling criticism would be that Steelworkers is correctly decided but that all it is, is correct. It is “correct” on most mainstream theories of legal process. For example, two prominent liberal theorists, Rolf Sartorious and Andrew Altman, taking off from Dworkin’s influential ideas, have argued that the “reigning convention” of our legal culture is, and should be, that disputes are resolved by reference to those principles that achieve the greatest “logical fit” with the settled law.\[166\] In Sartorious’ view is:

\[\text{[T]he obligation of the judge is to reach that decision which coheres best with the total body of authoritative legal standards which he is bound to apply. The correct decision in a given case is that which achieves “the best resolution” of existing standards in terms of systematic coherence as formally determined, not in terms of optimal desirability as determined either by some supreme substantive principle or by the judge’s own personal scheme of values.}


Again, the touchstone of Sartorious’ ideas is Ronald Dworkin, who is probably the most influential legal philosopher writing today. See Dworkin, The Model of Rules I, in R. DWORKIN, TAKING RIGHTS SERIOUSLY (1977) and LAW’S EMPIRE (1986).

Altman describes the Dworkin/Sartorious theory, with which he substantially agrees, as requiring “that legal decisions and the reasoning that supports them achieve maximum coherence with the body of settled norms, doctrines, and decisions.” A. ALTMAN, supra note 3, at 41. Altman does concede, though, that at “the margins of the [legal] system,” considerations of the moral adequacy of the principles involved might play a limited role. Altman, supra note 14, at 42-43. Altman does not see that every legal rule, no matter how “consistent” and “coherent” with past precedent, is challengeable by litigants at any time. If this did not happen, law could not grow and develop the way it does. “Maximum coherence” is a recipe for a frozen stasis.
these terms, Steelworkers is no doubt “correctly decided.” That the company wins no doubt fits the largest part (but not all of) of the body of settled law.

What CLS brings to our attention, however, is that “correct” and “wrong” are not the only terms of criticism we can apply to judicial decisions. All mainstream jurisprudential theorists share the assumption that the correctness of a judicial decision, in terms of some set of rules or principles from which results are derived, is the single standard in light of which decisions and judgments can be criticized. But this is not the case. Decisions and judgments are acts, they are things that people do, and they can go wrong, and they can be criticized, in all the multifarious ways in which actions can go wrong and be criticized. Steelworkers is a correct decision. It is also a cowardly decision, a spineless decision, a shabby decision, a decision

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167 I am taking off here from J.L. Austin’s insight that “true” and “false” are not the only ways that we can evaluate even statements that purport merely to state matters of fact (which Austin calls “constative,” as opposed to “performative” statements). Austin focuses on the example, “France is hexagonal.”

Is the constative, then, always true or false? When a constative is confronted with the facts, we in fact appraise it in ways involving the employment of a vast array of terms which overlap with those that we use in the appraisal of performatives. In real life, as opposed to the simple situations envisaged in logical theory, one cannot always answer in a simple manner whether it is true or false.

Suppose that we confront ‘France is hexagonal’ with the facts in this case, I suppose, with France, is it true or false? Well, if you like, up to a point; of course I can see what you mean by saying that it is true for certain intents and purposes. It is good enough for a top-ranking general, perhaps, but not for a geographer. ‘Naturally it is pretty rough’, we should say, ‘and pretty good as a pretty rough statement’. But then someone says: But is it true or false? I don’t mind whether it’s rough or not; of course it’s rough, but it has to be true or false -- it’s a statement, isn’t it? How can one answer this question, whether it is true or false that France is hexagonal? It is just rough, and that is the right and final answer to the question of the relation of ‘France is hexagonal’ to France. It is a rough description; it is not a true or a false one.

J.L. Austin, How To Do Things With Words 142-43 (J.O. Urmson & M. Sbisa eds. 2d ed. 1975). What Austin shows here is that even a "statement of fact" like “France is hexagonal” is an action and subject to assessment and appraisal as an action, not simply as a logical linking of subject and predicate.
manifesting an attitude of avoidance and denial. These are the ultimate criticisms of it. Once this has been said, what’s the point of calling it “wrong?”

What I am suggesting is that a decision often can and should be simultaneously be labeled “correct” and “bad.” (Not “correct” and “wrong;” that would be self-contradictory.) This is not as paradoxical as it sounds. In a common law system in which all rules are subject to change by the judge, what is startling about saying a decision is correct but bad? Correct, but not the one that should have been taken?

