A NATION OF EMPLOYEES OR EVERY MAN A KING—WHO IS TO SAY? SOME VIEWS ON PRIVATE EMPLOYMENT LAW*

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In the past Term of Court, we were required to accommodate within our law dual visions of the predominant American type. Although today we might ask Huey Long to speak of "every person a sovereign," the mythology remains the same. The image of the Marlboro man calls us to a rugged individualism, while the reality of Grace Pierce's relationship with the Ortho Pharmaceutical Corporation evokes the recognition that "[w]e are a nation of employees."[1] I shall attempt to demonstrate that the choice between the two visions reflects but another step in our long transition from a feudal society, based on community, to a mercantile society, based on choice, and that elements of each vision continue to influence the path of the law. The choice of the vision arises for us in the context of private employment law as demonstrated in *Shebar v. Sanyo Business Systems Corp.*[2] and *Ingersoll-Rand Co. v. Ciavatta.*[3]

In *Shebar*, the New Jersey Supreme Court was called upon to determine the validity of a contract for indefinite employment under New Jersey law. It presented a clash of cultures: the Japanese idea of a corporation as a lifetime employer versus the American bottom-line employment mentality. In that context, the court ruled that if the plaintiff could prove that he had foregone an opportunity for other employment by relying on his employer's promise of permanent employment, his at-will employment would be transformed into employment with termi-

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1 Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 417 A.2d 505 (1980) (considering at-will employee's cause of action against employer for damages stemming from perceived wrongful termination).

2 111 N.J. 276, 544 A.2d 377 (1988).

3 110 N.J. 609, 542 A.2d 879 (1988).

nation for cause only.[4] And in such instances, the former employer may be liable for breach of contract.[5]

In *Ingersoll-Rand*, the court considered the validity of a post-employment right to inventions conceived during the term of employment.[6] Somewhat like Archimedes, the defendant Ciavatta professed to have conceived his invention while changing a light bulb. Here, the court observed that "courts must evaluate the reasonableness of holdover agreements in light of the individual circumstances of the employer and employee. Courts must balance the employer's need for protection and the hardship on the employee that may result."[7] The court concluded that the holdover agreement was unreasonably restrictive under the circumstances of the case, and therefore unenforceable, even if applicable to that particular employee's invention.

Although neither case will have the majestic consequences of a case like *Henningsen v. Bloomfield Motors, Inc.*,[8] each case required the court to think hard about the judicial process and, in particular, about the role of judges in fixing the outer boundaries of private relations. The question remains: should the law, or more particularly, should appointed judges, view the private employment relationship as predominantly one of free choice based on market relations or one of qualified choice based on the status of the parties. In short, are the courts the ones who are to say which of the two visions will predominate—whether we are to be viewed as a nation of employees with defined rights based on status or a nation of entrepreneurs trading their services in a free market.

To answer the question, I shall give a brief summary of the development of American contract law, and then, refer to two schools of contemporary legal thought—the law and economics, or the Chicago school, and the Critical Legal Studies school. I will suggest that neither school will become a prevalent mode of legal theory that will tell courts how to decide such cases and conclude by arguing that the choice of the visions is inevitably required of us in the common law process of judging.

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[4] *Shebar*, 111 N.J. at 288-89, 544 A.2d at 383.

[5] *Id.* at 289, 544 A.2d at 383. However, the court cautioned that "not every relinquishment of a prior job or job offer constitutes additional consideration to support the modification of an at-will employment into employment with termination for cause only." *Id.*

[6] *Ingersoll-Rand*, 110 N.J. at 612, 542 A.2d at 880.

[7] *Id.* at 639, 542 A.2d at 894.

[8] 32 N.J. 358, 161 A.2d 69 (1960).

I.

To avoid any charges of misuse of intellectual property, I must preface my remarks by stating at the outset that very little of what follows can be regarded as original research. In fact, the theme of these remarks was derived from a provocative observation of the President of our Association. He told me that he did not disagree with the holding in *Woolley v. Hoffman-La Roche, Inc.*,[9] in which the court enforced the discharge-for-cause terms of an employment manual. It was, indeed, a fair holding because, after all, the employer had promised not to discharge the employee without cause. However, he questioned whether courts were the ones to say that the law of this state should be changed to conform to the court's perception of fairness.[10]

To begin this study, we might start with the kind of approach that Justice Sidney Schreiber would often take at oral argument in the New Jersey Supreme Court when he would ask the attorneys a question such as "What is law?" But I will assume that most of you would answer that inquiry with the question: "What do you mean by *is*?"

This is no laughing matter, however, for respectable scholars seem to be of the view that language itself is a problem in understanding the legal process. For them, "words do not have essence; words do not have core meanings; and words can be used in an infinite number of ways."[11] But I can spend no more time on that subject for I would be otherwise subject to the greatest of criticism by my colleague, Justice Clifford, for whom some of our decisions represent "a significant, if unwitting, contribution to the decline of exactness in speech."[12]

For me, law always remains, in large measure, what Henry M. Hart described as "an institutionalized procedure for the settlement of human disputes." I leave to another lecturer whether such procedures should be rooted in the dictates of morality or

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9 99 N.J. 284, 491 A.2d 1257 (1985).

10 H. Reed Ellis, *The Court's Perception of Fairness Cannot be Disputed, But Significant Questions Remain*, N.J. STATE BAR ASS'N LAB. & EMPLOYMENT L. (1985).

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

12 State v. Lee, 96 N.J. 156, 167, 475 A.2d 31, 36-37 (1984). Unlike Holmes, for whom "[a] word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used," Towne v. Eisner, 245 U.S. 418, 425 (1918), Justice Clifford believes that the meaning of words is fixed and we are bound to accept those fixed meanings. How then did the "L" word (liberal), a word that means free and open, become a pejorative?

custom or legal positivism. Contract law is a branch of law that generally seeks to establish procedures to deal with voluntary arrangements between people. After all, we as people are the ones who decide to treat corporations as people to suit our purposes. Thus, a word may have a meaning which we intend it to have.

