Cross Purposes & Unintended Consequences: Karl Llewellyn, Article 2, and the Limits of Social Transformation

Danielle Kie Hart*

Abstract

Despite attempts to reform the law to eliminate hierarchies that subordinate groups of people, the law usually ends up re-instantiating those hierarchies. This "preservation through transformation" phenomenon occurs consistently, over time and across legal disciplines. Karl Llewellyn's efforts at drafting Article 2 of the Uniform Commercial Code are no different. Llewellyn attempted a paradigm shift in contract formation when he sought to decouple contract law from its formalistic roots and bring it back in touch with reality. But in so doing, the law-in-action strand of Legal Realism ended up working at cross purposes with the other, critical strand of Realism. As a result, Llewellyn's paradigm shift only served to exacerbate structural problems built into the contract law system. This Essay attempts to explain why Llewellyn's efforts to reform contract law have had such serious long-term but unintended consequences for the modern contract law system. It does so in an unorthodox way. Instead of drawing from traditional contract-law scholarship, the Essay imports insights from two seemingly unrelated fields—civil rights law and social philosophy. The Essay's central thesis is that revising existing doctrine will rarely if ever result in meaningful change in the modern contract law system. In fact, doctrinal reform will almost always be counter-productive, as reforms from within will only rebuild power, advancing and further protecting the interests of the privileged. Understanding and revealing this trap is essential to finding a path to lasting change. Contrary to traditional contract-law critiques, meaningful reform will only occur by understanding power—who has it, why they have it, and how they keep it.

* Professor of Law, Southwestern Law School; LL.M. Harvard Law School; J.D. William S. Richardson School of Law, University of Hawaii; B.A. Whitman College. This Essay benefitted greatly from a sabbatical leave granted to me by Southwestern Law School. My sincere thanks go to Roman Hoyos, Austen Parrish, Gowri Ramachandran, Arthur McEvoy, and Dean Bryant Garth for their valuable comments. Thanks also go to my research assistant Margaret Leidy and the editors at the Nevada Law Journal.

INTRODUCTION

Contract law is full of unacknowledged contradictions that have real life consequences. It purports, for example, to provide neutral and objective rules to govern every aspect of a contract, from its making[1] to its performance,[2] to its remedies in the event of breach.[3] But instead of living up to its promise of providing neutral rules, contract law continues to privilege and protect unequal bargaining power, which in turn reinforces societal inequities and privileges rather than reduces the coercion that exists in every contract.[4] In a world of dramatically expanding inequality,[5] it seems more than appropriate to examine contract law's role in this reproduction of inequality.

Last century's attempt at a paradigm shift in contract formation is embedded in one strand of Legal Realism scholarship—a strand most often identified with Karl Llewellyn and Article 2 of the Uniform Commercial Code.[6] That strand of legal realism, commonly referred to as the reformist or law-in-action strand, sought to decouple contract law from its formalistic roots and bring it back in touch with reality.[7] But in so doing, the law-in-action strand of Legal Realism ended up working at cross purposes with the other, critical strand of Realism. As a practical consequence, Llewellyn's paradigm shift in contract law only served to intensify the structural problems built into the contract law system.

This Essay takes a preliminary stab at explaining why Llewellyn's efforts to reform contract law have had such serious long-term but unintended consequences for the modern contract law system. It does so in an unorthodox way. Instead of drawing from traditional contract-law scholarship, the Essay imports insights from two fields that at first blush seem distant: civil rights law and social philosophy. The Essay's central thesis is that tweaking existing doctrine will never meaningfully change the modern contract law system. In fact, doctri-

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[1] *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 9–16 (1979) (Formation of Contracts—Parties and Capacity); *id.* §§ 17–70 (Formation of Contracts—Mutual Assent); *id.* §§ 71–109 (Formation of Contracts—Consideration).

[2] *See, e.g.*, *id.* §§ 200–30 (The Scope of Contractual Obligations); *id.* §§ 231–60 (Performance and Non-Performance).

[3] *See, e.g.*, *id.* §§ 344–85 (Remedies).

[4] *See generally* Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions* (forthcoming) [hereinafter Hart, *Reality*] (on file with author).

[5] *See, e.g*., Jared Bernstein et al., *Pulling Apart: A State-by-State Analysis of Income Trends*, ECON. POL'Y INST. (Apr. 8, 2008), http://www.epi.org/publications/entry/studies_pulling_apart_2008/ ("[T]he incomes of the country's richest families climbed substantially over the past two decades, while middle- and lower-income families saw only modest increases in income."); Andrew Sum & Ishwar Khastiwada, *Labor Underutilization Problems of U.S. Workers Across Household Income Groups at the End of the Great Recession: A Truly Great Depression Among the Nation's Low Income Workers Amidst Full Employment Among the Most Affluent*, CENTER FOR LAB. MARKET STUD. (Feb. 1, 2010), http://iris.lib.neu.edu/clms_pub/26/, (lower income people disproportionately lost jobs and are underemployed vis-à-vis the more affluent); Timothy Noah, *The Great Divergence*, SLATE MAG. (Sept. 16, 2010, 9:19PM), http://img.slate.com/media/3/100914_NoahT_GreatDivergence.pdf (1915—the richest 1% possessed 18% of the nation's income; today, the richest 1% account for 24% of the nation's income).

[6] *See infra* Part I.

[7] *See infra* Part I.

nal reform will almost always be counterproductive, as reforms from within will only rebuild power, advancing and further protecting the interests of the privileged. Understanding and revealing this trap is essential to finding a path to meaningful, lasting change.

The Essay has three parts. Part I sets the stage by summarizing the contributions made by the Legal Realists and, in particular, Karl Llewellyn. Part II then explores how Llewellyn's project within Legal Realism has worked at cross-purposes to the goals of other Legal Realists. Specifically, by pursuing law in action, Llewellyn ultimately, although unintentionally, increased the power embedded in contract law and exacerbated, rather than reduced, inequities. Drawing from leading scholarship in other fields, Part III reveals why the law-in-action strand of Legal Realism was destined to fail and continues to fail. The Essay concludes with some tentative thoughts on how to move forward.

A key point to underscore before continuing is that this Essay's aim is not to provide a comprehensive recipe for contract law reform. Such an ambitious project is beyond the scope of an essay. But while perhaps less ambitious, the Essay's bottom line is equally important. It reveals an intrinsic failing in the dominant approaches to contract law reform and seeks to spur scholarly discussion on how to more meaningfully dismantle current inequities entrenched in the law. Contrary to traditional contract law critiques, this Essay concludes that meaningful reform will only occur by understanding power—who has it, why they have it, and how they keep it.

I. LEGAL REALISM AND KARL LLEWELLYN

The story of Legal Realism of the 1920s and 1930s[8] is still debated[9] and full of contradictions, both internal[10] and external.[11] This Essay does not attempt to resolve these contradictions or to engage in the substantive debate surrounding Legal Realism. That said, there seems to be no disagreement that Karl Llewellyn was a Legal Realist.[12] Consequently, a brief history of Legal

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[8] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 169 (1992) ("[Legal Realism] usually refers to the body of legal thought produced for the most part by law professors at Columbia and Yale Law Schools during the 1920s and 1930s."); BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 18, 87 (2007).

