

University of Miami Law School

University of Miami School of Law Institutional Repository

Articles

Faculty and Deans

1985

Manners, Metaprinciples, Metapolitics and Kennedy's Form and Substance

William Wilson Bratton

Follow this and additional works at: https://repository.law.miami.edu/fac_articles

 Part of the [Law Commons](#)

RESPONSIVE SCHOLARSHIP FROM OUTSIDE THE MOVEMENT

MANNERS, METAPRINCIPLES, METAPOLITICS AND KENNEDY'S *FORM AND SUBSTANCE*

*William W. Bratton, Jr.**

Relations between Critical Legal Studies ("CLS") and the rest of the legal academy have given rise to images of battle.¹ In one image, members of a small group of clever leftist academics arm themselves with esoteric European theories and set off to "delegitimize" their colleagues. They start a two-front war, aiming for intellectual primacy in the law reviews and political primacy at faculty meetings. Other images follow. The legal academics under attack at first ignore the critique. Then they become stunned and enraged as the attack's magnitude increases. Finally, they counterattack. "Nihilists," they splutter, as they defend their territory in the law reviews and at faculty meetings.²

* Associate Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University.

The first version of this essay was presented at the fifth Cardozo Faculty Seminar on Critical Legal Studies, held on June 13, 1984.

A number of sources have heavily influenced me. Among them are novels of E.F. Benson (comic communitarianism), George Eliot (cautionary communitarianism), and Anthony Trollope (county communitarianism), and Beethoven's opera, *Fidelio* (altruism and freedom). Also, I have had the great benefit of comments from Ian MacNeil, Chuck Yablon, David Carlson, Paul Shupack, Steve Diamond, and Arthur Jacobson.

¹ CLS has revived the slang term "trashing" to describe its critiques of conventional legal academic work. See generally Kelman, *Trashing*, 36 *Stan. L. Rev.* 293 (1984). The term appears to have been drawn from the radical vocabulary of 15 years ago. In those days, the term described physical action against large institutions, such as the hurling of bricks through the windows of universities, banks, or government departments, rather than intellectual action.

For aggressive liberal responsive literature, see generally Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 *Stan. L. Rev.* 413 (1984) (CLS movement and proponents described as naive, utopian, neo-Marxist, and irresponsible).

The intellectual battle may be having ramifications at the promotion and tenure meetings of law faculties. On this point, compare a recently published letter of Professor Robert Gordon to Dean Paul Carrington, with the letter from Professor Phillip Johnson to Professor Paul Brest in "Of Law and the River," and *Of Nihilism and Academic Freedom*, 35 *J. Legal Educ.* 1, 13-16, 18-19 (1985).

² Needless to say, all the figures in the images see themselves as innocent victims. For defensive statements from the CLS side, see Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 *Stan. L. Rev.* 391, 399 & n.28 (1984); for defensive statements from the liberal side, see Carrington, *Of Law and the River*, 34 *J. Legal Educ.* 222, 226-28 (1984); for a defensive, but constructive interchange

These images, while crude, aptly depict much of the rhetoric and some of the substance of the discourse surrounding CLS. CLS has constructed a picture of the mindset prevalent in the contemporary legal academy, and has advanced a challenging critical appraisal of the mindset it depicts. In consequence, fundamental theoretical debate now occurs in academic quarters where many theoretical assumptions only recently passed as self-evident truths.

In the CLS characterization,³ legal academics assume that conflicts between the individual and society can be compromised rationally, and that laws effect and embody these rational compromises. Legal academics also assume that legal doctrine, applied through the proper process of legal reasoning, correctly determines the results of disputes between individuals. According to CLS, most legal academics see themselves in a pair of related social roles. First, they objectively review the work of legal decisionmakers, sorting out the cases to identify correct results and correct reasoning. Second, they serve as agents for the integration of political and social orders from outside the law, or "policies," into legal doctrine. A few less conventional, more theoretically inclined legal academics see themselves in a more reconstructive role, remaking the doctrine better to accord with liberal theory.

CLS challenges each of these legal academic assumptions and questions each of these legal academic functions. CLS asserts that individuals and society are in perpetual conflict. It also asserts that all attempts to resolve the conflict through law are arbitrary.⁴ It denies the existence of a correct form of legal reasoning. It also denies that doctrine determines the results of cases.⁵ To explain law, it looks beyond doctrine to the structures of moral, economic, and political

across the lines, see the published correspondence of Professor Gordon and Dean Carrington, *supra* note 1.

³ Numerous characterizations of the conventional legal academic and his world view can be found in and around CLS literature. For a good, succinct version, see Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *Stan. L. Rev.* 575, 579-85 (1984).

CLS writers tend to apply the philosophical categorization of "liberal legalist" to outside legal scholars. By this term, CLS refers to its colleagues' theoretical roots in Hobbes, Locke, and Hume. See Johnson, *Do You Sincerely Want To Be Radical?*, 36 *Stan. L. Rev.* 247, 256 (1984).

⁴ This characterization of the CLS position is derived from Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 *Stan. L. Rev.* 199, 208-09 (1984); and Trubek, *Empiricism*, *supra* note 3, at 579.

⁵ From within CLS, see, e.g., Kennedy, *Legal Education as Training for Hierarchy*, in *The Politics of Law: A Progressive Critique* 40 (D. Kairys ed. 1982). For an outside exposition of the Critical concept of indeterminacy, see Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 *Cardozo L. Rev.* 917 (1985).

thought, or "metaprinciples," that motivate legal decisionmakers.⁶ It advances these explanations, not to preserve and strengthen legal doctrine but to deconstruct it, in order, ultimately, to facilitate goals of political transformation.

Now it might be hard to find a real world legal academic perfectly embodying the CLS picture. The picture assembles a very familiar set of elements even so; CLS engages every other legal academic on one or another fundamental point. Thus do intense academic battles result from encounters between CLS and the rest of the legal academy.

Yet these encounters need not always result in conflict. Contrary to the assumptions underlying the images of battle, the world views behind the discourse between CLS and others do not have a binary cast of "critical" and "liberal." Rather, gradations of opinion exist, allowing encounters to lead to give and take and mutual influence. Even legal academics doing doctrinal work can acquaint themselves with the CLS critique and constructively utilize it without suffering insult or injury. This essay describes perspectives to promote such cordial encounters. As a basis for discussion, it employs Duncan Kennedy's critique of contract law,⁷ as advanced in *Form and Substance in Private Law Adjudication*⁸ and *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*.⁹

Part I looks into the meaning of images of academic battle, con-

⁶ See generally Schlegel, Introduction, 28 Buffalo L. Rev. 203, 203 (1979) ("[T]here can be no plausible legal theory without a social theory . . ."); Yablon, *supra* note 5, at 934 ("Critical explanation of legal decisionmaking . . . does not view judicial motivation as separate from and extraneous to the structure of the doctrinal rule itself.")

The "metaprinciples" referred to in the text are our shared patterns of thought. Kennedy's usage is narrower. To Kennedy, metaprinciples are determinate deep structures of thought. See *infra* text accompanying note 22.

⁷ This is done with the knowledge that Kennedy "recants" many significant elements of this critique in Gabel & Kennedy, Roll Over Beethoven, 36 Stan. L. Rev. 1, 14-18 (1984). The "Kennedy" discussed in this essay is comprised of the statements made in Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685 (1976) [hereinafter cited as Kennedy, *Form and Substance*]; and Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Md. L. Rev. 563 (1982) [hereinafter cited as Kennedy, *Paternalism*]. No claims are made as to identity between this "Kennedy" and the human being, Professor Duncan Kennedy of the Harvard Law School.

⁸ Kennedy, *Form and Substance*, *supra* note 7.

⁹ Kennedy, *Paternalism*, *supra* note 7.

CLS has singled out contract law for intensive study. Professor Roberto Unger explains the attraction as part of CLS's enterprise of showing the highly political content of the law:

Classical contract theory has always proved seductive to jurists in search of a legal calculus that could claim to generate the impersonal rules of free human interaction. For the same reason, it offers the most valuable challenge to a concep-

sidering the matter of manners in academic discourse. This discussion identifies some relationships between the manners and world views of academics and identifies the place these relationships hold in the debate surrounding CLS. Part II looks into the possibility of constructive use of Kennedy's critique of contract law by those academics outside of CLS who do doctrinal work. This discussion affirms the continued viability of doctrinal work in the post-Realist tradition, but recognizes this work's diminished theoretical respectability. The contemporary legal academy more and more relegates doctrinal work to the status of a narrow form of professional practice. Kennedy, while contributing significantly to this loss of status, simultaneously shows ways to increase both the explanatory power and practical utility of doctrinal work and thereby to salvage some of its academic respectability. Part III looks into the political underpinnings of the images of battle. To facilitate appraisal of the antiliberal theory underlying Kennedy's critique of contract, this discussion compares Kennedy's *Paternalism* with Professor Anthony Kronman's recent work on the same subject.¹⁰ The comparison highlights a core of humanistic values that makes Kennedy's antiliberal discourse less adverse to the liberalism of legal academics outside of CLS than the images of battle would suggest.

I. MANNERS

Academic discussion is a highly stylized form of social intercourse characterized by extraordinary personal detachment. Even so, when academics interact by discussing ideas, there occur the same sorts of conflict between self and other that occur with any other social interaction within a community. Academics integrate themselves with their ideas in many ways. For example, they consider fluency with given ideas relevant to their self-evaluations. They also draw on their personal experiences when formulating ideas. Sometimes they make association with certain ideas a mark of status in the academic community. And sometimes their public presentations and exchanges

tion of the doctrine that emphasizes the continuity of legal analysis with ideological conflict.

Unger, *The Critical Legal Studies Movement*, 96 Harv. L. Rev. 561, 618 (1983). For other CLS work on contract law, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997 (1985); Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. Rev. 829 (1983); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 Minn. L. Rev. 601 (1977); Mensch, *Freedom of Contract as Ideology* (Book Review), 33 Stan. L. Rev. 753 (1981) (reviewing P.S. Atiyah, *The Rise and Fall of Freedom of Contract* (1979)).

¹⁰ Kronman, *Paternalism and the Law of Contracts*, 92 Yale L.J. 763 (1983) [hereinafter cited as Kronman, *Paternalism*].

of ideas become competitive events. In short, whether the forum is the lecture hall, the seminar room, the office and corridor, or the pages of a journal, academic exchanges can be threatening to individual academics' self-respect.

Manners of presentation reduce or enhance the chance of injury to the self-respect of those participating in academic interchanges of ideas. The greater the apprehension of injury, the more likely an academic audience will form unconsidered negative judgments regarding the substance of the idea. Manners of presentation also engage or alienate the stylistic sensibilities of those in the academic audience. As with any community, prevailing opinions regarding the manners of a member over time may affect the size, composition and receptiveness of his or her audience. Images to which such manners give rise even may figure into the audience's image of the idea conveyed.

Perhaps manners should be completely beside the point in academic discourse. We can posit an ideal academic world in which this would be the case. Academics in this world would devote all of their energies to formulating, communicating, and evaluating ideas. These scholars would not permit their personalities to interfere with this utterly substantive work. They would accord importance neither to the mode of an idea's communication nor to any elements of personality incidentally communicated with an idea. Even in a less than ideal academic world, the most nearly ideal academic would be so interested in ideas and would have a spirit so magnanimous that no academic discussion could offend his or her sensibilities or injure his or her self-esteem. Unfortunately, the real academic world and real academics tend to fall short of these ideals. As a result, manners are not quite beside the point in academic discourse. They can bear on the substance communicated.

Highly aggressive and intensely personal manners of presentation are particularly likely to bear on substance. They can prompt unconsidered negative judgments or otherwise alienate academic audiences. These dangerous characteristics are considered in turn in the following discussion.

A. *Aggression*

Ideas can be conveyed aggressively. Sometimes aggression may alienate members of the audience but carries no concomitant risk of injury to them, as with spoken and written tub-thumping and table-pounding and other minor assaults on the sensibilities. The risk of injury increases as aggression becomes attack on designated or undesignated members of the audience. Such attacks occur commonly in

the legal academy, most notoriously in Kingsfield's contracts class,¹¹ but just as aggressively on the pages of the law reviews. An idea's proponent may assert personal superiority for having formulated it. Or, a proponent may challenge directly the intellectual and moral worth of those in the community holding any idea but that advanced, notwithstanding a risk of injury to the identity of those challenged.

The polar opposite of communication by attack is restrained and supportive teaching. The ideal restrained teacher combines a rigorous, socratic approach with empathy towards students. This teacher instructs an audience of error in its thinking by engaging it on common ground. The teacher displays understanding of the set of mind that encompasses the erroneous idea and affirms its legitimacy. The teacher then points the audience to the views that have not occurred to it, leading it into self-criticism. Thus, the same idea that injures identity when employed as an instrument of attack, can advance painlessly an understanding of self and the world if communicated with care.

Theoretical justifications exist for both of these manners of communication. Most legal academics simultaneously subscribe to both theories, even though the theories conflict. Happily, this contradiction is hardly noticeable in academic practice as academics tailor their manners to suit different situations.