Let me elaborate this idea by considering the general relation of law and morality. We have seen that one thing that Dworkin and Critics have in common is that they both think it is impossible for a court to render a decision without reference to moral reasons; they think that law and morality are always intermingled. This distinguishes them both from the positivists, like H.L.A. Hart, for whom law is an autonomous system of rules distinct from moral rules. For the positivists, morality doesn’t enter into judicial decision-making: it doesn’t in the “easy cases” because there the judge simply applies legal rules, and it doesn’t in “hard cases” because there the judge has “discretion” to lay down a new rule of law, and morality is no help because the decision is completely subjective (“discretionary”) and “up to the judge.”

Dworkin and the Critics do see morality as essential to law, but they obviously differ in what they make of that: for the Critics, it means decisions will always be purely subjective (or
“ideological,” as Kennedy puts it in his A Critique of Adjudication.\textsuperscript{168} For Dworkin, the notion of a “correct answer” to a legal/moral problem remains, but such answers can only be found, apparently, by super-judges in the nature of Hercules, although the idea of a right answer still functions as a regulative or guiding ideal for the ordinary, non-super judge.

I want to argue that both Dworkin and the Critics have misunderstood the nature of moral discourse. Let’s start by thinking about just how odd, in a common sense way, their conception of morality is. Human beings have apparently developed an entire mode of discourse and apparatus of concepts which purport to do something that can’t be done! We invest enormous energy and emotion into a search for something that doesn’t exist, like unicorns, or which ordinary humans can apparently never find. Over the course of a couple of thousand years we haven’t been able to figure out that moral judgment is either all meaningless and just an expression of our “personal preferences” or something that only a “Hercules” can discover? That would be extremely bizarre.

I want to suggest that the purpose of moral discourse is not to reach a conclusion about a correct or incorrect proposition. Here I am going to rely heavily on the theory of morality put forward in Stanley Cavell’s The Claim of Reason, which I think is an almost unique expression of this point of view.\textsuperscript{169}

\textsuperscript{168} D. Kennedy, A Critique of Adjudication (Fin De Siecle) 54-56 passim (1997).

B. The Function of Moral Discourse.

The Critics generally assume that moral judgments (and judicial decisions to the extent that they rely upon moral concepts and theories) are subjective in the literal sense, unsupportable by reason. The contrast is always to science, in which use of the scientific method compels one to accept a correct answer to a question – or show oneself irrational in science. This is what it means to say that science and logic are “normative.” It doesn’t mean that everyone will accept their conclusions. It means that if someone fails to accept their conclusions, he will be regarded as irrational or incompetent in that mode of reasoning.\textsuperscript{170}

But in moral argument, the rationality of the antagonists does not depend on agreement (although we always hope that agreement will emerge.) That is, in morals there can be rational disagreement. Why assume (as Dworkin does) that there is one right thing to be done and that that can be found out?\textsuperscript{171}

Then how is the rationality of moral discourse to be determined? By the arguments, which can establish rationality in the absence of agreement. Without the hope of agreement, argument is pointless, but it doesn’t follow from this that if it does not reach agreement, the argument was pointless. In moral arguments, the rationality of the antagonists and their discourse is not dependent on their agreement. (Dworkin believes we have to commit ourselves

\textsuperscript{170} Cavell, id. at 262-64.

\textsuperscript{171} Id. at 254.
to the principle that there always is a “right answer,” in order for moral discourse to be rational at all.)

Science does provide agreement about matters of fact. But what makes the agreement that we get from science possible? It is agreement about what constitute scientific method and procedures, which permit certain disputes to be resolved in certain ways. Being a scientist then just means having a commitment to, and competence in, those methods.