[9] JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE 1–2 (1995); *see also* HOROWITZ, *supra* note 8, at 170; LEITER, *supra* note 8.

[10] HORWITZ, *supra* note 8, at 208–09.

[11] *Compare* NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 107 (1995), *and* HORWITZ, *supra* note 8, at 195–98 (situating Robert Hale squarely within Legal Realism), *with* LEITER, *supra* note 8, at 18–19, 88 (arguing that Robert Hale was merely a marginal figure within Realism). *See generally* LAURA KALMAN, LEGAL REALISM AT YALE 1927–1960 (1986) (legal realism as functionalism), Joseph William Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 476–503 (1988) (reviewing KALMAN, *supra*) [hereinafter Singer, *Realism*] (disagreeing with Laura Kalman's interpretation of Legal Realism); Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEX. L. REV. 731, 731 (2009) (challenging a conventional narrative about Legal Realism that credits the Realists "with bringing about a revolutionary shift in views about judging in the American legal tradition").

[12] *See, e.g.*, DUXBURY, *supra* note 11, at 68; HORWITZ, *supra* note 8, at 169; KALMAN, *supra* note 11, at 67; LEITER, *supra* note 8, at 61.

Realism is necessary, if only to situate Llewellyn within it. This Essay therefore offers the following as one, obviously simplified, version of the Realism story, one that intentionally glosses over the contradictions.

Legal Realism of the 1920s and 1930s was not an intellectual movement.[13] It did not represent a distinctive methodology or embody a systematic jurisprudence.[14] Instead, Legal Realism, with its emphasis on social science,[15] is probably best seen as a continuation of the sociological jurisprudence[16] of the pre-World War I Progressives,[17] which directly challenged early twentieth century classical legal thought.[18] Notwithstanding this continuity, there are enough differences to treat Legal Realism as a distinct intellectual outlook.[19] And, regardless of approach, "[a]ll Realists shared one basic premise—that the law had come to be out of touch with reality."[20]

The attack on classical legal thought spawned contradictory responses from Legal Realists.[21] As a result of these contradictions, two strands of Legal Realism emerged: one critical and one reformist.[22]

The critical strand of Legal Realism challenged classical legal thought's conceptions of law and legal reasoning,[23] which drew sharp distinctions between law and politics[24] and portrayed law as an autonomous and self-exe-

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[13] Brian Leiter, for example, calls "American Legal Realism . . . the major intellectual event in 20th century American legal practice and scholarship." LEITER, supra note 8, at 1. *See also* DUXBURY, *supra* note 11, at 4, 68–69; WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 26, 376 (1985).

[14] DUXBURY, *supra* note 11, at 64–65; HORWITZ, *supra* note 8, at 169–70; SCHLEGEL, *supra* note 9, at 8. *But see* KALMAN, *supra* note 11, at 3 (claiming the Realists developed a jurisprudence); LEITER, *supra* note 8, at 61 (disputing the claim that Legal Realism cannot be "defined"); Grant Gilmore, *In Memoriam: Karl Llewellyn*, 71 YALE L.J. 813, 814 (1961) (Llewellyn himself told Gilmore that Realism was a methodology).

[15] *See generally, e.g.*, HORWITZ, *supra* note 8; KALMAN, *supra* note 11.

[16] *See* DUXBURY, *supra* note 11, at 58 (discussing Pound's sociological jurisprudence); HORWITZ, *supra* note 8, at 189 ("Progressives treated social science research as providing a necessary demystifying first step toward the goal of social reform. In short, social science was another way of undermining disembodied formalism.").

[17] DUXBURY, *supra* note 11, at 94–95; HORWITZ, *supra* note 8, at 209; G. Edward White, *From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America*, 58 VA. L. REV. 999, 1020 (1972).

[18] DUXBURY, *supra* note 11, at 9–10, 77; HORWITZ, *supra* note 8, at 169, 171; EDWARD A. PURCELL, JR., THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE 79 (1973).

[19] For example, the Progressive reformist agenda was court-centered, while Legal Realism concentrated on statutory and administrative change. HORWITZ, *supra* note 8, at 170.

[20] *Id.* at 187; *cf.* KALMAN, *supra* note 11, at 9.

[21] *See supra* note 11 and accompanying text (noting internal contradictions).

[22] HORWITZ, *supra* note 8, at 209; *cf.,* SCHLEGEL, *supra* note 9, at 7–8.

[23] DUXBURY, *supra* note 11, at 3 (explaining legal formalism, which conceived of law "as a small body of formally interrelated fundamental doctrinal principles"); *id.* at 10–32; KALMAN, *supra* note 11, at 3–4 (Realists challenged the conceptualism of Classical Legal Thought, which was an attempt to "reduce law to a set of rules and principles" that "guided judges to their decision."); *id.* at 10–12; PURCELL, *supra* note 18, at 74–75; Elizabeth Mensch, *The History of Mainstream Legal Thought*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 23, 32 (David Kairys ed., 3d. ed. 1998) [hereinafter Mensch, *History*].

[24] HORWITZ, *supra* note 8, at 170; SCHLEGEL, *supra* note 9, at 1; Mensch, *History*, *supra* note 23, at 28–32; Singer, *Realism*, *supra* note 11, at 478–79.

cuting discourse.[25] By systematically deconstructing the free market[26] and challenging the coherence of what was supposed to be purely private law in the form of property[27] and contract rights,[28] the Realists were able to expose the omnipresence of the state in the creation and distribution of rights and wealth in society.[29] In so doing, the Realists sought to debunk the claim of the older legal orthodoxy that law was neutral, natural, and apolitical,[30] and expose the politically conservative, status-quo-oriented nature of classical legal thought.[31] The critical strand of Legal Realism, therefore, was at least in part a critique of power[32]—power that was embedded but concealed in law, in the ostensibly free market, and in society in general.

The reformist strand of Legal Realism set out to determine the "law in action;"[33] that is, to figure out the way the law actually worked in society in

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[25] *See* DUXBURY, *supra* note 11, at 10–32; HORWITZ, *supra* note 8, at 193; KALMAN, *supra* note 11, at 10–12; PURCELL, *supra* note 18, at 74–75; SCHLEGEL, *supra* note 9, at 10; Mensch, *History*, *supra* note 23, at 29–30, 33; Singer, *Realism*, *supra* note 11, at 475–503.

[26] *See generally* Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923) [hereinafter Hale, *Coercion*]; Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943) [hereinafter Hale, *Duress*]; Singer, *Realism*, *supra* note 11, at 482–96.