The justification of attack draws on the rhetoric of individualism. We envision a tough academic world in which the interchange of ideas tends to be a rough-and-tumble affair. Those who stand up and speak in this world must assume the risk that those moved to respond will ignore social niceties.

The justification of attack also draws on traditional academic values. In a vital academy ideas, and only ideas, can matter. Therefore, restrained manners confer no intrinsic benefit. Scarce human energies cannot be diverted from the vigorous pursuit of truth to train manners protective of delicate egos. Nor is polished, caring behavior inherently good. Pleasing manners may obscure intellectual and moral deficiencies; an obnoxious and hurtful academic may have a good heart as well as good ideas.

The justification of attack also has an instrumental dimension. Academics advancing new ideas cannot safely assume the efficacy of the restrained and supportive mode. The audience may not be disposed to subject itself to self-criticism. Cold academic print is more easily ignored than the first-year contracts teacher. An attack on an

¹¹ See J. Osborne, *The Paper Chase* (1971). The reference is to Charles W. Kingsfield, the novel's intimidating professor of contracts.

audience's thinking may be the only practical way to break through its indolence and complacency and to get its attention.

Finally, professional values figure into the justification of attack. Attack remains a part of the advocate's craft, and training in attack remains a part of legal education. We can assume that those in the legal academy have learned to deal with it.

The justification of restrained and supportive teaching counters the justification of attack. It draws on the rhetoric of community. Many conventions of "good manners" restrain self-expression out of concern for others. Academics, like other people, experience plenty of insecurity. Restraint in academic discussion eases these feelings of insecurity. It therefore should be practised out of respect for others' self-respect.

The justification of restrained teaching also includes academic values and instrumental considerations. Insecurity, stemming from the aggression of other members of the academic community in the normal conduct of community affairs, does not, in the long run, serve a constructive purpose. If only ideas matter in a vital legal academy, then surely its members would not want to divert energy from the pursuit of ideas to the formulation of aggressive rhetoric. If only ideas matter, then the ego-suppression necessary for restraint will require little effort. In any event, the amount of energy expended in ego-suppression by academic speakers may be less than the amount of energy needed to assuage the wounds of their audiences. Restraint then, may be cost beneficial. Of course, restraint does disadvantage those introducing new ideas by making their work less noticeable. But this sacrifice advances communitarian goals. And the sacrifice lasts only for a short term because good ideas achieve currency in the long run. Thus, while a vital academy always will subject its members' ideas to searching criticism, its vitality need not require the sacrifice of its members' human worth.

Finally, the justification of restrained teaching rejects the adversary system and its institutionalized aggression as an inappropriate model for the academy. Courtroom advocates do not become engaged personally in the ideas they advance.¹² While they take a craftsman's pride in their work, they do not stake as much personal worth on their discourse as do academics. The attacks the advocate suffers bear on the client's case, rather than on his or her craftsmanship.

¹² But see Yablon, *supra* note 5, at 918 & n.5 (the "identification by the advocate with the cause being advanced sometimes resonates with religiosity").

B. *Personal Involvement*

This is the matter of manners bound up in the writer's choice between the first and third persons. Like aggressive and restrained manners, personal and impersonal manners are subject to conflicting theoretical justifications. We associate the personal mode with subjectivity, informality, flexibility, passion, and free expression. We associate the impersonal mode with objectivity, formality, rigidity, reserve, and disciplined expression. In practice, academics inject themselves into their work by degrees, employing both modes of expression to varying degrees in different situations.

Under prevailing conventions of manners, impersonal academic writing has an appearance of propriety and the personal mode tends to be reserved to the classroom. Even so, personal writing appears in the law reviews. One no longer expects to hear the convention favoring impersonal academic writing stated as a rule; the resemblance of such a rule to the formal dictates of the etiquette books of the past would be too close for modern sensibilities. As modern social informality becomes more customary in the law reviews, it seems less and less likely that academic readers will dismiss a work solely because the writer employs the first person and otherwise places his or her personality on display. At the same time, intensely personal academic writing will still produce some alienation in certain quarters.

It should be noted that personal manners have no necessary affinity with aggressive manners in theory or in practice. One can be aggressive personally or impersonally. Restrained teaching also can be conducted personally or impersonally. But personal display may enhance the effect of either manner of presentation. When the attacker commits his or her personality, the targets may be shaken even more. When the restrained teacher commits his or her personality, the student may be drawn toward a more intense level of self-teaching.

Unlike aggressive and restrained manners, personal and impersonal manners have definite substantive analogues. Legal academics theoretically disposed to search for objective truth—whether as classical liberal legalists or modern structuralists—should be drawn to an impersonal style.¹³ The academic's personality can only interfere with the effective description, analysis and communication of true doctrines, determinant structures and other objective realities outside the person. On the other hand, legal academics theoretically disposed to see ideas as subjective constructs should be drawn to a personal

¹³ For a structuralist analysis of the relationship between structures of thought and styles of discourse, see Heller, *Structuralism and Critique*, 36 *Stan. L. Rev.* 127, 147-49 (1984).

style. To these legal academics, a sentence starting with the words "The law is," or "The law should be," dubiously asserts an objective certainty. Members of this group would find "I think the law should be," or even more relatively, "I believe the law should be," to be more accurate formulations.

From this starting point, a broader subjectivist critique of the convention of formal legal writing can be constructed along with an objectivist reply. To the subjectivist, formal style protects the process by which vain and ideological lawmakers and scholars misrepresent their private value choices as the dictates of objective reality. They employ formal style in making ideas a means to the end of power. None of this will make sense to formalists and structuralists: Objective realities are, well, objective realities. This subjectivist critique at bottom goes to bad ideas, and in a free society bad ideas fall out of circulation irrespective of their manner of presentation. While informal style may enhance our understanding of the subjective side of things, it also can be subverted, less as a means to the end of power than as a means to the end of exhibitionistic display.

C. *Manners and CLS*

Discourse on academic manners is discourse on the theory and practice of community behavior and accompanying moral and instrumental considerations. Fortunately, no positive law figures into it: No professional codes of "disciplinary rules" or "ethical considerations" deal with this behavior. We can, of course, hypothesize a positive law of academic manners that fills this "gap." Such an exercise follows. It shows us why no such positive law exists.

In formulating a positive law of academic manners we probably would find ourselves drawn to standards rather than rules. And, as with the "good faith" and "bad faith" of private law, we would have to concede that no objective calculus could determine what constitutes "good manners" and "bad manners." The subjective disposition of the observer would figure in. Then we would posit a class of "easy cases" as to which all would agree. For example, all probably would concur in a judgment of bad manners with respect to a personal attack grounded in an exposé of the institutional or personal life of another academic. It could be noted that even here the offending conduct need not be irrelevant to the legal discourse—the biographical details may say something about the genesis of the ideas under critique. As punishment, we could recommend pariah status; as a remedy, money damages.

This positive law model works less and less neatly when applied

to the much larger class of cases where serious intellectual aggression causes alienation but only minor personal injury. The model demands "yes" and "no" answers where none can be given and where no injuries of enormous magnitude require that complexity be disregarded in the interest of a public and authoritative determination.

The rejection of positive law for these hard cases leads to the question whether the elaboration of any sort of collateral jurisprudence of academic behavior will detract from the overall success of the academic enterprise. Consider again the fundamental theoretical contradiction that academic manners pose: While academic manners matter because individual self-respect matters, considerations of individual self-respect should not impede the flow of academic discourse. In light of this, it may be that we should have neither law nor legalistic discourse respecting academic manners at all, public or private, formal or informal. Not only instrumental concerns, but also good manners should make us reluctant ever to pronounce publicly on one another's manners. The prevailing reliance on the community's invisible hand seems well justified.

The following comments on CLS' manners violate this suggestion of silence. But comments can be justified on the facts of the case. The customary silence already has been broken. The popular image of battle includes the image of a popular judgment of bad manners respecting CLS.¹⁴ An account of this image, and a substantive rebuttal of the accompanying negative judgment, do not seem inappropriate.

Much CLS work employs the aggressive mode, and with reason. CLS advances a critique so fundamental and sophisticated that aggression may be necessary in order to get the rest of the community's attention. It can be noted that, of all the members of the community, the established figures under attack by CLS have the least cause for insecurity.

CLS work also tends to be intensely personal, also with reason. Attacking "hierarchy" is a part of the CLS program. Formal law review style, like formal law school education, stems from and supports the "hierarchy." Rigid, impersonal style implies authority; it constrains individual expression; it makes passion and outrage difficult to communicate. Furthermore, personal style complements CLS's substantive assertion that personal motivations have a determinative role in legal decisionmaking. The CLS critique tells us that the

¹⁴ See, e.g., Johnson, *supra* note 3, at 247 (use of the image of the late 1960's vulgar radical); see also Schwartz, *supra* note 1 (CLS preference for and use of confrontational, uncompromising tactics).

conventional, impersonally written doctrinal piece that synthesizes some cases and proposes a norm cannot achieve the objective force its stylistic mode implies. Personal values, as well as reason, go into these normative choices. Such conventional academic exercises, therefore, would be more honest if a more personal style were adopted.

These substantive justifications of CLS style can be questioned, of course. As to aggression, CLS by now has the community's attention. As to personal involvement, legal scholars outside of CLS can defend the impersonal mode and point to the dangers of departing from it by drawing on liberal political precepts. To liberals, law is the individual's chief defense against the aggression of other individuals and groups. Law has this protective capacity only so long as lawmakers strive to derive it rationally and describe it objectively, despite the presence of subjective elements in legal discourse. If we collectively remit law and legal discourse to the personalities of lawmakers and scholars, law will lose its protective capacity. Bundles of restrictive legal concepts springing from a single personality do not carry the persuasive power of concepts derived from community traditions and general collective assent. And, although law has a subjective side, lawmakers and scholars derive authority from conscientious endeavors to make the process of formulating legal directives more objective. Formal style advances this endeavor by encouraging the individual to separate himself or herself from the legal question under discussion. Conventions of manners that discourage the subjective formulation of legal assertions—disapproval of revelations of "my values" or "my personal experience"—create healthy incentives for lawmakers and scholars to look outside of themselves for answers to questions.

Now it seems unlikely that the popular image of CLS's manners found its way into the community's consciousness as the result of widespread reflection on the meaning of aggression and personal involvement in academic communication. Such reflection, after all, might have prevented the value judgment respecting manners from being reached. The image can be more plausibly explained as a defensive response to the more successful segments of the critique. The body of CLS work questions every aspect of the conventional academic's institutional life. Fundamental defenses having been aroused, styles of presentation take on more than usual significance. Conventional small-scale doctrinal work does not have this effect, even though conveyed aggressively and personally. Small-scale work rarely involves serious assertion of the writer's personality against the reader's individual autonomy. With such work, only a small number

of readers working in the same area have a significant personal stake in the discourse. Of course, such work can include aggressive and injurious review of, and comment on, other work in the field. But in this arena the right touch of aggressiveness easily can prove beneficial to all concerned. A little intemperate behavior adds to the readership's enjoyment, and the conflict draws beneficial attention to both the attacker and the targets. The fight is consensual and stylized—an academic drawing room comedy performed to gratify the actors and amuse the audience. Aggression takes on a less pleasing aspect as the subject matter and audience grow in size and significance. When, as in CLS's case, the subject becomes the world view embedded in the rest of the community's consciousness,¹⁵ heightened sensitivity to manners can be expected. If counteraggression or denial results, aggression may have the effect of retarding serious consideration of the ideas communicated.

It bears noting that legal academics from outside of CLS—members of the Chicago School of Law and Economics, for example—also aggressively advance broad-ranging critiques. Yet the same popular behavioral image does not seem to have arisen. Several related explanations may be proposed. Unlike members of CLS, Chicago School economists share a pool of liberal assumptions with the community mainstream. Their critiques, accordingly, impart a lesser theoretical threat. The economists also tend to employ an impersonal, formal style. Given the individualistic world view they sometimes propound, no substantive contrast highlights the occasional rough handling of opponents. CLS's aggressiveness toward the academic community in which it lives sometimes strangely contrasts with its pronouncements of communitarian ideals.¹⁶ One suspects that CLS writers would not

¹⁵ The phrase is adapted from Trubek, *Empiricism*, supra note 3, at 589.

¹⁶ The composition of the audience also must be considered in evaluating academic expression. One suspects that CLS has a particularly difficult task in addressing its published work so as to achieve optimal levels of communication to all of the substantially different groups comprising the academic audience. A point well made in one manner to an audience of CLS insiders may be incomprehensible or offensive to legal academic outsiders. Still a third formulation might be advisable for an audience of political scientists.

The Kennedy of Form and Substance may not be so different than the Kennedy of Roll Over Beethoven as first appears, and this despite the fact that much of Form and Substance is repudiated in Roll Over Beethoven. See Kennedy & Gabel, supra note 7, at 15–17, 24, 36–37. Form and Substance is addressed to a broad audience: Anyone past the first year of law school has access to it. Roll Over Beethoven can be characterized as internal conversation. Whether Gabel and Kennedy expected it to be accessible only to themselves or to a somewhat wider group within CLS is not clear. Access to outsiders is so difficult that it creates an alienating effect. Less easily noticed but similar failures of communication are inevitable when specialized academic discourse achieves general circulation.