In that case, morality can be rational just as science is; we commit ourselves to certain modes of argument, even if they don’t always lead to agreement. To say that a moral argument “must be accepted” means (just as in science), that the person who rejects them is irrational or incompetent in morality. But what counts as “acceptance” won’t be agreeing with a conclusion, but can rather be disagreeing rationally. This is how science and morality differ. The similarity between science and morality is the necessity of commitment to standards which establish what will count as an argument or a reason within each.172 Take what I assume to be a statement of morality, “If what a person did was done by accident, we don’t blame him as much as if he deliberately did it.” If someone disagrees with this statement, isn’t there some suspicion that he is morally incompetent? If he says, “Well, I prefer to blame those who acted accidentally and those who acted deliberately the same,” is that just the end of the matter? Is there no doubt cast then on the moral rationality of the speaker? If we do agree about this, then the fact that we disagree about other specific things (how good an excuse “accident” is, whether a given person is

172 Id. at 261-62.
entitled to it, etc.) does not deny the rationality of moral argument but reveals a way of argument whose characteristic feature is that it can establish the rationality of both parties even if they don’t come to agreement.\footnote{Id., at 262-63.}

Let me give an analogy from another supposedly “subjective” area of discourse, that about the arts. It is often asserted that no one can prove Milton is better than Khalil Gibran; artistic preferences are notoriously “subjective,” like preferences for food. If I say, “I love Southern Comfort,” and you say, “How can you say that? It tastes like cough syrup made from petroleum by-products,” I can say, “Well, I like it,” and that’s the end of the matter. Now compare this:

A: He played beautifully, didn’t he?

B: “Yes, too beautifully. Beethoven is not Chopin.”

Or B may say:
B: “How can you say that? There was no line, no structure, no idea of what the music was about.”

Now, suppose A replies, “Well, I liked it.” As Cavell points out, don’t we feel this is “a feeble rejoinder, a retreat to personal taste?” Because B’s reasons are obviously relevant to the evaluation of the performance, and because they are arguable, in ways that anyone who knows about such things will know how to do. Aesthetic discourse is not purely subjective, even though it may never eventuate in agreement about the pianist’s performance. It is rational because its statements are arguable according to standards which anyone competent in music will recognize. If you fail to recognize them, it doesn’t show you are “wrong;” that kind of rationality aesthetic discourse does not have. It just shows you are not part of our world of music. But the same is ultimately true of science; if you don’t accept the conclusions generated by agreed upon scientific methods, you are either irrational or not part of our world of science.

Let’s now turn to some examples of moral discourse; I reproduce them exactly as Cavell supplies them:

I.

A: You owe it to your family and friends not to go through with this farce.

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174 Cavell, Aesthetic Problems of Modern Philosophy, in S. Cavell, MUST WE MEAN WHAT WE SAY? (1969) 73, 91

175 Id. at 91-92.
B: I respect and love the city which has found me guilty, and I will not break her laws by escaping.

A: Come off it. If you respect and love her so much, don’t force the issue by making her do something she’s going to regret.

B: Let’s put it this way. I will not be put in the position of becoming an ordinary law-breaker.

A: And your friends, your family...?

B: My friends will respect my position.

II.

A: You know the person you mean to honor was an enemy of the state.

B: The person? He was my brother.

A: I know how strong your feelings of loyalty are, and I respect them; but do not go on.

B: I know how strongly you will be offended; but do not go on.

III.

A: I’ve decided against offering him the job.

B: But he’s counting on it. You most explicitly promised it to him.

Each of the following exchanges is meant as a continuation of the opening of III.

A₁: I’ve decided against offering him the job.
B1: What he did you yourself have done, but you tell yourself that in your case

“it was different.” It’s different in every case. And the same. You’re
muddled, criminally muddled.

* * *

A2: I know, but it has suddenly become very inconvenient to have him around,

and there is someone else really better qualified anyway.

B2: If you do this to him, I’ll never speak to you again.

A2: Don’t make such an issue out of it. I’ll see that he gets a job, and I’ll give

him some money to see him through.

B2: Goodbye.

* * *

A3: I said merely that I would try to find him a job.

B3: But from a man in your position that is tantamount to a promise of a job.

You know he took it as a promise.

A3: That is his business.

B3: You are cruel.

* * *

A4: But I’ve since learned what kind of man he is.

