Using Legal Theory to Sharpen Your Arguments

If one were to apply each of the major forms of reasoning discussed in Chapter 5 to a particular case, the forms of reasoning might easily lead to differing outcomes. The question then is which form or forms will trump the others in the adversarial process? Jurisprudence—the philosophy of law— provides part of the answer to that question.

Forms of reasoning draw their persuasive force from underlying assumptions about the nature and function of law—about how cases are and should be decided. These are the questions of jurisprudence. Jurisprudence ponders such topics as what law is; where it comes from; whether it is internally consistent; whether it is or can be neutral; how we should decide new or hard cases; and whether and how law relates to morality, social values, economics, or politics.

The more you know about jurisprudence, the more it will show you practical arguments and lawyering strategies. Your own grasp of the jurisprudential basis of a form of argument and your sensitivity to the jurisprudential approach of the judge will strengthen your ability to use these forms of argument to represent your clients well. This section introduces some of the major schools of American jurisprudence and explores how these jurisprudential schools relate to the forms of legal reasoning described above.[1]

A caveat is in order. One cannot draw lines tightly defining jurisprudential schools of thought because the categories overlap and because different strains have developed within each school. Nonetheless, a broad and general description is helpful to introduce the field. With that goal in mind, here is the story of the development of American jurisprudence with particular reference to three of its most vexing questions (1) the relationship between law and morality; (2) the degree to which law is predictable; and (3) the degree to which law is, can, or should be neutral—that is, not inherently favoring any particular segment of society.

I. NATURAL LAW

American jurisprudence began with natural law, the predominant jurisprudential school the American colonies inherited from English law. Natural law holds that law is a product of "natural reason." This natural reason has often been associated with religious thought, but natural law is actually much broader. It relies on the deepest moral instincts of humanity and attempts to justify these instincts rationally. According to natural law theory, law and morality (our beliefs about right and wrong, justice and injustice) are both grounded in natural reason and so are inevitably intertwined. An acceptable legal system must also be an acceptable moral system; that is, law should comply with standards of justice, fairness, and reasonableness. Therefore, laws can be defended or challenged on the basis of whether they are reasonable and moral.

Natural law theory favors the common law (case law) over statutes. The common law is more apt to reflect natural reason, whereas statutes, resulting from the political process, are thought to preempt the natural reason on which the common law was based. We saw natural law theory in action in Chapter 4, for instance, when we studied the canon of construction asserting that statutes "in derogation of the common law" should be narrowly construed.

A judge with a natural law bent might therefore be willing to take more liberties when interpreting a statute or more willing to hold it unconstitutional than would a judge of another jurisprudential persuasion. The natural law judge might use some of the canons of construction to justify a result consistent with her sense of natural reason and morality. Turn back to Chapter 4 to review the examples of canons of construction listed there. Do you see a canon that invites a kind of natural law inquiry?

A natural law judge also would be more willing to consider disregarding old or flawed precedent, justifying the decision by citing to the age of the precedent and to more recent moral development or the evolution of human understanding. By such a decision, this judge might be inviting the higher court to reconsider

1. Much of the material in this section is explained more fully in Chapter 6 of an excellent book by Professors Bailey Kuklin & Jeffrey W. Stempel, *Foundations of the Law: An Interdisciplinary and Jurisprudential Primer* (1994).

its earlier decision.

Forms of Legal Reasoning. Principle-based arguments are most persuasive to judges with natural law leanings. Principles of justice, fairness, reasonableness, and equity can be used to interpret rules or to challenge the strict application of legal rules. Principle-based reasoning represents a direct appeal to natural law.

Narrative reasoning is a less direct but sometimes more effective way to appeal to the values of natural law. Stories contain themes, encode principles, and espouse values. The effective use of narrative, especially the narrative of the client's case, can appeal to a decision-maker's sense of justice and morality. Custom-based reasoning can also be effective, because natural law is assumed to be consistent with generally accepted practices. Aberrations from the norm are suspect.

Although it is almost always good to organize an argument according to the structure of the rule, a natural law judge will not be overly constrained by the precise language of legal rules. Rule-based reasoning will not be strong here unless the advocate can show that the rule is a reasonable expression of a fair principle. One must not only demonstrate what the rule is but also that the rule is right.

Few judges today would be so solidly in the natural law camp that they would blatantly disregard a clear statutory mandate or a binding precedent. But if the judge has any leeway to interpret ambiguities in the rule or if the rule asks the judge to apply a flexible legal standard, our natural law judge will interpret and apply the rule in ways consistent with her understanding of natural law's abiding truths.