The presentation of the critique of contract in Form and Substance and Paternalism also bears comparison to the presentation of the similar critique of contract in Unger, supra note 9.

deny the discrepancy's existence, but would advance instrumental justifications.

Finally, and most importantly, the image of battle obscures the presence of exemplary works of restrained teaching in the CLS canon. *Form and Substance* and *Paternalism* are two such works. They make the same challenge to other academics' world views as does other CLS work. But they make the challenge gently, communicating respect for, and understanding of, the reader's positions. Significantly, in these works Kennedy refrains from making explicit his judgments regarding the legitimacy of the work and world views of others. By leaving the judging to the mind and conscience of the reader, he advances academic values well worth consideration.

II. METAPRINCIPLES

The following part of this essay describes the critique of contract in Kennedy's *Form and Substance* and *Paternalism*, and elaborates its bearing on the conventional academic enterprise of finding the law. This discussion is particularized: It isolates only a few of the many concepts set forth in these multifaceted works, and relates them only to one of the many forms of academic enterprise. The discussion highlights Kennedy's potential field of influence within the legal academy's most traditional quarters. Thus, it aspires to institutional significance, rather than significance as contracts jurisprudence.

A. *Kennedy's Contract Critique and Doctrinal Scholarship*

Kennedy challenges the conventional assumption that contract doctrine determines the results of contract cases. Doctrine may influence results in easy cases. But, says Kennedy, easy cases are uncommon. Pervasive "gaps, conflicts, and ambiguities" in the "elaborated body of law,"¹⁷ tend to give rise to hard cases. As to those cases, the

The abstract "expanded doctrine" presented by Unger is alienating and vaguely threatening to the uninitiated conventional academic. Kennedy's work realizes expanded doctrine in a way more easily comprehended by conventional academics. Kennedy speaks in familiar language and employs lawyerly conventions even as he participates in a subversive enterprise.

¹⁷ Kennedy, *Paternalism*, supra note 7, at 581. But see the explanation of the significance of the distinction between easy cases and hard cases in Heller, supra note 13, at 173-74 n.81:

Easy cases are those in which concrete outcomes clearly can be derived by applying the legitimating principles of the legal structure. Hard cases are those exceptional or aberrational situations in which results are not so easily derived. Law students encounter only hard cases since, presumably, they are more challenging. But the ideological value or meaning of the legal order is contained in the structure and its derivative easy case.

In practice the legal system depends on the existence of easy cases of a different type. A case is easy when particular settled practices are reproduced across

doctrine leaves decisionmakers wide latitude. The doctrine applicable to hard cases reduces to conflicting "stereotypical policy arguments," or "rhetorical modes."¹⁸ Sophisticated decisionmakers exercise choice in deciding hard cases by manipulating these conflicting pieces of doctrine to suit their impulses. Since doctrine does not determine the results of hard cases, it has no power to explain them.

Having rejected the adequacy of doctrinal explanations for the results achieved in contract cases, Kennedy advances explanations in terms of the deeper structures of thought, or "metaprinciples," that constitute and determine the impulses of decisionmakers. These, he says, partake of a fundamental contradiction. Individuals and their communities engage in perpetual and unresolvable conflict; and in each individual coexists conflicting individualistic and altruistic normative visions. "Metaprinciples" are comprised of these conflicting political, social, and moral values.¹⁹ Kennedy characterizes individualism this way:

The essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested. The form of conduct associated with individualism is self-reliance.²⁰

He characterizes the opposing metaprinciple of altruism this way:

The essence of altruism is the belief that one ought *not* to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful. It has roots in culture, in religion, ethics and art, that are as deep as those of individualism.²¹

Individualism, says Kennedy, explains the results of many contract cases. Contract decisionmakers motivated by individualism trust in market regulation and justify their decisions by drawing on devices such as classical interpretive literalism and the policy of transactional certainty. Altruism, says Kennedy, explains the results of many other contract cases. Contract decisionmakers motivated by altruism intervene against market failure and justify their decisions by

time without theoretical reexamination. But the heart of legal critique is to show that there are no easy cases in the sense that practice flows directly from legitimating principles.

¹⁸ Kennedy, *Paternalism*, *supra* note 7, at 581. See also Kennedy, *Form and Substance*, *supra* note 7, at 1723-24 ("[F]or each pro argument there is a con twin.").

¹⁹ See Trubek, *supra* note 3, at 604, 609; Yablon, *supra* note 5, at 934-36.

²⁰ Kennedy, *Form and Substance*, *supra* note 7, at 1713.

²¹ *Id.* at 1717.

drawing on devices such as flexible standards, contextualized interpretation and fairness theories. Kennedy does not tell us, however, what it is that causes individualistic motivations to determine the results of some cases and altruistic motivations to prevail in others. He recognizes that his explanation falls short of predictive calculus:

Like Llewellyn's famous set of contradictory "canons on statutes," the opposing positions seem to cancel each other out. Yet somehow this is not *always* the case in practice. Although each argument has an absolutist, imperialist ring to it, we find that we are able to distinguish particular fact situations in which one side is much more plausible than the other. The difficulty, the mystery, is that there are no available metaprinciples to explain just what it is about these particular situations that make them ripe for resolution.²²

Kennedy's critique revives, brings to date, and transforms the Realists' critique of classical contract law.²³ Classical contract theorists claimed that contract doctrine was derived through correctly reasoned application of the principle of freedom of contract. To them, all of contract could be justified as a means of protecting the autonomy of the individual in society. Realists pointed out the indeterminate relationship between the concept of freedom of contract and the results of contract cases. Some Realists also denied the autonomy of legal argument from general moral, economic, and political discourse,²⁴ and emphasized the determinative force of personal motivation in legal decisionmaking.²⁵ Kennedy repeats all of this, disregards many other Realist points, and adds his overarching image of perpetual contradiction and his explanatory metaprinciples of individualism and altruism. In so doing, he transforms the Realists' explanatory concept. Where some Realist work dismissed doctrines as irrelevant, *ex post* rationalizations of emotionally determined acts, Kennedy emphasizes the significance of doctrines as parts of larger,

²² *Id.* at 1723–24 (footnote omitted).

²³ Kennedy acknowledges his Realist antecedents. See *id.* at 1731–32; Kennedy, *Paternalism*, *supra* note 7, at 578.

In this essay, "classical" contract law is the construct of Langdell, Holmes, and Williston, memorialized in the *Restatement of Contracts* (1932). Post-Realist contract law is the revision of Corbin, Fuller, Gilmore, Braucher, and Farnsworth, memorialized in the *Restatement (Second) of Contracts* (1981).

²⁴ Kennedy, *Form and Substance*, *supra* note 7, at 1724, 1731–32, 1762.

²⁵ See, e.g., Hale, *Bargaining, Duress and Economic Liberty*, 43 *Colum. L. Rev.* 603 (1943); Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 *Harv. L. Rev.* 1222, 1238–39 (1931); see also, Mensch, *The History of Mainstream Legal Thought*, in *The Politics of Law* 18, 28 (D. Kairys ed. 1982) ("[T]here is no 'inner' core of free, autonomous bargaining to be protected from 'outside' state action; the inner and outer dissolve into each other.").

not necessarily consistent, systems of values.²⁶

Kennedy directs his critique against post-Realist theories that recognize the existence of conflict between individual and society, and advocate its resolution through interest-balancing jurisprudence. Says Kennedy, no theoretical core from which resolutions of conflicts rationally can be derived has been devised. Furthermore, no such overarching conflict-resolving metaprinciple will be found in the world as we know it since all philosophical inquiries lead back to the void of perpetual contradiction.²⁷

Kennedy also directs his critique against post-Realist contract doctrine. This, he says, ameliorates some of classicism's individualist excesses but does not differ from it in substance. Newer doctrinal notions, such as inequality of bargaining power, are just as indeterminate and incoherent in application as the classical notion of freedom of contract.²⁸ In *Paternalism* Kennedy offers a detailed economic and political contextualization of cases employing the inequality-of-bargaining-power rationale. This shows persuasively that the altruism metaprinciple, particularly manifested in redistributivist and paternalist impulses, better explains the set of decisions and better isolates the complex economic questions the cases raise than does the notion of inequality of bargaining power.²⁹

²⁶ For a description of the differences between the Realists' concept of legal explanation and the CLS metaprinciple, see Yablon, *supra* note 5, at 934-35 (CLS has found "doctrine worthy of serious study." The Realists rejected "any link between doctrine and motives for judicial action.").

²⁷ Kennedy, *Form and Substance*, *supra* note 7, at 1774-76; see Hutchinson & Monahan, *supra* note 4, at 208-11.

Kennedy also rejects the proffer of efficiency as a conflict-resolving metaprinciple. The efficiency norm, says Kennedy, cannot legitimate an area of law such as contract because its application always presupposes the existence of one or another economic order. Kennedy, *Form and Substance*, *supra* note 7, at 1762-64. Furthermore, efficiency works neatly only in tightly closed models. It fails to survive the transfer to real world conditions because its presence or absence simply does not admit of empirical proof. Kennedy, *Paternalism*, *supra* note 7, at 597-601.

Ironically, Kennedy proves himself to be one of the grand masters of microeconomic modeling in the contemporary legal academy even as he rejects efficiency as an explanatory metaprinciple. Compare *id.* at 604-14 with Schwartz & Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 *Va. L. Rev.* 1387, 1389 (1983).

²⁸ See Kennedy, *Form and Substance*, *supra* note 7, at 1731-32; Kennedy, *Paternalism*, *supra* note 7, at 578-81.

Kennedy also rejects capitalist class domination as an explanation for modern contract. Kennedy, *Form and Substance*, *supra* note 7, at 1721-22. For an opposing view from inside CLS, see Gabel & Feinman, *Contract Law as Ideology*, in *The Politics of Law* 172, 178-81 (D. Kairys ed. 1982).

²⁹ The notion of inequality of bargaining power, says Kennedy, conceives of equality in terms of power relationships among contracting parties operative inside the narrow doctrinal framework of contractual assent. The decisionmaker rectifies an uneven balance of power by

A personal moral vision pervades Kennedy's root-and-branch critique.³⁰ He values altruism and wants more of it in private law. He hopes his critique will contribute to an altered approach to contract decisionmaking under which altruist presumptions displace prevailing individualist presumptions. He believes this will result in better decisionmaking if this happens, even though we remain subject to the fundamental contradiction.³¹

At this point, one can imagine a conventional academic commenting that Kennedy's critique has no apparent connection with normal scholarly enterprise. He or she might argue that inspecting decisions for individualism and altruism appears a simple-minded exercise when compared with conventional intuitive distillation of subtle doctrinal statements from unruly groups of cases. The former endeavor, says this conventional academic, amounts to simplified political science, of interest only to political scientists. The latter, while making no pretense to social or political theoretical significance, at least serves the needs of judges and lawyers.

But appearances can be deceiving. Kennedy can be drawn on to renew and improve doctrinal work directed to professional audiences. We can see this by exploring the possibilities opened by Kennedy's expanded notions of doctrinal study and comparing the products of scholarship under the conventional model. Such a comparative exercise follows, undertaken in the illustrative context of the contract law good faith duty.

The good faith duty remains at a nascent stage of development. Its indeterminacy, therefore, still commands general recognition. Despite this, conventional scholarship respecting it operates under the conventional synthesis paradigm—that is, it works toward a general and consistent statement of the doctrine meaningful in determining decisions. Good faith being new and vague, the expectation is that a synthesis of it ultimately will resemble the synthesis of the substantial

imposing contract terms, thereby redistributing power from the strong to the weak party. Kennedy, *Paternalism*, supra note 7, at 615. Kennedy shows that this doctrine does not effectively isolate the instances when a compulsory term will truly benefit the distributive interests of the weak party. His models of redistributive situations show that multitudinous economic factors—particularly market structure and bargaining costs—need to be considered before any redistributive effect can be projected. *Id.* at 615, 618. The equality concept obscures a redistributive objective, but achieves only mild redistributions of wealth on a scattershot basis without threatening society's basic arrangements. "It nonetheless gives a very good feeling," says Kennedy. *Id.* at 621.

³⁰ The charge of nihilism, sometimes leveled against CLS work, applies to neither Form and Substance nor Paternalism.

³¹ Kennedy, *Form and Substance*, supra note 7, at 1777–78. Roberto Unger says more or less the same thing. See Unger, supra note 9, at 639–41.

performance doctrine. Thus, it will be manifested in a standard five or six factors for application in context, rather than in a rule. The Restatement (Second) of Contracts takes a first crack at this synthesis of good faith as follows:

Subterfuges and evasions violate the obligation of good faith in performance even though the actor believes his conduct to be justified. But the obligation goes further: bad faith may be overt or may consist of inaction, and fair dealing may require more than honesty. A complete catalogue of types of bad faith is impossible, but the following types are among those which have been recognized in judicial decisions: evasion of the spirit of the bargain, lack of diligence and slacking off, willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.³²

To assist in appraising the professional utility of the Restatement's synthesis, let us imagine an associate attorney undertaking a memorandum of law recommending a course of action to a client experiencing difficulty in a contractual relationship. The Restatement

³² Restatement (Second) of Contracts § 205 comment d (1981).