[27] *See generally* Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1928 [hereinafter Cohen, *Property*]; Hale, *Coercion*, *supra* note 26; Singer, *Realism*, supra note 11, at 487–95. It is certainly debatable whether Morris Cohen can be called a Legal Realist. *See, e.g.*, SCHLEGEL, *supra* note 9, at 7. Morris Cohen, along with Robert Hale and others, however, did mount devastating critiques against the Classical legal order. Grouping these critical writers together under the heading of Legal Realism, therefore, where Legal Realism is not seen as a jurisprudence or even a coherent movement, *see supra* text accompanying notes 11–17, but rather as an "intellectual mood" seems entirely legitimate. *See* DUXBURY *supra* note 11, at 4 (realism as an intellectual mood); HORWITZ, *supra* note 8, at 182–85; SCHLEGEL, *supra* note 9, at 7–8; TWINING, *supra* note 13, at 3 (Realists are a "variously defined aggregation of American jurists.").

[28] *See generally* Morris R. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933) [hereinafter Cohen, *Contract*]; Hale, *Coercion*, *supra* note 26; Hale, *Duress*, *supra* note 26; Singer, *Realism*, *supra* note 11, at 482–87.

[29] *See generally* Cohen, *Contract*, *supra* note 28; Cohen, *Property*, *supra* note 27; Hale, *Coercion*, *supra* note 26; Hale, *Duress*, *supra* note 26; Robert L. Hale, *Law Making by Unofficial Minorities*, 20 COLUM. L. REV. 451 (1920) [hereinafter Hale, *Minorities*]; Mensch, *History*, *supra* note 23, at 33–35; Singer, *Realism*, *supra* note 11, at 482.

[30] HORWITZ, *supra* note 8, at 170; PURCELL, *supra* note 18, at 93 ("In attacking [the] traditional abstractions and nonempirical concepts of justice [of Classical Legal Thought, the Realists] were usually assailing what they considered the practical injustices of American society."); WILLIAM M. WIECEK, LIBERTY UNDER LAW: THE SUPREME COURT IN AMERICAN LIFE 187 (1988); Mensch, *History*, *supra* note 23, at 33–34.

[31] DUXBURY, *supra* note 11, at 25–32 (discussing nineteenth century court centered allegiance to a *laissez-faire* world view); HORWITZ, *supra* note 8, at 201; KALMAN, *supra* note 11, at 13 ("[T]he conceptualism behind [Langdell's] case method bolstered the laissez-faire economics of the age."). *But see* Tamanaha, *supra* note 11, at 771–78 (contesting).

[32] *See* Mensch, *History*, *supra* note 23, at 35; Singer, *Realism*, *supra* note 11, at 475–503. *But see* DUXBURY, *supra* note 11, at 7 (Critical Legal Studies viewed Legal Realism as embodying a particular type of critique); LEITER, *supra* note 8, at 18–20, 88 (arguing that this interpretation of the Realist critique is largely the invention of Critical Legal Studies).

[33] *See generally* Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910).

terms of its impact on individuals and institutions.[34] To bring the law back in touch with reality, the Realists believed that the law needed to correctly mirror social relations.[35] To accomplish this task, the Realists adopted naturalism,[36] a methodology that required legal theorizing to be firmly situated and in line with the empirical approach in the natural sciences.[37] In conformity with this approach,[38] the Realists set out to develop and collect a series of social science studies that would accurately describe social reality.[39] Laws and institutions could then be crafted that would better reflect and be better prepared to deal with a more complex social reality.[40] This undertaking was specifically non-normative in nature.[41] The "Is," in other words, was consciously separated from the "Ought."[42] The purpose of legal theory, therefore, was merely to identify and describe, not justify, the social reality that was uncovered.[43]

Karl Llewellyn is known as one of the most important figures in Legal Realism, though this, too, is debated.[44] Regardless of his actual place in the

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[34] DUXBURY, *supra* note 11, at 95–96; HORWITZ, *supra* note 8, at 210; KALMAN, *supra* note 11, at 9; *cf.* WHITE, *supra* note 17, at 1014.

[35] HORWITZ, *supra* note 8, at 209.

[36] PURCELL, *supra* note 18, at 3–12 (discussing scientific naturalism in American thought generally); *id.* at 74–94 (discussing naturalism in the context of Legal Realism).

[37] *Cf.* LEITER, *supra* note 8, at 30–31, 34; Walter Wheeler Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457, 458 (1924); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71, 159 (1924); Hessel E. Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468, 481 (1928). Kalman argues that the Realists' jurisprudence is most aptly called functionalism. KALMAN, *supra* note 11, at 3. There were, however, dissenting voices and different approaches to addressing the law in action question. *See* DUXBURY, *supra* note 11, at 80–81; HORWITZ, *supra* note 8, at 209; Morris R. Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352, 364–66 (1931); *see also* TWINING, *supra* note 13, at 140 (contesting the claim that Llewellyn and the Realists "identified natural science with legal science").

[38] DUXBURY, *supra* note 11, at 82 (arguing the Realist appeal to the natural sciences was not an attempt to initiate lawyers in the ways of natural sciences, but rather was "an appeal for lawyers to become familiar with the methods of the natural sciences specifically through the methods of the social sciences"); KALMAN, *supra* note 11, at 20 (discussing the Realist methodology).

[39] HORWITZ, *supra* note 8, at 209–10; Mensch, *History*, *supra* note 23, at 33.

[40] Leiter calls this aspect of the Legal Realist program, "pragmatism." LEITER, *supra* note 8, at 30–31, 52; *see also* HORWITZ, *supra* note 8, at 209; Arthur F. McEvoy, *A New Realism for Legal Studies*, 2005 WIS. L. REV. 433, 443 (2005).

[41] LEITER, *supra* note 8, at 63. *But see* KALMAN, *supra* note 11, at 32 (most realists were reformers); PURCELL, *supra* note 18, at 90–92 (noting Morris Cohen was very much a critic of the Realist ethical relativism).

[42] HORWITZ, *supra* note 8, at 210 (noting that Llewellyn intended the separation of the "Is" from the "Ought" to be temporary); PURCELL, *supra* note 18, at 82, 85; TWINING, *supra* note 13, at 140 (claiming Llewellyn was not indifferent to values).

[43] *Cf.* LEITER, *supra* note 8, at 63.