Strengths and Weaknesses. Natural law is attractive because it ties law to standards of justice, fairness, and reason, but it has disadvantages as well. Its two most problematic characteristics are its unpredictability and its inherent subjectivity. "Natural reason" is difficult to define or predict. And decisions resting on natural law theory historically have looked a lot like the moral perspectives of that generation's power structure. For instance, a natural law perspective might be more willing to condemn the morality of a homeless person stealing bread than the morality of the landowner who had evicted the person or the business owner who had fired him for no cause.

EXERCISE 1

What natural law influences do you see in the following excerpts from court opinions?

> "[Requiring an adverse possessor to have known that he did not have record title to the land] rewards . . . the intentional wrongdoer and disfavors an honest, mistaken entrant." *Mannillo v. Gorski*, 255 A.2d 258, 261 (N.J. 1969).
>
> "It cannot be expected that every purchaser will or should engage a surveyor to ascertain that the beach home he is purchasing lies within the boundaries described in his deed. Such a practice is neither reasonable nor customary . . . . [T]he squatter should not be able to profit by his trespass." *Howard v. Kunto*, 477 P.2d 210, 214 (Wash. 1970).
>
> "We therefore hold that antiquated real property concepts which served as the basis for the pre-existing rule shall no longer be controlling where there is a claim for damages under a residential lease. Such claims must be governed by more modern notions of fairness and equity. A landlord has a duty to mitigate damages where he seeks to recover rents due from a defaulting tenant." *Sommer v. Kridel*, 378 A.2d 767, 772-73 (N.J. 1977).
>
> "Where fairness and common sense dictate that an exception should be created, the evolution of the law should not be stifled by rigid application of a legal maxim." *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 676 (1991).

II. FORMALISM

In the last third of the nineteenth century, the Civil War had left American intellectuals disillusioned and skeptical. Further, the cultural infatuation with Darwinism and the scientific method was in full swing.[2] In

2. Louis Menand, *The Metaphysical Club: A Story of Ideas in America* (2001).

that climate, the idea of "natural reason" began to seem like unprovable superstition.

Meanwhile, on the other side of the Atlantic, leading English scholars were espousing positivism, a blatant rejection of natural law in favor of the idea that law is simply whatever the sovereign decrees and is willing to enforce. Positivists are unimpressed with the common law and with the role of judges. According to positivists, statutes—through which the sovereign speaks—are the most legitimate form of law. (Do you recall this perspective reflected in some of the canons of construction discussed in Chapter 4?)

Positivism seemed to dethrone law from its natural law pedestal, and Darwinism seemed to call for a "scientific" approach to everything. In 1870, when Christopher Columbus Langdell became the Dean of the Harvard Law School, he set out to establish law as a science too. He created the case method of law teaching—the method you probably are experiencing now in most of your classes—in the hope of showing the scientific nature of law. Langdell often is described as the father of legal formalism.

For formalists, law is drawn from a set of rules ("first principles") governing recurring situations,[3] not from a set of timeless moral standards. According to some strains of formalism, these first principles resemble the laws of science, like gravity or photosynthesis. They preexist any particular articulation of them, and they can be discovered and organized according to legal categories, much like the scientific categories of animal species.

According to formalism, the judge's job is simple. He is to select the appropriate legal rule from the appropriate legal category and apply it to the facts at hand. Formalists thought that this should be a straightforward, easy process. Granted, not every case would be clear, but the more difficult cases simply signal that we legal "scientists" have more work to do. As soon as we have discovered and articulated all the first principles, all cases will be simple and clear.

Law study and legal practice still reflect the influence of formalism. We still have the West key numbering system. Legal encyclopedias and other research sources are still organized according to categories that resemble Langdell's vision. The first-year curriculum still reflects formalist legal categories, and law school pedagogy still employs the Socratic method. And as Part III of this book explained, the classic paradigm for organizing a legal discussion begins by stating and explaining a rule and then applying that rule to the client's facts. As we saw when we studied the paradigm more closely, however, the process it requires is usually far more complex and unpredictable than Langdell envisioned.

Forms of Legal Reasoning. For the formalist, rule-based reasoning is the heart and soul of legal rhetoric. To persuade a formalist judge, the advocate must carefully and precisely articulate the rule, offer strong authority to prove that the rule is as she has articulated it, and then carefully apply the rule to the facts of the case. But what if the literal application of the language of the rule leads to an unfavorable conclusion? All is not lost. Remember that formalism is the jurisprudential cousin of positivism. What matters is the will of the sovereign, that is, the intent of the legislature or the court that established the binding precedent. You can engage in rule-based reasoning, arguing not from the literal language of the rule but from the intent of the rule-maker.