For most of us, contract law begins in the early years of law school as a sort of Baltimore Catechism. We really enjoy studying offer and acceptance. This is it. It makes sense and accords with our instincts. What kid on a playground is not upset when the rules are changed? How then could our logical set of principles (almost like game rules) be seen as a device of the ruling class to keep the underclass in bondage and how could we judges be considered the high-priests of a religion which worships contract doctrine and enthralls the masses? It sounds silly to most of us, but respected scholars think that this is what we may be doing. In this brief survey of American contract law, I will draw upon Morton Horwitz's *The Transformation of American Law, 1780-1860.*

This institutional bias for the "haves" is seen to have begun with a subtle movement in the law to substitute form for substance as the guiding principle for decision-making. But this was not always the case. Brought up on the common law, the generation of American lawyers, who built our legal structure after the Revolution, agreed, as we did in New Jersey, that "the common law of England, as well as so much of the statute law, as have been heretofore practiced in this Colony, shall still remain in force."[13] If anything that we know is certain, it is that the men who shaped our current legal system, that is, the system of the Judicial Article of the United States Constitution, wanted more than anything, judges who were free and independent. The very concept of lifetime appointment for judges conveys with it the essence of independent exercise of judicial power. Their disrespect for Crown Court judges arose, not from the process of common law adjudication, but from their enforcement of the King's warrants. "The persistent appeals to the common law in the constitutional struggles leading up to the American Revolution 'created a regard for its virtues that seems almost mystical.' "[14] We cannot be too sure of the mysticism though. In New Jersey the Governor served as Chancellor under the Constitution

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[13] N.J. CONST. art. XXII (1776).

[14] M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 5 (1977).

of 1776, and until the Constitution of 1947, lay judges served on our highest court, the Court of Errors and Appeals.

After the revolution, American courts gradually declared their independence from English precedent.

> [J]udges came to think of the common law as equally responsible with legislation for governing society and promoting socially desirable conduct. The emphasis on law as an instrument of policy encouraged innovation and allowed judges to formulate legal doctrine with the self-conscious goal of bringing about social change.[15]

In particular, it was customary for American courts to supervise the fairness of contracts, not only in equity but in law. Remember that law and equity had been different courts and the "King's conscience" had little effect in a law court.[16] This "function was performed at law by a substantive doctrine of consideration which allowed the jury to take into account not only whether there was consideration, but also whether it was adequate, before awarding damages."[17] Although later reversed, Chancellor Kent had then written that in contract actions at law, "relief can be afforded in damages, with a moderation agreeable to equity and good conscience."[18]

With this as background, Horwitz traces the emergence of the modern contract law to the recognition of expectation damages arising in cases involving speculation in stock. "The development of extensive markets at the turn of the [nineteenth] century contributed to a substantial erosion of belief in theories of objective value and just price."[19] The early nineteenth century saw instead the rise in America of the "will theory" of contract. These "jurists were engaged in a search for the built-in legal structure of the democracy and the market."[20] With the advent of the market economy,

> value came to be regarded as entirely subjective and . . . principles of substantive justice were inevitably seen as entailing an "arbitrary and uncertain" standard of value. Substantive justice, according to the earlier view, existed in order to prevent men from using the legal system in order to exploit each other. But where things have no "intrinsic value," there can

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15 *Id.* at 30.

16 L. FRIEDMAN, A HISTORY OF AMERICAN LAW 22 (1973).

17 M. HORWITZ, *supra* note 14, at 165.

18 Seymour v. Delancy, 6 Johns. Ch. 222, 232 (N.Y. Ch. 1822), *rev'd*, Seymour v. Delanc[e]y, 3 Cow. 445 (N.Y. 1824).

19 M. HORWITZ, *supra* note 14, at 180-81.

20 Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 567 (1983).

> be no substantive measure of exploitation and the parties are, by definition, equal. Modern contract law was thus born staunchly proclaiming that all men are equal because all measures of inequality are illusory.[21]

"[F]ormal rules . . . [became] identif[ied] exclusively with the 'rule of law' . . . [while] those ancient precepts of morality and equity . . . were . . . render[ed] suspect as subversive of 'the rule of law' itself."[22]

I have made no independent effort to verify Horwitz' scholarship. Others have questioned the premise of his argument that the institutional preference of judges dictates the course of doctrine.[23] I rather suspect that a more fundamental instinct was at work. Archibald MacLeish, who gave up the practice of law to write poetry, thinks the two callings are alike: Like poetry, "[t]he business of law is to make sense of the confusion of what we call human life—to reduce it to order but at the same time to give it possibility, scope, even dignity."[24] For the purposes of this article, I have only to see that change had taken place. What came to replace substantive analysis of the adequacy of consideration (once undertaken by juries) was that highly extraordinary body of contract law that eventually finds its way into Williston's work and the *Restatement of Contracts*. It represents, in large measure, acceptance of Holmes' theory that law should recognize only objective external manifestations of the will rather than substantive notions of value. Thus, the question was not what any particular individual actually intended, but what were the objective signals which were communicated.[25] The final

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21 M. HORWITZ, *supra* note 14, at 161.

22 *Id.* at 188.

23 Simpson, *The Horwitz Thesis and the History of Contracts*, 46 U. CHI. L. REV. 533 (1979).

24 A. MACLEISH, *Riders on the Earth*, in ESSAYS AND RECOLLECTIONS 85 (1978).

25 Scholars like Professor Grant Gilmore have peeled back the dogmas of classical contract theory to reveal that the structure had been drawn from a rather selective use, if not misuse, of casebook materials. G. GILMORE, THE DEATH OF CONTRACT 55-56 (1974). In an amusing insight into the real thought processes of the judges in Raffles v. Wichelhaus, 159 Eng. Rep. 375 (Ex. 1864), Gilmore explains how little the decision had to do with the failure of objective assent. The seller's attorney, Milward, was trying to make the point that the reference to the ship Peerless had nothing to do with the contract.