B4: A promise is a promise.176

176 Cavell, supra note 169, at 265-66.
What do we glean from these examples? In none of them is agreement reached; all
could go on further than they are set forth. They may never result in agreement. At some point,
someone will have to say, “These grounds (for acting in this way) are enough for me.” But what
counts as enough is precisely the subject of moral reasoning. The point of moral discourse is not
to reach agreement (although again, hopefully we will), but it is to reconcile two people whose
relationship has been disrupted by a moral disagreement.\textsuperscript{177}

In science, I may say, “That’s a goldfinch.” You may ask me how I know, and I say,
“Because of its red head.” You reply, “But goldcrests also have red heads.” My claim to know
has been countered and undermined. Having a red head is not enough to support my claim to
know. I can’t now say, “Well, the red head is enough for me,” without being counted irrational.
That’s what makes this issue an empirical, factual one. What makes moral contexts different is
that in moral discourse what is “enough” is part of the content of the argument. What is enough
to counter my claim to be right or justified is up to me to determine. As Cavell’s examples
show, I can refuse to accept a moral criticism of my acts without being counted irrational or
morally incompetent. What I cannot do (without being considered irrational or morally
incompetent) is to deny the relevance of the moral objection you have made to me. If I am about
to break a promise I made, you can criticize me for that, but I can reply to you, “Usually, one
does keep one’s promises, but in this case, the following considerations counsel that I must break
it.” And I may have good reasons for breaking it, reasons that you will accept as expressing
recognizably human concerns and interests, and you will respect that, even if you disagree here

\textsuperscript{177} Id. at 267.
and now with my specific choice to break my promise. But if you say, “But you promised,” I can’t say, “What difference does it make that I promised, (that he’s an enemy of the state, that I know he’s depending on me, that I’m the one that got her pregnant…”) Recognizing the relevance of these things is what it means to be moral, to be competent in morality.\textsuperscript{178}

So since moral discourse does depend on ultimate agreement, are the Critics right after all, and we are all completely at sea, and all judicial decisions are purely subjective, “ideological,” as Kennedy would say? No, not if we are willing really to acknowledge our common responses, interests, and concerns.

Let me run through, as a quick example, one of our most contentious legal issues: that of the morality and legality of abortion. In an article entitled “Abortion and the Death of the Fetus,” Steven Ross has argued that fetuses cannot be called persons, that therefore abortion can’t be called murder, and this is shown by the fact that even the most fervent opponent of abortion does not respond to fetuses as if they were persons:

[A] mother who loses her fetus in a miscarriage simply is not seen to have suffered the sort of loss suffered by someone who loses his eighteen-year-old son in war; the most vehement ‘right to lifer’ does not seriously consider treating a woman who has had an abortion exactly as if she were guilty of murdering an adult, and so on.\textsuperscript{179}

\textsuperscript{178} Id.

\textsuperscript{179} Ross, Abortion and the Death of the Fetus, 11 PHILOSOPHY & PUBLIC AFFAIRS 232 (1982).
Cavell himself has adumbrated an argument similar to this. He says that the assertion that embryos are human beings “cannot fully be meant by those who assert it.”

And in saying that the conservative cannot fully mean that human embryos are human beings I am saying that no conservative sound of mind abhors those who request and perform abortions as he would or should abhor Herod and the minions of Herod—at least as he would a discriminating Herod, one who slated for slaughter only those children he did not want, or found inconvenient. Herod must at all costs be stopped.\textsuperscript{180}

Are we to conclude that the conservative who claims that fetuses are persons and that abortion is murder is “abusing” these words or even using them “without sense, because using them apart from their usual criteria?” We cannot make assertions like that. Calling a fetus a person and abortion murder is a projection of those words, like “feed the meter” or “feed his pride” is a projection from “feed the cat.” It is by learning how to project words in this way that we learn a language. We cannot say that “we do not say that ‘fetuses are persons’, ” because some of us do say that, and there is no reason to assume that those who do say it are any less masters of their language than those whose reaction is that it cannot be said.

\textsuperscript{180} Cavell, supra note 169, at 374-75.
All we can do in this situation is to try to get the conservative to see that he himself or she herself does not want to say that fetuses are persons, that his or her own responses cannot be squared with the assertion that fetuses are persons. We would do that by adducing the sorts of considerations that Ross and Cavell put forth. The conservative might come to see that calling abortion “murder” is in fact self-defeating, that it masks from both sides of the debate what genuinely is abhorrent about abortion (an abhorrence the liberal is perhaps enabled to hide from him or herself by his or her ability to reject the assertion that fetuses are persons or that abortion is murder.) But we might fail, the conservative might still insist that fetuses are persons. Then what is the situation between us? Should we say that we are “right” and the conservative is “wrong?” But we have no standards to make that judgment. What is most accurate to say is that we do not form a community on the question of whether fetuses are persons, that here community has failed, relations between us have broken down.