Analogical reasoning can be persuasive to a formalist judge because it demonstrates that the judge has accurately identified the legal issue and therefore the appropriate governing legal rule. Because formalist judges believe that they should avoid decisions based on moral principles or public policy, they are not as receptive to principle-based or policy-based reasoning as such. However, you can use principle and policy arguments couched as the intent of the rule-maker. Pure formalists would be unimpressed by custom-based reasoning, considering it the weakest possible basis for a decision.

Strengths and Weaknesses. Assuming that formalism accurately describes law, it scores high on both predictability and objectivity, the two major weaknesses of natural law. Formalism recognizes that statutes and binding case law exist and that sometimes a judge is constrained to follow a clear binding rule. In such a case, the result does not depend on what the judge thinks of the litigants or on whether the judge agrees with

3. Kuklin & Stempel, *supra* note 1, at 149.

the rule.

Formalism carries major weaknesses, however, and the most serious is inaccuracy. Simply put, legal principles cannot remove subjectivity from judging. Judges do not decide cases just by looking up rules. And even if they were willing to limit their decision-making to that mechanical exercise, rules cannot be articulated in ways that account for all human situations. Human situations are infinitely varied, and a legal system that ignores these variations would not be desirable. Rules are made of words, and words must be interpreted by human beings.

Further, formalism enshrines the articulated rule as the real decision-maker, and articulated rules, whether statutory or common law, tend to reflect and entrench the values and perspectives of the economically and socially powerful. On this score, then, formalism was no improvement over natural law. In fact, it might have been a step backward because it leaves little room for escape. Because it disallows external standards like justice and reasonableness, it provides no basis for challenging a bad or outmoded law.

EXERCISE 2

What formalist influences do you see in the following excerpts from court opinions?

> "[The parties are co-owners of the property. The Defendant has taken possession of the property and is using it for a warehouse. The Plaintiff seeks payment from the Defendant of one-half the fair rental value of the property. The rule on occupancy by a co-owner permits each co-owner the right to possess the premises.] Thus, before an occupying cotenant can be liable for rent . . . , he must have denied his cotenant the right to enter. It is axiomatic that there can be no denial of the right to enter unless there is a demand or an attempt to enter. [Therefore, if the Plaintiff had first sought to enter into possession herself and been denied by the Defendant, she could then demand that the Defendant pay rent.]" *Spiller v. Mackereth*, 334 So. 2d 859, 862 (Ala. 1976).

> "[It seems to us that] this doctrine of causa mortis [gifts given by a donor on his death bed] is in direct conflict with the spirit and purpose of [the statute requiring wills to be in writing and properly witnessed. The purpose of that statute is] the prevention of fraud . . . . We were at first disposed to confi ne [gifts causa mortis] to cases of actual manual delivery, and are only prevented from doing so by our loyalty to our own [prior rulings] . . . ." *Newman v. Bost*, 29 S.E. 848, 849 (N.C. 1898).

III. LEGAL REALISM

Ironically, Langdell's case method, which he had hoped would demonstrate the scientific nature of law, might have provided the most powerful evidence against his own thesis. As students and professors systematically studied cases, they began to see that the deductive application of legal rules did not account for the results they observed. What, then, did?

Oliver Wendell Holmes, Jr., a contemporary of Langdell's, began the shift toward a set of ideas that later developed into legal realism, perhaps the preeminent American contribution to jurisprudence. Holmes's famous statement is often cited as an early description of legal realism:

> The life of the law has not been logic; it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed.[4]

Legal realists believe, as Holmes suggested, that law is made by people as the need arises. Law is not a manifestation of preexisting natural law or an objective application of rules. Our legal language still reflects this realist idea. We say that a judge "finds" facts, but we avoid saying that a judge "finds" a legal conclusion.[5] Thus, realists are willing to live with much less predictability than are formalists.

4. Oliver Wendell Holmes, *The Common Law* 1 (1881).

5. We say instead that a judge "holds" a legal conclusion.

Realists also reject the assumption that law is or ever could be objective. Realism acknowledges subjectivity and could even be said to embrace it, describing law as reflecting historical, social, political, anthropological, psychological, and economic influences. Realists admit that outcomes will vary according to the identity of the decision-makers and the cultural influences bearing upon them.

This reliance on the real world of place and time for law creation leads realists to believe that law should accurately reflect and effectively participate in that real world. Prior to the realist revolution, the law had become insular, largely indifferent to other disciplines. Realism called law back into dialogue with the social sciences. Therefore, realists encourage lawyers and judges to consult interdisciplinary materials such as sociology, psychology, and economics to help them decide cases.

Louis Brandeis, a legal realist who later sat on the United States Supreme Court, filed a brief in *Muller v. Oregon*,[6] relying on social science research to argue the propriety of a law limiting working hours for women. To this day, we call a brief that provides the court with social science or other interdisciplinary information a "Brandeis brief." The plaintiff's brief in *Brown v. Board of Education*[7] was just such a brief.

