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Practical Legal Studies and Critical Legal Studies

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PRACTICAL LEGAL STUDIES AND CRITICAL LEGAL STUDIES

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Richard Posner's recent article entitled *The Jurisprudence of Skepticism*[1] highlights a new wave of legal scholarship. Every intellectual movement needs a name; because of the new wave's use of "practical reason"[2] and because of its odd link with Critical Legal Studies,[3] I suggest that this scholarly movement may now formally be called the Practical Legal Studies (PLS) movement. Practical Legal Studies expressly abandons the goals of certainty, formal accuracy, and formal legitimacy in legal decisionmaking in favor of more fluid techniques of reasoning and argumentation. Because the PLS movement has now achieved such stature, it is time to begin the inevitable process of analyzing the movement's philosophy, its place in American jurisprudence, and the motivations and attitudes of its adherents — the same process to which Critical Legal Studies has been subject.[4] As Posner says, it also is important to distinguish this approach from "radical skeptics in the critical legal studies movement" (p. 829). While there are differences within PLS (pp. 837-38, 847-48, 887-88), it is appropriate to begin with Posner, a dominant figure in any enterprise that he undertakes.[5]

The basic questions that Practical Legal Studies confronts are how judges decide cases and how judges *should* decide cases.[6] The traditional analytic response to these questions has been that judges apply formal methods of legal reasoning, and the formal methods sufficiently comport with the courts' role in the political structure to provide legitimacy. That response has been untenable for a generation or more;

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1. 86 MICH. L. REV. 827 (1988). All subsequent references will be enclosed in parentheses in the text.

2. *See infra* text following note 8.

3. *See infra* text accompanying notes 21-27.

4. *See, e.g., Symposium on Critical Legal Studies,* 6 CARDOZO L. REV. 691 (1985); *Critical Legal Studies Symposium,* 36 STAN. L. REV. 1 (1984).

5. Posner's article and the other PLS literature deal with a number of related issues; this comment addresses only the question of judicial decisionmaking.

6. For a useful introduction, see Wellman, *Practical Reasoning and Judicial Justification: Toward an Adequate Theory,* 57 U. COLO. L. REV. 45 (1985).

thus PLS has moved to informal legal reasoning as a description of adjudication and as a source of legitimacy.

Posner presents a two-part response to the questions. First, judges can relatively easily arrive at the correct decision in many cases by applying either some form of "exact inquiry" or of "practical reason." Second, some indeterminate cases remain in which the correct result is unavailable through these methods; the judge's job in those cases is to apply policy analysis to reach results which are reasonable, if not demonstrably correct.

The techniques by which most legal disputes are solved are exact inquiry and practical reason. Exact inquiry includes the methods traditionally associated with formal reasoning, particularly syllogistic and enthymematic logic and scientific observation. Courts use less rigorous versions of these methods than logicians do, but the methods as applied are adequate to solve many cases. For example, where an applicable rule, its validity, and the facts to which it is to be applied are clear, logic (or something that resembles it) is enough for the court to reach a correct result.

In other cases practical reason is required. Practical reason is defined as "the methods that people who are not credulous — who have inquiring minds — use to form beliefs about matters that cannot be verified by logic or exact observation" (p. 838). The "grab bag" of methods of investigation and persuasion includes anecdote, introspection, common sense, intuition, and — especially relevant to law — authority, reasoning by analogy, interpretation, means-end rationality, tacit knowledge, and the test of time. "Miscellaneous and unrigorous it may be, but practical reason is our principal set of tools for answering questions large and small" (pp. 838-39). In law, practical reason is usually adequate to achieve a high degree of certainty about the correct results in cases.

However, some difficult and controversial cases defy resolution even by practical reason. In these cases, there is no distinctive form of legal reasoning available, and the judge must apply policy analysis, which Posner presents as a four-step process. First, the judge draws from all available data a concept of the relevant field of law. The data useful for this purpose include legal texts such as cases and legislative history, the characteristics of legal institutions, and, "lacking definitive guidance from these sources, . . . a social vision as well" (p. 863). Second, the judge canvasses the pertinent precedents and other sources, legal and nonlegal, for information that may help decide the case. Third, based on this information, the judge makes a policy judgment about the applicability of the concept to the present case. Finally, he

returns to the precedents to assure that the policy judgment is reasonably consistent with them.

Posner states that this approach describes "the actual (though often implicit) reasoning process that good judges use in the tough cases" (p. 863). Depending on the "social vision" and "the policy judgments, political preferences, and ethical values of the judges" (p. 828) in the particular case, more than one result "would be equally likely to be pronounced correct by an informed, impartial observer" (p. 828). In the difficult case, therefore, the judge's goal cannot be to reach a *right* result but only a *reasonable* one.