> Milward got absolutely nowhere in explaining this point to the court. Two of the judges, Pollock and Martin, kept interrupting him with questions which suggest that they had no idea what he was talking about. Their evident assumption was that if the contract said Peerless, then Peerless was a fundamental term (or condition) of the contract and Milward could go on talking until he was blue in the face without shaking them. There seems to be an air of increasing desperation in Mil-

step "was to equate the 'liberty' secured by the due process clause of the federal and state constitutions with the 'free will' from which they believed they could define the common law rules."[26] The "will theory," characteristic of nineteenth century American contract law, "stands for the proposition that promises should be enforced to the extent possible in conformance to the will of the parties with little or no regard as to whether an 'equitable exchange' has been transacted."[27]

The high tide of the will theory of law may have been reached in *Lochner v. New York*,[28] in which the Supreme Court struck down a New York statute limiting the work day of bakers to ten hours. All men, they ruled, must be free to enjoy the liberty to work as long and as hard as their employers want them to. At this moment, I think of the verse often recalled by Justice Proctor:

> The golf links lie so near the mill That almost every day The laboring children can look out And watch the men at play.

Only gradually did the pendulum swing away from the formalism of the Lochnerian view of contract law. The leaders in this assault upon formalism were a school of legal realists best represented by Columbia scholars Karl Llewellyn and Jerome Frank. Each taught that law served human needs and that the doctrines of law were indeed not immutable, but were subject to change to meet changing conditions of society. While this "realism" may have appeared radical to some, it was but a reiteration of that formative period of American law when our common law broke its bondage to

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> ward's attempts to deal with the wooly-headed questions from the bench. Toward the end of his argument, perhaps distracted, he suddenly switched to an obviously unsound line: that parol evidence was not admissible [sic] to show which Peerless was meant—a diversionary tactic which the Court treated with the silent contempt it deserved.
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> Mellish, as counsel for the buyer, answered Milward. His first sentence effectively demolished Milward's unfortunate attempt to drag in the parol evidence rule. His second sentence was:
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> That being so [i.e. the parole evidence being admissible], there was no consensus ad idem, and therefore no binding contract. At that point he was stopped by the Court which forthwith announced judgment for Mellish's client.

G. GILMORE, *supra*, at 38-39.

In short, the question to the judges was not what the parties said but what they meant, a purely subjective failure of the minds to meet.

26 Kennedy, *Form and Substance in Private Law Adjudication*, 80 HARV. L. REV. 1685, 1754 (1976).

27 Leibman & Nathan, *The Enforceability of Post-Employment Noncompetition Agreements Formed After At-Will Employment Has Commenced: "The Afterthought" Agreement*, 60 S. CAL. L. REV. 1465, 1494 n.96 (1987).

28 198 U.S. 45 (1905).

English law and developed its own life. Professor Gilmore finds that reaffirmation of substance in the *Second Restatement of Contracts*:

> Obligations and remedies based on reliance are not peculiar to the law of contracts. This Section is often referred to in terms of "promissory estoppel," a phrase suggesting an extension of the doctrine of estoppel. Estoppel prevents a person from showing the truth contrary to a representation of fact made by him after another had relied on the representation. . . . Reliance is also a significant feature of numerous rules in the law of negligence, deceit and restitution. . . . In some cases those rules and this Section overlap; in others they provide analogies useful in determining the extent to which enforcement is necessary to prevent injustice.[29]

Noting, as always, that substance had never really left the common law courtroom, Gilmore observed that "[t]he academic mind is usually a generation or so behind the judicial mind in catching on to such things."[30]

In New Jersey, as elsewhere, our law reflected a similar return to concern for substantive rather than merely formal justice. Most notably, this was evidenced in the elaboration of our new Constitution of 1947 and the beautiful set of procedures that accompanied it. One of my gripes today is the ever-increasing detail found in our rules of court. I think that we could do well to scrap them and to start over again with a nice, simple, clean set of rules. But that is a story for another day. The Vanderbilt and Weintraub courts, freed procedurally from the forms of action that typified New Jersey practice, followed with a rather swift transformation of New Jersey law from a focus on procedure to one on substantive justice. This was most notably seen in the development of our law of insurance contracts where the New Jersey Supreme Court was able to find not only that ambiguous policies must be construed against the insurer, but that even insurance contracts that are unambiguous when all the fine print is examined will be construed contrary to their exact language so as to fulfill the reasonable expectations of the insured.[31]

Only recently in the celebrated case of *In re Baby M*[32] was this dichotomy between form and substance revisited. In that case, counsel for the father had insisted that the absolute right of the father to contract for the services of a surrogate must be respected by

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29 RESTATEMENT (SECOND) OF CONTRACTS § 90 comment a (1981).

30 G. GILMORE, *supra* note 25, at 90.

31 Gerhardt v. Continental Ins. Cos., 48 N.J. 291, 225 A.2d 328 (1966).

32 109 N.J. 396, 537 A.2d 1227 (1988).

a New Jersey court. The trial court cited *Lochner v. New York*[33] for the will theory of law, the proposition that the surrogate who is prohibited from voluntarily choosing to enter such a contract is deprived of the constitutionally-protected right to perform services.

In his brief dispatch of this argument, our Chief Justice Wilentz wrote: "There are, in a civilized society, some things that money cannot buy."[34]

II

If there are some things that money cannot buy, or in other words, some contracts that people cannot make, how shall courts decide which shall be enforced and which shall not? I will address two theories that have gained attention as providing an organizing principle for the exercise of judicial discretion.[35] I refer to the Chicago School and the Critical Legal Studies School. Although appearing to be different, each of the two schools is said to share a common phenomenon:

> Both movements can be understood as a reaction to a jurisprudence, confidently embraced by the bar in the sixties, that sees adjudication as the process for interpreting and nurturing a public morality. Both law and economics and critical legal studies are united in their rejection of the notion of law as public ideal. One school [the Chicago School] proclaims "law is efficient," [the Critical Legal Studies School], that "law is politics." But neither is willing to take law on its own terms, and to accept adjudication as an institutional arrangement in which public officials seek to elaborate and protect the values that we hold in common.[36]

A.