Legal realism forever unmasked the humanity, complexity, and malleability of the law. Realism's critique of formalism "cut so deeply into the premises of American legal thought that no amount of enlightened policy making and informed situation sense could ever really put Humpty Dumpty together again."[8] Every subsequent jurisprudential school is either an attempt to escape the implications of legal realism or to embrace them.

Forms of Legal Reasoning. Policy arguments are the life blood of realist rhetoric, especially at the appellate level. As in the natural law context, the realist court does not feel overly constrained by the words of a rule. In the natural law context, one asked the court to interpret the rule, or even reject the rule, based on external standards of justice and reason. Here one asks the court to interpret the rule, or even reject the rule, based on sound social policy. Such an argument should be supported, not by subjective speculation, but rather by solid data from interdisciplinary sources. In his classic, *The Nature of the Judicial Process,* Justice Cardozo called for more and better "Brandeis briefs."[9]

Realist judges also find analogical reasoning more persuasive than rule-based reasoning because factual comparisons contain within them the coded cultural influences that realists believe actually account for legal results. Custom-based reasoning is consistent with the realist admission of subjectivity and the impact of cultural norms.

Narrative, especially at the trial-court level, is also well-suited to legal realism. Narrative is the broadest, most flexible, and most inclusive form of persuasion. It can, therefore, do the most comprehensive job of touching all the subjective factors that, in the realist's view, actually govern the outcome of cases.

However, a realist judge, at least one with Holmes's distrust of grand principle, might be uncomfortable with principle-based reasoning, preferring a more concrete analysis of how the proposed result actually would work in the world.

Strengths and Weaknesses. Realism acknowledges that law is a human institution, with a limited capacity for objectivity and predictability. It honestly admits the inevitable influence of the dominant culture and of powerful economic interests. For the advocate, realism sets us free from formalism's insistence on rigid, mechanical application of formulaic rules. Realism legitimates broader, more flexible approaches to legal argument.

Still, realism sometimes suffers from its own excesses. It has a conflicted relationship with external cri-

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6. 208 U.S. 412 (1908).

7. 347 U.S. 483 (1954).

8. Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in The Politics of Law* 23, 27 (David Kairys ed., 1982).

9. Benjamin N. Cardozo, *The Nature of the Judicial Process* (1921).

teria such as reason, justice, and morality as standards for interpreting or applying law. True, realism grants that current notions of morality have a role to play, because current cultural norms inevitably influence law. But realism is hesitant to ask whether those cultural norms are objectively right or true. Thus, realism undermines an advocate's arguments that law should be tested by external standards. In place of these standards, realism offers an advocate the criteria of sound social policy, which can be supported by evidence that is more substantive than the abstract claims and subjective values of natural law.

Finally, realism seems to leave us without a stable ground on which to stand. Early realism often was summed up as asserting that the law depended less on precedent than on "what the judge ate for breakfast."[10] If that describes our legal system, can we have confidence in its results? And how can individual and corporate citizens plan their lives and fortunes? A purely realist analysis leaves the law without consistency, apt to shift with the wind at any moment. Realism left us in need of a stabilizing movement. To meet that need, the legal process school developed.

EXERCISE 3

What realist influences do you see in the following excerpts from court opinions?

> "It has long been the policy of our law to discourage landlords from taking the law into their own hands, and our decisions . . . have looked with disfavor upon any use of self-help to dispossess a tenant in circumstances which are likely to result in breaches of the peace . . . . To approve this lockout . . . merely because [the tenant was absent and so no] actual violence erupted while the locks were being changed would be to encourage all future tenants . . . to be vigilant and thereby set the stage for the very kind of public disturbance which it must be our policy to discourage . . . ." *Berg v. Wiley*, 264 N.W.2d 145, 149-50 (Minn. 1978).

> "[T]he requirement of delivery [to prove a valid gift] is not rigid or inflexible, but is to be applied in light of its purpose to avoid mistakes by donors and fraudulent claims by donees." *Gruen v. Gruen*, 496 N.E.2d 869, 874 (N.Y. 1986).

> "[A joint tenant has long been able to sever the joint tenancy by conveying his interest in the property to a straw person and then having that straw person convey the interest back to the former joint tenant. We now hold that the joint tenant can sever by conveying directly to himself.] Common sense as well as legal effi ciency dictate that a joint tenant should be able to accomplish directly what he or she could otherwise achieve indirectly by use of elaborate legal fi ctions." *Riddle v. Harmon*, 162 Cal. Rptr. 530, 534 (Ct. App. 1980).

