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WHAT SHOULD LAWYERS DO?: AN ESSAY ON LAWYERS, THE FREE ECONOMY, REDISTRIBUTION, AND DEMOCRATIC LEGITIMACY

JAMES P. BECKWITH, JR.*

What should lawyers do? The conventional wisdom is, of course, that the lawyer is a relatively value-free "hired gun" helping achieve whatever lawful ends the client desires. However, the recent controversies surrounding personal injury liability, the Legal Services Corporation, the role of history in constitutional adjudication, and Critical Legal Studies have reopened the debate concerning the lawyer's role and raise some fundamental questions about what clients demand, what lawyers do, and how lawyers are educated. This essay explores the extent to which wealth redistribution as opposed to wealth creation has come to influence our legal culture and shows that most participants in this culture, whether clients, lawyers, judges, or law professors, have been influenced by this trend.

Part I discusses the importance of three assumptions about the modern world: the inevitability of ignorance and the limitations of the human intellect; the inevitability of our fallen human nature; and the importance of prudential judgment in approaching the problem of suffering. Part II evaluates the demands of clients from the perspective of redistribution. Part III examines the inclinations of lawyers toward redistribution, and Part IV examines the impact of redistribution on constitutional law. Part V discusses the influence of redistribution on the law schools. The essay concludes with a call for renewal.

I. THE MODERN SETTING

Before proceeding further, I should make explicit three important assumptions. The first assumption focuses on what has been called the calculation problem and asks whether the use of knowledge in society

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exceeds the capacity of our minds to know. The second assumption concerns human nature. Are we inherently good or even malleable, or are we prone to sin and self-interest? Can institutional arrangements lead us to the good? Thirdly, how should we respond to suffering? In an imperfect world how do we make difficult choices involving scarcity and pain?

The first question centers on how we are to plan for and live our lives. It is not a question of whether planning will take place. It is a question of how, and we must begin with humility and recognize our own inevitable ignorance. Burdened by our own imperfect intellects, the choice is between planning by a dispersed, decentralized means such as the market as opposed to planning by a centralized means such as government. Which means works better?

As Professor Hayek and others¹ have shown, the free economy is the only mechanism capable of coordinating vast amounts of widely dispersed information that transcend the capacity of any individual mind to comprehend. We will never know enough to do without money prices. Indeed, the more complex a society becomes, the more essential decentralized mechanisms become and the more futile any attempt at centralized planning. As a result of this decentralized, spontaneous coordination by the price system, value-maximizing exchanges give rise to orderly structures that are the result of human action but not of human design.

The market is not only the sole mechanism capable of decentralized planning, but is the only means by which wealth can be created and living standards raised. The free economy is relatively youthful, and back beyond the eighteenth century one finds only the grim reality of static subsistence economies. As T. S. Ashton² and R. M. Hartwell³ have shown, the Industrial Revolution was an enormous leap forward from the degradation of medieval life. Perhaps the most extraordinary example of this process occurred in England where for the first time wealth increased at a faster rate than did population. The Industrial Revolution brought about a consumer revolution where cheaper goods were available for widespread use. Sanitation improved, infant mortality fell, and life expectancies increased. Why in England at that time? Largely because the legal guarantees of the common law and the flexible social and cultural system of the time inhibited redistribution, encouraged risk-taking, and fostered the release of an enormous amount of creative energy. The lawyer's role generally was benign because the state intruded so infrequently. The typical nineteenth-century Englishman could be born,

1. T. SOWELL, KNOWLEDGE AND DECISIONS (1980); Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519 (1945).

2. T. S. ASHTON, *THE INDUSTRIAL REVOLUTION 1760-1830* (1964).

3. R. M. HARTWELL, *THE INDUSTRIAL REVOLUTION AND ECONOMIC GROWTH* (1971); see also INSTITUTE OF ECONOMIC AFFAIRS, *THE LONG DEBATE ON POVERTY* (1974).

live, and die without having much contact with the state, or with lawyers, for that matter.

From the vantage point of a secure, sanitary, and prosperous society, the historical lessons of the past 200 years are forgotten all too quickly. The idea of progress, being relative, is not compared to a forgotten past. In lamenting the inequality of wealth, many ignore universal, medieval misery. In a concern over long-term degenerative diseases allegedly caused by the environmental impact of the mature market system, many forget that in pre-industrial society few people lived long enough to develop such diseases. They further forget that in our own time life expectancies continue to lengthen. In warning of the imminent exhaustion of resources, many forget that technology is not static, that the market is flexible and responsive to change, and that experience has disproved repeatedly these dire predictions. Only an awareness of history can overcome the unstated premise upon which these criticisms rest: the naive assumption that wealth is an everpresent fixed quantity to be redistributed rather than an expandable, enriching presence dependent upon and limited only by saving, capital investment, and human ingenuity.

In our own time the wealth-creating capacity of the market is richly apparent. The mature market societies enjoy the highest standard of living ever achieved for the greatest number. The fruits of the market adorn North America, Western Europe, Japan, and Australia. In the socialist countries, deprivation and tyranny stretch from Eastern Europe to Africa, China, and Southeast Asia. Given the impossibility of central planning, queues are everpresent and shortages inevitable. The familiar empty shelves typical of Marxist economies and the self-imposed misery of countries like Tanzania and Uganda bear eloquent testimony to the failure of socialism. Indeed, the market's virtues, being in accord with the natural tendency of human nature to maximize self-interest, are so durable that in many such countries productivity can be found only on the black market, such as in Burma or Vietnam, or in the surviving private sector, such as the tiny private plots in the Soviet Union that produce much of its food.

At present a new chapter in this familiar story is being written as developing countries that have turned toward a free economy experience real economic growth. All along the Pacific Rim, for example, living standards are rising. Hong Kong, a tiny enclave bereft of natural resources, by the use of the market and human ingenuity, has become the entrepreneurial hub of Asia. Taiwan, Malaysia, South Korea, and Singapore have grown richer while nearby countries that have repudiated the market stagnate. Equally compelling examples are those formerly socialist countries that have in varying degrees embraced the market after bitter experience. In Chile and Sri Lanka living standards are rising in

contrast with trends as recent as a decade ago. Even in Communist China, the importance of market incentives is being recognized, albeit hesitantly.

Given its grounding in the subjective decisions of consumers, the market is acutely sensitive and responsive to individual preferences, fostering enormous diversity of choice. This wider spectrum of choice is particularly important in a pluralistic society because the free economy provides opportunity for, and ameliorates prejudice against, racial and religious minorities.⁴

The virtues of the free economy extend far beyond the creation of wealth, however. Indeed, the more compelling justification for the free economy is a moral one and resides in the market's fostering of the liberty of the individual and its links to the timeless norms that undergird Judeo-Christian civilization.

Liberty reflects the extent of coercion of the individual and differs markedly from democracy. Democracy is a method for the attainment of liberty and is not necessarily a guarantor of its survival because of structural defects. By contrast, political liberty is fostered by the free economy, which disperses power in a manner reminiscent of the original intent of the American Constitution. Just as federalism and the separation of powers enhance the freedom of individuals, scattered independent actors who are free to pursue their own subjective preferences enjoy a greatly heightened personal autonomy. The related institutions of private property, free transferability, open competition, and freedom of contract further insulate the individual from arbitrary concentrations of power.

As economic liberty contracts, so does political freedom. Indeed, political freedom can never long survive the establishment of a governmental monopoly of economic power. The dismal track record of the socialist countries graphically portrays the inevitable loss of individual freedom that follows socialization of an economy. In the so-called social democracies, the decline in freedom is a gradual process. In countries lacking a strong democratic tradition, socialism usually begets an extinction of whatever political liberty existed previously. The abolition of the market also contributes to the decline of intellectual freedom. The recent struggle of the *Daily Gleaner* in Jamaica during the regime of Michael Manley, the interregnum of the *Grenadian Voice*, and the present struggle of *La Prensa* in Nicaragua aptly demonstrate the ephemeral nature of intellectual freedom in the absence of a free economy.