Thus, in Posner's view there are easy cases and hard cases, each amenable to treatment by different, equally legitimate methods. A common thread runs through the discussion of the different methods, however. Some easy cases can be solved syllogistically because the meaning, the applicability, and the validity of a doctrine are "clear" (p. 890). Other cases are solved through "practical" reasoning. And hard cases can still yield "reasonable" results through the application of policy analysis. The common thread is that each of these terms — clear, practical, reasonable — invokes a dominant political ideology as a basis for the methods of reasoning and their legitimacy.

The point can be made by considering the meaning of "practical" reason. Practical reason as a mode of thinking and rhetoric has an ancient lineage, but its modern uses in law are somewhat removed from that tradition.[7] Practical reason today encompasses a variety of everyday techniques of thinking. But what distinguishes a method of practical reason from what might be called "impractical irreason"? Why is means-end rationality useful in deciding a case while reading the entrails of a goat or trial by ordeal is not? The distinguishing feature, of course, is our society's judgment about the utility and rationality of the former methods, and the uselessness and irrationality of the latter. That judgment is based on beliefs about human rationality and the inaccessibility of divine guidance. In short, societal conventions establish what is "practical," just as they establish what is "clear" or "reasonable."[8]

Focusing on social conventions suggests that Posner's use of "practical" in the phrase "practical reason" resonates with many familiar,

7. Practical reason is a faculty defined within the Aristotelian tradition. As Mark Tushnet points out, however, the social preconditions for an Aristotelian exercise of practical reason are unavailable to us. Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502, 1534-36 (1985).

8. Posner distinguishes himself from the scholars he calls the new conventionalists, but the distinction appears to turn on the extent of the commitment to conventions as the source of reason; all PLS scholars place considerable reliance on convention.

nontechnical uses of the term. For example, CLS scholars are not being "practical" when they suggest utopian reorganizations of law school or radical transformations of doctrine, or when they criticize law and legal thought without immediately proposing an alternative. In public life, it is not "practical" to vote for Jesse Jackson (or Eugene McCarthy, or Pat Robertson) for president, because a Black (or peace candidate, or fundamentalist Christian) "can't" win. And it's not "practical" to divest of investments in South Africa, or to engage in civil disobedience to achieve desegregation in the South, or to cease the deployment of nuclear weapons unilaterally, and so on.

What "practical" means, in general, is that the view espoused conforms to the prevailing political ideology. In all of these particular contexts, to be "practical" means that any action proposed or taken must conform to the currently dominant ideology that frames the issues, and that any view that lies outside the political mainstream is by definition not "practical." Thus, any action within the political mainstream is "reasonable"; while "reasonable people can differ" about judgments within the mainstream, it is "unreasonable" to be outside the mainstream. Further, "unreasonable" is often used synonymously with a pejorative sense of the term "political." This explains how Posner can acknowledge that judges must use their political preferences in making some decisions (p. 828), while denying that most decisions — those arrived at through practical reason — are "political" (p. 840).[9]

Of course, a dominant ideology is neither unitary nor capable of precise definition, and subscribing to the ideology does not mean supporting "the *status quo*" in a crude sense.[10] Moreover, in particular areas of endeavor, such as legal discourse, the ideology takes distinctive forms. One branch of PLS focuses on "the special traditions of the legal profession" as a source of conventional understanding (pp. 886-87), but "conventional understanding" is simply another way of describing ideology.

The inability to delineate the ideology precisely does not deny its existence or its impact.[11] The ideology can be evoked by familiar catch-phrases:[12] an economy of regulated capitalism; a democratic,

9. The same association of unreasonableness and politics appears in academics when leftist tenure candidates can be criticized either for being "political" or on a "nonpolitical" scholarly basis, while their critics remain "reasonable" and "nonpolitical." *See* Frug, *McCarthyism and Critical Legal Studies,* 22 HARV. C.R.-C.L. L. REV. 665 (1987).

10. Accordingly, Practical scholars of various political stripes can comfortably fit within the movement. *See infra* text accompanying notes 21-24.

11. Posner might suggest that knowledge of the ideology is available through the exercise of practical reason.

12. Because PLS is, as Posner says, "skeptical," all of these terms should be qualified by the term "relatively."

pluralist polity; a meritocratic yet egalitarian social order; an autonomous, functional legal process; and a unitary but hierarchical bar.