> "There is no sound policy reason to deny plaintiff relief for failing to discover a state of affairs which the most prudent purchaser would not be expected to even contemplate." *Stambovsky v. Ackley*, 572 N.Y.S.2d 672, 676 (1991).

IV. LEGAL PROCESS

As we have seen, formalists said that a judge could and should follow legal rules, assumed to be neutral, regardless of the preferences of the judge. Realists said that judges did not and could not do this because judges are human and because legal rules are not really neutral. The legal process school tried to find a middle ground that would recognize the realists' critique of formalism but still would curb the unpredictability of realism.

The hope lay in turning our attention to the legal process itself, especially to judicial decision-making. Perhaps careful study and development of judicial roles and systemic controls would restore some sense of predictability and objectivity in law. If the *content* of the law was not objective, perhaps we could articulate neutral standards for *how* decisions were to be made. Legal process adherents look to institutional controls (division of governmental authority, adherence to fair procedure, judicial restraint, and mandated reasoned

10. Kuklin & Stempel, *supra* note 1, at 155.

elaboration) to constrain arbitrary judging.[11]

According to the legal process school, judges are to restrain their personal preferences in favor of neutral procedures and standards of judging. Recall that in Chapters 1 and 2 we saw several instances in which a judge's role requires just this restraint. For instance, a trial judge cannot overturn a jury's verdict simply because the judge would have decided the case otherwise. The judge can overturn the verdict only if there was no reasonable evidentiary basis for the jury's decision.

Similarly, on questions of fact, an appellate judge cannot reverse a trial judge's decision merely because the appellate judge would have decided the case differently. The appellate judge can reverse the trial judge only if no reasonable consideration of the evidence in the record would support the trial judge's decision. Legal process adherents hope that neutral standards like these will restore a sense of stability and predictability and provide protection against abuse of the judicial role.

Forms of Legal Reasoning. A judge with a legal process bent is persuaded by rule-based reasoning when the rule is binding on her court and has a clear meaning directly applicable to the pending case. In that instance, the legal process judge will feel constrained to follow the rule and will monitor carefully her personal preferences to keep them from interfering subtly with her judicial duty. Similarly, analogical reasoning is persuasive to a legal process judge because she is concerned about procedural fairness. After all, when the facts are similar, the results should not vary from court to court.

When no clear binding rule applies or when the rule allows discretion, a legal process judge is willing to consider policy-based reasoning because it seems reliable and objective. But a legal process judge will be uncomfortable with pure custom-based reasoning because it seems too close to subjective personal preference. Principle-based reasoning will be persuasive when the principles relate to procedural fairness. Other principles might seem too abstract to be applied without subjectivity. Direct reliance on narrative is the most subjective of all, and a legal process judge will try to resist her personal reaction to the client's stories.

Strengths and Weaknesses. The legal process school succeeds in restoring some stability for the legal system. Undoubtedly, its success is limited by its necessary reliance on imperfect human beings to achieve its goals. Most judges have been thoroughly enculturated with the legal process school's description of the judicial role, however, and they try to conform to that role as best they can.

But the legal process school still does not help us find a way to explore whether the *content* of our law is consistent with fundamental principles of justice and commonly shared principles of morality. Lon Fuller, himself a natural law advocate, tried to provide a link by suggesting that a fair process with public, reasoned decision-making was itself moral,[12] but the legal process movement itself did not rush to make this connection. A movement in that direction came with the development of the fundamental rights school.

EXERCISE 4

What legal process influences do you see in the following excerpts from court opinions?

> "Even if we were to feel that the referee was mistaken in so weighing the evidence, we would be powerless to change the determination where, as we have seen, there is some evidence in the record to support his conclusion." *Van Valkenburgh v. Lutz*, 106 N.E.2d 28, 32 (N.Y. 1952) (dissenting opinion).

> "[The goal of our law is] to prevent those claiming a right of . . . possession of land from redressing their own wrongs by entering into possession in a . . . forcible manner . . . . The law does not permit the owner of land, be his title ever so good, to be the judge of his own rights with respect to possession . . . , but puts him to his remedy under the statutes." *Lobdell v. Keene*, 88 N.W. 426, 430 (Minn. 1901).

11. Kuklin & Stempel, *supra* note 1, at 159.

12. Lon Fuller, *The Morality of Law* (Yale U. Press 1964).

V. FUNDAMENTAL RIGHTS

By now we were entering the 1950s, and the Supreme Court, under the leadership of Earl Warren, was in a period of judicial activism. *Brown v. Board of Education*[13] and other landmark decisions were establishing principles of human rights and opening doors to political and economic power.