Admittedly, economic liberty is a necessary condition for personal freedom but is not a sufficient one. Even so, the free economy mitigates

4. T. SOWELL, *MARKETS AND MINORITIES* (1981); T. SOWELL, *RACE AND ECONOMICS* (1975); W. WILLIAMS, *THE STATE AGAINST BLACKS* (1982).

the concentration of political power in authoritarian countries and generates a rising standard of living. By contrast, in the totalitarian countries where the government enjoys both an economic and political monopoly aimed at total control, the individual enjoys no protected spheres from the state. Ironically, the relative freedom of market-oriented authoritarian countries enables the critics of the market order to portray the shortcomings of those countries with relative ease while virtually no information escapes the socialist, totalitarian states. As a result, virtue rarely is associated with the market because of the inevitable silence regarding the evils of non-market states.

The duality of economic and political liberty reinforces the moral justification for the free economy. To argue solely that the free economy creates wealth is never sufficient because such an approach offers no vision of a just society. Very few people commit themselves to institutions that they do not believe to be morally deserving. The great strength of the market resides in its being materially enriching while enjoying an ethical basis that in practice is superior to non-market alternatives. The practice of the free economy creates wealth, which encourages our generosity and charity, not because of governmentally coerced redistribution, but because of the judgment of the giver. The market encourages tolerance by imposing the costs of discrimination on those who would discriminate where value-maximizing exchange could otherwise take place. Because the subjective preferences of consumers are the source of value, the market fosters a regard for others. Honesty, thrift, and deferred gratification are rewarded by private markets. The free economy also gives the greatest opportunities for the free exercise of religion because of the market's enhancement of all private spheres of action. What seems materialistic on the surface can nourish deeply held norms.

The market economy does not, however, create equalities of wealth. While equality before the law is essential, equality of condition is unattainable, and attempts to achieve equality of wealth create disastrous negative incentives that reduce the wealth of society. More importantly, the legally enforced reduction of income differences emerging from voluntary arrangements intensifies the inequality of political power.⁵ Coercion must be used because people differ, enjoying the "boundless variety of human nature . . . the wide range of differences in individual capacities and potentialities [that] is one of the most distinctive facts about the human species."⁶ Among these differential aptitudes, one of the most important is that of entrepreneurial anticipation of market changes. The entrepreneur is the discoverer who perceives opportunities for wealth

5. Bauer, *Egalitarianism: Art of the Impossible*, in *TWO ESSAYS ON INCOME DISTRIBUTION AND THE OPEN SOCIETY* 9, 10 (Int'l Inst. Econ. Research 1977).

6. F. HAYEK, *THE CONSTITUTION OF LIBERTY* 86 (1962).

creation. These opportunities are available for all but are perceived and acted upon by only a few. People also differ in their attitudes toward wealth creation. As noted by Edward Banfield in his skillful analysis of time horizons, wealth creation is associated with saving and a preference for deferred gratification over present consumption.⁷ Finally, consumers with their varying tastes are notoriously fickle as to whom they will reward with their favor.

In sum, the inequality of income is the inescapable byproduct of a free society because of this greater industry, unequal endowment of the rare gift of entrepreneurship, differing attitudes toward saving and consumption, and differential rewards from satisfied consumers. These unequal rewards for initiative are morally just and cannot ethically be condemned. Even so, with open, competitive markets maximizing wealth for the entire society, dissatisfaction is excited by a sense of relative deprivation. Mindful of this, politicians adeptly use envy as a means for gaining the support of voters. Envy is perhaps the most corrosive influence in our civic culture. The persecution of productive trading and banking minorities such as European Jewry and the Chinese of Southeast Asia is a grim reminder of this tendency.

The second preliminary question already has been alluded to: the attributes of our human nature. Are we inherently good and capable of unlimited improvement in the proper environment? Or are we inherently less than good, led by sin, self-interest or a combination of these things to try to live at the expense of others if given the chance?

I am not an optimist nor do I entertain romantic notions of the perfectibility of persons. My view is derived from eighteenth-century republicanism, the viewpoint of the American founders, which is consistent with the insights of both the religious community and the economists. Guided by sin and self-interest, we do err, and virtue arises less by exhortation than by realistic institutional arrangements that take into account our natural tendencies. These tendencies can be channeled but not reformed, harnessed but not transformed. Redemption is by grace, not of this world. This possibility of our knowing ourselves does not contradict the idea that we do not know enough to solve the calculation problem. That our intellects allow us to observe and intuit our faults does not qualify us to presume that we can do without money prices to coordinate our economic arrangements.

Finally, before we turn our attention to lawyers and their clients, what is to be done about suffering? Before we began to take affluence for granted, suffering was our constant companion. Its familiarity bred stoicism and acceptance and strengthened religious faith in the hereafter.

7. E. BANFIELD, *THE UNHEAVENLY CITY REVISITED* 52-76 (1974).

Now we no longer accept its inevitability. The conquest of suffering has made its lingering remnants even more unacceptable, and to some, intolerable.

Suffering and pain are not to be relished, and charity and compassion are laudable virtues. However, an impatience with suffering carries its own risks, especially the possibility that purported public remedies will create more suffering than originally existed to be ameliorated. Good intentions must be tempered with a realistic appraisal of the unintended consequences of human action. The most shockingly vulnerable example of this failure is seen today as a result of the incentives generated by ill-conceived policies aimed at improving the lives of the disadvantaged.⁸ One of the great tragedies of the welfare state, as illustrated by the Social Security and AFDC programs, is its insidious erosion of moral standards and its destruction of the extended and nuclear family, the great vehicle for the transmission of culture. For example, the once solid bourgeois virtues of the Scandinavian countries are being supplanted by envy, indolence, and tax evasion. In this country, the inhibition of the formation of inner-city families and the feminization of poverty are starkly apparent.

Morality decays from within as well. The free economy can be self-defeating to the extent that its very success erodes the cultural context within which the market operates. Affluence has risks, among them apathy, materialism, and guilt over inherited wealth. Wilhelm Roepke recognized the link between the market and its moral setting and condemned materialism as "a disorder of spiritual perception of almost pathological nature, a misjudgment of the true scale of vital values, a degradation of man. . . ."⁹ Furthermore, the rise of moral relativism since the turn of the century¹⁰ has led many to conclude that no moral difference exists between voluntary wealth creation and coerced political redistribution. The moral bonds that promoted self-restraint have been broken.

In such an economic and moral context, what do clients want from their lawyers? Modern law practice is built on two fundamental choices. On the one hand, in the context of the market, many clients are creating wealth through the processes of saving, investment, and exchange. When the market fosters real economic growth, a demand is created for legal services associated with these transactions. Many such clients want traditional legal services: business transactions finalized, contracts and wills drafted, disputes settled, and debts collected. While those in business may operate more on the basis of informal agreement than on specific rules of law and build their long-term relationships on mutual

8. See, e.g., C. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980* (1984).

9. W. ROEPKE, *A HUMANE ECONOMY* 109 (1971).

10. P. JOHNSON, *MODERN TIMES* 1-48 (1983).

trust,¹¹ the legal system provides a context for bargaining in which expectations can be assured and confidence engendered for going forward. These familiar staples of law practice share one essential characteristic: they are positive sum games that facilitate productive free exchange, which in turn increases the total wealth of society. Goods and services move to higher-valued uses. Savings are invested in tools of production rather than used for present consumption, thereby yielding greater future income. In this context lawyers can represent their clients with vigor, confident that single-minded devotion to their client's cause creates greater wealth for society.