The dominant ideology also has implicit personal characteristics: white, male, elite, and rational. The concept of "different voices" is by now familiar in legal scholarship[13] (though not universally accepted by any means), and this dominant ideology is a voice which permeates the PLS literature.[14] A particularly telling instance of this is the image Posner presents of the practical, skeptical judge. His model judge deliberates on issues using the best tools available, imperfect though they may be; in the most controversial cases, the judge coolly applies Posner's four-step policy analysis. We have seen this skeptical judge, this deliberative decisionmaker, somewhere before. He is, I suggest, a close relative of the rational calculator who is the personification of the economic analysis of law. The skeptical judge has the same qualities of careful calculation and knowledge of self and situation that characterize economic man.

Much of the source of power in the dominant ideology is revealed by this type of personification. The skeptical judge and the sources on which he draws are presented as entities that exist in the world. Who can dispute the authority of the deliberative, skeptical judge? How can we disagree with the "reasonableness" of a decision as assessed by "an informed, impartial observer" (p. 88)? Indeed, what alternative is there to being "practical"?

Unfortunately, all of this is reification. What is "practical" is a political choice, but a choice that is hidden behind seemingly neutral terms, concepts, and images. Thus, PLS scholars may argue that there simply is no alternative to the reliance on convention and the use of the techniques Posner outlines. That narrow vision, however, is simply a consequence of the focus on supporting established institutions of power. In fact, it is entirely possible for judges to be impractical, or Critical — that is, to confront the dominant ideology — and not just skeptical.

When stated at a general level, the process of Critical legal decisionmaking is not easy to distinguish from Practical legal decisionmaking. Daniel Farber and Philip Frickey define some fundamental characteristics of PLS as

> a concern for history and context; a desire to avoid abstracting away the human component in judicial decisionmaking; an appreciation of the

13. *See* West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987).

14. The Critical literature is not immune, either. *See Symposium, Minority Critiques of the Critical Legal Studies Movement*, 22 HARV. C.R.-C.L. L. REV. 297 (1987).

> complexity of life; some faith in dialogue and deliberation; a tolerance for ambiguity, accommodation, and tentativeness, but a skepticism of rigid dichotomies; and an overall humility.[15]

Many Critical scholars would accept the same characteristics, although their content might vary. "A concern for history and context" might simply mean complexity to a Practical scholar, where it suggests dialectical materialism[16] or Foucaultian genealogy[17] to a Critical scholar. "Skepticism of rigid dichotomies" may mean Posnerian skepticism about intangible concepts or it may mean critical deconstruction.[18] "The human component in decisionmaking" could be Realist recognition of the individuality of the judge or a phenomenological analysis stressing the power of preconscious social conventions.[19]

Thus, there are disciplinary differences between practical and impractical approaches, but the real key may be the singer, not the song. What is required for Critical judging (and Critical scholarship) is to be "unreasonable" with precisely the connotation that term carries in Posner's usage: to proceed from a radically different political perspective, with a sense that legal conventions are problematic. Any general description of methodology will fail to capture this essential distinction, which can only be apprehended by the exercise, not of practical reason, but of one's sense of personal and political connection with like-minded others. This faculty is something akin to elements of Posner's grab-bag of practical reason — anecdote, intuition, empathy — but, as with the larger issue, the description of the process fails to capture our experience of it.[20]

The fundamental political difference between CLS and PLS, like the broad and potent definitions of such terms as "reasonable," "practical," and "political," explains the wide range of political and intellectual beliefs represented in the Practical Legal Studies movement.

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15. Farber & Frickey, *Practical Reason and the First Amendment,* 34 UCLA L. REV. 1615, 1646 (1987), *quoted in* Posner, *supra* note 1, at 887. Posner criticizes this description as too ad hoc and discretionary. *Id.*

16. *See, e.g.,* Holt, *Recovery by the Worker Who Quits: A Comparison of the Mainstream, Legal Realist, and Critical Legal Studies Approaches to a Problem of Nineteenth Century Contract Law,* 1986 WIS. L. REV. 677.

17. *See, e.g.,* Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought,* 133 U. PA. L. REV. 685 (1985).

18. *See* Balkin, *Deconstructive Practice and Legal Theory,* 96 YALE L.J. 743 (1987).

19. *See, e.g.,* Gabel, *Reification in Legal Reasoning,* 3 RES. L. & SOC. 25 (1980).

