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DISCUSSION: JURISPRUDENTIAL RESPONSES TO LEGAL REALISM

PAUL BATOR (John P. Wilson Professor of Law, University of Chicago Law School): I would like to seize the opportunity of being the organizer of the discussion by identifying some common themes and posing some questions. All three of our speakers spoke about the problem of the gap. It is the most famous gap in the law. It is the gap created by the indeterminacy of rules. The size of that gap is itself a subject of controversy, with the critical legal studies people saying that the constraining power of rules is very small, almost invisible.

But the problem of how we describe what it is that we do within the gap is common to us all. Now, we have had various proposals about that, but I think I would like to ask our panelists to push that project further. Dick Posner said that the gap really exists only in the field of statutory and constitutional interpretation and that it is filled by reference to cultural understandings. So partly he joined up, I think, with your conventionalist camp. It is the background understandings of the culture that tell us what is meant by the proposition that only somebody who is thirty-five can run for President. Charles Fried did not really get into the project of how the gap is filled. What he did was to give us some moral exhortations about the attitude which we should have when we undertake to fill it, which is one of due modesty and old-fashioned virtues. Tony Kronman gave us an historical account of various projects that the realists themselves undertook to try to fill that gap. I would like to invite our speakers, and the audience also, to address this ancient conundrum. What goes on, when judges do law and when practitioners and ordinary people have to figure out what is to be done under a system of rules that have some, but not complete, constraining and determinative configurations? Does one, at the end of the constraint, jump immediately into totally subjective and arbitrary policy science: I do what I please, and it is just a matter of guesswork whether that will be lawful or not, whether some judge will agree with it or not? Or is there something about human intelligence and human language that can be called rational and purposive, and yet, that is not within the sphere of purely formal deduction?

The one theme that was missing in the descriptions given us is something that we do all the time, and that is not logical deduction, and that is not unconstrained policy science, either. We do it in

every enterprise we engage in, particularly joint enterprises. It is making judgments about the aptness of means to ends. It is the process of saying, well now we have an institution, a contract, an enterprise, a corporation, an adjudication, a constitution, and we have an understanding of its purpose. It may just be having a lunch club or a lunch discussion group, and then problems arise as to how to understand the rules of that enterprise when an unforeseen problem arises. It seems to me that what we do all the time in solving that problem is neither logical deduction nor some sort of unconstrained policy choice. Rather, it is judgments—sometimes tacit, intuitive judgments—about what is a suitable way of achieving the common purpose. In the field of the law this terrain has been relatively undescribed. It is an undervalued part of the scene. This terrain is what might be called purposive policy science, where you have to enter into the purpose that is given to you from the outside, and then, in good faith, to see how that purpose can best be accomplished. With that, I think, I will ask the three speakers, in order, whether they want to reprise the discussion, and then I will throw the discussion open to the audience.

POSNER: Well, Paul, unfortunately you have asked a question that is beyond the competence of a janitor to address. Paul's question is an extremely subtle refutation of Charles and of Tony, because he says that what we should be discussing is an issue of epistemology, a very difficult issue—yet if we are to return to conventionalism we shall have to abandon such issues. I would like to address a question on the janitorial plane. I would like to tell Charles what the *Enelow-Ettelson*¹ doctrine is.

It is not a doctrine of insurance law. It is an extremely important doctrine of federal appealability. It is also the single most widely, uncontroversially condemned doctrine of federal law. It has been condemned by every judge and every professor from every corner of the political compass who has spoken on the doctrine in the last thirty years. The doctrine is as follows. If a federal judge grants a stay in a suit that is equitable in character, the stay, whether itself legal or equitable in character, is not appealable as a preliminary injunction under section 1292(a)(1) of the Judicial Code.² But if the underlying suit is legal in character and the stay is equitable in character, then the stay is appealable as a preliminary injunction. The doctrine, which emerged in a series of Supreme Court cases decided in the 1920's and 1940's,³ rests on an elementary historical

¹ See, e.g., *Olson v. Paine, Webber, Jackson & Curtis, Inc.*, 806 F.2d 731 (7th Cir. 1986).