What else do clients want? Some clients hire lawyers not because they wish to create wealth, but rather because they hope to redistribute existing wealth from others with government and politics as the means. These clients are similar to wealth creators because they are entrepreneurs of a sort, but the consequences and morality of their actions are very different.

How is the political system utilized to redistribute wealth? The prior discussion has focused primarily on the free economy as the principal means for the creation of wealth and as a context for the encouragement of moral precepts. Other markets, however, perform in the same way as the market for goods and services but offer an opportunity to circumscribe that market. I refer to the markets for politics and ideas.

The market is vulnerable because the political system sets the legal rules by which the economic system must operate. The minimal state can and does play an essential role in the enforcement of private agreements, the protection of private property and persons, and the maintenance of public order. In common law countries one sees this process at work in the law of contracts, property, and torts. The legal rules governing free exchange are not immutable, however, because enacted law is especially subject to change. The intellectuals and journalists who traffic in the commerce of ideas influence public opinion, and legislators respond accordingly to well-organized interests. In the absence of constitutional restraints, the redistributive temptation may make the pursuit of wealth through entrepreneurial politics irresistible to political coalitions and to intellectuals in the academy and the media. Because of this vulnerability, the free economy may change as a result of the smooth functioning of the market for politics and the market for ideas.

Herein lies the paradox of the free economy. The political process operating as a market may well provide what the consumers of governmental action want: the restriction of the market for goods and the

11. Macaulay, *Elegant Models, Empirical Pictures, and the Complexities of Contract*, 11 LAW & SOC'Y REV. 507 (1977); Macaulay, *Non-Contractual Relations in Business: A Preliminary Study*, 28 AM. SOC. REV. 55 (1963).

redistribution of wealth by the force of transfer legislation. It was not meant to be this way. Our founders distrusted power profoundly and appreciated the importance of economic growth for a commercial republic. Far from utopian, they were aware of the shortcomings of human nature; therefore, they erected barriers to the concentration of power. These barriers worked well enough during the nineteenth century but have eroded in our time.

The legislator is an entrepreneur¹² who rationally wants the support of voters in order to maximize his chances for re-election. In the market for governmental regulation, the benefits are concentrated while the costs are diffuse. These concentrated benefits make producers, and not consumers, intervene in the political process because for only them do the benefits of intervention exceed the costs. For consumers to lobby against the subsidy is irrational because the cost of such lobbying exceeds the minute benefits to each consumer, and chronic free-rider problems encourage inaction. As a result, the amorphous consumer interest is systematically under-represented. Producer groups go to the legislature in pursuit of advantages unattainable through competition in the market such as import restrictions for the textile industry, price supports for farmers, low-interest loans for students, and bailouts for banks with bad loans. Rational vote-maximizing politicians respond by giving these groups exactly what they desire in return for electoral support. Thus government grows relentlessly in response to the incentives of political logic. Because the costs are so diffuse, the victims remain unaware of the true costs of the special interests receiving concentrated benefits.

Clients who demand redistribution and do not create wealth are playing negative sum games. They wish to add to their own wealth at the expense of other groups or individuals, typically taxpayers and consumers, whose wealth is reduced. Redistribution takes many guises with a resort to law the usual means by which economic choice is politicized and entitlement transfers established. Robbing Peter to pay Paul is not just a zero-sum game because when the resources expended in the pursuit of transfers (special interest lobbying costs and legal fees are good examples) are taken into account, the process becomes a negative sum game with a dead-weight loss to society. To use Mancur Olson's analogy, the game is like Peter and Paul wrestling in a china shop to see who gets control of its fine porcelain. As a result of the struggle, much of the porcelain is broken.

The paradox of the market is heightened by the influence of intellectu-

12. J. BUCHANAN & G. TULLOCK, *THE CALCULUS OF CONSENT* (1962); M. OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965); M. OLSON, *THE RISE AND DECLINE OF NATIONS* (1982); R. POSNER, *ECONOMIC ANALYSIS OF LAW* 405-07 (2d ed. 1977); *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* (J. Buchanan, R. Tollison, & G. Tullock eds. 1980).

als and journalists in the market for ideas. The market for ideas operates in much the same way as the market for goods and has a close relationship with politics because of its influence on public opinion. Intellectuals and journalists traffic in the commerce of ideas as they write books and columns, give lectures, and appear on television and radio. Voters, however, have a strong incentive to be uninformed on most political questions that do not directly affect their concentrated producer interest because the cost of becoming well-informed usually exceeds the benefits. Accordingly, many voters rely on the media and "costless" information broadcast over the regulated broadcast spectrum and supported invisibly by the costs of advertising borne by consumers. Unfortunately, complex explanations, particularly those based on economics, often seem counter-intuitive and baffling to the average person who is more comfortable with non-spontaneous explanations that emphasize conscious planning and manipulation. In addition, Ronald Coase has indicated that many people are more interested in the struggle between truth and falsehood than in the truth itself.¹³ The spread of television has popularized trite analysis of visual images based on emotion and has displaced thoughtful reflection on the complexities conveyed by the written word.

In this context, many intellectuals and journalists are hostile toward voluntary free markets for goods while remaining protective of their own market for ideas. This choice is not accidental. Ambitious but averse to the market, intellectuals tend to be visionaries who criticize the existing (usually capitalistic) order by recourse to an aspiration toward a vague (usually socialistic) ideal. Preoccupied by the result of equality of condition and unconcerned with wealth creation as a process, many intellectuals seek a society of permanence where spontaneous orders, especially the market for goods, are restrained by force. Envious of the material rewards of the business world but loath or incapable of competing in free markets, which do not recognize or reward alleged moral superiority but instead reward those who please the subjective mass preferences of consumers, these intellectuals see governmental expansion as the avenue to wealth, power, prestige, and a lasting recognition of the status they deserve. As a class, critical intellectuals are made possible by the affluence created by the economic system many of them dislike.¹⁴ Indeed, alienated egalitarian intellectuals are a luxury that can be afforded only by a society that has not fully implemented their ideas.

While intellectuals often are hostile toward the free economy in goods, they are strenuous advocates of their own prerogatives. They presume government to be competent to regulate the market for goods while as-

13. Coase, *The Marketplace for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 390 (Papers & Proceedings 1974).

14. J. SCHUMPETER, CAPITALISM, SOCIALISM AND DEMOCRACY 145-55 (3d ed. 1976).

serting the primacy of freedom of speech in opposing any governmental intrusion into the untrammelled commerce in ideas. As Ronald Coase and Aaron Director so cogently have observed, the intellectuals have acted in their own self-interest to avoid regulation of speech as they ply their own trade while approving the regulation of the "economic" activities of others, especially as they see themselves doing the regulating.¹⁵ By failing to perceive the relationship between economic liberty and intellectual freedom, the intellectuals' support for economic regulation inevitably undermines their own autonomy as academics and traders in ideas.

As a result of the disproportionate influence of these constituencies, public perception of institutions and economic systems often lacks the subtlety with which to overcome the redistributivist temptation. Preventing redistribution is difficult enough when the incentives are intact even if the redistributors know that the overall result is grossly inefficient and impoverishing for the society as a whole. The encouragement of wealth creation is even more difficult when the intellectuals and the structural flaws of democracy encourage public opinion to overlook the very real but often diffusely invisible costs and believe that redistribution is beneficial. In the marketplace of ideas, uncontroverted bad ideas soon dominate.

II. REDISTRIBUTION IN PRACTICE: THE CLIENTS

Among the numerous advantages promised by a well-constructed union, none deserves to be more accurately developed than its tendency to break and control the violence of faction.