[44] *Compare* PURCELL, *supra* note 18, at 80 (Llewellyn was "often regarded as the most important of the new critics."); TWINING, *supra* note 13, at 82 (naming Llewellyn as one of two leading Realists); *id.* at 367 (Llewellyn was the realist movement's "most sophisticated jurist, and a central figure in its most important controversy."), *and* Zipporah Batshaw Wiseman, *The Limits of Vision: Karl Llewellyn and the Merchant Rules*, 100 HARV. L. REV. 465, 466 (1987) (Llewellyn was a central figure), *with* HORWITZ, *supra* note 8, at 171 (calling it ironic that Llewellyn came to be known as the "undisputed guru of Realism," given Llewellyn's inexperience and lack of jurisprudential work at the time he "defined" Legal Realism);

historiography, it seems undisputable that Llewellyn pursued the law in action or reformist strand of Legal Realism.[45] Nowhere is this better reflected than in Llewellyn's own writings.[46] A couple of examples will have to suffice to establish this point. In the conclusion to *A Realistic Jurisprudence*, for instance, Llewellyn argued that the "focus of study . . . for all things legal has been shifting," such that a "clearer visualization of the problems involved moves toward ever-decreasing emphasis on words, and ever-increasing emphasis on observable behavior."[47] Then, in *Some Realism About Realism*, Llewellyn remonstrated that, "no judgment of what Ought to be done in the future with respect to any part of law can be intelligently made without knowing objectively, as far as possible, what that part of law is now doing."[48] Tellingly, Llewellyn went on to state that, "'[l]aw' without effect approaches zero in its meaning. To be ignorant of its effect is to be ignorant of its meaning. To know its effect without study of the persons whom it affects is impossible."[49]

To situate Karl Llewellyn within Legal Realism, therefore, seems relatively straightforward. To pin down Llewellyn's contribution(s) to American jurisprudence in general or to Legal Realism in particular, however, is beyond the scope of this Essay. Others are much more qualified to undertake that task.[50] It is sufficient for the purposes of this Essay to note that the Uniform Commercial Code has been called "the flower of the legal realist movement in

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SCHLEGEL, *supra* note 9, at 6 (Llewellyn was on the margins of Legal Realism), *and* Tamanaha, *supra* note 11, at 736.

[45] *See* AMERICAN LEGAL REALISM 51 (William W. Fisher III et al. eds., 1993); Wiseman, *supra* note 44, at 470–71, 493; John M. Breen, *Statutory Interpretation and the Lessons of Llewellyn*, 33 LOY. L.A. L. REV. 263, 305–06 (2000); Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 STAN. L. REV. 621, 623–24 (1975); Frederick Schauer, *Editor's Introduction*, *in* KARL N. LLEWELLYN, THE THEORY OF RULES 1, 5–6 (Frederick Schauer ed., 2011).

[46] *See generally* Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) [hereinafter Llewellyn, *Jurisprudence*]; Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931) [hereinafter Llewellyn, *Realism*]; Karl N. Llewellyn, *One "Realist's" View of Natural Law for Judges*, 15 NOTRE DAME LAW. 3 (1939) [hereinafter Llewellyn, *Natural Law*]; Karl N. Llewellyn, *Our Case-Law of Contract: Offer and Acceptance, II*, 48 YALE L.J. 779 (1939) [hereinafter Llewellyn, *Offer*]; Karl N. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1930) [hereinafter Llewellyn, *Contract*].

[47] Llewellyn, *Jurisprudence*, *supra* note 46, at 464.

[48] Llewellyn, *Realism*, *supra* note 46, at 1236–37.

[49] *Id.* at 1249; *see also* Llewellyn, *Contract*, *supra* note 46, at 705 (posing and attempting to answer the broad question of "the role of contract in the social order, the part that contract plays in the life of men"); Llewellyn, *Natural Law*, *supra* note 46, at 6 ("Guidance for a particular society must plant its feet in that society. And guidance for a positive legal scheme must rub elbows with that scheme, or grow chimerical."). In Llewellyn, *Offe*r, *supra* note 46, Llewellyn's main argument is that the dichotomy drawn between bilateral and unilateral contracts under traditional (or orthodox) contract law was completely meaningless when factually tested in the context of business bargains. *See also* Eugene F. Mooney, *Old Kontract Principles and Karl's New Kode: An Essay on the Jurisprudence of Our New Commercial Law*, 11 VILL. L. REV. 213, 227 (1966) (reiterating the thesis of Llewellyn, *Offer*, *supra* note 46).

[50] *See generally* TWINING, *supra* note 13; Breen, *supra* note 45; Gilmore, *supra* note 14; Wiseman, *supra* note 44.

American law,"[51] and Karl Llewellyn, as the Chief Reporter[52] of the UCC, was its "principal architect."[53] Notwithstanding his contribution to the UCC project as a whole, Llewellyn is probably most well-known for drafting Article 2 (covering the sale of goods).[54] Llewellyn's pursuit of the law in action is stamped all over this part of the Code.[55] Unfortunately, in pursuing the law in action, Llewellyn ultimately worked at cross-purposes with the critical strand of Legal Realism, and this produced (and continues to produce) serious but unintended consequences.

II. Cross Purposes and Unintended Consequences

Karl Llewellyn was extremely critical of the orthodox conception of contract law that was premised on what he considered an archaic formation structure consisting of offer, acceptance, and consideration.[56] To Llewellyn, this model was unrealistic because it did not actually function well and did not comport with reality.[57] He therefore attempted a paradigm shift away from the idea of a promise as the basis of contractual obligation in favor of the parties' agreement in fact.[58] He did so in a specific attempt to substitute a more dynamic agreement construct, one that was transaction-oriented, for the old,

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[51] Mooney, *supra* 49, at 254; *see also* Stewart Macaulay, *The New Versus the Old Legal Realism: "Things Ain't What They Used To Be"*, 2005 Wis. L. Rev. 365, 370 (2005); Gregory E. Maggs, *Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code*, 71 U Colo. L Rev. 541, 542–44 (2000).

[52] *See* Twining, *supra* note 13, at 283 (describing the role of the Chief Reporter, in general); *id.* at 284, 300, 339–40.

[53] *Id.* at 367; *accord* Mooney, *supra* note 49, at 223; *see also* Breen, *supra* note 45, at 267–68; Danzig, *supra* note 45, at 621–22; Gilmore, *supra* note 14, at 814; Maggs, *supra* note 51, at 541; Wiseman, *supra* note 44, at 467.

[54] Breen, *supra* note 45, at 268; Danzig, *supra* note 45, at 621–22; Ingrid Michelsen Hillinger, *The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve the Good, the True, the Beautiful in Commercial Law*, 73 Geo. L.J. 1141, 1146 (1984); Mooney, *supra* note 49, at 223; Wiseman, *supra* note 44, at 468. Llewellyn was also the principal drafter of Article One of the Code (General Provisions). Mooney, *supra* note 49, at 223; Wiseman, *supra* note 44, at 467.

[55] *See infra* Part II; Wiseman, *supra* note 44, at 493–94, 504, 509–19 (discussing 3 specific merchant rules); *cf.* Danzig, *supra* note 45, at 628, 631.

[56] Mooney, *supra* note 49, at 218, 230.

[57] *Id.* at 218, 221–22.