But where was the jurisprudential justification for this kind of judicial activism? Natural law did not provide it because the old view of natural law seemed tied to the perspectives of the established power structure, and these decisions ran counter to that power structure. Formalism did not provide it because formalism enshrines the status quo. The legal process school could help on procedural issues like due process and access to courts. But on non-procedural issues, legal process is uncomfortable with decisions that seem based on personal political preferences. We had to return to the vexing question of how law relates to broad principles like justice and human dignity. From this renewed struggle emerged the fundamental rights school.

The fundamental rights school argued that promoting justice and human welfare outweighs the need for predictability and stability.[14] Judges should be ready to apply overarching principles inherent in the law, especially if the principle has been given greater certainty through judicial interpretation. For fundamental rights proponents, the results of this decision-making process are objectively correct, not merely the subjective product of political preferences.[15]

Forms of Legal Reasoning. Principle-based reasoning is primary in fundamental rights jurisprudence, as it is in natural law. However, the principles here are not the principles that preserve the status quo, but rather the principles of liberal political philosophy that assert the rights of poor and marginalized people. Fundamental rights judges are readily guided by such principles, especially when the principle is enshrined in the constitution or other forms of law.

Rule-based reasoning remains valuable here, but in this context it is helpful to look for the principle that the law serves. A fundamental rights judge will prefer to interpret the rule in accordance with the principle. She will overturn the rule in favor of a principle only as a last resort.

Narrative reasoning works in the fundamental rights context much as it did in the natural law context. It is an indirect but highly effective way to communicate the principles and values that should guide the decision-maker. The principles comprising "fundamental rights" are persuasive when stated directly; but they gain affective force when conveyed through the warm, human medium of story, especially the client's story.

Policy-based reasoning has its place in fundamental rights jurisprudence, but it is a narrower place. The fundamental rights judge does not see herself as a free-form social engineer, but fundamental rights are meaningless unless they are grounded in social reality. So interdisciplinary sources might be needed to show how an application of the law will play out in society to either advance or undermine fundamental rights. Custom-based reasoning will generally not be very persuasive to a fundamental rights judge unless it shows that a certain right is widely recognized as fundamental.

Strengths and Weaknesses. The fundamental rights school resurrects a place for something resembling morality, reclaiming an aspirational and even a pedagogical function for law. It defines a ground of decision-making that can connect us to our past and help us mold our future. But like natural law, it suffers from the difficulty and inherent subjectivity of defining the principles to be enforced. It is vulnerable to the charge of preferencing one person's politics over another's. To the extent that the fundamental rights school seemed synonymous with liberal politics, the conservatives were ready with an alternative: law and economics.

EXERCISE 5

What fundamental rights influences do you see in the following excerpts from court opinions?

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13. 347 U.S. 483 (1954).

14. Kuklin & Stempel, *supra* note 1, at 165.

15. *Kuklin & Stempel, supra* note 1, at 166; Ronald Dworkin, *Law's Empire* (1986); Ronald Dworkin, *A Matter of Principle* (1985).

"This pattern of land use regulation has been adopted for the same purpose in developing municipality after municipality. Almost every one acts solely in its own selfi sh and parochial interest and in effect builds a wall around itself to keep out those people or entities not adding favorably to the tax base, despite the location of the municipality or the demand for varied kinds of housing . . . . One incongruous result is the picture of developing municipalities rendering it impossible for lower paid employees of industries they have eagerly sought and welcomed with open arms . . . to live in the community where they work." *S. Burlington Co. NAACP v. Twp. of Mount Laurel,* 336 A.2d 713, 723 (N.J. 1975).

"One should not be able to stand behind the impervious shield of caveat emptor [buyer beware] and take advantage of another's ignorance . . . ." *Johnson v. Davis*, 480 So. 2d 625, 628 (Fla. 1985).

"Confronted with a recognized shortage of safe, decent housing, today's tenant is in an inferior bargaining position compared to that of the landlord. *Park W. Mgmt. Corp. v. Mitchell*, 391 N.E.2d 1288, 1292 (N.Y. 1979). Tenants vying for this limited housing are 'virtually powerless to compel the performance of essential services.' *Id*. at 1292 . . . . In light of these changes in the relationship between tenants and landlords, it would be wrong for the law to continue to [hold that landlords have no duty to provide a habitable dwelling] . . . . Therefore, we now hold expressly that in the rental of any residential dwelling unit an implied warranty exists in the lease . . . that the landlord will deliver over and maintain . . . premises that are safe, clean and fit for human habitation." *Hilder v. St. Peter*, 478 A.2d 202, 207 (Vt. 1984).

VI. LAW AND ECONOMICS

Law and economics assesses legal doctrine on the basis of economic principles such as market dynamics, pricing, supply, and demand. Economics has been a part of legal analysis since the realists, but in recent years, economic analysis has become important enough to support a powerful jurisprudential movement of its own.