The philosophical appeal to what we say, and the search for our criteria on the basis of which we say what we say, are claims to community. And the claim to community is always a search for the basis upon which it can or has been established. I have nothing more to go on than my conviction, my sense that I make sense. It may prove to be the case that I am wrong, that my conviction isolates me, from all others, from myself.

Let me sum up the way CLS is right: There is no right answer to any real legal dispute. But this is not a failing of legal or moral discourse. If there were a right answer, moral discourse would not fulfill the function it has in human life. That function is to morally reconcile two persons who cannot agree by getting them to acknowledge that the other’s position is not
“immoral” but an expression of recognizable human interests and concerns. What this implies is that in moral disputes no one can play the role that an umpire or referee does in a game. That is because it is the nature of morality (and law) that every rule is always challengeable – even a rule laid down by Hercules – and to deny this is to deny the moral competence, which is to say the otherness as a person, of the one who challenges the rule. For what it means to be a member of the moral community is that one has the capacity to challenge any rule of morality.

C. CLS, Law and Practical Deliberation.

It might be thought that once we cut ourselves loose from concepts like correct/incorrect or right/wrong, we are abandoning rationality and setting ourselves loose on an ocean of subjectivity. CLS itself has in fact seemed to be doing just that in claiming that all decisions are ultimately “political.” But here we reach the point at which CLS mischaracterizes its own message. CLS actually follows “liberal thought” in identifying rationality with the achievement of knowledge and certainty obtained through arguments that are purely logical, if not strictly deductive, so that science and scientific method becomes the epitome of rationality – largely because it can produce answers to its questions with which everyone knowledgeable and well-trained in science must agree – or, as it were, lose their union card as a scientist. Seeing that this approach to the world actually isolates us from the world, CLS concludes that rationality itself must be overthrown. But the point at which CLS identifies rationality with the activity of knowing, understood as achieving certainty according to a scientific model, is precisely the point at which CLS is infected by the very disease it attempts to cure.
That ultimately we must decide legal disputes does not mean that they are “indeterminate” in the sense that the decisions are “not susceptible to criticism as better or worse.” A typical CLS analysis of a legal issue will note that arguments can be generated for either side and then say something like, “but no polar position has such killer force as to negate utterly its opposite, to make it go away completely.” 181 The conclusion is quickly reached that any resolution is “arbitrary” or “political” because the actual arguments are “indeterminate.” As John Van Doren says, the underlying assumption is “the idea that moral judgments cannot be established as can statements of fact, by rational argument.” 182

Now, this is again a peculiar picture of decision-making. I am trying to decide whether to change jobs; each option has certain things to be said for and against it; the reasons for neither option are strong enough to “negate utterly its opposite.” We would not conclude that the decision is arbitrary, or that there is no way that I can be said to have chosen on the basis of good reasons or to have made a good decision (not, note, necessarily a correct decision.) This is precisely the situation in which a decision is called for; if one argument “negated utterly” the other, there would be no need for a decision. The concept of a “decision” is only applicable in situations where one side does not utterly negate its opposite. Otherwise, there’d be nothing to decide.

181 M. Kelman, *supra* note 27, at 20. Kelman also says:

If mainstream lawyers are to make a convincing case that the Critics are wrong to see formal contradiction between rules and standard positions . . . they must demonstrate some fairly general tendency for formal disputes to coverage toward a single balanced solution.

The CLS emphasis on analyzing specific legal issues as instantiations of a small group of very high-level contradictory pairs greatly reinforces its peculiar picture of the process of deliberation. In CLS analyses, legal issues almost wholly lose their specificity. They are no longer particular conflicts between particular values embodied in individuals. In an ironic return of a debased Platonism, each dispute becomes a ghostly reflection of a very small number of highly abstract “ideas.” At that level of abstraction, there will be no way to conclude that any decision will be better than any other. At that level of abstraction, all the things that we normally rely on in practical deliberation have been stripped away. As Martha Nussbaum has convincingly shown, practical deliberation is ineluctably judgment concerning particulars.