² 28 U.S.C. § 1292(a)(1) (1982).

³ See *Baltimore Contractors, Inc. v. Bondinger*, 348 U.S. 176 (1955); *City of Mor-*

mistake. The mistake is thinking that in the nineteenth century, when the predecessor of section 1292(a)(1) (the Evarts Act) was passed, a common law judge could not issue a stay; that if you wanted a stay of a common law suit you had to get an injunction from a chancellor. That was not true in the nineteenth century, and probably was never true. This historical mistake rigidified in a series of very unreflective, very *conventional* Supreme Court opinions into a rule that is too complicated to be taught in law school, and that is not understood by judges or practicing lawyers because it involves such mysteries as—when a suit asks for both legal and equitable relief shall it be classified as a legal or equitable suit for purposes of the *Enelow-Ettelson* doctrine? For purposes of deciding whether there is a right to a jury trial, such a suit would be classified as a legal suit; but for purposes of appealability under *Enelow-Ettelson* it has been classified as an equitable suit. There is also the problem of deciding whether forms of relief that did not exist in the nineteenth century shall be deemed legal or equitable, such as a motion for a stay based on an agreement to arbitrate, which would not have been enforceable in the nineteenth century. There are many other problems as well. *Enelow-Ettelson* is a monstrosity of a doctrine. I wrote an opinion⁴ recently in which I applied the doctrine, as we were required to do, but pleaded with the Supreme Court to overrule it. I quoted opinions from every circuit denouncing the doctrine, and from an article in which the author had urged the federal courts of appeals to practice, as she put it, the judicial equivalent of civil disobedience, and simply refuse to enforce the *Enelow-Ettelson* doctrine.⁵

In addition to urging us to re-orient legal thought so that memorizing, and cherishing, and extending the *Enelow-Ettelson* doctrine will be at the heart of legal education, Charles urged us to focus more on the details of bankruptcy law. Yet what has made bankruptcy an interesting field, and attracted the attention of very able economists and lawyer-economists who have presented empirical evidence as well as theoretical arguments that the well-meaning bankruptcy reform of 1978 has increased interest rates, increased

gantown v. Royal Ins. Co., 337 U.S. 254 (1949); *Ettelson v. Metropolitan Life Ins. Co.*, 317 U.S. 188 (1942); *Shanferoke Coal & Supply Corp. v. Westchester Serv. Corp.*, 293 U.S. 449, 452 (1935); *Enelow v. New York Life Ins. Co.*, 293 U.S. 379 (1935); *Red Cross Line v. Atlantic Fruit Co.*, 264 U.S. 109 (1924); *United States v. Girouard*, 149 F.2d 760, 765-67 (1st Cir. 1945), *rev'd*, 328 U.S. 61 (1946); *Spector Motor Serv. v. Walsh*, 139 F.2d 809, 814 (2d Cir. 1943), *vacated*, 323 U.S. 101 (1944); *Perkins v. Endicott Johnson Corp.*, 128 F.2d 208, 217-18 (2d Cir. 1942), *aff'd* 317 U.S. 501 (1943); *Beaunit Mills, Inc. v. Eday Fabric Sales Corp.*, 124 F.2d 563, 565 (2d Cir. 1942).

⁴ *Olson*, 806 F.2d 731.

⁵ Mathy, *The Appealability of District Court Orders Staying Court Proceedings Pending Arbitration*, 63 MARQ. L. REV. 31, 69 (1979).

the number of bankruptcy filings, and in short had counterproductive effects on both creditors and debtors, is theory and consequence, not legal detail. And this example shows that it is not true that all twentieth century thought is left-wing thought. Yes, Michel Foucault was a left-winger, and Franz Fanon and many others, but Milton Friedman is not a left-winger, or Friedrich Hayek, or even T.S. Eliot. So it is not true that if we return to conventionalism, we will simply be ridding ourselves of left-wing ideologies. I infer that Charles himself has no abiding faith in the conventional, because when he contributed an article to the 100th anniversary issue of the *Harvard Law Review*, what was his article about? It was about Sonnet LXV by Shakespeare. And this article was published only one month ago.⁶

I am perfectly happy to conceive of my role as that of a janitor—I am compensated at about the level of a unionized janitor—but do I, as I sweep the jurisprudential floor, have to use a bundle of faggots, like the middle-aged women who sweep the streets of Moscow, or can I at least have an electrical-powered buffer?