[58] *Id.* at 222, 224, 227; Twining, *supra* note 13, at 339; James J. White & Robert S. Summers, Uniform Commercial Code §1–2, at 28–29 (5th ed. 2000); Breen, *supra* note 45, at 270, 319–22. Article 1 of the Uniform Commercial Code applies to all other Articles of the UCC. *See* U.C.C. §1-201(11) (2010) (a contract is defined as, "the total legal obligation which results from the parties' agreement"); *id*. §1-201(3) (an agreement is defined as, "the bargain of the parties in fact as found in their language or by implication from other circumstances including course of dealing or usage of trade or course of performance as provided in this Act (Sections 1-205, 2-208, and 2A-207)."); *id*. § 1-205(1) (course of dealing); *id*. § 1-205(2) (usage of trade); *id*. §2-208(1) (current version at U.C.C. § 3-303 (2010)) (course of performance), *id*. §1-303 (revised—containing definitions for course of dealing, usage of trade, course of performance); *see also* Bruce W. Frier & James J. White, The Modern Law of Contracts 306–07 (2d ed. 2008) (discussing UCC §2-202(a) and its significance in undermining the "contract/no contract dichotomy" by expanding what constitutes "the contract," by including trade usage, course of dealing, and course of performance).

static model of formation premised on offer, acceptance, and consideration.[59] To Llewellyn, his new construct represented the law in action—it was functional and represented the way businesses actually conducted business.[60] And by "business," Llewellyn meant "merchants." Llewellyn, in other words, drafted Article 2 to reflect mercantile customs and practices.[61]

Under Llewellyn's agreement-in-fact construct, therefore, formation of a contract was (and is) made much easier.[62] For example, under Article 2, contracts can be formed by conduct[63] and not just through an exchange of communications that constitute an offer followed by an acceptance.[64] In addition, a contract can be formed even though the exact moment of mutual assent cannot be identified,[65] and even if material terms are missing,[66] provided that the parties intended to make a contract and an appropriate remedy can be crafted.[67] The Code's rules regarding acceptance are also relaxed, thus making it easier to conclude that acceptance occurred,[68] and, hence, a contract was formed.[69] As for consideration, it is not even required for a valid contract in certain instances.[70]

At the same time, Llewellyn also introduced two concepts that were new to contract law: good faith[71] and unconscionability.[72] Together, these doctrines

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[59] Mooney, *supra* note 49, at 220–21.

[60] *But see* TWINING, *supra* note 13, at 313–14 (noting that no systematic empirical research was conducted for the UCC drafting project); Hillinger, *supra* note 54, at 1146–62 (arguing that Llewellyn made up the merchant rules in Article 2 and discussing specifics).

[61] HORWITZ, *supra* note 8, at 211; Mooney, *supra* note 49, at 220; Wiseman, *supra* note 44, at 471–72, 491–93. But also note the radical change Llewellyn envisioned with his merchant rules never came about. *See* Hillinger, *supra* note 54, at 1146–62 (arguing that Article 2 was not premised on actual business practice).

[62] WHITE & SUMMERS, *supra* note 58, § 1-2, at 4; *see also* Danielle Kie Hart, *Contract Formation and the Entrenchment of Power*, 41 LOY. U. CHI. L.J. 175, 202–04 (2009) [hereinafter Hart, *Formation*].

[63] U.C.C. § 2-204(1) (2010); *see also id.* §§ 2-206(1) & 2-207(3).

[64] WHITE & SUMMERS, *supra* note 58, § 1–2, at 4.

[65] U.C.C. § 2-204(2).

[66] *Id.* §§ 2-305 (open price term), 2-307 (parties have not specified whether delivery and payment are to be made in lots), 2-308 (place for delivery not specified), 2-309 (time for delivery not specified).

[67] *Id.* § 2-204(3).

[68] Under § 2-206(1), for example, unless otherwise unambiguously indicated by the offeror, offers are "construed as inviting acceptance in any manner and by any medium reasonable in the circumstances." *Id.* § 2-206(1). Moreover, acceptance can be made either by shipment or promise by the offeree, and simply by beginning performance with notice to the offeror of such. *See id.* § 2-206(1)(b) & (2), respectively. Even acceptances that vary the terms of the offer will operate as an acceptance, unless the offeree explicitly states that its acceptance is conditional on the offeror's assent. *See id.* § 2-207(i); *see also* WHITE & SUMMERS, *supra* note 58, § 1-2, at 5.

[69] Mooney, *supra* note 49, at 235.

[70] *See* U.C.C. §§ 2-205 (firm offers require no consideration to be binding for up to 3 months), 2-209(1) (modifications are binding without consideration).

[71] *See id.* §§ 1-201(19) (general standard of good faith) & 2-103(1)(j) (good faith standard for merchants); *see also* Mooney, *supra* note 49, at 222, 245–46.

[72] U.C.C. § 2-302; *see also* Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 U. PA. L. REV. 485, 488 n.11 (1967) (noting that Llewellyn was the principal draftsman of Article 2).

incorporated norms of fairness and cooperation into contract law[73] and ostensibly worked to benefit the weaker contracting party by circumscribing the types of terms that would theoretically get enforced[74] and the behavior of the contracting partners in the performance and enforcement of their contract.[75]

Where Llewellyn may have gotten his ideas for Article 2 of the Uniform Commercial Code may be open to question,[76] but one thing is clear: By making formation easier, Llewellyn ended up increasing and further entrenching the power embedded in contract law—power that according to the critical strand of Legal Realism, takes the form of state-sponsored coercion.[77]

According to the "critical" Realists,[78] coercion is ubiquitous in contracting. In fact, coercion is "at the heart of *every* bargain."[79] This is because every party is entitled by law to withhold from his contracting partner *everything* that he owns, whether it be his land, labor, capital, money, etc.[80] "Coercion, therefore, is a function of ownership."[81] Ownership, in turn, is determined by the state, because ownership is very much "a function of legal entitlements[;] it was and is the state that creates and protects property rights."[82] It follows that the more one party owns, the stronger that party's threat to withhold what he owns becomes.[83] Coercion therefore exists every time a party decides to enter into a contract "to avoid the consequences with which the other [party] threatens him."[84] Thus, because every contract involves mutual threats to withhold—for example, where one party says "pay me what I am asking, or I will withhold my goods" and the other party responds "give me your goods, or I will withhold my money,"—*every* contract is the product of state-sponsored coercion.[85]

In the context of contract formation, the amount a party owns determines that party's bargaining power or capacity to coerce.[86] The more coercive capac-

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[73] *See* Hart, *Formation*, *supra* note 62, at 193; *cf.* Peter Gabel & Jay Feinman, *Contract Law as Ideology*, *in* THE POLITICS OF LAW, *supra* note 23, at 497; Charles L. Knapp, Commentary, *An Offer You Can't Revoke*, 2004 WIS. L. REV. 309, 318; Wiseman, *supra* note 44, at 506.

[74] *See* U.C.C. § 2-302.

[75] *See id.* §§ 1-201(19) & 2-103(1)(b); *see also* Mooney, *supra* note 49, at 247–51; *cf.* Hillinger, *supra* note 54, at 1147, 1163.

[76] *Compare, e.g.*, Hillinger, *supra* note 54, at 1146–62 *with* TWINING, *supra* note 13, at 313–21.

[77] I have mapped out the Realists' coercion argument in detail elsewhere. *See generally* Hart, *Reality*, *supra* note 4, at 29–33.