CLS’s retreat to an abstract level of recurrent contradictions does not just result in a misconception of deliberative decision-making. It is, as I have stressed in this Part, destructive of CLS’s most important and distinctive message. That message, again, is that the private/public distinction provides the law with a sphere in which it can act but also with a sphere in which it purely observes the world. The ideology of the law today enforces a passivity in the face of the world by filtering the world through sets of theories which provide us with excuses for inaction, for evading the responsibilities to which CLS wants to draw our attention.

182a Refer back to my discussion of Hasnas’, “doctor hypothetical,” supra note 49.

Steelworkers again illustrates this. It may be the case that after careful consideration of the alternatives, balancing the effects on the steelworkers and their families against the social effects of such a limitation in freedom of capital, a court decides that within the framework of contract law, it should not give the Union a legal remedy. The specifically ideologizing effect of “the law” or of “liberal thought” is this: once we decide that the steelworkers possess no “right” that the company stay, then their plight is irrelevant to the public sphere and falls back into the purely private realm of “unfortunate happenings,” a purely “natural” problem about which we can do nothing. (This is the real thrust, I think, of CLS’s stance against “rights.” We have used the assignment and enforcement of rights to soak up our entire sense of our responsibility to others.)

Nussbaum again has shown that a practical deliberation that suitably attends to the particularities of the individual case will recognize that in every situation presenting a need for deliberation there are incommensurable values that cannot all be accommodated.184 This is related to the particularity of deliberation; deliberation is qualitative, not quantitative, in that the different values that are in conflict in a situation calling for deliberation cannot be reduced to a single metric. Rather, deliberation “is based upon a grasp of the special nature of each of the items in question.”185 It follows that there may well be irreconcilable conflicts among them. As Nussbaum says, in such cases, “to decide that A is preferable to B is sometimes the least of our worries.”186 Our real problem is, what can we do to repair the damage done by having to select

184 Id. at 56-66. CLS tries to capture this fact in the idea of the fundamental contradiction.

185 Id. at 61.

186 Id. at 63.
A over B? In other words, the problem of which of two options to prefer, is not all there is to rational deliberation.

What can be done, thought, felt, about the deficiency or guilt involved in missing out on B? What actions, emotions, responses are appropriate to the agent who is trapped in such a situation? What expressions of remorse, what reparative efforts, does morality require here?\footnote{Id. at 64-65. Again, it is the egregious way in which these questions are raised by \textit{Local 1330}, and then denied, that make this decision stick so painfully in the throat of CLS writers.}

Stanley Cavell has asked, under what conditions would the fact that we have to resort to a decision seem to deny the rationality of choice? His answer: in a situation in which the concept of “decision” had become “disengaged from its (grammatical) connections with the concepts of commitment and responsibility.”\footnote{S. \textit{Cavell}, \textit{The Availability of Wittgenstein’s Later Philosophy}, in \textit{MUST WE MEAN WHAT WE SAY? 53-54} (1969).} “Decision” has become so disengaged when we “decide” conflicts without confronting any of the questions raised by Nussbaum. In \textit{Steelworkers}, this means that once we decide the workers have no “legal right” to enforce, their suffering ceases to have any connection to us.

Richard Posner’s analysis of discrimination and the problem of affirmative action provides a good illustration of this disengagement. For Posner, racial discrimination is a result of information costs. A person can save on information costs if he takes race, which is an easily
discerned personal characteristic, as a proxy for some less easily discerned characteristic. No characteristic is a perfect proxy for another, so making decisions based on proxies will inevitably involve some mistakes. But this is alright as long as the mistakes cost less than the effort it would take us to engage in the individualized search necessary to find them out. Posner compares such discrimination to consumer shopping: a person buys a tube of toothpaste, has a bad experience with it and decides not to buy that brand anymore, although the next tube of that brand might be perfectly fine. Likewise, Posner says, if a person believes all Myceanaens have strong garlic breath and that person doesn’t like garlic breath, the person can save on information costs, and thus be better off, by avoiding all associations with Myceanaens, despite the fact that there are some Myceanaens without garlic breath whom the person would enjoy knowing.189

Applying this “information cost” theory of discrimination to the real world of racial differences, Posner concludes that the decision to discriminate (i.e., avoid contact or association with a particular race) is a rational decision.