20. For examples of the critical alternative to reasonableness, see Feinman, *A Case Study in Critical Contract Law,* 1987 ANN. SURV. AM. L. (forthcoming); Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology,* 36 J. LEGAL EDUC. 518 (1986); Singer, *The Reliance Interest in Property,* 40 STAN. L. REV. 611 (1988); R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 43-90 (1986).

Many PLS scholars defy characterization as liberal or conservative; a representative list includes such diverse figures as Anthony Kronman,[21] Daniel Farber and Philip Frickey,[22] Steve Shiffrin,[23] Cass Sunstein,[24] and Posner. It would be banal to state that all of these scholars share a commitment to the prevailing legal and political order, more or less; most legal scholars, including some Critical scholars, could be described in that way. More to the point, all of these scholars lack an association with an extensive critique of the prevailing legal and political order — that is, with the Critical Legal Studies movement.

Accordingly, we can situate the rise of Practical Legal Studies within the historical development of American jurisprudence. In *The Jurisprudence of Skepticism,* Posner suggests that lawyers ought to do away with inchoate and unverifiable concepts such as intent and simply focus on observable behavior (pp. 866-71). Pursuing that thought, we need not impute to PLS scholars the conscious motive of confronting CLS. Instead, two interlocking behavioral explanations account for the rise of Practical Legal Studies. An observation of human behavior is that people respond, often dramatically, when the ideas that give meaning to their lives are threatened. Critical Legal Studies challenges many of the things that constitute the psychological and professional identity of legal academics, so their response is understandable. While CLS has been scorned and derided, at least within the legal academy it has had a profoundly disquieting impact in undermining the accepted modes of legal discourse. One response has been simply to attempt to remove the critics.[25] For more thoughtful and committed scholars, a different response has been to build an intellectual defense. The defense could not rest on some archaic formalism, so PLS scholars have attempted to erect new fortifications to the citadel.

From a historical perspective, the PLS response to the CLS challenge follows a familiar pattern of radical challenge and traditionalist response in American legal thought, as in other branches of intellec-

21. Kronman, *Living in the Law,* 54 U. CHI. L. REV. 835 (1987); Kronman, *Alexander Bickel's Philosophy of Prudence,* 94 YALE L.J. 1567 (1985).

22. Farber & Frickey, *supra* note 15, at 1615; Farber & Frickey, *The Jurisprudence of Public Choice,* 65 TEXAS L. REV. 873 (1987). A useful bibliography of some of the PLS literature is provided in Farber & Frickey, *supra* note 15, at 1645 n.129.

23. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment,* 78 NW. U.L. REV. 1212 (1983); Shiffrin, *Liberalism, Radicalism, and Legal Scholarship,* 30 UCLA L. REV. 1103 (1983).

24. Sunstein, *Legal Interferences with Private Preferences,* 53 U. CHI. L. REV. 1129 (1986); Sunstein, *Interest Groups in American Public Law,* 38 STAN. L. REV. 29 (1985).

25. *See* Frug, *supra* note 9.

tual life. The Legal Realists provoked a response from natural law theorists and process jurisprudence,[26] for example, and now the pattern repeats itself.

Thus PLS in all its forms can be viewed as a liberal/moderate/conservative response to the radicalism of Critical Legal Studies. However, this line of thought should not be taken too seriously. Critical legal history is not limited to simple behavioral accounts. Instead, a common critical account involves complex economic, social, and psychological webs out of which historical actors attempt to find meaning.[27] From this perspective, Practical Legal Studies is more than a simple response to Critical Legal Studies; it is an attempt by many legal intellectuals to find their place in the modern world.

In this respect it is interesting to return to Posner himself. Because of Posner's association with (or dominance of) law and economics, in some circles "Posnerian" has been a pejorative adjective connoting great intellect, narrowly focused. His more recent scholarship shatters that perception. *The Jurisprudence of Skepticism,* added to his other recent contributions to diverse fields,[28] assures recognition of Posner's wide-ranging and creative scholarship. The problems facing modern legal intellectuals defy solution on traditional grounds, and law and economics is clearly too confining a tradition for Posner. The further step that needs to be taken is to recognize, as well, the confinement imposed by Practical Legal Studies' association with the dominant tradition in politics.

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26. *See* G. WHITE, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change,* in PATTERNS OF AMERICAN LEGAL THOUGHT 136 (1978).

27. The basic account is Gordon, *Critical Legal Histories,* 36 STAN. L. REV. 57 (1984). *See also* Holt, *supra* note 16. For an unusual example, see Feinman, *The Meaning of Reliance: A Historical Perspective,* 1984 WIS. L. REV. 1373.

28. *E.g.,* R. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION (1988).