Professor Kronman did much the same thing. He showed that his conventionalism is skin-deep, because whom does he hold up as a conventionalist? Stanley Fish. I do not know whether Stanley Fish is a well-known name in this hall. Fish is a literary critic—an expert on Milton, and the inventor of a method of literary criticism called “affective stylistics.” He is not Jacques Derrida or Hans-Georg Gadamer, but he is a down-home version of these French and German philosophical heretics. Like Derrida, he is a radical skeptic, who believes that there is no such thing as a text. He wrote a book called *Is There a Text in This Class?* and he answered the question posed by the title in the negative. His view is that every text is the creation of the reader. He is part of a school of modern philosophical skepticism whose European branches are represented by people like Derrida and whose law outpost in the United States is the critical legal studies movement. So beneath the critical legal studies movement which Tony has placed in opposition to conventionalists like Stanley Fish is a body of skeptical European thought whose American epigone is none other than Stanley Fish.

I conclude from all this that modern social thought, whether it is economic, or philosophical, or what have you, is inescapable. All the speakers come back to it in one form or another. Conventionalism—the law’s autonomy—the return to the fifties, or the thirties, or the 1780’s is out of the question. That is not how social thought works. We will have to come to terms with modern thought—even

⁶ Fried, *Sonnet LXV and the “Black Ink” of the Framers’ Intention*, 100 HARV. L. REV. 751 (1987).

use the parts of it that are constructive and relevant to law—and abandon the nostalgia for the olden days when lawyers knew nothing that was not in law books.

FRIED: I cannot exaggerate my pleasure at hearing Dick discourse on the *Enelow-Ettelson* doctrine. It is worth coming to Chicago for a whole weekend just to hear that. I would like to just say a little bit about Paul's description of the gap, because I think Paul really got it quite right and I feel very comfortable with his account and I feel that it is entirely compatible with what I was urging. The notion of law as a purposive discipline does go back in its formulation to Lon Fuller. But the way in which one operates in those contexts which Paul described, whether we have a luncheon club or the law or contracts, is a little bit like what Aristotle said about happiness: you attain it by not aiming at it. And I think, you attain the purposes of the luncheon club or the *Enelow-Ettelson* doctrine, or whatever, by not inquiring or, at least, allowing yourself to be distracted by too deep an inquiry into purposes. I think that the word that I suggested is simply a decent attitude towards the text, or the doctrine or the precedent, and that is this good faith entering into the shared context. But as Wittgenstein demonstrated, the business of following rules cannot be formalized to the 'nth degree; there is always a place where you hit bedrock, your spade is turned, and what you do is you just follow the rule. The whole difficulty which the pseudo-philosophy of critical legal studies and legal realism raise, is the difficulty about explaining right down to the bottom of the earth and out the other side, how it is that you can follow rules, the rules about following rules, and so on. And that is a mug's game. What I am suggesting is that it is a mug's game we do not need to play. And I think my answer to Paul is, do not worry. Oh, incidentally, as to continental thinkers, I did want to say one word about Hayek, whom I revere. Hayek, I think, would be on board with me and Tony and the other conventionalists, as would, I suspect, James Madison.