James Madison,
The Federalist, No. X

Ever the realist, James Madison was familiar with the potential for the redistribution of wealth by the abuse of politics as opposed to wealth creation in the market. Lawyers play a crucial role in this choice because they can market their services in the pursuit of both. Writ large, a redistributive law practice is built around the transfers *among* members of the middle class resulting from governmental regulation, entitlement programs, and the structural incentives of the judicial system. Unlike the popular stereotype, the redistribution of wealth is rarely from the rich to the poor. Regulation and subsidy often are captured by the regulated persons or industries with government constituting the single greatest source of monopoly in the economy. Entitlement programs usually benefit the politically well-organized middle class just as the judicial system

15. Coase, *Advertising and Free Speech*, 6 J. LEGAL STUD. 1 (1977); Coase, *supra* note 13; Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1 (1964); see also R. POSNER, *supra* note 12, at 549-50.

too often principally benefits the lawyers. Because the organization of legal work in the practice of law follows client type as well as the doctrinal lines of a law school curriculum, any analysis of the lawyers' involvement in redistribution should incorporate both approaches.

Accordingly, this essay argues for an approach that examines doctrine and client type. The doctrinal line follows the conventional lines of law school curricula from the perspective of wealth creation and begins with contracts, the great field of civil obligation grounded on promise, which is at the heart of the process. For this discussion contracts takes precedence over property and torts, two older fields of law with feudal roots antedating the eighteenth-century revolution in productive exchange. Property governs the institution of private property, the presupposed basis for exchange, and torts completes the realm of civil obligation, governing the protection of the person and property from injury. In addition are the rules of civil procedure by which civil disputes are resolved. Beyond these first year courses are such important themes as regulation, antitrust, constitutional law, and jurisprudence in which redistributive possibilities through politics loom large. The client continuum follows size and incentives for political organization and begins with the large, politically well-organized (usually corporate) client and ends with the politically unorganized individual or small business client. Redistribution usually is achieved outside the market by politically well-organized clients acting in concert with legislators and governmental agencies. Rarely is redistribution a concern of the common law or of politically unorganized consumers.

Contract is capitalism. The purpose of contract law is to effectuate exchange based on promises. Arising through *assumpsit* in response to the transformation of wealth in the fifteenth and sixteenth centuries, the enforceability of executory promises was an enormous leap forward from the traditional protections of tort for misfeasance. Soon wealth consisted of more than mere land; therefore, a suitable basis for the protection of the creative potential of the entrepreneur had to be found. As the Industrial Revolution began, wealth became more abstract in the form of capital, and the protections of *assumpsit* encouraged risk taking. In England, this risk taking brought about the triumph over medieval life from 1760 to 1830. Similarly, in the United States during this magnificent century, the "years of contract" from 1800 to 1875 saw unprecedented wealth creation. Economic historians must emphasize the legal framework within which the creation of mass wealth began. The Law Merchant, dating from the Middle Ages, played a helpful role in this process, both in England and internationally.¹⁶ Free from the constraints of politics of any government, the Law Merchant spontaneously grew to serve the

16. L. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* (1983).

needs of trading merchants and their consumers. Business custom was viewed as the law, and productive exchange was enhanced. Since then, the mark of the great commercial judges, such as Lord Mansfield and Cardozo, has been the deciding of cases in the manner of the Law Merchant, in the light of commercial practice.

Contract governs the bargains of clients all along the line of political organization from the large corporation to the individual. Where contracts render enforceable agreements in open, competitive markets, they are desirable means for wealth creation. Contract-based free exchange assumes that value is subjective and thereby accords the consumer a recognition of individual choice. At the common law of contract, this process is at work when the courts refrain from judging the adequacy of consideration.¹⁷ For these judges it is sufficient that the parties intended that an exchange take place. The law of contract is ennobling for the lawyer whose work embraces free exchange, and to the extent that open markets result, replacing politics, redistribution is inhibited.

However, redistribution occasionally arises in contract law. At the consumer end of the client continuum, where individual consumers are unorganized politically, judges, in the guise of paternalism, sometimes decide cases on redistributive grounds. These clients have not sought redistribution in the manner of regulated industries, although their lawyers may have been motivated by distributional concerns. The most conspicuous example of good intentions gone awry are the unconscionability cases. In response to Karl Llewellyn's heroic invitation to make the bases of decision explicit,¹⁸ the result has been uniformly unsatisfactory. While there may be less manipulation of doctrine for unstated ends, whether viewed from the perspective of form¹⁹ or substance,²⁰ the courts never asked the right questions. The judges failed to examine whether the financial devices in question served useful purposes or whether market conditions justified high prices. Accordingly, the cases that emerged are incoherent rationalizations that consumers can take. Uninformed by any understanding of markets, the decisions in practice would only make life worse for the intended beneficiaries.²¹

Because contract is so closely allied with free exchange, the attitude of scholars toward redistribution has had a profound influence on the debate over contractual obligation. The moral basis of contract in the

17. R. POSNER, *supra* note 12, at 71.

18. NEW YORK STATE LAW REVISION COMMISSION REPORT 177-78 (N.Y. LEG. DOC. NO. 65, 1954).

19. *E.g.*, *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965).

20. *E.g.*, *Jones v. Star-Credit Corp.*, 59 Misc.2d 189, 298 N.Y.S.2d 264 (Sup. Ct. 1969).

21. R. POSNER, *supra* note 12, at 87-88; Epstein, *Unconscionability: A Critical Reappraisal*, 18 J.L. & ECON. 293 (1975); Schwartz, *Seller Unequal Bargaining Power and the Judicial Process*, 49 IND. L.J. 367 (1974).

promissory principle is consistent with the freedom of the individual and the inhibition of redistribution.²² On the other hand, those sympathetic with redistribution often embrace the argument that contract should be absorbed into tort. The denegation of the promissory principle is consistent with the preference for a collective, rather than individual, basis of obligation.²³ Even so, the redistributive consequences of common law contract doctrines are insignificant when compared with those of the legislative process.

The law of property, although older than that of contract, aids wealth creation by providing the freely transferable property rights necessary for exchange²⁴ and offers enduring solutions to many troublesome policy questions such as the allocation of scarce water.²⁵ In short, the best way to save any resource is to create private property rights in that resource. Communal, socialist ownership is a guarantee of its overconsumption and eventual destruction.

Private property rights can be the object of redistribution, however, on behest of politically well organized clients operating outside the market. Zoning²⁶ and environmental regulation²⁷ are conspicuous examples of subsidy and redistribution on behalf of the middle and upper classes. Other examples abound in the mismanagement of public lands in the West, especially timber and grazing lands, and the subsidies given to timber companies and ranchers.²⁸

As with contract, in property law some judges have engaged in redistributive decision-making on behalf of consumers in the implied warranty of habitability cases.²⁹ Again, as in the unconscionability cases, the judges failed to understand the context of competitive markets. To the extent that added costs are passed on to tenants in competitive rental markets, good intentions go awry, and the consumers' well-being is not

22. C. FRIED, *CONTRACT AS PROMISE* (1981).

23. *Id.* at 4-5. For illustrations of the contours of this approach, see P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979) and G. GILMORE, *THE DEATH OF CONTRACT* (1974).

24. G. W. NUTTER, *Markets Without Property: A Grand Illusion*, in *POLITICAL ECONOMY AND FREEDOM* 94-102 (1983).

25. T. ANDERSON, *WATER CRISIS: ENDING THE POLICY DROUGHT* (1983); Anderson, *Water Needn't Be a Fighting Word*, *Wall St. J.*, Sept. 30, 1983, at 30, col. 4.

26. B. SIEGAN, *LAND USE WITHOUT ZONING* (1972).

27. R. ISAAC & E. ISAAC, *THE COERCIVE UTOPIANS* 45-83 (1983); W. TUCKER, *PROGRESS AND PRIVILEGE: AMERICA IN THE AGE OF ENVIRONMENTALISM* (1982); Isaac & Isaac, *Subsidizing Political Hidden Agendas*, *Wall St. J.*, Sept. 6, 1984, at 28, col. 3.