[78] *See supra* notes 23–32 (discussing the critical strand of Legal Realism).

[79] Betty Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753, 764 (1981) (reviewing P.S. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT) [hereinafter Mensch, *Ideology*].

[80] *See generally* Cohen, *Property*, *supra* note 27; Hale, *Coercion*, *supra* note 26; Mensch, *Ideology*, *supra* note 79, at 764; Singer, *Realism*, *supra* note 11, at 486.

[81] Hart, *Reality*, *supra* note 4, at 29 (footnote omitted).

[82] *Id.*

[83] Cohen, *Property*, *supra* note 27, at 11–13; Hale, *Coercion*, *supra* note 26, at 471–73; Hale, *Duress*, *supra* note 26, at 627; Mensch, *Ideology*, *supra* note 79, at 764; Singer, *Realism*, *supra* note 11, at 486.

[84] Hart, *Reality*, *supra* note 4, at 29 (footnote omitted).

[85] *See generally id.*

[86] *See* Hale, *Duress*, *supra* note 26, at 627–28; *see also* Hart, *Reality*, *supra* note 4, at 29.

ity/bargaining power a party has the more that party gets to dictate the terms of the contract. A party's coercive capacity does not in and of itself pose a problem. But this capacity is coupled with two structural features of the modern contract law system that make it extremely difficult for the weaker party to effectively challenge whether a contract was formed at all. First, regardless of ideology, all the competing tests for mutual assent (i.e., the doctrine by which the individual agreement of the parties is tested) make it very easy to establish mutual assent in practice;[87] and, as a general rule, consideration is usually present in market-based transactions.[88] Second, a presumption of contract validity springs into existence at the moment a contract is formed via mutual assent and consideration.[89]

This presumption of contract validity is extremely difficult to rebut in practice because of what I have referred to elsewhere as the "process problem" in contract law.[90] To begin with, the process problem imposes the burden on the party challenging the contract or defending a breach of contract action to show that the contract is unenforceable.[91] Moreover, *all* the other contract doctrines one might use to either challenge or defend against the contract (including but not limited to contract interpretation and defenses to performance) presume that a valid contract has already been formed.[92] In addition, several practical realities exist, such as the costs of litigation, the ubiquity of certain contract boilerplate clauses (i.e., merger, arbitration, choice of law, choice of forum clauses), and the fact that courts are reluctant to allow parties out of their contracts, regardless of the legal excuse raised.[93] All of this together means that a successful rebuttal of the presumption of contract validity is highly unlikely in practice.[94]

Thus, as a direct result of the presumption of contract validity, a contract formed via Article 2's formation rules will usually be binding and all of its terms, including any unreasonable ones, will most likely be enforceable in court.[95] Significantly, the difficulty of disproving the presumption of contract validity may well give license, if not perverse incentive, to the party with greater coercive capacity to impose more onerous terms during contract formation.[96] The result, even if such incentives are not capitalized on,[97] is to increase

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[87] *See* Hart, *Formation*, *supra* note 62, at 204–10.

[88] *See* E. ALLAN FARNSWORTH, CONTRACTS § 2.2, at 48 (4th ed. 2004); Charles L. Knapp, *Rescuing Reliance: The Perils of Promissory Estoppel*, 49 HASTINGS L.J. 1191, 1195 (1998).

[89] *See generally* Hart, *Formation*, *supra* note 62, at 206–15; Hart, *Reality*, *supra* note 4, at 11.

[90] *See* Hart, *Formation*, *supra* note 62, at 210–15; Hart, *Reality*, *supra* note 4, at 11–12.

[91] Hart, *Formation*, *supra* note 62, at 206; Hart, *Reality*, *supra* note 4, at 12.

[92] Hart, *Formation*, *supra* note 62, at 200–02; Hart, *Reality*, *supra* note 4, at 12.

[93] Hart, *Formation*, *supra* note 62, at 212–14; Hart, *Reality*, *supra* note 4, at 12–13.

[94] *See generally* Hart, *Formation*, *supra* note 62, at 200–02, 210–16; Hart, *Reality*, *supra* note 4, at 11–13 (citations omitted).

[95] Hart, *Formation*, *supra* note 62, at 215; Hart, *Reality*, *supra* note 4, at 13.

[96] Hart, *Formation*, *supra* note 62, at 216; Hart, *Reality*, *supra* note 4, at 57.

[97] Regardless of whether the incentive to impose more onerous terms is capitalized on or not, the party with more coercive capacity/bargaining power will get to dictate the terms of the contract. Coercive capacity/bargaining power will be increased with each contract the stronger party enters into because the stronger party is able to reap more from each contract

the coercive capacity of the stronger contracting party.[98] This is because the stronger party will not only be able to reap more gains (in terms of money, land, capital, etc.) through each contract it enters into, but the presumption of contract validity will also enable that party to retain those gains.[99] Recall that the amount one owns determines one's bargaining power/coercive capacity. It thus becomes a vicious circle: the more a party owns, the more bargaining power/coercive capacity that party has; the more that party gets to dictate contract terms, the more property that party gets to acquire; and so on.[100] In the end, the coercion present in contract law is increased and entrenched. More than that, the coercion that exists is concealed, because satisfying Article 2's formation rules provides a veneer of voluntariness.[101] A contract is by common understanding an act of free will (autonomy); after all, one must "agree" to be bound.[102] Hence, there is (usually) no coercion in contracting.[103] Or so the argument goes.

In short, by pursuing the law in action in Article 2, specifically, by making it easier to form a contract, Llewellyn ended up increasing, further entrenching, and concealing the coercion present in contract law. In so doing, he worked at cross-purposes with and arguably even undermined the other critical strand of Legal Realism that exposed and critiqued power.[104] This result is not surprising and, in fact, is to be expected.

III. THE LIMITS OF SOCIAL TRANSFORMATION

A. "Preservation Through Transformation"

By changing contract law's formation rules, Llewellyn ended up increasing the coercion present in contract law. This result is to be expected because this is what the law does. That is, regardless of any attempts to bring about change, the law tends to evolve in such a way as to preserve and privilege

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than it otherwise could with less coercive capacity/bargaining power. *See* Hart, *Reality*, *supra* note 4, at 52.

[98] *Id.* at 52, 57.

[99] *Id.* at 52.

[100] *Id.*

[101] *Id.* at 57.

[102] *Id.*

[103] "Usually" is the operative word here because contract law does recognize that coercion sometimes does come into play, and it takes steps to address coercion in those delimited situations. *See, e.g.*, RESTATEMENT (SECOND) OF CONTRACTS §§ 164 (1981) (misrepresentation), 175 (duress), 208 (unconscionability). It is important to keep in mind, however, that these steps are largely ineffective. *See generally* Hart, *Formation*, *supra* note 62, at 198–218.