KRONMAN: I would like to say a word or two about Paul's observations concerning purposive instrumentalism. But first I feel compelled to say at least a little something in defense of Stanley Fish. I did, I must confess, feel some awkwardness myself in invoking a Milton scholar as authority for the jurisprudential view that I was meaning to defend. But it is a sign, I think, of just how far we have come from the prosaic truths of conventionalism that we need instruction in them from outside our own home discipline. Fish, it is true, is a skeptic, but he is a skeptic of a different kind, indeed, of a radically opposite sort, from the kind of skeptic you find in the critical legal studies movement. Unger's skepticism, for example, starts

with the premise that the law is full of gaps and that in order to fill them up you have ultimately to step outside the law, and practice moral philosophy. You have first to discover the basic truths about human nature and political life, and once you have these securely in place, then you can begin working gradually back toward, say, the law of offer and acceptance. But you have to start from the Archimedean point that only philosophy can supply, and that is a point by definition outside the discipline of law. Fish's skepticism is of just the opposite sort. What Fish is skeptical about is the effort to supply a foundation for the discipline of law which is deeper than the going conventional practices of the discipline itself. Fish would say, for example, that to know what the rules of offer and acceptance mean and how they are to be applied in particular cases, you have to immerse yourself in the details of the law for a considerable period of time and acquire a set of professional habits; when you have been properly habituated, you will just see how it ought to go in a particular case. But if you think that the way to answer hard legal questions is to step outside the law and address them from some other and more fundamental perspective, then on Fish's conventionalist view you are simply mistaken about the nature of legal argument, what it requires, and what is possible in it. Fish is, I should add, a sworn enemy of the critical legal studies movement. So Dick's rhetorical effort to assimilate the two should not mislead you.

Now as regards purposive instrumentalism, consider something like a breakfast club, or a law school faculty, or any relatively small association of individuals who share a set of common purposes. I think that Paul is absolutely right to point out that when problems arise in the course of the life of such an association, its members do not step back to some intellectual ground zero and begin reflecting about the aims of the organization and the responsibilities of individuals within it from a point of view more fundamental than the point of view which the purposes of that organization itself provide. That is where you start: you start with the aims and ambitions and shared objectives of the people who are engaged in that quite specific activity. But, of course, things do not always go smoothly. There are, first of all, problems of implementation. We may, for example, all be committed to a given set of purposes, but it may also be unclear how they are best achieved in a particular case. Or, more problematically, conflicts may arise among the different ends which the members of a certain group share. We want A and B and C and D, but on occasion we discover they cannot all be had simultaneously, so we must adjust or accommodate these ends, work to harmonize them as best we can.

Now in making these sorts of adjustments (and I think Paul is

right here too), we do not perform some mental deduction, starting with the purposes in question and then reasoning our way *more geometrico* to the proper conclusion in the case at hand. Nor do we just throw up our hands and sit back and wait for some blindingly correct intuition to come to us. We deliberate about the issue. Deliberation is the name of the activity that describes the kind of practical reasoning that goes on in these contextually dense, purposively well-defined situations.

But what deliberation is remains, I think, a great mystery. The nature of deliberation seems in any case to be an issue that has pretty much dropped off the menu of jurisprudentially interesting topics. But deliberation is our distinctive craft. It is what judges and good lawyers practice. Until we have some idea of what it is and how it is distinct both from intuition and deduction, we do not have, we cannot have really, a satisfactory account of what it is that we do when we practice law, whether it is judging or some other activity that is in question. I would just add that I do not think it is possible to give a satisfactory account of deliberation without introducing at some critical point the notion of convention or tradition. I do not think of conventionalism as blind adherence to going practices; every convention worth its salt, every meaningful convention, has an open-texturedness which not only allows but actually requires its development over time. That is the mark of a great tradition, and I think it is the mark of the tradition of the law.

BATOR: I am very happy with that last intervention. I think it is just right. A creative conventionalism tries to understand what are the shared understandings. Jurisprudence should go back and describe that process of deliberation in the light of shared purposes, what it is like. I think we can learn lessons, here, from philosophers of science and epistemologists of science.