The Restatement (Second) synthesis derives from Summers, "Good Faith" in *General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 Va. L. Rev. 195 (1968). There Professor Summers formulated an "excluder" analysis of good faith. Under this analysis, a judge determines good faith by "focus[ing] on the forms of bad faith ruled out in previous opinions and work[ing] from [those] opinions either directly or by way of analogy." *Id.* at 207. Once a body of holdings is created which describe what conduct is in bad faith, there should be "certainty" and ultimately, a rule will be created. *Id.* at 264-65. Furthermore, it is "easy enough to formulate examples of bad faith," and "good faith takes on definite . . . meanings by way of contrast." *Id.* at 263-64. Summers made out a noninclusive list of bad faith actions which eventually found its way into the Restatement (Second) § 205 comment d. These included, "negotiating without serious intent to contract, . . . entering a transaction without intending to perform . . . , evading the spirit of a transaction, lack of diligence, willfully rendering only substantial performance, and abusing the power to specify terms or to determine compliance . . . [as well as] interfering with or failing to cooperate in the other party's performance." Summers, *supra*, at 216-17. For a confirmation of the derivation of this Restatement list, see Summers, *The General Duty of Good Faith—Its Recognition and Conceptualization*, 67 Cornell L. Rev. 810 (1982). In the later piece, Summers "suspect[s] that it is now possible to develop useful lists of factors generally relevant to the determination of good-faith performance in a number of . . . contexts." *Id.* at 833.

Professor Burton seeks a determinate formulation by reconstructing good faith through a cost analysis. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 Harv. L. Rev. 369 (1980). Under this analysis, bad faith is the recapturing of "foregone opportunities." *Id.* at 387. A "foregone opportunity" is an objectively determined alternative the promisor did not choose at formation. *Id.* at 373. The jury decides whether the obligor abused his or her discretion by recapturing a foregone opportunity. *Id.* at 389.

In contrast, Professor Gillette recommends that good faith not be given the status of an independent cause of action precisely because it is vague and often subjectively applied. See Gillette, *Limitations on the Obligation of Good Faith*, 1981 Duke L.J. 619. Even "imbued with its utility as an 'excluder,' good faith may mean different things to different [people]." *Id.* at 643 (footnote omitted).

will help this practitioner only with the first paragraph of the "legal discussion" segment of the memorandum. It tells the practitioner that conduct injurious to the interests of other parties may provide occasions for imposition of the duty. And it tells the practitioner that decisionmakers may draw freely on the entire realm of private law doctrinal and policy notions in justifying their decision. Any notions of fault, culpability, transaction costs, equality of bargaining power, transaction structure, or the parties' status, transactional purpose, or intent (actual or imputed) may be advanced as decisional determinants in a good faith case consistent with the Restatement.³³ The Restatement's doctrinal summary has less utility as the practitioner proceeds into the memorandum. The practitioner's client wants an appraisal of legal risks. To provide it, the practitioner needs to know about decisionmaker behavior patterns the client likely would encounter were the matter to be litigated. Synthesized case law describes only the grammar and vocabulary of the cases' rhetoric, filtering out any motivational volatility.³⁴ It thus provides little assistance with risk appraisal.

We compare a hypothetical study of good faith case law undertaken pursuant to Kennedy's paradigm. This study would scrutinize each case for the intuitive leap taken by the judge in determining the degree of altruistic duty appropriate in the context.³⁵ It would view doctrinal statements as *ex post* rationalizations of these intuitive decisions, interesting nonetheless for what they tell us about the political composition of the decisionmakers. The inquiry would be relational. With Macneil,³⁶ Kennedy tells us that pure exchange relations tend to prompt individualistic responses, and that the sharing and sacrifice arising among the parties in more relational situations tend to prompt altruistic decisions. The study would survey fact patterns, isolating

³³ The conventional law review articles on the subject do little to clarify matters. See *supra* note 32.

³⁴ The Restatement (Second) of Contracts § 205 (1981) good faith duty represents an abstract, almost academic commitment to altruism. By its own terms, the duty applies to every contract. And yet a survey of any series of reporters on the law library shelf containing contract cases will show that there still occurs plenty of Willistonian decisionmaking which fails to take the good faith duty into account. Kennedy's conflicting metaprinciples better account for these phenomena than do generally phrased doctrinal pronouncements on the parameters of the duty.

³⁵ See Kennedy, *Form and Substance*, *supra* note 7, at 1721, 1759-60.

³⁶ Kennedy acknowledges a debt to Macneil. See Kennedy, *Form and Substance*, *supra* note 7, at 1718. For views of Macneil published shortly before *Form and Substance*, see, e.g., Macneil, *The Many Futures of Contracts*, 47 *S. Cal. L. Rev.* 691, 735-805 (1974). Macneil's theories nevertheless place him very much outside of CLS. See, e.g., Macneil, *Values in Contract: Internal and External*, 78 *Nw. U.L. Rev.* 340, 409 (1983) (relational theory accepts the perpetual contradiction).

the interplay of the decisionmakers' motivational dispositions with relational considerations such as the degree of communal involvement, the parties' moral fault or virtue, and the benefit granted or withheld in connection with the particular decision.³⁷ Presumably, some relationship between relational characteristics and "good faith" outcomes would emerge.

The study envisioned would be as much "behaviorist" as "critical" or "political." "Realistic" may be the best fitting single term. The study would find what the law is by examining what decisionmakers do and simultaneously say about it. The study would be more useful to practitioners than scholarship limited by the synthesis paradigm. Information and analysis respecting decisionmaker motivations and relational contexts facilitate the projection of legal risks. By laying out metaprinciples, we tell practitioners useful things about the probability of given results in given cases.

The legal academic who puts Kennedy's critique to use in this or some similar way may find reason to be grateful. Not only do Kennedy's structural theories restore some theoretical respectability to doctrinal scholarship, but they do so without requiring that the doctrinal scholar undertake substantial professional retraining. This academic may find Kennedy's theories easier to grasp and employ than the competing theories of the law and economics schools. And, unlike the law and economics literature, Kennedy's work reaffirms the value of doing what legal academics traditionally have done best: studying judicial opinions. Even though Kennedy makes the unconventional demand that "there can be no plausible legal theory without a social theory,"³⁸ he does not also demand an academic practice involving empirical research into law and society, which most legal academics are unequipped and unwilling to undertake.³⁹ Work under Kennedy's theory requires training in doctrinal discourse. A political scientist or sociologist would have difficulty succeeding at it without a legal education. By thus advancing a scholarship that builds upon the traditional legal academic discipline,⁴⁰ Kennedy protects the legal academy's traditional institutional position.

It also should be noted that nothing in *Form and Substance* and *Paternalism* asserts that meaningful scholarship must focus on deci-

³⁷ See Kennedy, *Form and Substance*, supra note 7, at 1718.

³⁸ See, e.g., id. at 1702, 1712, 1724, 1776. The phrase comes from Schlegel, Introduction, supra note 6, at 203.

³⁹ See Trubek, supra note 3, at 579-88 for a description of the tradition of empirical studies of law.

⁴⁰ See Shupack, Rules and Standards in Kennedy's *Form and Substance*, 6 *Cardozo L. Rev.* 947, 948 (1985).

sionmaker values. Other relational or social inquiries—studies of regulatory structures and empirical settings, for example—can be fitted into Kennedy's critical picture. Decisionmakers' individualist and altruist values are sensitive to pictures of reality, pictures that often are stereotyped and distorted in legal literature and conventional legal imaginations. Kennedy presumably would admit that scholarly reconstructions of these pictures can better structure the channels in which legal motivations flow.

If the Kennedy of *Form and Substance* and *Paternalism* threatens anyone in the legal academy, it is the unreconstructed doctrinalist. This is the anti-Realist academic writer of glorified student notes. This academic accepts doctrine as the apolitical determinant of the results of cases, even while silently employing politics to critique doctrine's formulation and deployment in judicial opinions. Kennedy implicitly asserts that this work lacks legitimacy. But it should be noted that Kennedy here "delegitimizes" not the law itself, but a genre of legal scholarship. It also should be noted that Kennedy's attack primarily goes against this scholarship's institutional status as explanatory theory. The law and economics literature and the law and society literature each makes substantially similar implicit challenges, albeit while advancing different explanatory concepts.⁴¹

The Kennedy of *Form and Substance* bids the unreconstructed doctrinalist to abandon claims to status as a high theorist and to accept the indeterminacy of doctrine and the significance of decisionmaker values in its creation and application. Presumably, once the duly chastened doctrinalist does this, he or she legitimately can return to doctrinal work. The practitioner audience for doctrinal discourse will be there as before, looking to the doctrinalist academic and the treatise writer to do the ongoing job of keeping the doctrine organized and translating political, social and economic ideas into doctrinal terms. To these practitioners, the doctrinal academic probably will remain a theorist. At the same time, academic theorists will view the doctrinalists' work as an exercise ancillary to practice. Ironically, the job of conveying the ideas of academic theorists to the practitioners ultimately may fall to the doctrinalist academic.

B. *Caveats*

Two significant qualifications limit the foregoing commendation of Kennedy's critique to doctrinalist contract scholars. First, the explanatory power of the metaprinciples of *Form and Substance* tends to

⁴¹ For a fuller discussion of the role explanatory concepts play in any particular school of thought, see Yablon, *supra* note 5, at 925-29.

decrease as private relationships become more complex. Second, at some points, Kennedy's antiliberal objectives so influence his legal analysis as to place his explanations of legal structure out of touch with any reality within the purview of most scholars. The following discussion details these caveats.

1. Group Associations

In *Form and Substance* Kennedy asserts that the metaprinciples of individualism and altruism explain the legal governance of private relations more complex than those dealt with under the traditional categories of contract and tort law. He suggests, for example, that an individualistic corporate law appeared in the late nineteenth century, paralleling the appearance of individualistic contract law. This must mean that Kennedy would explain the late nineteenth century cessation of close state law scrutiny of corporate affairs in terms of the notion of individual self-responsibility.⁴² Such an explanation certainly captures significant characteristics of late nineteenth century corporate law. The courts and legislatures of that era did remit shareholders, workers, and consumers to self-protection in their dealings with corporate entities.

But we cannot fully explain the emergence of modern corporation law by references to legal decisionmakers' notions of individual self-responsibility. Closer focus on late nineteenth century developments respecting internal corporate relationships shows us a system in which individual self-responsibility was anything but the norm. Internal corporate life of that era centered on community support for the leadership and individual sacrifice for the interests of the collective enterprise. Corporate law facilitated this corporate-community solidarity by protecting management discretion and limiting management accountability to individuals dealing with the corporate entity.⁴³ In

⁴² At least, absent evidence of a lack of free will. Kennedy, *Form and Substance*, supra note 7, at 1730. The subject comment is made in the course of Kennedy's discussion of 19th-century contract law:

[T]he rules of contract law still represented a moral as well as a practical vision, but that vision was no longer perceptibly altruist. The new premise was that people were responsible for themselves unless they could produce evidence that they lacked free will in the particular circumstances. . . .

We could trace a similar process of development in torts or property or corporate law. In each case, there was a central individualist concept representing a substantial limitation on the total freedom of the state of nature.

Id.

⁴³ See generally J. Hurst, *The Legitimacy of the Business Corporation in the Laws of the United States 1780-1970* (1970) (accounting for the emergence of management-protective corporate law). Says Hurst: "Corporation law early favored business arrangements which central-

order to explain this management-protective corporate law in Kennedy's terms, we must make recourse to his altruism metaprinciple, rather than to individualism. That is, the lawmakers' altruism toward the management group fostered a corporate law privileging collective interests over individual rights. And, fully consistent with the analysis of *Form and Substance*, the lawmakers manifested this collectivist regime in standards, rather than rules.⁴⁴

Unfortunately, this analysis of early modern corporate law in individualist/altruist terms only begins to relate the body of legal decisions in question to the determinant social and political visions of the decisionmakers. This individualist/altruist analysis isolates some fundamental concepts respecting the appropriateness of mutual dependence as instantiated in corporate law.⁴⁵ Corporate law also instantiates particularized concepts respecting political and social control of powerful business entities. It may be that the latter group played the more significant causative role in late nineteenth century decisionmaking.

Similar caveats must be entered against employment of the metaprinciples of individualism and altruism to explain contemporary corporate law phenomena. One of the great contemporary corporate law issues, the fiduciary duties of management groups threatened with takeovers, can be taken as an example. One strain of discourse on this issue advances agency-cost jurisprudence against traditional judicial

ized decision making, gave it considerable assurance of tenure, and armed it for vigorous maneuver." *Id.* at 25. This characterization is comprised of both individualism and altruism.

⁴⁴ Those standards overrode the freedom of parties doing business to alter them contractually. See *id.* at 56.