28. *BUREAUCRACY VS. ENVIRONMENT: THE ENVIRONMENTAL COSTS OF BUREAUCRATIC GOVERNANCE* (J. Baden & R. Stroup eds. 1981); *PRIVATE RIGHTS & PUBLIC LANDS* (P. Truluck ed. 1983); Baden & Stroup, *Property Rights, Environmental Quality, and the Management of National Forests*, in *MANAGING THE COMMONS* 229 (G. Hardin & J. Baden eds. 1977); Stroup & Baden, *Externality, Property Rights, and the Management of our National Forests*, 16 *J.L. & ECON.* 303 (1973).

29. *E.g.*, *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. Cir. 1970).

enhanced.³⁰

Tort law protects the person and property from harm. Although much debate has taken place over whether tort law fulfills purposes of justice, compensation, or efficiency, explicit redistribution never figured prominently among its purposes. In recent years, however, the incentives of the court system and tort doctrine have generated serious redistributive problems in products liability and personal injury cases. The decline of the fault principle and the rise of enterprise liability reflect a redistributive agenda. The almost routine recovery of punitive damages against corporate defendants and of extravagant amounts for pain and suffering also is grounded on redistribution. To the extent that these trends reflect the manipulative skills of plaintiffs' trial lawyers, they are a commentary on the deficiencies of the adversarial system. Should these trends represent a change in judicial and public attitudes toward risk, corporations, and physicians, disturbing questions are raised about the formation of public opinion, especially the influence of anti-business, egalitarian media and intellectual elites. Plaintiffs' trial lawyers are responding to the incentives of the contingency fee system and encouraging juries to award damages based on envy of those with so-called "deep pockets." Because corporations usually are owned by many shareholders, often through pension funds, and because consumers ultimately bear the costs of doing business, these extravagant awards are not paid by some mythical wealthy class, although such an image is convenient for use by litigators with a vested interest in the size of the award.

Traditionally, the rules of civil procedure have been used for the settlement of disputes between private parties. The lawsuit was controlled by the parties, and the judge was the neutral umpire. Under this approach, the rules were in keeping with the traditional distinction between adjudication and legislation and were not available for the active promotion of redistribution. Increasingly, however, building upon the equitable principles of mandamus and mandatory injunctions, the rules of civil procedure are being used for prospective political change of public institutions under the label of "public law litigation."³¹ In these cases, the impetus for redistribution comes at the behest of either ideological plaintiffs or lawyers working with nominal plaintiffs. Accordingly, any discussion of the new civil procedure should be part of a later discussion of the lawyer as entrepreneur.

Much redistribution comes in the guise of governmental regulation, and lawyers help their clients attain and keep these subsidies. On the federal level, regulatory practice clusters about the familiar alphabet

30. R. POSNER, *supra* note 12, at 356-61.

31. See, e.g., Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

soup of agencies such as the ICC, FTC, FCC, and SEC as well as such departments as Agriculture and Interior. The cost of regulation exceeds the benefits and amounts to a redistribution from unorganized interests, often consumers, to the better organized interests. Furthermore, legal fees paid to lawyers who are advocating redistribution is social waste. Admittedly, since 1980, a desirable cutback of agency excess³² and one unparalleled example of agency termination³³ have taken place. However, the political structures fostering incentives for subsidy and redistribution largely have remained intact. On the state and local level, lawyers congregate before political redistributors such as zoning boards, milk commissions, and innumerable licensing boards.³⁴ To the extent that transfer activity supplants the creation of wealth, lawyers will have an incentive to become another constituency of redistribution. This transformation is particularly deplorable given the increased demand for legal services that could result from an increase in the total wealth of society.

In antitrust law, the debate centers on the purpose of the statutes. Were they aimed at promoting the efficiency of the market and consumer welfare, or were they enacted with a redistributive intent? Even in the absence of a redistributive intent, enforcement policy has shifted with changes in administration, and redistribution has made an impact. The more compelling argument justifies antitrust law solely on the promotion of consumer welfare, a goal attainable only through open, competitive markets and not through redistribution.³⁵

Do lawyers have an ethical obligation to inform their clients of the economic and moral consequences of redistribution? The Model Rules of Professional Conduct, adopted by the American Bar Association in 1983, do not require such action. However, a lawyer is authorized to inform the clients of the law and "other considerations such as moral, economic, social and political factors that may be relevant to the client's

32. Three examples readily come to mind. Since 1980 the Federal Trade Commission has employed greater economic analysis and curtailed its rulemaking proceedings. See Muris, *Rules Without Reason: The Case of the FTC*, Regulation, Sept.-Oct. 1982, at 21. In addition, the Commission has reformulated its standard for evaluation of deceptive trade practices under § 5 of the FTC Act. *FTC Alters Its Policy on Deceptive Ads by 3-2 Vote, Sparks Congressional Outcry*, Wall St. J., Oct. 24, 1983, at 41, col. 1. For a discussion critical of the new standard, see Bailey & Pertschuk, *The Law of Deception: The Past as Prologue*, 33 AM. U.L. REV. 849 (1984). The record of the Interstate Commerce Commission has been mixed. Moore, *Rail and Truck Reform — The Record So Far*, Regulation, Nov.-Dec. 1983, at 33. The Federal Communications Commission has pursued a vigorous agenda of deregulation. Mark Fowler, *FCC's apostle of deregulation*, Wash. Times, Feb. 7, 1985, at 7B, col. 2.

33. The Civil Aeronautics Board was abolished Jan. 1, 1985 following the emergence of a broad bipartisan coalition critical of the costs of regulation. For a discussion of the CAB's earlier cartelization of the airlines, see R. MCKENZIE & G. TULLOCK, *THE NEW WORLD OF ECONOMICS: EXPLORATIONS INTO THE HUMAN EXPERIENCE* 249-51 (3d ed. 1981).

34. For trenchant criticism of these state and local restraints, see W. WILLIAMS, *supra* note 4, at 67-123.

35. See R. BORK, *THE ANTITRUST PARADOX* (1978); R. POSNER, *supra* note 12, at 211-37.

situation.”³⁶ This position derives from an earlier ethical consideration under the Model Code of Professional Responsibility.³⁷ The format of the Model Rules arguably places greater emphasis on evaluation of the consequences of client preferences because the standard is placed in the black-letter portion in Restatement style rather than in an ethical consideration as in the Model Code. However, because the standard is merely permissive, even the black letter of the Model Rules is no restraint on redistribution. With lawyers taking a client’s preferences largely as a given, this neutrality reinforces the attitude that people should use their political influence to transfer wealth. Indeed, lawyers who persistently advise their subsidy-seeking clients to eschew politics and to compete in the market likely will lose those clients.

III. REDISTRIBUTION IN PRACTICE: THE LAWYERS

Clients are not the only people adept at redistribution. Some lawyers now seek to redistribute wealth directly to themselves. This development stems from the incentives of the adversarial trial system as well as from direct awards of fees. In addition, redistribution is motivated by radical ideology in some cases.

Should the court system be available at minimal or no cost to litigants? Just as a zero price creates unlimited demand and encourages overuse and destruction of such things as public parks,³⁸ so does a subsidy of parties to a lawsuit lower their costs and encourage litigation. Those who are able to pay user fees should do so, and such fees should be sufficiently high to reflect actual costs and discourage nuisance suits.³⁹ In addition, the threshold jurisdictional amount for access to the federal courts should be raised significantly.⁴⁰ Private courts and arbitration provide a desirable market alternative to the present tax-supported system. Like any private firm, private dispute settlement firms would have every incentive to be fair and impartial. In addition, they would develop specialized expertise in business practices so that, like the merchant juries of Lord Mansfield’s court, they could decide the cases in light of commercial practice. Finally, in order to invite reflection on the merits of a potential plaintiff’s claim, losers should be required to pay the court costs and legal fees of the prevailing party.⁴¹

Direct payments to lawyers are a relatively recent development. Ever

36. MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1983).

37. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1983).