The doctrine of law and economics is based on the supposition that judges have created rules which are designed to "maximize the total satisfaction of preferences."[37] That is, their theory has been characterized as explaining past decisions according to a selection of preferences,[38] but these economic rules also pro-

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[33] 198 U.S. 45 (1905).

[34] *In re Baby M*, 109 N.J. at 440, 537 A.2d at 1249.

[35] Another jurisprudential theory that I do not address in this article is the Rights and Principle School. This school focuses more on questions of public law and was discussed by Justice Handler in his lecture to this body in 1985. *See* Handler, *Jurisprudence and Prudential Justice*, 16 SETON HALL L. REV. 571 (1986).

[36] Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 2 (1986).

[37] *Id.* at 2-3.

[38] Judge Richard Posner, a pioneer of the law and economics movement, theo-

vide a way to decide cases for the future by setting aside fairness or reasonableness as

> a hopeless jumble of intuitions and offer[ing] an intellectual structure to order [these] intuitions and give them content. That structure is the market. According to this branch of law and economics, the normative concepts of the law [that is, the concepts of the law that shape the conduct of individuals] should be construed and applied in such a way as to make the judicial power an instrument for perfecting the market.[39]

The doctrine is and must be an empty net and as stated:

> ultimately rests on the relativization of all values. All values [which] are reduced to preferences and all preferences are assumed to have an equal claim for satisfaction. . . . There is no way, moreover, of judging one preference as more worthy than the other, any more than there is a way of judging the preference for one flavor of ice cream better than another. [Therefore] [a]ny choice between the two would be arbitrary. . . . Having thus reduced all values to preferences, and having established that a choice between preferences would be arbitrary, it then follows that social institutions can have one purpose and only one purpose and that is to maximize the total satisfaction of preferences.[40]

In the context of the cases that I discussed at the outset—the private employment contract—Professor Richard E. Epstein of the Chicago School would tell us that as in *Lochner*, we had best leave the parties where we find them. In a law review article, Epstein says:

> There is thus today a widely held view that the contract at will has outlived its usefulness. But this view is mistaken. . . . [T]he parties should be permitted as of right to adopt this form of contract if they so desire. The principle behind this conclusion is that freedom of contract tends both to advance individual autonomy and to promote the efficient operation of labor markets.[41]

In the context of private employment law,[42] Epstein teaches that law

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rized that although judges are not formally trained in economics, they still adjudicate according to a maximization of preferences. Posner validated his theory by likening the bench's behavior to laboratory animals who behave " 'as if' the maximization of their satisfaction was their objective and it was not important for the validity of such an explanation that the [laboratory animals] actually thought about maximization, economics, or for that matter anything else." *Id.* at 3.

39 *Id.* at 5.

40 *Id.* at 5-6.

41 Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984).

42 Epstein recognizes, of course, the right of government to regulate labor relations. And even the Chicago School recognizes some limits on the autonomy of

should seek to promote the efficient operation of labor markets. He says: "Freedom of contract is an aspect of individual liberty, every bit as much as freedom of speech, or freedom in the selection of marriage partners or in the adoption of religious beliefs or affiliation."[43] He recognizes that the law has a right to study carefully some contracts, but he says with employment contracts "we are not dealing with the widow who has sold her inheritance for a song to a man with a thin mustache."[44] Paradoxically, he says that an:

> employee who knows that he can quit at will understands what it means to be fired at will, even though he may not like it after the fact. So long as it is accepted that the employer is the full owner of his capital and the employee is the full owner of his labor, the two are free to exchange on whatever terms and conditions they see fit, within limited constraints just noted.[45]

Those limited constraints are fraud, insanity and the like. Epstein resolves any other "aberrations" by assessing that "[i]f the arrangement turns out to be disastrous to one side, that is his problem; and once cautioned, he probably will not make the same mistake a second time."[46]

Were we to apply these principles of autonomy to the two cases before us, presuming that the parties to the contract understand the economic risks better than we do, we would rule against the employer in the *Shebar* case, doing nothing more than enforcing its contract, and in favor of the employer's right to retain the inventions in the *Ingersoll-Rand* case, again the free choice of the employee. These principles would seem to have ruled in favor of the at-will employee in *Woolley*, who relied upon his manual indicating that he would be fired only "for cause." According to Epstein, if the arrangements in the Employment Manual turn out to be disastrous, then the employer will probably not make the same mistake twice.

Without, for the moment, considering whether there is a better organizing principle for the process of adjudication of such controversies, one must question in the long run whether, as a practical matter, private employment rules necessarily maximize efficiency in the economic sphere. In other words, can it be good business to have employment conditions where one is not discharged except for

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employers. *See* Jordan v. Duff & Phelps, Inc., 815 F.2d 429, 438 (7th Cir. 1987) ("But no one, not even Professor Epstein, doubts that an *avowedly* opportunistic discharge is a breach of contract, although the employment is at-will.").

[43] Epstein, *supra* note 41, at 953.

[44] *Id.* at 954.

[45] *Id.* at 955.

[46] *Id.*

cause? Epstein suggests that the employment at-will contracts are more responsive to the fluctuations in the employment relationship than any other legislative or judicial solution.[47] The kinds of records presented at our level of the appellate process, however, never settle such points.

Not surprisingly, the Critical Legal Studies scholars see the Chicago School (as well as the Rights and Principle School) as but another form of politics, which seeks to impose objectivism and formalism upon law to serve its own political ends.