⁴⁵ Professor Gerald Frug's recent work in the corporate area does not employ the metaprinciples of individualism and altruism. Frug looks at the larger structural picture of law and ideology constituting and legitimating large corporate bureaucracies. He considers the different theories that purport to contain corporate power even as they protect it. He shows that each such theory attempts simultaneously to impose objective limitations on corporate power and to protect subjective spheres of self-expression both inside and outside of the corporation. He asserts that the theories fail successfully to accomplish this subjective/objective dichotomy and therefore are inadequate. Frug himself would like to reconstruct social life by dismantling corporate and other bureaucracies and substituting other forms of human relationships. See Frug, *The Ideology of Bureaucracy in American Law*, 97 *Harv. L. Rev.* 1276 (1984).

Professor Roberta Romano would term Frug a "participationist":

The participationist ideal is organized around small nonhierarchical groups that display, as the name denotes, high levels of member participation in all decisions. This vision is organic and not individualist because it perceives the group, which may be the entire community, as the elemental political and social unit. The primary goal is the decentralization of decisionmaking.

Romano, *Metapolitics and Corporate Law Reform*, 36 *Stan. L. Rev.* 923, 946 (1984). The Kennedy of *Form and Substance* and *Paternalism* also can be so categorized. But cf. Unger, *supra* note 9.

tolerance of self-protective management conduct. Conflicting individualistic and altruistic motivations can be detected behind the legal arguments on both sides. The judicial position reflects an altruistic sense of interprofessional solidarity.⁴⁶ The judge knows that union employees, academics, judges, and other government workers have tenure systems, and that today a good faith contract duty protects even untenured employees; the judge, thus, feels that business executives also should have some sort of tenure. The academic attack on decisionmaking prompted by these feelings in effect recommends destabilization of a longstanding system of executive tenure by the play of market forces. This position can be characterized as individualistic.

These explanations in terms of individualism and altruism tell us less and less about the determinants of this area of the law as we develop the picture of the conflicting interests at stake. Massive fights over slices of corporate pies bring the interests of many groups into simultaneous conflict. These interests, belonging to groups and subgroups of managers, shareholders, employees, and creditors, go in and out of alignment as the posture of each battle changes. So many different individualistic and altruistic responses can be provoked by the many stimuli involved that employment of Kennedy's metaprinciples results in a sort of explanatory indeterminacy. Suppose the legal regime tilts to favor target shareholders. We could say that it thereby imposes a duty of sharing to the benefit of the larger corporate community. But, because this duty of sharing denies management tenure, it has a concomitant individualistic aspect. If we reverse the hypothetical and posit a legal regime tilting toward target management, we see sharing and self-reliance imposed on target stockholders for the benefit of a larger, but differently conceived corporate entity. Again, we can talk of both individualism and altruism. In neither case have we learned much about what determined the legal result.

We would do better with explanations of this and other areas of corporate law that center on interest groups, wealth, and power. The

⁴⁶ The judicial position is set forth in a number of well-known opinions. See, e.g., *Panter v. Marshall Field & Co.*, 646 F.2d 271, 295-97 (7th Cir.), cert. denied, 454 U.S. 1092 (1981); *Johnson v. Trueblood*, 629 F.2d 287, 292-93, vacated on other grounds, 629 F.2d 302 (3d Cir. 1980), cert. denied, 450 U.S. 999 (1981); *Cheff v. Mathes*, 41 Del. Ch. 494, 508, 199 A.2d 548, 556-57 (1964).

The agency-cost critique has an extensive literature. See, e.g., *Bebchuk, The Case for Facilitating Competing Tender Offers*, 95 Harv. L. Rev. 1028 (1982); *Easterbrook & Fischel, The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981); *Easterbrook & Fischel, Takeover Bids, Defensive Tactics, and Shareholders' Welfare*, 36 Bus. Law. 1733 (1981); *Gilson, A Structural Approach to Corporations: The Case Against Defensive Tactics in Tender Offers*, 33 Stan. L. Rev. 819 (1981).

dollars and cents stakes of the regulatory alternatives respecting the market for corporate control are high and plain to see. Thus, it is plausible to explain legal decisionmaking in this area in instrumentalist terms. Redistributive motives against management power also may be involved, and such motives would be comprised of complex mixtures of individualism and altruism. As Kennedy recognizes in *Paternalism*, altruism and redistributivism need not be concurrent: A duty of sharing imposed on the weak may stem from altruism, even while retarding the cause of equal distribution of wealth.⁴⁷

Competitive individualistic and altruistic motivations most persuasively explain decisionmaking respecting simple private relationships. Despite Kennedy's contrary assertion, *Form and Substance* impliedly assumes that legal structures respecting group associations build on a basis of altruism. From this beginning point, *Form and Substance* goes on to advance the proposition that the altruism of the law of group relations may be applied aggressively with respect to simpler, more fully voluntary transactions. Corporate law, a product and constituent of group relations, does not involve the same conflicts between individualism and altruism Kennedy identifies in *Form and Substance*. Corporations give us not only individuals in conflict with individuals, but individuals and groups in conflict with one another over collective interests in corporate entities and corporate collectivities in conflict with society. While corporate doctrine is as subject as any other doctrine to criticism for incoherence and indeterminacy, individualism and altruism at best only begin an explanation.

2. The Substantive Meaning of Form and Kennedy's Political Agenda

In *Form and Substance*, Kennedy observes an association of rules with individualism, and standards with altruism; he then proposes an explanation therefor. In so doing, he makes a number of valuable observations respecting the private law decisionmaking process. But here Kennedy simultaneously acts as a designer of transformative political tools. Legal academics not within CLS, therefore, have reason to beware of these theories.

Kennedy begins with observations concerning classical and neo-classical contract law:

There is a strong analogy between the arguments that lawyers make when they are defending a "strict" interpretation of a rule and those they put forward when they are asking a judge to make a rule that is substantively individualist. Likewise, there is a rhetori-

⁴⁷ Kennedy, *Paternalism*, supra note 7, at 584.

cal analogy between the arguments lawyers make for "relaxing the rigor" of a regime of rules and those they offer in support of substantively altruist lawmaking. The simplest of these analogies is at the level of moral argument. Individualist rhetoric in general emphasizes self-reliance as a cardinal virtue. . . .

In the formal dispute about rules and standards, this argument has a prominent role in assessing the seriousness of the over- and underinclusiveness of rules.⁴⁸

So far as concerns classical and post-Realist contract, these are accurate observations.⁴⁹ But Kennedy wants the point to carry as an absolute. He puts arguments in favor of rules into a lockstep with arguments in favor of individualist substance:

[B]oth reject result orientation in the particular case in favor of an indirect strategy. They both claim that the attempt to achieve a total ordering in accord with the lawmaker's purpose will be counterproductive. . . . In short, the arguments for rules over standards is inherently noninterventionist, and it is for that reason inherently individualist.⁵⁰

Problems arise when we attempt to employ these "inherent" values as metaprinciples explaining the conduct of decisionmakers. We very quickly find that the complexity of human motivations limits the practical application of the theory. Consider a decisionmaker applying venerable contract rules that always have had an altruistic coloration, such as those concerning capacity and liquidated damages. The capacity rules can be applied to release a sophisticated adolescent. The liquidated damages rule can be applied to avoid a heavily negotiated penalty clause. In either case, the decisionmaker so acting may have to overcome a distaste for upsetting the justified expectations of the losing party. When the decisionmaker applies the rules harshly despite this distaste, the operative motivation may be an altruistic concern for the integrity of a total order protective of children or intolerant of private penalties. Although the decisionmaker applies the rules harshly, he or she gets no individualistic satisfactions from the exercise.⁵¹

Altruistic contract doctrine, then, can be manifested in rules.

⁴⁸ Kennedy, *Form and Substance*, *supra* note 7, at 1738-39. This point is applied to the governance of the welfare system in Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 *Yale L.J.* 1198, 1223-54 (1983).

⁴⁹ Kennedy, *Form and Substance*, *supra* note 7, at 1741.

⁵⁰ *Id.* at 1741.

⁵¹ Kennedy, in contrast, characterizes such an application of the capacity rules as individualistic. *Id.* at 1739-40. In another example, Kennedy notes that the individualistic doctrines of institutional competence and political questions were invented by altruists for instrumental ends, prior to the Second World War. *Id.* at 1753.

The point seems counterintuitive at first. But a quick look at the Code of Federal Regulations bears it out. Prolix and complex bodies of rules are the everyday tools of today's collectivist lawmakers. Nothing prevents the lawmakers of the future from carrying this bureaucratized system further into regulation of individual business relationships.

None of this would come as news to Kennedy. He admits at the conclusion of *Form and Substance* that "[i]n practice, the choice between rules and standards is often instrumental to the pursuit of substantive objectives."⁵² If we read his rigid analogy between rules and individualism together with this admission, there emerges less an insight into the wellsprings of decisionmaker behavior than a technical observation concerning the operation of rules. Rules, being inherently over- and underinclusive, create hard cases. Individualists value this hardness. Altruists do not, but nevertheless formulate and apply rules when pursuing broader strategies.

This is a comparatively narrow point in the broad-ranging context of *Form and Substance*. Yet Kennedy gives it pride of place. One wonders why, given that Kennedy does not advance to these "inherent" values of rules and standards as essential explanations of actual decisionmaker behavior. Political transformation is a plausible explanation. Kennedy lets us know that he prefers standards to rules, just as he prefers altruism to individualism. In a harmonious world, he says, no rules would be needed.⁵³ When he makes a list of contradictory pairs of values—one value associated with rules and an opposite number associated with standards—we infer that he privileges the values associated with standards over those associated with rules. For example, we infer that Kennedy would privilege the value of "flexibility," associated with standards, over the "neutrality" of rules. He would privilege the "creativity" brought to the application of standards over the "precision" associated with the rules. He would privilege the "spontaneity" of standards over the "certainty" of rules, and so on.⁵⁴ Thus does *Form and Substance* advance a notion of standards over rules as an aspirational benchmark to promote better decisionmaking.

This aspirational jurisprudence of standards can be related substantively to the political jurisprudence of other CLS writers. It

⁵² Id. at 1776.

⁵³ Id. at 1746.

⁵⁴ Id. at 1711-12.

manifests the concept of destabilization.⁵⁵ According to Professor Roberto Unger, destabilization serves the ultimate goals of loosening the hold the status quo has on our consciousnesses and freeing up our imaginations for the creation of a new, less structured and ordered society. He would realize these aspirations through an "expanded doctrine" containing a system of "destabilization rights" exercised by the community against entrenched individuals and institutions. Among other things, this system would substitute a centrally administered "rotating capital fund" for the present system of market and property rights.⁵⁶ The destabilization idea is manifested throughout CLS private law scholarship. For example, CLS writers take special pains to debunk certainty rationales.⁵⁷ Certainty rationales stem from the antithetical idea that social and economic stability has an overriding value. Kennedy's equation of rules with individualism and standards with altruism similarly manifests the destabilization idea. Rules stabilize things by making outcomes more certain; therefore, they get a negative connotation. Standards destabilize things by expanding the range of possible outcomes; therefore, they get a positive connotation.

Once placed in this broader political framework, Kennedy's "inherent" values of form seem unlikely to figure into the private law conceptions of those not sharing Kennedy's politics. Only those attracted by the proposition that constant destabilization leads to achievement of the greatest possible degree of collective social benefits will pursue standards for their own sake. And even for those pursuing destabilization, contract law hardly seems the body of doctrine most urgently in need of treatment. Post-Realist contract law privileges standards over rules. Surviving classical rules tend to be formulated and applied in standardlike ways. These days, one would do better to look to the jurisprudence of socialism than to the benign jurisprudence of contract for legal structures riddled with the cold individualism of rules.⁵⁸

⁵⁵ For a discussion of the destabilizing effect of selecting form over rules, see Shupack, *supra* note 40, at 962-65.

⁵⁶ Unger, *supra* note 9, at 602-16.

⁵⁷ See, e.g., the critique of "adaptationist" legal scholarship in Gordon, *Historicism in Legal Scholarship*, 90 *Yale L.J.* 1017, 1028-37 (1981), or the description of the "modest realist" responding to the CLS political theories by insisting on specific programmatic suggestions in Frug, *supra* note 45, at 1384-85.

⁵⁸ The CLS attack on certainty rationales having been discussed, one final caveat should be mentioned. This critique works well when directed to individualist judicial decisionmaking. Certainty rhetoric covers individualist impulses where deeper understanding of the relationship would show that an altruistic decision would not cause suboptimal or other undesirable behavior. See Bratton, *The Economics and Jurisprudence of Convertible Bonds*, 1984 *Wis. L.*

III. METAPOLITICS

Legal academics outside CLS can encounter Kennedy's contract critique, and all its stated and unstated radical political assumptions and assertions, and emerge with a renewed commitment to the "liberal legalism" CLS attacks. Denial, hostility, or other defensive weapons need not be taken up despite Kennedy's challenge to do so. Instead, the encounter can be treated as an occasion for constructive political self-examination.⁵⁹ Some observations follow on Kennedy's function as a character-building exercise for legal academics outside CLS. These observations build on a comparative political analysis of the treatments of contract paternalism of Kennedy and Kronman.