QUESTION: When we are talking about introducing, as I think one should, the notion of means and ends, that is, of using the means to achieve purposes of a tool for filling in gaps, is not there an inherent equivocation in the notion of the term "purpose," in that one can be referring to the purpose of the particular rule or discreet set of rules before you in a particular case, or the purpose of the system of the rules as a whole. And if we are talking about the former, a particular discreet set of rules, do not we run headfirst into the problem of not knowing, and being inherently incapable of knowing, the purposes of particular rules which in fact may not have purposes in that sense in that they emerged spontaneously without any particular designer. So I would just ask for clarification, those who are proposing purpose as an answer, of what they mean by purpose. Purposes of what? Of the system or of the discreet rule?

FRIED: Well, I think that is why I urged Aristotle's answer, that you hit the purpose, like happiness, by not aiming at it. What you aim at is simply to get it right, to understand the rule, to treat it like a text. Incidentally that is why I allowed myself the conceit of writing about Sonnet LXV. Then what you do is, your purpose as an interpreter is, to take that text and take it very seriously as a text, rather than to speculate about what purposes people might have had in enacting it, on the assumption that words and texts do yield answers, or indeed, doctrines as a kind of written text. They do yield answers when you question them, and you do not need to psychoanalyze them. You just need to question them, and I think psychoanalyzing them is the enterprise of going beneath them to ask, well why did you say that instead of saying what is it that you said.

BATOR: My answer to that is that we are constantly referring to our understanding of the function of the specific rule, and we try to understand that in the context of the function of the enterprise. If you and I have a rule that we will meet for lunch every third Wednesday of the month at one o'clock, that is our rule, that is the only rule of our club. That includes all kinds of implicit understandings and shared assumptions that you, in fact, will be there unless you let me know in advance, unless there is some emergency. But if your mother dies a half an hour before that lunch date and you do not have time, I would not regard it as a breach of the rule for you to stay away, even though you inconvenienced me. That is, we have a very complicated set of understandings; they are built on conventions, they are built also on the power of language, and language itself is a conventional set of understandings. It is built on our ability to enter into joint and shared enterprises. And I do agree that a decent respect for the spirit of the enterprise is part of the shared understanding. Now there will be pathologies where that set of understandings breaks down. But we tend, as lawyers, to focus too much on the pathologies and not to pay attention to rigorous description of the vast areas in which these enterprises work very well. It is not a mystery to most of us how to make a good lunch discussion group go. We manage it.

FRIED: That is absolutely correct.

KRONMAN: I would like to add one observation. In inquiring about the purpose of a particular rule, one that belongs to a larger system of rules, it is quite sensible—indeed it is unavoidable—to think of the purpose of the rule in question as being a function of, or in any case as being modified by, the larger purposes of the whole activity to which the rule belongs.

But a temptation arises to think that the purposes of that activity must also be understood in a larger context, so that just as the

rule is embedded in the practice, the practice has to be embedded in something else, and so on, until we reach the supremely abstract level of the whole of humanity, or at least, the whole of American humanity. I think it is that unmooring of the question from local practice—the response to an understandable temptation—which gets us into trouble.

QUESTION: This is primarily addressed to Judge Posner. Even assuming that we ought to make sure that judges can use the power sweepers, are there limits on the extent to which you can incorporate new learning to interpret old words. That is, to what extent is there a difference in incorporating new learning between common law matters and statutory matters?

POSNER: I think there is a difference. I think the common law, in principle, is evolving to adapt to changed social circumstances, so the more we understand about practices the more we can bring the common law into harmony with our underlying purposes. But in the case of a statute or the Constitution, as I said, the first duty is to interpret the text, and it may be that the interpretation results in a policy which is anachronistic and out of phase with modern thinking; but one is nevertheless committed to it until it can be changed through the ordinary course. So I do think economics has inherently a smaller role to play in constitutional and statutory law. On the other hand, I also think there are provisions in the Constitution that invite economic analysis because they set forth considerations that are easily referable to economics. I will just give one example—the fourth amendment, which forbids unreasonable searches and seizures. In the term “unreasonable” is an invitation to balance the costs and benefits of alternative methods of police investigation. As we learn more about the economic consequences of alternative remedies, such as the exclusionary rule versus tort remedies against police officers, we may be able to develop arguments for changing, or in some cases for confirming, existing interpretations of the fourth amendment.