> Each of these theories of law [Law and Economics and Rights and Principle] is advanced by a group that stands at the margin of high power, that despairs of seeing its aims triumph through the normal means of governmental politics, and that appeals to some conceptual mechanism designed to show that the advancement of its program is a practical or moral necessity. . . . [B]oth theoretical tendencies can best be understood as efforts to recover the objectivist and formalist position.[48]

As Unger sees it, the abstract market idea is particularly identified with one specific version of the market—"the one that has prevailed in most of the modern history of most Western countries—with all its surrounding social assumptions, real or imagined."[49] Professor Tribe is more pithy. He would characterize the doctrine as "ideology masquerading as knowledge."[50]

The New Jersey Supreme Court has not yet embraced the doctrine of law and economics, although in a recent concurring opinion Justice Pollock suggested that these principles were implicit in the court's decision.[51] That case involved the question who should pay for the medical expenses of a prisoner released by Essex County to the Saint Barnabas Medical Center's Burn Center. The prisoner had been sentenced originally for fifteen days. His treatment at the Burn Center far exceeded that. But who should bear the cost of the difference? Although neither party presented factual information regarding the economic implications, Justice Pollock wrote: "To the extent that the Court considers the distribution of the risk of loss [as between all of the taxpayers of the County of Essex and all of the patients at hospitals throughout the state], its decision is consistent

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47 *Id.* at 952.

48 Unger, *supra* note 20, at 574.

49 *Id.*

50 Fox, *The Politics of Law and Economics in Judicial Decision Making: AntiTrust as a Window*, 61 N.Y.U. L. REV. 554, 555 (1986).

51 Saint Barnabas Medical Center v. County of Essex, 111 N.J. 67, 543 A.2d 34 (1988).

with other opinions of this Court."[52] In sum, Justice Pollock concluded that "a consideration of economic consequences in arriving at an appropriate decision is consistent with our jurisprudence."[53] He suggested that the court's references to "unjust enrichment" suggest "a moral basis for law (perhaps) divorced from the economic."[54] Judge Posner, who is a principal spokesman for the doctrine of law and economics, suggested that familiar concepts such as unjust enrichment are better explained in economic than moral terms.[55] Thus Justice Pollock wrote: "[T]he Court's decision may be understood not only in terms of unjust enrichment, but in terms of its economic consequences."[56] Justice Pollock cautioned, however, that such standards are more easily applied in cases involving rights traditionally measured by monetary measure rather than in cases that involve fundamental or deeply personal rights. He concluded: "Deciding cases remains an exercise in judgment, and an economic analysis, although it sheds light on a just decision, need not predetermine the outcome of a case."[57]

Thus, our jurisprudence had not yet fully incorporated at the time of our decisions the principle of maximization of preferences. Obviously, both Mr. Ciavatti and Ingersoll-Rand would prefer to keep his invention, and Mr. Shebar would prefer to remain employed while Sanyo would prefer to have him fired. What rule of law would maximize the satisfaction of these various preferences was not developed in the record.[58]

B.

The doctrine of Critical Legal Studies ("CLS") is far more difficult for me to comprehend and as yet less widely accepted than the school of economic analysis. But two paragraphs from a recent essay highlight public perceptions of the doctrine:

> What is "Critical Legal Studies," and why are people say-

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[52] *Id.* at 86, 543 A.2d at 44 (Pollock, J., concurring) (citing, among other cases, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960)).

[53] *Id.* at 87, 543 A.2d at 44 (Pollock, J., concurring).

[54] *Id.* (citing R. POSNER, ECONOMIC ANALYSIS OF LAW § 4.13, at 122 (3d ed. 1986)).

[55] *Id.*

[56] *Id.*

[57] *Id.* at 88, 543 A.2d at 45 (Pollock, J., concurring).

[58] *Cf.* Perry v. Sears Roebuck & Co., 508 So.2d 1086, 1090-91 (Miss. 1987) (Robertson, J., concurring) (Parties seeking to advance a rule of law on an economic basis should provide "credible economic analyses of the likely impact of the changes they advocate. . . . [T]hose who would press the point are obliged to do their homework.").

> ing such terrible things about it? *The Wall Street Journal*, for example, calls it a "Marxist/Anarchist movement," which holds that "law is merely a tool for the rich, and should be toppled forthwith." A senior official in the Reagan Justice Department denounces it as " '60s radicalism turned into '80s legal theory." An article in *The New Republic* labels the movement's adherents—many of whom are law professors at the nation's most prestigious law schools—"guerrillas with tenure."
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> Voices within legal academia have scarcely been more generous. One calls the published works of the movement "irresponsib[le]" and "[g]rotesque." Another suggests that "the Crits" (critical legal theorists) represent "a pathological phenomenon, a Peter Pan syndrome." And Dean Paul Carrington of Duke declares that they are "nihilist[s]," who "have an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy."[59]

How could I possibly spend, then, more than a moment of your time on such a school of thought? Yet, I suspect that much of the revolting vitriol that is heaped upon "Crits" is attributable as much to the form of their speech and to their seeming obscurantism, as to the substantive content of their thought. Would it be radical to suggest that they have not departed far from the formative period of American law which candidly recognized that the common law served the goals of the developing American society and was indeed subject to change? Like the Legal Realists of the 1930s, the Critical Legal Studies School has come to believe that the dominant legal theories at American law schools have tended to institutionalize the present state of affairs. And I take it that the present state of affairs means the belief that an objective deduction from the principles of law can be made which will provide organizing principles for decision in the various fields of law. They call this "The Politics of Reason,"[60] sort of an oxymoron like a smart Irishman.

The Critical Legal Studies School finds it disconcerting that for every rational principle that allegedly guides a judge to a decision there is a counter-principle and that in the last analysis these principles are played off against each other to achieve the result that the judge desires. It's the old joke about the lawyer who when asked "What is two plus two?" responds "What do you want it to be?" Yet despite these two trendy theories, one reducing law to efficiency and one to politics, we remain steadfast in our idealized image of the

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59 Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505 (1987) (footnotes omitted).

60 Boyle, *supra* note 11, at 685.

law. Over the Harvard Law School Library is the carved inscription, "Non Sub Homine Sed Sub Deo et Lege." So deeply rooted is this in our legal culture that we take it to mean that ours is ultimately a government of laws and not men. At the same time, we often frankly recognize that our judicial process is subject to the inevitable influence of men and today women in the law.