38. Beckwith, *Parks, Property Rights, and the Possibilities of the Private Law*, 1 CATO J. 473 (1981).

39. Crovitz, *Lawyers on Trial*, 35 POL’Y REV. 72, 74 (1986); *Settling Out of Court*, Wall St. J., Aug. 22, 1985, at 22, col. 1.

40. R. POSNER, THE FEDERAL COURTS 252 (1985).

41. Crovitz, *supra* note 39, at 73-74.

since the federal government began awarding attorneys' fees to successful litigants, entrepreneurial lawyers have done well in collecting fees from the taxpayer.⁴² Particularly offensive have been the large settlements of class action suits such as the Agent Orange litigation.⁴³ Such settlements are redistributive to the extent that they reflect the enhanced nuisance value of frivolous suits in the context of media influence on opinion. Jurors are not immune from the redistributive influence of intellectual fashion, and the awards in tort cases as well as jurors' statements following the verdict in the highly publicized murder trial of Jack Henry Abbott, the *cause celebre* of New York intellectuals,⁴⁴ do not augur well for the integrity of the jury system.

One of the more startling developments for entrepreneurial lawyers is called public law litigation, or, more accurately, substantive civil procedure.⁴⁵ Unlike the traditional lawsuit with its focus on specific aggrieved clients, the new civil procedure focuses on changes in the operation of public institutions at the behest of lawyers and ideological plaintiffs. Precise measurement of the redistributive impetus for these lawsuits is difficult, but a few preliminary observations are in order. The object of these lawsuits is the vindication of constitutional or statutory policies, and they often reflect "skepticism about the existing distribution of power and privilege in American society."⁴⁶ These lawsuits result in judges assuming essentially legislative power with on-going responsibilities for supervision of societal institutions. What are these policies? To the extent that they reflect entitlements from government rather than traditional immunities from its coercive power, these lawsuits are redistributive. For example, their origin in social security entitlements, environmental regulation, and the new equal protection jurisprudence is especially vulnerable to criticism.

Redistributive law practice can be funded by the state. The unhappy history of several agencies funded by the Legal Services Corporation [LSC] is an example of politicization by radical lawyers to achieve a socialist agenda for the redistribution of wealth. The Legal Services Corporation was established to provide routine legal assistance to the poor but

42. See 42 U.S.C. § 1988 (1982 & Supp. 1983). Although named the Civil Rights Attorneys Fees Award Act, § 1988 has been construed to have a very broad reach. See *Lawyers on the Dole*, Wall St. J., Sept. 8, 1982, at 32, col. 1; *Caught in the Act*, Wall St. J., Oct. 31, 1980, at 28, col. 1;

43. *Champerty*, Wall St. J., Oct. 18, 1984, at 28, col. 1.

44. The jurors, conscious of their status as celebrities and of the support for Abbott among literary figures, discussed their belief that society rather than the individual is responsible for crime. Was their response in keeping with their celebrity status and the "expected" response that no one should be held individually accountable? See Rabinowitz, *Jack Henry Abbott: The Verdict Was Manslaughter*, Wall St. J., Jan. 29, 1982, at 28, col. 3.

45. See G. McDowell, *THE CONSTITUTION AND CONTEMPORARY CONSTITUTIONAL THEORY* 29-34 (1985).

46. Fiss, *The Social and Political Foundations of Adjudication*, in *HOW DOES THE CONSTITUTION SECURE RIGHTS?* 8 (R. Goldwin & W. Schambra eds. 1985).

some of its constituent agencies exceeded this mandate. Class action suits were filed taking broad policy positions on topics ranging from Indian land claims to opposition to nuclear power. Large portions of LSC staff time and budget were consumed by these class actions.⁴⁷ In addition, following the 1980 election, LSC officials diverted funds and staff time into a so-called "survival campaign."⁴⁸ Further, in December 1982, allegations of excessive fees by new appointees were made by sympathetic media. These unfounded allegations diverted attention from scrutiny of a continuing resolution to fund the agency for two years, thus effectively blocking reform by the then active board.⁴⁹ These examples from the history of the LSC illustrate that the impetus for redistribution did not derive from the clients, who typically want routine services such as a divorce or help in resolving differences with a landlord. Instead, the lawyers' ideology determined the commitment to radical redistribution and involvement in politics. The influence of the National Lawyers Guild in radicalizing some agencies funded by the LSC is undisputed.⁵⁰ This influence parallels its involvement in the Critical Legal Studies movement.⁵¹

The curricula of the law schools have responded to shifting client preferences and the inclinations of the professors. After the Langdellian case-method revolution at Harvard in 1870, the birth of redistribution through regulation spawned courses in economic regulation, antitrust, labor law, and administrative law. In recent years, courses in social welfare legislation, complex litigation, and environmental law have developed. Older courses, such as constitutional law and taxation, have been affected greatly by the sweeping tide of egalitarianism and judicial activism in our time. Indeed, a study of the evolution of these course offerings would illustrate graphically the paradox of the market and the rise of redistribution in an atmosphere devoid of self-restraint and inhibiting democratic procedures and constitutional interpretations.

Since the 1930's, these curriculum patterns of redistribution have been paralleled by a change in outlook, first among many law professors and now among many judges, as to what judges should do. The Realist Movement brought an end to the formal, doctrinal jurisprudence of the

47. R. ISAAC & E. ISAAC, *supra* note 27, at 234-43; *Not So Legal Services*, Wall St. J., Oct. 4, 1985, at 20, col. 1; Isaac & Isaac, *Subsidizing Political Hidden Agendas*, Wall St. J., Sept. 6, 1984, at 28, col. 3.

48. Kucewicz, *A Little Larceny in Legal Services?*, Wall St. J., Aug. 19, 1983, at 18, col. 4.

49. *Id.*; *Press held 'used' in Legal Services ploy*, Wash. Times, Aug. 4, 1983, at 2A, col. 2; *Video reveals Legal Services Corp. drew 'survival plans'*, Wash. Times, July 28, 1983, at 4A, col. 1; *Misuse of legal aid fund revealed*, Wash. Times, July 12, 1983, at 1, col. 1.

50. R. ISAAC & E. ISAAC, *supra* note 27, at 237-40.

51. The Guild co-sponsored the first volume of Critical Legal Studies essays in 1977 following the first Critical Legal Studies meeting. See *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 7 (D. Kairys ed. 1982).

late nineteenth century.⁵² In their varied voices, the realists said that the rules at law do not always explain the results at law. At its core, realism asserts that judges draw on their life experiences to consider the “two because” of every case, the doctrine of the prior cases and the policy justification underlying the rule that emerges from those cases. In subsequent cases the great judge, who is disciplined by the judicial role, would, within the leeways of precedent, follow the sense of the situation, carving out appropriate exceptions for compelling equities particular to the question for decision.⁵³

In the absence of a directly applicable statute or constitutional provision, a modest realism in the development of common law cases can be helpful. Such realism recognizes the humanity of the judge who, confined by the judicial role, can evaluate whether the initial policy justification of a particular rule extracted from the cases supports the rule’s extension by analogy in a new situation. The rejection of mechanical jurisprudence does not, however, mean the absence of constraints. In particular, an aversion to the reification of ideas does not imply approval of the judicial exercise of legislative power. This judgment is a matter of degree just as the modest realist finds sufficient reckonability within the leeways of precedent to recognize that this lack of certainty in the appellate courts is an invitation for craftsmanship and not a reason for the despair of nihilism.