A. *Kennedy's Political Challenge*

We can develop a working, albeit simplified, picture of Kennedy's political challenge by hypothesizing a legal academic reader encountering Kennedy's treatment of paternalism in contract. In *Paternalism*, Kennedy advances an expansive notion of acceptable paternalist intervention in private relations.⁶⁰ In the process, he runs up against a number of liberal assumptions often made by legal academics.⁶¹ He starts with an unobjectionable and broad definition: "[P]aternalist interventions involve overruling the preferences of the beneficiary in his own best interest."⁶² He then surveys contract doctrine to show that paternalism beneficently motivates much case law customarily explained by reference to concepts of "fairness."⁶³ Thus, he groups consideration cases, good faith cases, and reliance cases together with the more obviously paternalistic cases involving capacity, unconscionability, and nonwaivable duties like implied warranties.⁶⁴

Rev. 667. It by no means follows that certainty should perish as a jurisprudential consideration, at least in the work of those who do not subscribe to destabilization politics. For purposes of dealing with private relationships in the world as it stands now and for the immediate future, certainty counts because people desire it. The exercise of valuing an uncertain stream of future payments confirms this lesson. The practicing lawyer whose client is investing a substantial sum in a transaction seeks certainty because his client wants it; he is not using it as a front for individualistic values. And while he knows very well that perfect certainty cannot be obtained, adequate legal certainty is his stock in trade.

⁵⁹ A growing responsive jurisprudence can be drawn upon for assistance. For responses to the critique of contract law, see C. Fried, *Contract as Promise: A Theory of Contractual Obligation* (1981); Macneil, *Relational Contract: What We Do and Do Not Know*, 1985 *Wis. L. Rev.* 483. For general jurisprudence, see, e.g., Fiss, *Objectivity and Interpretation*, 34 *Stan. L. Rev.* 739 (1982); Johnson, *supra* note 3.

⁶⁰ Kennedy, *Paternalism*, *supra* note 7, at 645.

⁶¹ *Id.* at 645-46.

⁶² *Id.* at 572.

⁶³ *Id.* at 624-38.

⁶⁴ *Id.* at 624-29, 632-36.

Kennedy presents his doctrinal analysis most persuasively. It even succeeds in overcoming some of our hypothetical academic reader's ingrained individualist hostility to the idea of a contracts jurisprudence motivated by paternalism. But the reader's concessions to Kennedy will have substantial political implications. Granting theoretical sanction to aggressive judicial altruism in the aid of the disabled opens a "principled" doctrinal path to all manner of radical reordering of private economic relations. Kennedy drives home the point with a radical suggestion: If he were a decisionmaker, he would favor "an adventurous and experimental program of left-wing compulsory terms."⁶⁵ He shows us what he has in mind by pulling out *United Steel Workers, Local 1330 v. United States Steel Corp.*,⁶⁶ a case frequently discussed in CLS. There the plaintiff steelworkers' union unsuccessfully tried to prevent mill closings with a promissory estoppel theory. Kennedy, employing a more classical contract device, would go farther than that:

[T]he court should have implied into every contract of employment between the company and an individual worker the following term: As part payment for the worker's labor, the company promised that in the event it wished to terminate the manufacture of steel in the plant, it would convey the plant to the union in trust for the present workers The company further impliedly promised to condition the conveyance so that if the union as trustee attempted to sell the plant or convert it to a use that would substantially reduce the economic benefit it generated for the town, the town would become the owner in fee simple.⁶⁷

This proposal creates a problem for our hypothetical academic reader. She has found Kennedy's treatment of paternalism persuasive up to this point, but now balks. She finds that the usual resort to treatises and reporters to formulate a conventional counterargument grounded in "contract law principles" no longer works. Kennedy has demonstrated to her that these principles are inconsistent and indeterminate. Furthermore, Kennedy has taught her to relate her own legal consciousness to the world view underlying it. She finds her assumption of the inevitability and necessity of social arrangements in conformity with the doctrine underlying the argument from the doctrine. Well-schooled in the critique, she sees that the doctrinal argument unsuccessfully attempts to legitimate these social arrangements non-

⁶⁵ Id. at 629-30.

⁶⁶ 492 F. Supp. 1 (N.D. Ohio 1980), aff'd in part, vacated and remanded in part, 631 F.2d 1264 (6th Cir. 1980); see Feinman, *supra* note 9, at 858-59.

⁶⁷ Kennedy, *Paternalism*, *supra* note 7, at 630.

ideologically,⁶⁸ and that the determinate consciousness can be changed. Thus deprived of the usual autonomous legal defenses, she must admit to a desire that the steel company's management and shareholders have the leftover assets and must scrutinize the political and social assumptions underlying this desire. Defending the corporation will require a lot of work: She must advance principles to justify a substantial segment of the economic and social status quo.

This hypothetical encounter shows Kennedy at his salubrious best, challenging those in the legal academy who defend existing institutions without seriously considering alternative arrangements. Standard lawyerly objections to proposals for change based on the "burden of persuasion" concept ring hollow in the face of Kennedy's critique. The academy is not a court. Those in it do not decide cases. They only discuss them. All academics ought to bear the burden of persuasion.

Let us hypothesize a second academic reader of Kennedy's *Paternalism*. This reader seeks persuasively to demonstrate the wrongfulness of Kennedy's expansive notions of paternalism and plans to look beyond contract case law to higher political and social values in order to do so. If this reader seeks to build this argument on notions of freedom and autonomy, he will find excellent material in the exposition of the metaprinciple of individualism in *Form and Substance*. He can start by using Kennedy to confirm the moral basis of individualism:

The notion of self-reliance has a strong affirmative moral content, the demand for respect for the rights of others. This means that the individualist ethic is as demanding in its way as the counter-ethic of altruism. It involves the renunciation of the use of both private and public force in the struggle for satisfaction, and acquiescence in the refusal of others to behave in a communal fashion.⁶⁹

The reader can then draw on Kennedy-on-individualism to warn of the dangers of statist impositions of community values:

Thus, if the state is only an instrument each party adopts to achieve his individual purposes, it is hard to see how it would ever make sense to set up state processes founded on the notions of changing or developing values. If the state is truly only a means to values, and all values are inherently arbitrary and subjective, the only legitimate state institutions are *facilitative*. The instant the

⁶⁸ For Kennedy on the legitimating function of doctrine, see Kennedy, *Paternalism*, *supra* note 7, at 604, 621. For a general discussion of the CLS critique of the legitimating functions of legal consciousness, see Trubek, *supra* note 3, at 595-600.

⁶⁹ Kennedy, *Form and Substance*, *supra* note 7, at 1715; see also *id.* at 1716 (discussing common justifications for self-interest).

state adopts change or development of values as a purpose, we will suspect that it does so in opposition to certain members whose values other members desire to change. The state then becomes not a means to the ends of all, but an instrument of some in their struggle with others, supposing that those others desire to retain and pursue their disfavored purposes.⁷⁰

While conceding that Kennedy's paternalist position has a certain misguided sincerity behind it, the reader can cite to Kennedy-on-altruism to demonstrate the position's implicit totalitarianism. Patent dangers to individual freedom lie behind the following altruistic statement:

We can achieve real freedom only collectively, through *group* self-determination. We are simply too weak to realize ourselves in isolation. True, collective self-determination, short of utopia, implies the use of force against the individual. But we experience and accept the use of physical and psychic coercion every day, in family life, education and culture.⁷¹

The reader can then shift back to Kennedy-on-individualism for a passionate climax: "So long as others are, to some degree, independent and unknowable beings, the slogan of shared values carries a real threat of a tyranny more oppressive than alienation in an at least somewhat altruistic liberal state."⁷²

Unfortunately for the reader, this turning of Kennedy on Kennedy will not conclusively rebut or disprove Kennedy's points on paternalism. Kennedy understands the rhetoric of freedom well and anticipates all the standard counterpoints in *Paternalism*. He sees the good in contemporary society, even taking the trouble to commend the democratic achievements of late capitalist culture.⁷³ *Form and Substance* and *Paternalism*, moreover, are radical only in their implications and, thus, present elusive objects for political attack. They in terms suggest only that private law be reshaped to privilege altruistic metaprinciples over individualistic ones.⁷⁴ No fundamental restruc-

⁷⁰ Id. at 1770.

⁷¹ Id. at 1774. Kennedy here is constructing a paradigmatically altruist argument. The problem of perpetual contradiction, he says, is that we simultaneously believe in both the individualist and altruist sets of premises. Id. at 1774-76.

⁷² Id. at 1775. Here Kennedy recounts an individualistic argument for freedom. The CLS notion of freedom is somewhat different. Hutchinson and Monahan describe it as a belief that each individual must be left free from constraints of inhibiting consciousness. See Hutchinson & Monahan, *supra* note 4, at 229-30.

⁷³ See Kennedy, *Paternalism*, *supra* note 7, at 578 ("There is a sense in which there has never been a culture more the conscious and intelligent product of the mass of people—a more democratic culture—than that of late capitalism.").

⁷⁴ Kennedy, *Form and Substance*, *supra* note 7, at 1777-78.

turing of anyone's life by some threatening new state is advocated.⁷⁵ For that matter, Kennedy's communitarian aspirations do not necessarily entail implementation by a big state.

Our hypothetical readers would be well-advised to modify their objectives respecting Kennedy.⁷⁶ The first reader's conscientiousness will prevent her from claiming that any single set of principles provides the basis for a complete defense of the political and economic status quo. Similarly, the second reader eventually will find himself engaging Kennedy on a level of abstraction on which Kennedy cannot be "proven" wrong in any meaningful sense. But both safely can abandon these absolutist lines of argument. They can redirect attention to the formulation of accounts of the differences between Kennedy's politics and their own. This exercise should lead to political "refutations" of Kennedy and provide a basis for the extraction of those elements of Kennedy's critique not wholly constituted of his politics.

B. *Comparing the Critical and Liberal Approaches—Kennedy and Kronman on Paternalism*

Comparing Professor Anthony Kronman's recent article on paternalism in contract law⁷⁷ with Kennedy's precedent treatment of the same subject matter provides a basis for anticipating the directions to be taken by new theories concerning private law⁷⁸ that combine liber-

⁷⁵ But cf. Unger, *supra* note 9 (the constructive outcome of a critique of objectivism is to lead to a search for alternative institutional forms).

⁷⁶ Strangely, Kennedy should present less of a political challenge to a radical conservative than to a rights-oriented liberal. Kennedy's point that law is a "radically underdetermined" product of consciousness rather than a manifestation of a rational theory might have a liberating effect on an extreme individualist. To this reader Kennedy may suggest a theoretical alternative to the economists' problematic project of explaining and restating law as a rational elaboration of the efficiency metaprinciple. See *supra* note 28. Once having accepted Kennedy's vision of conflicting thought structures and motivations, he or she can wage a new kind of war against entrenched socialist institutions. So long as socialist institutions are the objectives of the attack, "destabilization" will not seem an unattractive political goal. To advance the attack, he or she may follow Kennedy's advice and work on a rhetoric attuned as closely as possible to the individualist strain that dominates American consciousness.

Fortunately for the cause of communitarianism, this is an improbable scenario. One is unlikely to encounter this hypothetical individualist in the contemporary legal academy. Most American individualists also are conservatives who believe in the inevitability and rightness of certain notions. They are unlikely to find Kennedy's structuralist critique persuasive.

⁷⁷ Kronman, *Paternalism*, *supra* note 10.

⁷⁸ The more highly developed literature of response to the CLS critique of constitutional law scholarship affords concepts useful in the defense of contract. The notion of interpretive community—that the community's shared interpretation provides law with objectives apart from individual consciousness, see Fiss, *supra* note 59 (discussed in Hutchinson & Monahan, *supra* note 4, at 207 n.35)—also mediates between assertions of contract law as politics and contract law as autonomous rationality. We can adopt this concept and characterize post-

alism with cognizance of, and respect for, the principal elements of Kennedy's critique. It should be noted that Kronman's *Paternalism* does not directly address Kennedy's treatment.⁷⁹ Even so, an implicit dialogue between the two works emerges from the exercise of comparison.

1. Scholarly Perspectives and Political Objectives

Kennedy and Kronman start with the same notion of paternalism⁸⁰ and then go off in different directions. Kennedy breaks down doctrinally based preconceptions to demonstrate paternalism's significant role as a motivational force in contract law decisionmaking. Kronman restricts himself to the small body of contract doctrine generally acknowledged for its paternalism—rules that restrict “the liberty to bind oneself by making a legally enforceable promise.”⁸¹ Kronman then divides this doctrine into three categories for separate examination. Like Kennedy, Kronman seeks to “explain” this doctrinal subject matter by reference to ideas from outside. But Kronman's explanatory discourse draws on a different body of ideas and pursues a different goal. Kennedy, it will be recalled, explains doctrine by isolating the ideas that motivate decisionmakers. Kronman bypasses this inquiry into ideological causation and undertakes an *ex post* rationalization and justification of doctrine in the treatises. He seeks to set forth ideas that make the doctrine good doctrine, rather than set forth ideas that put the doctrine there in the first place. In effect, he reconstructs and transforms the doctrine by discarding the decisionmaker's theoretical explanation and substituting a new and im-

Realist contract law as a community settlement of various individualist/altruist conflicts, marked out in rules and standards, effective for the time being, and always open to critique in response to changes in our economic and social structure. While areas of individualist/altruist conflict continue to exist, their parameters have been marked out by gentlemanly truces among the combatants.