[104] Professor Morton Horwitz also concludes that the reformist strand of Legal Realism ended up suppressing the critical strand. HORWITZ, *supra* note 8, at 210. Professor Horwitz's theory of why the constructive strand of Realism not only failed but also worked against the critical strand centers on the willingness of the reformers to separate the Is from the Ought, that is, on their willingness to avoid having to determine values. *Id.* at 210–11. This explanation is very persuasive, but is different from the arguments made in this Essay. *See infra* Part III.B.

established hierarchies. Two ground-breaking articles, one by Reva Siegel and the other by Cheryl Harris, illustrate this phenomenon.[105]

In *'The Rule of Love': Wife Beating as Prerogative*,[106] Reva Siegel documents the evolution of the law governing marital violence (or wife beating) from the days when husbands possessed a "chastisement prerogative," to the enactment of the Violence Against Women Act.[107] Notwithstanding consistent efforts to reform the law to better protect women,[108] violence against women within their own households continues to persist in staggering numbers.[109] In "Whiteness As Property,"[110] Cheryl Harris traces the transformation of the concept of "whiteness" from a description of skin color used merely as a way to distinguish white indentured or bond servants from captured Africans who were sold in the Americas,[111] to a property right with legal and social value and consequences.[112]

It is not possible to do justice to either of these articles in the short space that this Essay will devote to them. But collectively, both articles tell a very similar story, and it is this collective story that has resonances for contract law. That story goes like this:

Despite periodic success, the law governing marital violence and race evolved in such a way as to reflect and perpetuate racial, gender, and class hierarchies such that heterosexual white men, usually but not necessarily limited to the middle and upper classes, were privileged and their interests protected by law. For example, by the 1870s, a husband's prerogative to physically chastise his wife[113] was unequivocally repudiated by the courts.[114] Violence in marriage, however, continued to exist.[115] The law's response to the ongoing violence was hostile to any remedy "that might assist wives in separating from

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[105] Even though this Essay focuses on the Siegel and Harris articles, it is important to acknowledge that they were certainly not the first to critique power and its role in both the social construction and oppression of race, gender, identity, etc. *See, e.g.*, Patricia J. Williams, *On Being the Object of Property*, *in* THE ALCHEMY OF RACE AND RIGHTS 216, 223 (1991); CATHERINE MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW 12–13 (1987); Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 880 (1990); Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1332 n.2 (1988).

[106] *See* Reva B. Siegel, *"The Rule of Love": Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996).

[107] *Id. at* 2121–2200 (chronicling the transformation of marital violence law over time).

[108] These reform efforts included the antebellum temperance movement and the women's rights movement—both the original and contemporary. *Id*. at 2127.

[109] *Id.* at 2172–73 (using statistics from 1995 to show persistence in violence against women).

[110] *See* Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707 (1993).

[111] *Id.* at 1709.

[112] *See generally id.* at 1715–77 (documenting in detail the way in which whiteness was constructed as a property right from slavery through the 1986 case of *Wygant v. Jackson Bd. of Educ.*, 467 U.S. 267 (1986)). According to Harris, "[t]he law's construction of whiteness defined and affirmed critical aspects of identity (who is white); of privilege (what benefits accrue to that status); and, of property (what *legal* entitlements arise from that status)." *Id.* at 1725.

[113] Siegel, *supra* note 106, at 2122–23.

[114] *Id.* at 2129.

[115] *Id.* at 2130.

their husbands"[116] because nineteenth-century judges assumed "that a wife was obliged to endure various kinds of violence as a normal—and sometimes deserved—part of married life."[117] These same judges also assumed that a certain amount of violence was an accepted fact of life for the married poor.[118] Some marital violence was subject to criminal prosecution,[119] but those prosecutions were usually limited to African-American men[120] and members of the "vicious [and dangerous] classes,"[121] i.e., the poor, who beat their wives.[122] Middle and upper class white men were rarely if ever prosecuted, and, in fact, were granted various legal immunities, both criminal and civil,[123] for wife beating in the name of "affective privacy."[124]

This privileging of heterosexual white men translated into the unequal distribution of social and material benefits and goods.[125] Ownership of property, for example, was originally limited to white men.[126] In addition to social standing,[127] public reputation,[128] and the "'public and psychological wage'" of being white,[129] white identity also "conferred tangible and economically valuable benefits"[130] because property was and is broadly construed to include "all of those human rights, liberties, powers, and immunities that are important for

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[116] *Id.* at 2132.

[117] *Id.* at 2133–34.

[118] *Id.* at 2134.

[119] Several states adopted public flogging as the punishment for wife beating. *Id.* at 2137.

[120] *Id.* at 2136, 2138–40.

[121] *Id.* at 2138–39 (internal quotation marks omitted).

[122] *See id.*

[123] *Id.* at 2154–61 (discussing criminal immunity), 2161–70 (discussing inter-spousal tort immunity).

[124] "Affective privacy" is the rhetoric that replaced authority-based conceptions of marriage, which had been used to justify giving husbands the prerogative to physically chastise their wives. *Id.* at 2151–53. Affective privacy embodied the ideas of companionate marriage, (i.e., the belief that wives were companions to their husbands and not their servants, and therefore, ties of affection and "disinterested love," not authority, linked household members), and marital privacy (i.e., the belief that to protect the sanctity of marriage, what happens between a husband and wife should be shielded from public scrutiny). *Id.* at 2143–44, 2147, 2151–53.

[125] *See, e.g.*, Harris, *supra* note 110, at 1741.

[126] *See id.* at 1715–24 (discussing the racialized nature of property in general), 1718 (noting that Blacks were not permitted to own property), 1718–21 (discussing fusion of race economic domination through slavery), 1721–24 (showing only white claims to property ownership were recognized via conquest); *see also* Siegel, *supra* note 106, at 2122 (discussing how a husband acquired rights to most of his wife's property upon marriage).

[127] Harris, *supra* note 110, at 1737.

[128] *Id.* at 1734–36, 1746–50 (discussing Homer A. Plessy's reputation claim in the case of *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

[129] *Id.* at 1741 (quoting W.E.B. DU BOIS, BLACK RECONSTRUCTION 700 (1976)). These wages that were accorded to white identity included public deference, being "'admitted freely with all classes of white people, to public functions . . . . The police were drawn from their ranks . . . . Their vote selected public officials [which] . . . had great effect on their personal treatment.'" *Id.* at 1741–42 (quoting W.E.B. DU BOIS, BLACK RECONSTRUCTION 700–01 (1976)).