We have recently experienced a profound national debate about the selection of judges for the United States Supreme Court. The question asked of candidates for judicial office is "Will you make the law?" I secretly hoped that one might answer: What else did you expect me to make? Skepticism about the role of judges is found, not only in academic circles, but in every walk of life. Even Justice Brennan complains of the activism of his colleagues who created a federal common law of immunity for defense contractors when Congress had not.[61] Professor Fischl asks:

> How did we get to this ambivalent state of affairs? How did we reach a point where we seem to believe both that law is mechanical and rule-bound, on the one hand, and that it is political and highly discretionary, on the other? Where we entrust many of our most deeply divisive questions to judges, but routinely condemn them for giving us the answers.[62]

So why not tell us how to give the answer in advance?

For our purposes, the Critical Legal Studies group would suggest that once the formalistic rules of contract are destroyed, our decision would require us to embrace a counter-vision of the law.

> The countervision thus generated would start by emphasizing the impossibility of adequately distinguishing contract from domination without either changing the institutional structure of economic activity or, at least, adopting a range of second-best alternatives to this institutional reconstruction.
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> . . . .
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> The countervision refuses to acquiesce in the stark opposition of community as selfless devotion and contract as unsentimental money-making. . . . Informed by those ideas, doctrine might develop a series of distinguishing criteria to characterize situations suitable for the application of a more limited solidarity constraint, a constraint requiring each party to give some force to the other party's interests, though perhaps less than to his own. The need and the justification for

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61 *See* Boyle v. United Technologies Corp., 108 S. Ct. 2510, 2528 (1988) (Brennan, J., dissenting) ("[Congress] is the primary and most often the exclusive arbiter of federal fiscal affairs.").

62 Fischl, *supra* note 59, at 510 (footnote omitted).

> such an intermediate standard have already been anticipated by the two-tiered theory of rights that the countervision presupposes. The circumstances suitable for its application might be selected on the basis of features that would include expressed intent, induced or even unwarranted trust in fact, disparity of power manifest in one party's greater vulnerability to harm, and the continuing character of the contractual relationship.[63]

Using these principles in the *Shebar* case might have led us to conclude, precisely as we did, that the predominance of the expressed intent, the induced trust, a greater vulnerability of harm, and the continuing character of the contractual relationship would have warranted the relief granted. Less clear is the way these principles would apply to the *Ingersoll-Rand* case. Clearly the expressed intent argued in favor of the employer in that case as did the trust in fact. But the disparity in power and the lack of continuing character of the contractual relationship suggest a standoff.

I have no idea whether I have correctly interpreted the Critical Legal Studies school, but we certainly did not articulate in either of these cases such a counter-vision of contract law. The *Shebar* case was decided on essentially familiar principles of contract—no more, no less. The *Ingersoll-Rand* case was decided on the basis of a candid assessment of the public policy interests involved. We rather unselfconsciously concluded in that case that "enforcement of the holdover agreement would work an undue hardship on [the] defendant."[64]

I suspect that CLS will not gain ascendancy in common law courts in part because it is difficult to comprehend. This criticism of CLS may contain more than a grain of truth: "Many of the writings associated with the movement are extremely difficult to read and understand—some of them, perhaps, needlessly so. Accordingly, the fair-minded law student, lawyer, [and I may say, judge], or law professor who would like to draw her own conclusions about CLS faces the formidable task of having to negotiate some rather challenging terrain."[65]

The following language articulates the principles of CLS: "Legal rules and doctrines define the basic institutional arrangements of society. [That isn't too far from what Henry Hart said—"Law is an institutionalized procedure for the settlement of human

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63 Unger, *supra* note 20, at 640-42.

64 Ingersoll-Rand Co. v. Ciavatta, 110 N.J. 609, 643, 542 A.2d 879, 896 (1988).

65 Fischl, *supra*, note 59, at 506.

disputes"]. These arrangements determine the limits and shape the content of routine economic or governmental activity."[66]

But after explaining that these rules must have some generality, or else there will be a continuing struggle over the structure of society itself, Unger explains:

> Deviationist doctrine sees its opportunity in the dependence of a social world upon a legally defined formative context that is in turn hostage to a vision of right. In a limited setting and with specific instruments, the practice of expanded doctrine [CLS] begins all over again the fight over the terms of social life. It is the legal-theoretical concomitant to a social theory that sees transformative possibilities built into the very mechanisms of social stabilization and that refuses to explain the established forms of society, or the sequence of these forms in history, as primarily reflecting practical or psychological imperatives. Enlarged doctrine extends into legal thought a social program committed to moderate the contrast between routinized social life and its occasional revolutionary re-creation. It wants something of the quality of the latter to pass into the former.[67]

Contrast this with the extraordinary simplicity of the New Jersey Supreme Court in a case that dispatched in a single stroke the insulated status of the holder-in-due-course.[68] First, quoting Justice Frankfurter in *United States v. Bethlehem Steel Corp.*,[69] as he had in *Henningsen v. Bloomfield Motors*,[70] Justice Francis said for the New Jersey Supreme Court:

> But is there any principle which is more familiar or more firmly embedded in the history of Anglo-American law than the basic doctrine that the courts will not permit themselves to be used as instruments of inequity and injustice? Does any principle in our law have more universal application than the doctrine that courts will not enforce transactions in which the relative positions of the parties are such that one has unconscionably taken advantage of the necessities of the other?[71]

He went on:

> Just as the community has an interest in insuring (usually by means of the legislative process) that credit financing contracts facilitating sales of consumer goods conform to community-

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66 Unger, *supra* note 20, at 582.
67 *Id.* at 583.
68 *See* Unico v. Owen, 50 N.J. 101, 232 A.2d 405 (1967).
69 315 U.S. 289, 326 (1942).
70 32 N.J. at 358, 398, 161 A.2d 69, 91 (1960).
71 *Unico*, 50 N.J. at 111-12, 232 A.2d at 411.