[S]uppose that a particular racial or ethnic identity is correlated with characteristics that are widely disliked for reasons not patently exploitative, anticompetitive, or irrational. A substantial proportion of the members of the group may be loud, poor, hostile, irresponsible, poorly educated, dangerously

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irascible, or ill-mannered, or have different tastes, values, and work habits from our own, or speak an unintelligible patois.\footnote{Id. at 368-69 (footnotes omitted). Posner makes it clear that he thinks racial minorities actually do possess (at least some of) these traits, since he says that prejudice based on incorrect stereotypes dissipates on contact with the minority. Id. at 368n.12. Since prejudice against blacks in America has hardly dissipated, we can draw only one conclusion.}

Because it is rational not to want to associate with an individual whom one believes has these qualities, Posner says, it is rational to avoid association with all members of the racial group which typically or frequently is associated with these traits, because the move from the former to the latter is mediated by the cost/benefit calculation of information costs.

What is completely absent from the “rationality” of this decision is any sense of who is responsible for the fact that members of a certain group are poorly educated, differ from us in attitudes, habits, values, or are hostile, and any sense that a (rational) decision to discriminate duplicates, and perpetuates, the acts that made race a proxy for undesirable characteristics in the first place. Absent is any sense of the responsibility one bears when one acts toward these specific people in this way, or any sense of what is entailed in treating persons the way one treats brands of toothpaste. These considerations would become relevant for Posner only if one happened to have a “taste” for helping out minorities, that is, if the preference functions of racial minorities are part of one’s own preference function. But these considerations form no part, for Posner, of what it means to make a “rational decision” to discriminate. This is “decision” detached from its grammatical connections with commitment and responsibility, with a vengeance. Confronted with such uses of reason, one might be tempted to claim that the only
alternative is the repudiation of rationality in favor of “empathy” and “faith and hope in humanity.” What is actually needed, and wanted, is a conception of rationality that restores its natural connection with human action and response.

If the heart of CLS is an attempt to overcome what I have called the theatricalization of social life, then it is not surprising that it has had some trouble articulating a specific “political program” to correct the social ills that it attacks. This is because the social ills that CLS tries to point to are not explicitly political at all. They are philosophical, even spiritual; a problem not in the fact that we have a capitalist rather than a socialist economy, but in a defect in our collective soul, an inability to respond to the needless suffering of others. If we could see the extent of our responsibility, we could realize that there is room for action.

This may strike CLS authors as another advocating of “incremental reform,” the hallmark of a bankrupt liberalism, and a rejection of the required “utopian” attitude. The “utopianism” of CLS is yet another trap, another way in which CLS refuses its own truths. This is nowhere better illustrated than in Joel Fineman’s article on contract law. After advocating “creative revolutionary thinking” in the context of the Steelworkers case, Fineman then says that two problems remain. The first is “the problem of theory”: “at present we have no compelling utopian vision, no theory which leads inevitably to the correct decision in each case.”

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191 Feinman, supra note 21, at 860.
It is disappointing that a CLS thinker, given what CLS has accomplished in its critique of contemporary society, should fall back in the end on a need for “theories,” which will yield “inevitably” the “correct answer” in all cases. CLS is virtually the only jurisprudential movement today that is attempting to make us see the corrupting effect of theories and inevitable correct answers, to make us see that an epistemologized “legal reasoning” is blocking us from our own perceptions and responses when we are confronted with the suffering of others. Fineman’s last minute retreat back to “theory” illustrates how hard it is not to be ultimately seduced by the pervasive theatricality of the social world. This means that much of what CLS says is itself misguided, distorting of the very truths it wants to reveal. But the ultimate judgment on CLS must be that it is one of the few morally serious approaches to law today.

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192 One final thought on the positive CLS vision: I believe that what CLS sees as the main characteristic of a nonhierarchical, nonalienated world is that in such a world, all persons’ ability to engage in practical reason will be maximized. That is, everyone will be free from domination, both internal and external, so that they may make their own deliberations and come to real decisions in light not of conventionally imposed beliefs and desires but in light of the True and the Good. This is why some CLS literature stresses the dismantling of state and corporate bureaucracy in favor of smaller social units that could engage in “participatory democracy.” The point of this, for CLS, is not that in this way people can maximize satisfaction of their preferences, but that the ability to engage in practical reasoning is a good in itself. It is what Aristotle would call a human excellence or virtue. But that this is its goal is another thing the subjectivist rhetoric of CLS blocks itself from seeing.