Realism was destructive, however. By bringing an end to formal rule-oriented analysis, the realists opened the way for their more extreme disciples to bring an end to the judicial function in a manner reminiscent of Keynes’ disciples bringing perpetual deficits in a way he never contemplated. Just how destructive the disciples of realism have been we now know as we contemplate the wreckage of constitutional law and the disaster of socialist thought in the law schools, especially the excesses of Critical Legal Studies.

IV. REDISTRIBUTION IN THEORY I: CONSTITUTIONAL LAW

Constitutional law is in crisis, and the outcome of the present debate will determine whether constitutional law will, in fact, be constitutional law at all. The questions seem disarmingly simple: to what extent shall a sitting judge be bound by the written text and ascertainable intent of the framers of the Constitution? Can history be known with sufficient clarity to guide the judge? The debate centers on the choice between interpretivism, which looks primarily to the text of the Constitution and the intent of the framers, and noninterpretivism, which looks primarily outside the

52. See, e.g., Gilmore, Book Review, 60 YALE L.J. 1251 (1951).

53. K. LLEWELLYN, THE COMMON LAW TRADITION 1-157 (1960).

text and history to the moral values of the judges and the law professors. Those who believe that the historic intention can and should guide the judge face a critical task of restoration to insure that interpretivism is once more the dominant mode of constitutional discourse.

Constitutions, if they are to survive, must grow, rooted in the experience and timeless norms of a people. They cannot successfully be poured on from the top as inventions out of abstraction. As stated by Judge Robert Bork, that most graceful of interpretivists:

Our constitutional liberties arose out of historical experience and out of political, moral, and religious sentiment. They do not rest upon any general theory. Attempts to frame a theory that removes from democratic control areas of life the framers intended to leave there can only succeed if abstractions are regarded as overriding the constitutional text and structure, judicial precedent, and the history that gives our rights life, rootedness, and meaning.⁵⁴

These permanent things, the experienced norms and the earthy rootedness of the historic Constitution contrast vividly with the gossamer webs of moral philosophy and other ephemeral sources of noninterpretivism.

The theories of noninterpretivism are increasingly abstract and philosophical, divorced from the practical wisdom that was the style of earlier constitutional analysis.⁵⁵ In addition, the professors who advocate noninterpretivism are much more permissive and egalitarian than either the historic Constitution or the American people as a whole.⁵⁶ Thus when the original intention is no longer the sole legitimate premise for constitutional analysis, this outlook becomes the substance of the Constitution. Such a pursuit of permissive, egalitarian abstraction can only dissolve into coercion and a loss of freedom.

One recent historical example shows how dangerous the pursuit of ahistorical abstraction can be. In 1975, following the overthrow of the Cambodian government, the Khmer Rouge began to relentlessly transform Cambodia in accord with an abstract socialist idea unrelated to Cambodian history or the cultural experience of its people.⁵⁷ These actions were accomplished at the behest of a small group of intellectuals trained on a mixture of Proudhon and Marx at the Sorbonne. They were "pure intellectuals" who praised the theoretical virtues of rural life and, like many intellectuals hostile toward capitalism, despised commerce and

54. R. BORK, *TRADITION AND MORALITY IN CONSTITUTIONAL LAW* 8 (Am. Enter. Inst. 1984).

55. Bork, *Foreword* to G. McDOWELL, *supra* note 45, at vi (1985). For a lucid discussion of the weaknesses of noninterpretivism, see Kurland, *Curia Regis: Some Comments on the Divine Right of Kings and Courts "to Say What the Law Is"*, 23 *Ariz. L. Rev.* 581 (1981).

56. Bork, *supra* note 55, at vii; Bork, *The Struggle Over the Court*, *Nat'l Rev.*, Sept. 17, 1982, at 1137.

57. Conversation with Chhang Song, former Cambodian Minister of Information and former president of the Association of Cambodian Journalists (Jan. 27, 1979).

cities. Predictably, "none of them had ever engaged in manual labor or had any experience at all of creating wealth."⁵⁸ These intellectuals intentionally sought to obliterate the past and create a new society based solely on theoretical foundations. The result was an episode of unspeakable cruelty and barbarism. As Phnom Penh was emptied and its citizens scattered into the countryside, the killings began, and before the violence ended, two million people were dead.

My contrast of noninterpretivism with the Cambodian revolution or the French, from which it derived, is intentional. The similarity of their modes of thought is striking and unavoidable. Hardly an *ad hominem* ploy, this parallel between noninterpretivism and the Cambodian genocide should give pause to any thoughtful noninterpretivist as a reminder of how easily the pursuit of ahistorical egalitarian abstraction degenerates into political coercion.

Constitutional law is linked closely to redistribution. The choice between interpretivism and noninterpretivism is, in fact, a choice between the inhibition and the encouragement of redistribution. Those who look to the text and original intent are beginning with eighteenth-century republicanism. To the framers, sin and self-interest were very real and they had no illusions about the malleability or perfectibility of persons. Constitutional limitations were meant to restrain these natural tendencies. The genius of American constitutionalism stems from its inhibition of envy and redistribution and its channeling of private vice into public virtue. A restoration of the original intention would inhibit redistribution.⁵⁹ On the other hand, those who look first to the ahistorical moral values of the judges are looking at the relentlessly egalitarian and redistributive values of the professors who purport to instruct them.

Using the methods of a modest realism, one must ask whether the rules of constitutional adjudication explain the choices made by the professors. Does the choice of method conceal an unstated prior choice of desired result? To their credit, the interpretivists have honesty on their side because they do not defend a judge using conservative or libertarian moral values divorced from the text and the claims of history. Do the noninterpretivists believe in their method, or do they embrace noninterpretivism because they have no history to call their own? After all, the Philadelphia Convention of 1787 was not the Paris Commune. Does their self-consciousness and prolix embarrassment reveal a fundamental awareness of their own illegitimacy and a desire to conceal that only their dislike of the history they find causes them to reject history's claims?

58. P. JOHNSON, *supra* note 10, at 155.

59. See, e.g., R. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985).

The noninterpretivist constitutional law scholars are at risk. Judge Bork bluntly states that “legitimate non-interpretivism is like the perpetual motion machine—nobody is going to make it work.”⁶⁰ In their quest for power and authority, for which they have no constitutional warrant, the professors, like the proverbial emperor, wear no clothes. Only the isolation of legal culture and the lingering deference given the status of the professors’ offices in the law schools explain the durability of their pretense. The professors will quickly exhaust their residual good will should the people come to understand the consequences of noninterpretivism.

V. REDISTRIBUTION IN THEORY II: THE LAW PROFESSORS AND THE DISASTER OF SOCIALIST THOUGHT

Traditionally, law teachers have been more conservative than professors generally, especially when compared with the more radical disciplines such as sociology.⁶¹ In recent years, the influence of socialist thought has been on the increase in the law schools, primarily under the umbrella of Critical Legal Studies [CLS]. This change is attributable to increasingly interdisciplinary approaches to legal scholarship⁶² as well as the political outlook of the generation of law teachers now on the threshold of middle age. While generalizations are difficult, some aspects of this newest manifestation of socialist thought warrant attention.

The war of some in CLS against the rich⁶³ is puzzling and resembles the fear of statistical presentations of both corporate market share and income differences. In each case, critics assume that the results are static and reflect a distribution that is unchanging over time. In the absence of governmental protection, when competitive firms survive, their market shares reflect the ability to weather the creative destruction of innovation.⁶⁴ Many firms with large market shares are displaced over time by other firms more responsive to the changing preferences of consumers. Firms must evolve or perish, and firms with obsolete technologies (e.g., whale oil and candles for lamps, steam locomotives, natural fibers before synthetics) disappear. Static, one-time statistical measures of market share fail to capture the complexity of causation or evolution over time. The rich are recycled like firms, and only the competitive survive. Unless the rich create wealth, they will exhaust their capital and become middle class. Great entrepreneurial fortunes often are divided among growing

60. Bork, *supra* note 55, at ix.

61. E. LADD & S. LIPSET, *THE DIVIDED ACADEMY: PROFESSORS AND POLITICS* 55-92 (1976).

62. Glazer, *Marxism and the Law School: A Nonlegal Perspective*, 8 HARV. J.L. & PUB. POL’Y 249, 253 (1985).

63. See, e.g., Kennedy, *Positive and Normative Elements in Legal Education: A Response*, 8 HARV. J.L. & PUB. POL’Y 263, 266 (1985).