Proponents argue that, unlike the abstract values of fundamental rights, economic principles are concrete and objective. Some proponents would claim that economic analysis is apolitical. Law and economics emphasizes efficiency, market maximization, and the reduction of governmental controls. Early law and economic theorists argued that the law's goal should be maximizing social wealth, even at the expense of harm for individuals.[16]

The law and economics school includes a broad spectrum of approaches. For instance, some adherents still believe that law's primary goal should be wealth maximization, whereas more moderate proponents consider economic analysis only a component in law making, albeit an important one. Some assume that individual actors will act rationally to advance their own economic positions, whereas others recognize the perversities of human psychology. This breadth of exploration coupled with the badly needed economic expertise the movement encouraged has made law and economics a valuable jurisprudential movement.

Forms of Legal Reasoning. A judge with law and economics leanings would be persuaded particularly by policy-based reasoning, especially economic policy. Such a judge would be willing to interpret and apply legal rules in ways that would advance economic growth and would be ready to find seemingly analogous cases distinguishable because of differences in economic implications. Principle-based reasoning and custom-based reasoning would seem too amorphous to be of reliable help, and the narratives of the individual litigants might seem almost irrelevant unless they implicate the economic issues in the case. For a law and economics judge, rule-based reasoning should focus not on literal application of the rule's words, but on an interpretation of the rule on the assumption that its purpose is to increase social wealth.

Strengths and Weaknesses. Law and economics has offered a helpful and grounding counterweight to the fundamental rights school's abstraction and subjectivity. It has improved the economic sophistication of

16. Kuklin & Stempel, *supra* note 1, at 169.

law and made important corrections to inaccurate economic assumptions. Its less extreme proponents have worked to improve the ways economic considerations can interact with other important considerations for the welfare of the society. In that sense, it has continued the work of the realists.

Law and economics has suffered primarily from three weaknesses: It sometimes has been too willing to credit economic conclusions not backed by sufficient research; it has been susceptible to unrealistic applications; and it sometimes has been unwilling to admit the inherent political bias of its own perspective.

EXERCISE 6

What law and economics influences do you see in the following excerpts from court opinions?

> "[According to the applicable statute, a court can order the sale of co-owned property if one owner seeks partition and if division of the property cannot be made without great prejudice to the owners.] The language of this statute means that a sale may be ordered if it appears to the satisfaction of the court that the value of the share of each cotenant, in case of partition, would be materially less than his share of the money equivalent that could probably be obtained for the whole. [We give no weight to the fact that several of the cotenants have made the property their home for nearly forty years or to their interest in remaining on the family homestead.]" *Johnson v. Hendrickson*, 24 N.W.2d 914, 916 (S.D. 1946).

> "[When the markets of the nation are furnished by a business], there is great reason to give encouragement [to that business] . . . [T]he people who are so instrumental by their skill and industry so to furnish the markets should reap the benefit . . . ."*Keeble v. Hickeringill*, 3 Salk. 9 (Queen's Bench 1707).

> "Economic policies influence our decision as well. '[B]y virtue of superior knowledge, skill, and experience in the construction of houses, a builder-vendor is generally better positioned than the purchaser to . . . evaluate and guard against [and insure against] the financial risk posed by a [latent defect in the construction]." *Lempke v. Dagenais*, 547 A.2d 290, 295 (N.H. 1988) (internal citations omitted).

> "The safety of real estate titles is considered more important than the unfortunate results which may follow the application of the rule in a few individual instances." *Sweeney, Adm'x v. Sweeney*, 11 A.2d 806, 808 (Conn. 1940).

VII. CRITICAL LEGAL THEORY

One could never accuse the proponents of critical legal theory of denying its political bias. Critical legal theory admits that its own movement is all about politics, and it maintains that everyone else's is as well. For the sake of brevity and simplicity, we will include a number of diverse jurisprudential movements under the umbrella of critical legal theory, most notably critical legal studies, critical race theory, and feminist legal theory. Most of this description will focus on critical legal studies because much of its thinking is consistent with that of the other critical schools.

Critical Legal Studies (CLS) is perhaps the most direct heir of the Legal Realist School. CLS proponents consider law to be entirely subjective and political. They believe that purportedly objective legal rules actually reflect value choices that privilege politically powerful segments of society. CLS asserts that all legal reasoning is simply a post hoc rationalization rather than a description of a method of decision-making. Therefore, instead of articulated rules, CLS scholars trust narratives about the experiences of oppressed groups.

Ironically, CLS is willing to use a form of economic analysis, too, one that asks directly about the distributional consequences for politically marginalized groups.[17] CLS supports the idea of an activist judiciary to empower such segments of society. Part of this political empowerment should be the demystification of legal processes so lay people can participate more effectively.