This characterization meets only a small part of the critique, however. In a sense it asserts only that something is there in contract law, a point no one disputes. Once we accept that the thought structure exists, the question arises of the extent to which it determines behavior. This depends on the extent of the community agreement. Kennedy would admit, for example, a general consensus that reliance can provide a basis for enforcing promises. But he would go on to assert that the community would fail to agree on the application of the idea in most cases. For further discussion, see Yablon, *supra* note 5, at 931–36. Thereafter comes the question whether the interpretive community's principles, whatever their state of confusion, possess moral legitimacy.

⁷⁹ Kronman cites to Kennedy's *Paternalism* twice during the course of his article. Kronman, *Paternalism*, *supra* note 10, at 765 n.14, 781 n.60.

⁸⁰ Kronman says: “[A]ny legal rule that prohibits an action on the ground that it would be contrary to the actor's own welfare is paternalistic.” *Id.* at 763. Compare Kennedy's notion in the text accompanying note 62 *supra*.

⁸¹ Kronman, *Paternalism*, *supra* note 10, at 764.

proved set of constitutive ideas. In so doing, Kronman adopts a flexible posture, avoiding the jurisprudential model in which each case must give rise to a single correct answer.⁸² He proposes only a "most plausible justification"⁸³ for each of his categories of paternalist doctrine. In this manner, Kronman keeps outside of the range of many standard CLS criticisms.

The ideological underpinnings and objectives of Kronman's treatment are liberal:

One who believes, as Mill did and I do, that some paternalistic restrictions on contractual freedom are not only permissible but morally required, must supply a standard or principle for evaluating paternalistic arguments in particular cases; only in this way can the legitimacy of paternalism be established and its limits defined.⁸⁴

This liberal profession carries an implicit rejection of Kennedy's images of law and society. Ideas explaining and justifying contract doctrine in the sense Kronman promises cannot be comprised of and determined by Kennedy's perpetual contradiction. But Kronman must keep theory substantially separate from practice, even as he keeps himself free from the perpetual contradiction. He advances "principle[s] for evaluating paternalistic arguments,"⁸⁵ but makes no concomitant claims that these principles have determined decision-making in the past or can or should be expected to determine decisions in the future. Their most likely future employment lies within an ongoing theoretical critique of judicial practice.

Kronman implicitly accepts, or at least makes no attempt to deny, Kennedy's points that doctrine does not determine the results of cases and that the cases cannot consistently be read together. But he implicitly rejects the idea that delegitimation follows from recognition of inconsistency and indeterminacy. He purports to evaluate and legitimate paternalism in contract, but does not also purport to con-

⁸² See Dworkin, *No Right Answer?*, 53 N.Y.U. L. Rev. 1 (1978).

⁸³ Kronman, *Paternalism*, *supra* note 10, at 765.

⁸⁴ *Id.*

⁸⁵ *Id.* Under this view, judicial decisionmaking ripens into fullest legitimacy only upon theoretical reconsideration in the academy. The judge does the practical work, exercising what Richards calls "competence at critical evaluation." Richards, *The Theory of Adjudication and the Task of the Great Judge*, 1 *Cardozo L. Rev.* 171, 179 (1979). The academic performs the more theoretical exercise of articulating the operative principles behind the judgment, what Richards calls "critical self-consciousness." *Id.* at 178-80. This approach deemphasizes the theoretical significance of the judicial opinion. The opinion serves only to discipline the judge in the exercise of critical evaluation, assuring that the judge goes beyond intuition to apply deliberative rationality. Theoretical authoritativeness tends to be achieved only upon academic reconsideration. See Kronman, *Paternalism*, *supra* note 10, at 790.

struct a rational system enclosing all judicial practice. By proceeding in this limited way, Kronman implicitly asserts that irrationalities in the decisionmaking process need not prevent the decisionmaker's action from being followed by rational and legitimating theoretical discourse.⁸⁶

2. Doctrinal Discussion

There follow more particular comparisons of Kennedy and Kronman on paternalistic contract doctrine. The comparisons show that despite their conflicting theoretical conceptions, Kennedy and Kronman have similar things to say about practical matters, both doctrinal and political.

We start with Kronman's first category of paternalistic contract doctrine. This includes cases imposing nonwaivable contract duties such as the implied warranty of habitability.

Here Kennedy and Kronman converge on the famous redistribution model devised by Bruce Ackerman.⁸⁷ Kronman accepts it with a mild empirical caveat.⁸⁸ Kennedy accepts it with a strong empirical caveat.⁸⁹ Then they diverge. Kennedy goes on to add his overlay of altruism and individualism, predictably finding altruistic motivations behind the doctrine of nonwaivability. Interestingly, Kennedy does not let his theories about decisionmaking or his scruples regarding the empirical intractability of efficiency determinations prevent him from including a few practical observations about how cases might be decided. It often "makes sense," he says, to proceed to a redistributive result based on "rough intuitive assessments" of the economic variables.⁹⁰ Throw in a paternalistic intuition, and "there may be a strong case for intervention even with sketchy information and a lot of uncertainty."⁹¹

Kronman turns rightward to add a second best efficiency theory to redistribution as another equally good, justification. Free bargaining over contract terms would produce the most efficient result in a perfect world. But we inhabit an imperfect world in which a regime of free bargaining between landlords and tenants could result in rampant irremediable fraud by landlords keeping quiet about hidden defects in leased premises. Thus, in our imperfect world, nonwaivable

⁸⁶ Kronman, *Paternalism*, *supra* note 10, at 765.

⁸⁷ See Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution Policy*, 80 *Yale L.J.* 1093 (1971).

⁸⁸ Kronman, *Paternalism*, *supra* note 10, at 772.

⁸⁹ Kennedy, *Paternalism*, *supra* note 7, at 611-13.

⁹⁰ *Id.* at 614.

⁹¹ *Id.*

duties may turn out to be the most efficient approach available.⁹² Presumably, Kronman knows that Kennedy's *Paternalism* makes much of the empirical hazards of just this sort of transaction-cost jurisprudence.⁹³ Yet Kronman goes ahead, albeit without empirical proof, offering an intuitive economic hypothesis as a "best" explanation. Decisionmaker motivations do not, in terms, enter into his discussion.

Kronman's second category of paternalistic contract rules includes those restricting contracts of peonage and those restricting waivers of the right to engage in a particular profession, obtain a discharge in bankruptcy, or institute a divorce action.⁹⁴ Kennedy finds these rules necessary even though the individuals they purport to protect act voluntarily. False consciousness afflicts these people; the peonage rule manifests an altruistic objection to slavery as a way of life.⁹⁵

Kronman's explanation looks very different at first. He tries out a distribution theory, but finds it inappropriate.⁹⁶ He then experiments with an efficiency theory. But he finds this "unsatisfying."⁹⁷ Finally, he turns to contract doctrine, in particular the standards restricting specific performance decrees. He draws out an insight into the meaning of the concept of self-enslavement. The limitations on specific performance protect the promisor's right to "depersonalize" the contract relationship by buying his way out. We protect this right because the alternative mode of enforcement, forced performance of the promise, would threaten the promisor's integrity or self-respect. This rationale, says Kronman, explains this category of prohibi-

⁹² Kronman, *Paternalism*, supra note 10, at 767-69. Kronman's intuitions about the workings of relations between landlords and tenants differ from my own. I doubt that landlords of low-income urban housing spend much energy on fraudulent concealment of defects in leased premises. And I would guess that most cases of tenants withholding rent involve problems either arising after the start of the lease or visible at the start of the lease. The classic cases involve facilities breaking down through use over time. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir.) (unclear when defect arose), cert. denied, 400 U.S. 925 (1970); *Green v. Superior Court*, 10 Cal. 3d 616, 517 P.2d 1168, 111 Cal. Rptr. 704 (1974) (failure to maintain); *Marini v. Ireland*, 56 N.J. 130, 265 A.2d 526 (1970) (toilet cracked two months after lease began); *Brown v. Southall Realty Co.*, 237 A.2d 834 (D.C. 1968) (defects at the start of the lease of which the tenant was informed).

⁹³ Kronman, *Paternalism*, supra note 10, at 765 n.14, 781 n.60.

⁹⁴ *Id.* at 775.

⁹⁵ See Kennedy, *Paternalism*, supra note 7, at 627-28.

⁹⁶ Distributive rules insure fair distribution of scarce material resources, while the rules in Kronman's second category concern personal liberty. See Kronman, *Paternalism*, supra note 10, at 775.

⁹⁷ The theory makes the prohibition a "second best" device to avoid fraud and duress. The problem, says Kronman, is that he would bar these contracts even where clearly uncoerced. *Id.* at 777.

tions.⁹⁸ As an overlay, he adds a fair distinction between different types of breaching promisors. Some breach out of mere "disappointment" with the course of events taken by an otherwise soundly conceived transaction. Others, including breaching promisors in the second category, undergo a change in their entire system of values that causes them to "regret" the whole relationship.⁹⁹ Enforcement against the latter promisors would intensify their feelings of self-betrayal and lack of self-respect and, thus, is avoided.¹⁰⁰

At least in one sense, Kennedy and Kronman here offer different versions of the same explanation. Kronman's conception of this doctrine as a product of concern for the self-respect of others is a finely wrought manifestation of Kennedy's altruism metaprinciple. But by justifying altruistic intervention in terms of "integrity" and "self-respect" rather than "false consciousness," Kronman also engages individualist sensibilities.¹⁰¹ Kronman even defends his concept with a Kantian moral assertion: The moral community respects the integrity of its individual members. Kronman's concept of respect for the beneficiary's self-respect in a sense looks to the fusion of Kennedy's perpetual contradiction. Kennedy, in response, doubtless would point to the illusory nature of any such "fusion." Vague concepts such as this never determine the results of real cases; no amount of theorizing along such lines will eradicate all the individual alienation in this world. For a rejoinder, a defender of Kronman can assert that individual alienation at least will be diminished somewhat in a world in which such theorizing informs legal practices.

This implicit critical/liberal debate intensifies with comparison of the articles' treatments of Kronman's third category of legal doctrine. This category includes the limitations on enforcement of promises made by infants and other incompetent persons.

Here Kennedy turns his critical sights to the old free will explanation of incapacity. This justification, he says, never was consistently applied. The doctrine made some contracts void, but others merely voidable. It therefore fails for incoherence. What we really have is ad hoc loving intervention by the courts to protect people from their own false consciousness. "People are idiots," he says.¹⁰² Furthermore, no principled antipaternalism can exist: "There is no objective way to fix the content of paternalist intervention, if by 'ob-

⁹⁸ *Id.* at 778-79.

⁹⁹ *Id.* at 780-81.

¹⁰⁰ *Id.* at 779-83.

¹⁰¹ Kennedy places respect for the rights of others at the core of his concept of individualism. Kennedy, *Form and Substance*, *supra* note 7, at 1713.

¹⁰² Kennedy, *Paternalism*, *supra* note 7, at 633.

jective' we mean a method of judgment without judgment."¹⁰³ Both paternalism and antipaternalism must be ad hoc. And, as between ad hoc paternalist intervention and ad hoc restraint, Kennedy prefers ad hoc intervention, despite the attendant risk of arbitrary action. Given subjectively motivated intervention, says Kennedy, we can ameliorate the risk of arbitrary action by encouraging decisionmakers to reflect on what constitutes a responsible exercise of judgment.¹⁰⁴

Kronman endeavors to construct the principled antipaternalism that Kennedy asserts to be impossible. The capacity rules, says Kronman, serve the purpose of encouraging sound judgment in a set of special cases where the promisor's capacity to judge is impaired. He has in mind a Kantian model of judgment:¹⁰⁵ Judgment involves critical reflection on one's interests and desires and requires distance from them. It does not involve the instrumental rationality of choosing means to ends. It is rather the intuitive, deliberative exercise of choosing the best ends. It requires strength, sobriety, disinterestedness and dispassion. It is "the capacity to form an imaginative conception of the moral consequences of a proposed course of action and to anticipate its effect on one's character."¹⁰⁶ Capacity doctrines paternalistically protect people unable to achieve this act of disengagement.

Here, once again, Kronman offers an altruistic explanation, but deploys altruism differently than does Kennedy. Where Kennedy brushes off the protected promisor as an idiot with false consciousness and focuses on the emotional makeup of the decisionmaker, Kronman focuses on the emotional makeup of the promisor and looks there for a reason sufficient to justify the release of the decisionmaker's altruistic impulses.¹⁰⁷ Kronman believes that reasons can control motiva-

¹⁰³ *Id.* at 638.

¹⁰⁴ *Id.* at 636-38. Kennedy suggests that fiduciary duties and contract gap-filling techniques also can be relied upon to keep decisionmakers in check. This is a peculiar suggestion, given Kennedy's views on the indeterminacy of doctrine. Perhaps we should understand it as instrumentalist argumentation.