> imposed standards of fairness and decency, so too the courts, in the absence of controlling legislation, in applying the adjudicatory process must endeavor, whenever reasonably possible, to impose those same standards on principles of equity and public policy.[72]

Of Justice Francis, Justice Proctor said: "Justice Francis wrote many opinions that have indeed become classics in the literature of the law. His opinions are graceful and read easily. The language is never stuffy and the reason never obscured. His opinions have been cited widely by the courts of this country. Among them are the *Henningsen v. Bloomfield Motors, Inc.* and the *Santore* cases. These great opinions put a heart into the products liability law."[73]

C.

Why then was it so acceptable to the New Jersey legal community for Justice Francis to state that courts in the adjudicatory process must endeavor whenever reasonably possible to impose standards of fairness upon the contracting arrangements of parties on principles of equity and public policy? None would have ever considered him a deviationist. And yet in essence what he was doing was what the CLS group is suggesting—holding that it is the role of the community that shapes the development of law. It is the community's understanding of fair dealing that counts. Would we dare say of Justice Francis that principles of solidarity motivated his jurisprudential doctrine?

I suspect that there is a much less subtle explanation why courts are permitted to shape the law to meet these community concepts of fairness. Justice Stevens has explained:

> [T]he judges at the time the Constitution was adopted were in a sense lawmakers in the common law tradition. They had the authority not only to declare invalid the acts of inferior bodies, but also to decide cases in which there was no written law that gave the courts guidance on how to resolve the question. Part

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72 *Id.* at 112, 232 A.2d at 411.

73 Address by Justice Proctor, Memorial Proceedings for The Honorable John J. Francis, Sr. and The Honorable Frederick W. Hall (September 10, 1984). I once heard a lecture on the intellectual origins of products-liability in New Jersey advancing the thesis that the conceptual roots of *Henningsen* were to be found in the works of Frederick Kessler, a German scholar who had fled the Hitler regime to the United States. Kessler equated industrial monopoly with totalitarism and made repeated references to commercial fascism. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law*, 14 J. LEGAL STUDIES 461 (1985). How bemused was I to hear these remarks, having heard Justice Proctor's remarks but a few weeks before.

> of the tradition of the judge's business at the time was to decide difficult cases and occasionally to make law. It was part of what had to be done in order to govern society.[74]

There is nothing revolutionary about that. There is nothing deviationist about that. It is a simple recognition of the institutionalized procedure that our society has established for the settlement of human disputes, a tradition for judges to "decide difficult cases and occasionally to make law."[75] And in this work of exercising the "prerogative of choice" we are pretty much on our own.

> The working judge is not and never has been a philosopher. He has no coherent system, no problem solver for all seasons, to which he can straightaway refer the normative issues. Indeed, if he could envision such a system for himself, he would doubt that, as a judge, he was entitled to resort to it; he would think he must be less self-regarding. If he should make a direct appeal to the accredited moral philosophies of our time, he would probably find no answers. Moreover, he would face the difficulty that there is no superformula by which he could elect among the philosophies, if it came to that.[76]

The members of my court laugh at me when I tell them that I adhere to the Coral Reef School of jurisprudence. They associate it with the University of Miami Law School. But I suspect that, like the CLS movement, the idea of law as a coral reef contains elements of truth. For me, no greater guide to the decision of cases ever has been furnished than Cardozo's, *The Nature of the Judicial Process*—that simple, tiny book which "investigated the uses of discretion: when to follow precedent, when to temporize, when to forge ahead, and which factors to consider when abandoning or rejecting precedent."[77] On the paradox of affairs that has us yearning for both an immutable law and mutable judges, Judge Wahl quotes Learned Hand's review of Cardozo's book:

> The position of an English speaking judge, especially, presents an apparent contradiction that has always exorcised those who are speculatively inclined. The pretention of such a judge is, or at least it has been, that he declares pre-existing law, of which he is only the mouthpiece. . . .Yet the whole structure of the common law is an obvious denial of this theory; it stands as a monument slowly raised, like a coral reef, from the minute

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74 Stevens, *Commentary*, 49 U. PITT. L. REV. 723, 726-27 (1988).

75 *Id.* at 727.

76 Kaplan, *Encounters With O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1849 (1983).

77 Wald, *Some Thoughts on Judging as Gleaned from One Hundred Years of the Harvard Law Review and Other Great Books*, 100 HARV. L. REV. 887, 897 (1987).

> accretions of past individuals, of whom each built upon the relics which his predecessors left, and in his turn left a foundation upon which his successors might work.
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> We have grown more self-conscious of late and can no longer content ourselves with fictions; and candid men like Judge Cardozo will not stomach these equivocations which keep the promise to the ear and break it to the hope. So, while he is aware enough of the limitations upon the judge's freedom, he is more acutely aware than many of his contemporaries of the extent to which he must choose responsibly.[78]

And chose we must, for if we decide that an employer is not bound by its solemn promises we make law no less than when we hold the employee bound.

Only recently did a very distinguished friend of this organization, Andy Kaufman, (his father was long a practicing attorney in Newark) remind us of the continuing vitality of Cardozo's thought. He wrote:

> Some critics would have judges deduce doctrine from carefully thought out philosophic, political or economic models. Other critics believe that judicial principles are completely indeterminate and manipulable and that judging is virtually the equivalent of legislating; they view judges as nearly free to decide cases on the basis of their personal notions of justice.
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> Most judges have resisted the blandishments of these schools most of the time. It is to them that Cardozo still speaks. . . . [He tells them]: "History or custom or social utility or some compelling sense of justice or sometimes perhaps a semi-intuitive apprehension of the pervading spirit of our law must come to the rescue of the anxious judge and tell him where to go."[79]

How well grounded then in Cardozo's thought was Justice Francis' invalidation of the automobile manufacturer's disclaimer of warranty. Justice Francis stated that "an instinctively felt sense of justice cries out against such a sharp bargain."[80]

Justice Brennan, who directly preceded Justice Francis on the New Jersey Appellate Division, is equally skeptical that law may be found in abstractions. He explained that:

> At the turn of the century the formalism of American jurispru-

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[78] *Id.* (quoting Hand, Book Review, 35 HARV. L. REV. 479, 479 (1929)).