17. Kuklin & Stempel, *supra* note 1, at 175.

Critical race theory and feminist jurisprudence largely agree with CLS approaches but from an explicitly racial or gendered perspective.

Forms of Legal Reasoning. Because CLS has been largely a critique of the legal system from the outside, few CLS proponents have become judges. A judge with CLS sympathies, however, would pay particular attention to the narratives presented by the litigants and would be especially willing to explore the differing perspectives of the "outsiders." The judge also would be willing to listen to policy and principle-based reasoning to support a result that opens legal and political process and increases self-determination for marginalized groups. A CLS judge would be less persuaded by rule-based and custom-based reasoning, as each is embedded in the political and social power structure.

In comparison to the other schools of jurisprudence, CLS is less helpful as a guide to rule interpretation and application. It is most effectively used to challenge rule-based, natural law, and custom-based arguments by showing that they are masked assertions of oppressive power. It is not so much a form of argument in itself as a tool for deconstructing arguments for the status quo.

Strengths and Weaknesses. CLS has provided helpful deconstructions of law and law's origins, and it has reminded us that law must hear and represent all segments of society. It has, however, been heavy on critique and light on cure, and like law and economics, it has been vulnerable to extreme views. In the case of CLS, some of these views have advocated refusal to participate in a tainted process, but boycotting a process significantly limits one's ability to change it.

EXERCISE 7

What critical legal theory influences do you see in the following excerpt from a court opinion?

> "The plain truth is that the true object of the ordinance in question is to . . . regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reason why some persons live in a mansion and others in a shack, why some live in a single-family dwelling and others in a double-family dwelling, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic . . . . [The ordinance furthers] these . . . class tendencies . . . ." *Amber Realty Co. v. Village of Euclid,* 297 F. 307, 316 (N.D. Ohio 1924).

VIII. THE JURISPRUDENCE OF LEGAL WRITING

We have seen a wide diversity of legal thought, just in this brief overview of some of the major jurisprudential schools, but they all have been vulnerable to one major weakness: the temptation of exclusivity. Each school has been a little too willing to think that it alone has discovered the truth. Each school has been a little too ready to reject the observations of the others.

Practicing lawyers and legal writers, however, know that exclusivity is folly. Every one of these jurisprudential schools teaches us something important about law. Each has perceived something real and true about how our legal system does and should function. And each of them needs the others' perspectives to support or temper its own.

More important for our purposes, each of these jurisprudential schools provides lawyers with important lessons about predicting what a judge might decide and about persuading a particular judge to rule in favor of a client. Sometimes you will know a particular judge well enough to tailor your arguments directly to that judge's jurisprudential leanings. However, even if you do not, imagine how much stronger your brief will be if you are careful to provide the judge with reasoning that covers the jurisprudential bases.

EXERCISE 8

Facts. In the past few years, the city of Annville has created a historic district in an effort to restore and preserve its architectural heritage. Several municipal programs have been implemented to encourage suburban residents to return to the city's center to live in restored older homes. A city-owned low-income housing apartment building is not far away from the historic district, and efforts are currently under way to decide what to do with it. The building is old and run down, and modern thinking about low-income housing is critical of the practice of building high-density units dedicated solely to low-income housing. Alternatives under consideration include remodeling the apartments and continuing their use as low-income housing; tearing down the apartment building and implementing a voucher system to enable low-income families to rent directly from private landlords throughout the city; and tearing down the apartment building and replacing it with city-owned low-income duplexes interspersed among private homes meant for moderate-income families.

A drug treatment clinic recently purchased property adjacent to the historic district, intending to open a drug treatment facility there. The location would be ideal because many of the clinic's present and potential patients live in the low-income apartments. At the time of the purchase, the zoning classification for that property permitted a treatment facility. Upon learning of the clinic's plans, however, residents of the historic district became fearful of the facility's effect on their neighborhood. These residents petitioned the zoning board to rezone the block that includes the clinic's newly purchased property. In response to the residents' petition, the zoning board has rezoned that block to prohibit the clinic. The board notified the clinic's directors of the petition and allowed them to file a written response, but the board did not take testimony at a hearing, make any factual findings, or write an opinion that explained the reasons for the change. The following is the relevant statute pertaining to zoning changes:

> At any time after the adoption of a zoning ordinance, the zoning board may . . . amend the ordinance by a two-thirds vote of its members.

The clinic has appealed the zoning board's decision to the appropriate court, arguing both that the decision was wrong and that the procedure was faulty. Consider how the major jurisprudential perspectives might view this situation. What arguments could you use to support the clinic? What arguments would support the zoning change?