¹⁰⁵ See I. Kant, *Foundations of the Metaphysics of Morals* 47-59 (L. Beck trans. 1959). Richards explicates the Kantian model of impartial deliberation for the contemporary audience and applies it to legitimate the process of adjudication. Richards, *supra* note 85, at 182-85, 205-15.

¹⁰⁶ Kronman, *Paternalism*, *supra* note 10, at 790.

¹⁰⁷ Kronman anticipates Kennedy's standard inconsistency objection. This would be that contract law does nothing to protect legions of promisors with impaired judgment who fall outside of the narrow capacity categories. Kronman answers that our society is sparing with paternalistic intervention because such intervention is antidemocratic. We leave individuals free to pursue their own perceptions of the good so "long as they do not violate the rights of others." *Id.* at 794-95.

tions; Kennedy does not because he does not believe that neutral modes of rational discourse really exist.

3. Judgment and Legitimacy

Those defending the legitimacy of law and the legal process against charges of indeterminacy and incoherence sometimes advance the possibility of sound decisionmaking in the individual case. This, they say, ameliorates the failure of the body of law as a whole to stand up to rigorous analytical inspection. Llewellyn theorized about judicial "situation sense" and "singing reason."¹⁰⁸ Cardozo thought along similar lines respecting good judging in a world of free choice:

There is in each of us a stream of tendency, whether you choose to call it philosophy or not, which gives coherence and direction to thought and action. Judges cannot escape that current any more than other mortals. All their lives, forces which they do not recognize and cannot name, have been tugging at them—inherited instincts, traditional beliefs, acquired convictions; and the resultant is an outlook on life, a conception of social needs, a sense in James's phrase of "the total push and pressure of the cosmos," which, when reasons are nicely balanced, must determine where choice shall fall.¹⁰⁹

More recent literature offers notions of judicial "psychological maturity"¹¹⁰ and "political astuteness"¹¹¹ to justify the irrationality in our system of legal ideas. In his *Paternalism*, Kronman contributes to this line of thinking, and with a formulation apparently responsive to the CLS critique. He suggests that his concept of judgment might be extended beyond an evaluation of contracting parties to an evaluation of judges.¹¹²

The judge, says Kronman, must "striv[e] to be objective."¹¹³ He must separate himself from his immediate desires,¹¹⁴ and adopt a point of view above that of the parties. This is a condition indispen-

¹⁰⁸ K. Llewellyn, *The Common Law Tradition: Deciding Appeals* 61, 121–57 (1960).

¹⁰⁹ B. Cardozo, *The Nature of the Judicial Process* 12 (1921). Professor Richard Weisberg explains Cardozo's conception of the role of culture in judicial decisionmaking and of decisionmaking in the culture: "[C]ulture involves more; it is the *trained sense in the adjudicator of the common perception of the surrounding society*, not so much in its ideal as in its actual form" Weisberg, *Law, Literature, and Cardozo's Judicial Poetics*, 1 *Cardozo L. Rev.* 283, 302 (1979).

¹¹⁰ Hutchinson & Monahan, *supra* note 4, at 205.

¹¹¹ Johnson, *supra* note 3, at 279. For a CLS critique of this approach, see Mensch, *supra* note 25, at 32–34.

¹¹² Kronman, *Paternalism*, *supra* note 10, at 790–94.

¹¹³ *Id.* at 792.

¹¹⁴ But not from his deepest interests. See *id.* at 792–93; see also Richards, *supra* note 85, at 171, 208–09 (discussing separation from Kantian perspective).

sible to attaining "even a small measure of objectivity."¹¹⁵ Kronman's proposal accepts the subjectivist CLS point that law is a product of the consciousness of lawmakers. But Kronman does not concede that the lawmaker's subjective motivation must operate unregulated by ideas from outside his person. While wholly objective decisionmaking may not exist, objectivity is a state of mind to which legal decisionmakers should aspire. The decisionmaker who strives to separate his own desires from his judgments can achieve objectivity in some degree. In so striving, the decisionmaker shows respect for others. By implication, this decisionmaker thereby exercises his power so as to protect other individuals, and achieves legitimacy.

A concept of judgment also figures into Kennedy's *Paternalism*. It closes with a vision of legitimate private law and legitimate decisionmaking. Kennedy's vision is shaped by his idea that decisionmaker motivations determine outcomes and by his commitment to a transformative politics. Peaceful coexistence between the idea and the commitment requires Kennedy to find ways to guide and discipline decisionmakers. He recommends transformative political action in the form of intensified paternalistic decisionmaker intervention. But he recognizes that paternalistic decisionmaking has the potential for aggressively damaging human dignity. He relies on conscientious exercises of judgment to overcome this difficulty. His prescription looks quite liberal at first inspection: "The truth of the matter is that what we need when we make decisions affecting the well-being of other people is correct intuition about their needs and an attitude of respect for their autonomy. Nothing else will help."¹¹⁶

But resemblance fades as the observer becomes acquainted with Kennedy's belief that "correct intuition" ultimately must be achieved intuitively. To Kennedy, some intuitions about the needs of others are better informed than others. The decisionmaker with "lived intersubjectivity," that is, common experience, with the object of his or her paternalist intervention, has "real knowledge" on which to base his or her intuitions. This "lived intersubjectivity" can be achieved only in small spiritually cohesive communities.¹¹⁷ In larger communities, decisionmakers at best can act on "verbal models" derived from the intersubjective experiences of others.¹¹⁸

¹¹⁵ Kronman, *Paternalism*, supra note 10, at 792.

¹¹⁶ Kennedy, *Paternalism*, supra note 7, at 646.

¹¹⁷ Small communities are central to the metapolitical vision current among some CLS writers. See Frug, supra note 45, at 1295-96, 1384-86.

¹¹⁸ Kennedy, *Paternalism*, supra note 7, at 639. Once acting on a derivative verbal model, Kennedy's intersubjective judge bears a resemblance to Rawls' "sympathetic spectator," defined as combining "impartiality, possession of relevant knowledge, and powers of imaginative

Comparison of these two concepts of judging shows Kennedy and Kronman each constructing conflicting theories with respect to a set of common perceptions of the phenomena in the world. Both recognize the subjective motivations that influence decisionmakers. Both think that judgments springing from the unaffected intuitions and unregulated impulses of the judge are bad judgments. Both agree that good judgments must be based on an understanding of the parties judged.¹¹⁹

Kronman adopts these perceptions to the end of protecting the individual in a society apparently constituted more or less as we know it. He wants the judge to make an imaginative leap into a world of ideas about those judged. Presumably, the judge's imaginative conception of the parties operates inside a construct drawn from the hypotheses and models of legal doctrine. The judgment remains satisfactorily objective so long as the judge keeps his or her own needs and desires out of this process of imagining and reasoning. So long as decisionmakers impose this self-discipline, individual autonomy can have some protection against community invasion.

Kennedy adopts a similar view of what goes on when a judgment is made according to a different view of human nature. Like Kronman, he sees that the individuality of the judge must be kept out of the decisionmaking process. But unlike Kronman, he does not believe that the decisionmaker's personality can be suppressed to any significant degree by self-conscious adherence to ideas. Kennedy's intersubjectivity replaces Kronman's objectivity as the means by which the decisionmaker's ego is overcome. Common experience with others removes the egoistic aspect of actions based on personal motivations and makes good judgment possible.¹²⁰

Kennedy's ideal of intersubjective judgment manifests both extreme dissatisfaction with the world he perceives and an optimistic belief in the possibilities of changed consciousness and harmony between individual and community. Kronman's ideal of dispassionate judgment acknowledges the world's imperfections more than it manifests dissatisfaction with the world; yet it makes no apologies for

identification . . . to assure the complete and accurate response of natural sympathy." J. Rawls, *A Theory of Justice* 187 (1971).

¹¹⁹ See Kronman, *Paternalism*, *supra* note 10, at 792.

¹²⁰ Both Kennedy and Kronman employ exhortative rhetoric at this stage of the discussion. Both act in the common, but rarely recognized, legal academic capacity of preacher to the congregation of American decisionmakers. This preaching function follows as a matter of course from acknowledgement that the law is not an autonomous rational system. For discussion of the religious aspect of CLS literature and thought, see Johnson, *supra* note 3, at 287-89.

the status quo. Like Kennedy's concept, it manifests a belief that consciousness can change. Unlike Kennedy's concept, it manifests the view that individuals are bound to live in communities without common goals and experiences. Conflict being inevitable, individuals can achieve a commonality that protects each from the others by subscribing to common structures of thought. Dispassionate judging makes this protective system work. Kennedy is pessimistic respecting the efficacy of this sort of protective system and mistrustful of its operations, even while he is optimistic regarding possibilities for a radically changed approach and trustful of those effecting it. Kronman, in contrast, is implicitly pessimistic and mistrustful of such utopian visions, even while optimistic and trustful when contemplating protective systems of ideas.

C. Summary

Having counterbalanced Kennedy with Kronman, let us return to our hypothetical legal academics and their responses to Kennedy. We left them moved to ask questions respecting the theories offered to legitimate liberal institutions. But both readers resisted Kennedy, formulating challenges to him, even as they admitted the accuracy of Kennedy's assertions regarding the explanatory power of doctrine, the efficacy of legal reasoning, and the durability of conflict between individual and society.

As it turns out, the process of questioning does not entail conversion to the CLS point of view. While Kennedy destabilizes the readers' assumptions about the inevitability of liberal theories, nothing he says disturbs the liberal world views that prompted the theories' construction and provided the theories with ethical content. And, on the level of world view, irreconcilable differences separate Kennedy and our hypothetical readers. Kennedy and these readers perceive a common set of imperfections in the world. But they go on to bring different moral conceptions to the formulation of their political responses to these imperfections: Kennedy more emphatically privileges the alleviation of suffering over respect for individual autonomy than do the readers. Kennedy and the readers also may perceive the moral constitutions of other people differently, with Kennedy responding more trustingly. And they appraise differently the likelihood of breaking existing contexts of thought and action,¹²¹ with Kennedy deeming this

¹²¹ This phrase comes from D. Trubek, *TAKING RIGHTS LIGHTLY?: Radical Voices in American Legal Theory* 49 (unpublished manuscript based on remarks made at the New School for Social Research & Benjamin N. Cardozo School of Law Lecture in Social Theory, Nov. 19, 1984) (available in Benjamin N. Cardozo School of Law Library).

more easily done. These differences cause the readers to decline to accept CLS's conclusion respecting the legitimacy of law and the necessity of fundamental political and social transformation, while guardedly to accept Kennedy's conception of the law and legal theory.¹²²

This partial acceptance of the CLS critique leaves our hypothetical academics without a theory affirming the rationality—whether present, imminent or future—of our social and political ideas and arrangements. Kennedy has given them a critical awareness of the dualisms of Western thought and the irrationalities attending social ordering. But the readers remain committed to the idea that individual autonomy needs protection. Fortunately, the commitment and the critical facility can coexist. The readers reassemble themselves as perpetual challengers to perpetual contradiction—they strive to overcome the dualisms of Western thought and achieve a rational ordering protective of individual autonomy notwithstanding their shaken faith in this goal's attainability.

Unfortunately, this position carries professional disadvantages. Our academics must forego the often successful academic practice of propounding theories that explain everything and justify the individual academic's favorite things. They also must do without the satisfying belief that their work achieves progress toward practical objectives.

Thus, we leave our hypothetical academics carrying on the mundane academic practice of conscientiously criticizing inferior ideas. This result, while problematic, need not be considered unsatisfactory, either morally or professionally. Moral satisfaction can come from earnest participation in this gradual, probably perpetually uncom-

¹²² CLS writers have responded negatively to such partial acceptances of their ideas. See Frug, *supra* note 45, at 1382–86; Gabel & Kennedy, *supra* note 7, at 14–15.

Frug constructs a type and labels it the “modest realist” legal scholar. Frug, *supra* note 45, at 1384. The type admits the contradictory and incoherent nature of the law. But it otherwise rejects the critique, putting forward burden of proof arguments, dismissing propositions for fundamental change as utopian, and demanding concrete suggestions. The type in fact, says Frug, has “absorbed the various bureaucratic theories” into itself and is unable to see the difference between the theories and the real world. *Id.* Frug captures the type nicely. But the type captured hardly seems critical at all, and, in any event, is by no means the only partially Critical subspecies in the legal academy.

Gabel and Kennedy have a different way of dealing with partial Criticals. Gabel comments that Johnson accepts the fundamental contradiction, but employs it conservatively. Kennedy responds by recanting the concept, and “the whole idea of individualism and altruism.” Gabel & Kennedy, *supra* note 7, at 15. This scorched-earth discourse is effective: Gabel and Kennedy emerge having kept a clear line between themselves and even the most sympathetic outsiders. Of course, by employing this device, they imply that the ideas in their previous works are available for partial acceptance.

pleted endeavor.¹²³ And, as contract scholars, there remains plenty for them to do.

¹²³ Even Kennedy accords moral value to the striving academic: "But I honor the attempt to subject anarchic sentiment to the test of reason, however happy I may be each time it fails." Kennedy, *Paternalism*, *supra* note 7, at 624.