64. J. SCHUMPETER, *supra* note 14, at 81-86.

numbers of descendants who frequently lack either the aptitude or attitude needed to make money. Indeed, the pejorative term *nouveau riche* is a sign of health and vigor in a free economy. The very newness of their wealth illustrates the emptiness of statistical measures of wealth disparities.

A preoccupation with antecedent endowment of what is already produced obscures wealth creation as a process. What matters is process, not result. The only requirement is competitive markets with free entry for all. Then new wealth is created and is not extracted at someone's expense. The morality of the distribution of earned rewards is a question of means judged prospectively. Those who do not create new wealth and take from others by redistribution are morally reprehensible. Further, the misconception that wealth is extracted from a fixed quantity rather than created leads to the erroneous conclusion that groups are entitled to "shares" of wealth without regard to whether these groups have contributed to its creation.⁶⁵

Those in CLS who decry the alleged power of some to reduce others to "dependence" in large-scale private organizations forget that in competitive markets dependence is mutual. No critic ever mentions the dependence of the employer forced to pay competitive wage rates to obtain workers or the landlord unable to charge more than the competitive rental rate to obtain tenants. Furthermore, these critics face the impossible task of proving, contrary to a century of experience, that socialist alternatives will not generate the most oppressive tyrannies resulting from the centralization of political power. How else can they explain the lack of symmetry between a free and a socialist society? Some people fear freedom and responsibility. So be it, because in a free society mass man easily can live a life of unity and security in private collectives such as a monastery, kibbutz, or utopian community. On the other hand, for the individual who cherishes autonomy, to live as an individual within a socialist society is nearly impossible. Where is she to go, and what is to insulate her from the reach of the state?

The free economy and our original constitutional intention often are accepted or rejected in tandem. This parallel between alienation from the market and acceptance of noninterpretivism is in keeping with a preference for specific results over process, whether in the form of free exchange or elections. Not surprisingly, the author of the anti-market decisions in *Walker-Thomas*⁶⁶ and *Javins*⁶⁷ is a caustic noninterpre-

65. Bauer, *supra* note 5, at 12.

66. *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445 (D.C. Cir. 1965). See *supra* text accompanying note 19.

67. *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071 (D.C. 1970). See *supra* text accompanying note 29.

tivist.⁶⁸ Despite any good intentions, the practices of the socialist noninterpretivist deprive the average person of options. Participating in an exercise in the rhetoric of power, the radical noninterpretivist would deny free choice to consumers and voters alike in a socialist society that would in all likelihood be run by judges instructed by law professors.

The law schools have suffered as a result. Law students too rarely are studying the ennobling constraints on the power of the state. Instead, they increasingly are being trained in the uses of that power.⁶⁹ The uncivil behavior of some CLS publicists has achieved wide notoriety,⁷⁰ and the more extreme CLS nihilists have been invited to leave law teaching for other disciplines.⁷¹

Schumpeter was right. Capitalism would not be capitalism if it had not created this class of critical intellectuals, tenured, pampered, free to pursue their ideas in the freedom, affluence, and security of the West. That their private demons generate such destructive externalities in the law schools is deplorable.

VI. TOWARD A RENEWAL OF DEMOCRATIC LEGITIMACY

What is to be done to inhibit redistribution and restore democratic legitimacy? While ideas have consequences, ideas are competitive and vigorous effort is required to argue against and prevail over socialist thought. Furthermore, we must be realistic in assessing the likelihood of meaningful change in light of present political realities. In the realm of ideas, the intellectual errors of the opponents of the open society must be demonstrated. We must offer a just moral vision of democratic legitimacy to capture the imagination of the uncommitted. The socialists have been successful largely because they have argued in moral terms. Unwilling to learn from experience any lessons as to the actual practice of socialism, many socialists rely upon the superficial attraction of a pleasing moral vision to which many, especially intellectuals, readily aspire. This morally attractive aspiration gives the socialists much of their power, and once their program has been implemented and the terrible truth of socialist practice becomes known, the drift toward a redistributive subsistence economy and the collapse of democracy may be irreversible.

The friends of the free economy and democratic legitimacy must take the cultural offensive in a broad-based moral and utilitarian celebration

68. Wright, *Professor Bickel, the Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769 (1971).

69. Troy, *Learning the Law at Harvard*, Wall St. J., Aug. 6, 1982, at 14, col. 4.

70. Menard, *Radicalism For Yuppies*, The New Republic, March 17, 1986 at 20; Eastland, *Radicals in the Law Schools*, Wall St. J., Jan. 10, 1986, at 16, col. 4; Kamen, *War Between Professors Pervades Harvard Law*, Wash. Post, Dec. 21, 1985, at A3, col. 1. For a bibliography of CLS literature, see Kennedy & Clare, *A Bibliography of Critical Legal Studies*, 94 Yale L.J. 461 (1984).

71. Carrington, *Of Law and the River*, 34 J. LEG. ED. 222 (1984).

of the open society. We are opposing an irreconcilable adversarial culture that must be exposed as morally reprehensible and materially impoverishing. We must restore faith and confidence in a sweeping, spontaneous vision of history that inspires the individual to participate willingly, taking advantage of opportunities as they arise, free of the myths of determinism. The individual must have confidence that decentralized, spontaneous institutions such as the market, the whole of which he cannot comprehend and whose operation is indirect, will produce a just society of ordered liberty. We must build the faith that obviates the need for asking why a free society functions as the result of human action but not of human design. The creators of wealth, especially the entrepreneurs, must be convinced of their own virtues and encouraged to respond to and overcome the misrepresentations and distortions of the verbal class. Most importantly, the creators of wealth in open, competitive markets must never suffer guilt about the wealth they have earned. Theirs is the just reward for the service of consumers and superior entrepreneurial anticipation of the market. Having extracted nothing from others, they are the innovative builders of our society, and must never internalize the negative images spread by intellectuals, journalists, and the purveyors of popular entertainment.

Are ideas enough? What impact will ideas have on those who benefit from redistribution? The beneficiaries of special interest politics are not likely to surrender willingly their subsidies even if they know that an end to redistribution would benefit the society as a whole. A humane political economy is needed, nourished by interpretivist constitutional theory to implement the framers' intentions in today's world. With the renunciation of noninterpretivist judicial power, however, must come meaningful reform to restrain the legislative branch. Structural impediments must be erected to alter the incentives of democratic politics to lower the pay-off and raise the costs of special interest subsidies. Reforms such as the line-item veto and a constitutional limit to government spending⁷² offer viable opportunities for solving the riddle of democratic governance.

More than faith in the workings of the secular world is needed. We are linked to the transcendent and what T.S. Eliot called the permanent things. We must remember our history and the intent of the founders as an exercise in the moral imagination. By knowing from whence we come, we join a community of witnesses who are part of us and all that we do and all that we are. We learn the moral lessons of history and gain that uniquely Anglo-American common-sense wisdom based on centuries of experience. With faith in our Creator, confidence in ourselves, and fidelity to our bonds to the past, human creativity will be unleashed, and a virtuous and rich civilization engendered. Guided by a just vision,

72. Bork, *Would a Budget Amendment Work?*, Wall St. J., April 4, 1979, at 20, col. 4.

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we must persevere into the unknown in the sure and certain knowledge that we are the living embodiment of a society that is democratically legitimate, materially enriching, and spiritually uplifting.