[79] Kaufman, *Mr. Cardozo's Defense of the Common Law*, N.Y. Times, July 9, 1988, at 27, col. 2.

[80] *Henningsen*, 32 N.J. at 388, 161 A.2d at 85.

> dence made it an objective science whose progress depended upon a strict adherence to established precedents. This was admittedly a notion of law wholly unconcerned with the broader extralegal values pursued by society at large or by individuals. It lived in a heaven of abstract technicalities and legal forms, and found its answers to human problems in an aggregation of already existing rules, or found no answers at all. The substantive problems of human living were left for adjustment to the psychologists, sociologists, educators, economists, bankers and other specialists. But not too many decades ago practitioners of the law came to see that law must be a living process responsive to changing human needs. The shift must be away from fine-spun technicalities and abstract rules. The vogue for positivism in jurisprudence—the obsession with what the law is, which leaves no room for choice between equally acceptable alternatives—had to be replaced by a jurisprudence that recognizes human being as the most distinctive and important feature of the universe which confronts our senses, and of the function of law as the historic means of guaranteeing that pre-eminence. . . . In a scientific age it must ask, in effect, what is the nature of the universe with which they are confronted. . . . Why is a human being important; what gives him and her dignity; what limits their freedom to do whatever they like; what are their essential needs; whence comes their sense of injustice?[81]

In the last analysis, law is a human product. It serves human needs. It will always be the distinct product slowly raised like a coral reef from the minute accretions added slowly by numerous individuals. The quality and character of those individuals will determine the shape of that monument. No one denies that. Justice Proctor explained the wellspring of Justice Francis' judicial philosophy in these simple, yet profound words:

> Justice Francis was an outstanding trial lawyer for many years before he was appointed to the Bench. . . . This rich trial experience as an active practitioner sharpened the sense of fairness that he was born with. This was evident in his judicial thinking and in the opinions he wrote. His background surely influenced the approach he took. He knew they were living in a time of new demands upon the courts. Outworn judge-made law and concepts were overtaken by social, economic, and political development. Greater protection for the average man was needed. His approach and his opinions exhibit the

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[81] Speech of Justice William J. Brennan, Jr., New York University School of Law, Annual Survey of American Law (Apr. 15, 1982).

> depth of his compassion and his fervent desire to see that the little fellow got justice.[82]

Is this all there is, then? Of course not. "English judges believe that it is necessary of the law to retain some mystique, some mystery, and some permanence, if it is to hold its persuasive power and emotive force over the public. Demystification of the law is all very well, but the power of the law over the minds of men will surely collapse if the process [of analysis] goes too far."[83]

I think not. In his lecture to this organization several years ago, Justice Handler explained the jurisprudential process by which a court should undertake to address the few novel, tough cases that evoke a judge's "prerogative of choice."[84] He concluded that in those social areas courts are not free to substitute their predilections. A court must draw upon existing precedent and major relevant principles. It must also consider established rules of laws. Using our decision in *Department of Environmental Protection v. Ventron Corp.*,[85] as an illustration, he said that the court's holding imposing strict liability on predecessors in title for pollution damage "articulates a new rule of law fused from precedent, principle and public policy."[86] The correctness of such a new rule, he cautions, springs not from our dogmatic authority to declare it, but from the intrinsic integrity of the court's decision. Justice Handler surmised:

> In addition to acting responsibly within this [jurisprudential] framework, courts must also be perceived as acting responsibly; in this sense, courts must be accountable. This entails intellectual candor, clarity and completeness. The public should be able to understand readily and fully what the courts are doing and why they are doing it.[87]

This is what I call the "Sal's Tavern Test"—"In a self-governing society, law derives much of its normative force from acceptance and understanding of the justness of its principles."[88] Professor Kaplan has imposed this same principle of judging. It is the hall-

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82 Speech by Justice Haydn Proctor, In Memoriam of Justice John Francis, Sr. (Sept. 10, 1984).

83 Atiyah, *The Legacy of Holmes through English Eyes*, 63 B.U.L. REV. 341, 381 (1983).

84 Handler, *supra* note 35, at 571.

85 94 N.J. 473, 468 A.2d 150 (1983).

86 Handler, *supra* note 35, at 591.

87 *Id.* at 596.

88 Buckley v. Estate of Pirolo, 101 N.J. 68, 82, 500 A.2d 703, 711 (1985) (O'Hern, J., concurring). Since its opening on Shrewsbury Avenue in Red Bank, New Jersey, following the repeal of Prohibition in 1933, Sal's Tavern remains largely unaltered by time. Its patrons engage in occasional public commentary.

mark of a good opinion, he says, that it does a double job of persuading the "intelligent outsiders as well as professionals" of the justification for the rule of law adopted.[89]

III

Were we right then in choosing whether the visions of autonomy (every man a king) or community (a nation of employees) was the dominant vision in either the *Ingersoll-Rand* or the *Shebar* case? We have attempted to impose no personal view of employment relations upon our common law. An employer is still free to fire an employee for no good reason or no reason at all but not for a forbidden reason.[90] Certainly in the *Shebar* case we were aided by an intuitive sense of injustice evoked by the employer's solemnly-made promise of secure employment, inducing an employee to give up the offer of a better job, while at the same time shopping around for his replacement. In the *Ingersoll-Rand* case, rather equal competing claims predicated on fairness could be made. Tipping the scale may have been in the community's interest in the free flow of inventive ideas after termination of employment.

It must undoubtedly appear to the CLS school that we have but manipulated theory, choosing autonomy in one case and community in the other to advance the claims of employees in each. I can only say that in each case we attempted to fashion a rule of law "fused from precedent, principle and public policy."[91] How well we have succeeded will be measured by the acceptance of our decisions.

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89 Kaplan, *supra* note 76, at 1849.

90 Velantzas v. Colgate-Palmolive Co., 109 N.J. 189, 191-92, 536 A.2d 237, 238 (1988).

91 Handler, *supra* note 35, at 591.