[130] *Id.* at 1726; *see also* Siegel, *supra* note 106, at 2154–61, 2161–70 (discussing criminal immunity and inter-spousal tort immunity for wife beating).

human well-being, including: freedom of expression, . . . and free and equal opportunity to use personal faculties."[131]

But more than this, heterosexual white male privilege (material and social), together with its status on top of the hierarchy, were normalized such that the category and its privileges became the baseline, the quintessential objective, neutral, apolitical, and unquestioned norm.[132] A mechanism was then used that enabled the legal system to mask, or at least divert attention away from, the hierarchy with its attendant and unequal privileges. For Harris, this mechanism is her ingenious "whiteness" construct,[133] and for Siegel it is the use of ostensibly neutral legal language that reflects neither gender, nor class, nor race.[134] "Whiteness," for example, not only ameliorated class hierarchies but also enabled the class exploitation present in labor markets to be evaded.[135] This is because whiteness enabled white workers to "accept their lower class position in the hierarchy 'by fashioning identities as 'not slaves' and as 'not Blacks.'''"[136]

What changes from one period to another in the evolution of the law is simply the rhetoric and legal strategies or doctrines used to legitimate the new hierarchical regimes. A husband's right to physically chastise his wife,[137] for instance, was replaced by criminal and tort immunities for wife beating;[138] and the legal rhetoric changed from justifications that were authority-based and explicitly hierarchical[139] to the language of companionate marriage[140] and affective privacy.[141] In each instance, however, the hierarchies (men over women, rich men over poor men, white men over Black men) *and* a husband's prerogative to physically chastise his wife remained intact.[142]

Harris paints the same picture in the context of race. She argues, for example, that the United States Supreme Court's interpretation of the Equal Protection Clause in *Brown v. Board of Education*[143] simply modified its earlier interpretation of that Clause in *Plessy v. Ferguson*[144] and thus "accommodated both Blacks' claims for 'equality under the law' and the global interests of

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[131] Harris, *supra* note 110, at 1726 (quoting Laura S. Underkuffler, *On Property: An Essay*, 100 YALE L.J. 127, 128–29 (1990)). White identity also "determined whether one could vote, travel freely, attend schools, obtain work, and indeed, defined the structure of social relations along the entire spectrum of interactions between the individual and society." *Id.* at 1745.

[132] *See, e.g.*, *id.* at 1730, 1738, 1746, 1753; Siegel, *supra* note 106, at 2157, 2158.

[133] Harris, *supra* note 110, at 1730.

[134] *See, e.g.*, Siegel, *supra* note 106, at 2157, 2158.

[135] Harris, *supra* note 110, at 1742.

[136] *Id.* (quoting DAVID ROEDIGER, THE WAGES OF WHITENESS 13 (1991)).

[137] Siegel, supra note 106, at 2123–24.

[138] *Id.* at 2154–61 (discussing criminal immunity), 2161–70 (discussing inter-spousal tort immunity).

[139] *Id.* at 2122–23.

[140] *Id.* at 2142–44, 2146–48; *see also supra* note 124 (discussing companionate marriage and affective privacy).

[141] Siegel, supra note 100, at 2151–53; *see also supra* note 124.

[142] See *supra* notes 107–17.

[143] Brown v. Bd. of Educ., 349 U.S. 294 (1955).

[144] Plessy v. Ferguson, 168 U.S. 537 (1896).

white ruling elites."[145] What ended up changing was some of society's formal rules. But, "[w]hat remained consistent was the perpetuation of institutional privilege under a standard of legal equality . . . . What remained in revised and reconstituted form was whiteness as property."[146]

Some might argue that the collective story told by Siegel and Harris is about status law (gender, race, class) and is a public law (civil rights) story to boot, while contract law is private law, does not implicate a status category, and has nothing whatsoever to do with civil rights. But this argument would be wrong.[147] Although it is true that contract law and civil rights are rarely if ever discussed together, contract law *does* implicate a status category. Specifically, contract law is very much intertwined with class. Viewed from this perspective, the collective story told by Siegel and Harris is also the story of contract law.

Class hierarchy is intimately connected to contract law by virtue of the fact that pre-existing and unequal distributions of property (land, capital, resources, etc.) are taken as a given and never questioned,[148] as if such unequal distributions are natural, apolitical rights that are sorted out by individuals competing in a free market. In reality, property rights are state conferred rights that are literally premised on racial and gender subordination.[149] Recall that property ownership was originally limited to white men.[150] Consequently, the state did not distribute property rights equally from the very beginning.[151] This unequal distribution is thus perpetuated and exacerbated over time because one's property rights determine one's bargaining power in the market, and hence what and how much one will ultimately be able to acquire.[152]

And, like the collective story of gender and race hierarchy Siegel and Harris detail, contract law also evolved (and continues to evolve) in such a way as to reflect and maintain class hierarchy. The only things that change during the evolution of contract law are the rhetoric and legal doctrines used to legitimate the hierarchical regime.

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[145] Harris, *supra* note 110, at 1757.

[146] *Id.*

[147] I have argued elsewhere that contract law is public not private and will not devote any time to this argument in this Essay. *See* Hart, *Reality*, *supra* note 4, at 33–34; *see also* Danielle Kie Hart, *Contract Law in Context* (forthcoming) (on file with author) (arguing that contracts and contract law have everything to do with civil rights and equality).

[148] *See generally* Cohen, Property, *supra* note 27 (exposing the role of the state in creating property rights *and* the consequences that directly flow from that, namely, the delegation of power by the state to owners to compel fellow human beings to do what the owners want, which ultimately leads to the unequal distribution of material benefits); Hale, *Duress*, *supra* note 26, at 603–04 (exposing the unquestioned nature and existence of ownership of property (land, labor, etc.) and its relationship to coercion).

[149] *See* Hart, *Reality*, *supra* note 4, at 34–35, 55–57 (discussing the state's role in property rights and contracts); Harris, *supra* note 110, *passim* (documenting how whiteness was constructed by the state as a property right).

[150] See *supra* text accompanying notes 112, 126, & 131.

[151] Nor are all state-conferred property rights equal—some people are endowed with more advantageous rights than others. *See* Hale, *Duress*, *supra* note 26, at 627–28.

[152] *See supra* text accompanying notes 97, 112, & 131; *see also* Hale, *Duress*, *supra* note 26, at 627–28 ("It is with these unequal rights that men bargain and exert pressure on one another. These rights give birth to the unequal fruits of bargaining."); Hart, *Reality*, *supra* note 4, at 33–35, 54.

Contract law rhetoric went from the bucolic images of the nineteenth century's arm's length, face-to-face transaction to trade a horse,[153] for example, to Llewellyn's savvy merchant seller or buyer who was wise to the ways of the twentieth century market.[154] These changes in contract law rhetoric were probably prompted by the dramatic social and economic transformation of American society, including, but certainly not limited to, the increasingly greater concentration of capital among a smaller number of companies vis-à-vis the rights of workers who attempted to organize "in response to their collective dependence on these emerging monopolies . . . , exploitation of the Third World, [and] advancing technology."[155]

The classical rules of contract law simply did not reflect the power disparities that were part and parcel of everyday life.[156] Legal doctrine thus shifted from the static offer-acceptance-consideration construct of the nineteenth century[157] to Lewellyn's transaction-oriented agreement-in-fact construct, which was cabined by good faith and unconscionability to help ensure its fairness in operation.[158] This change in formation structure did (and does) produce some positive individual results, but not that often.[159] Because the shift in contract doctrine did not produce a systemic remedy[160] and the pre-existing and unequal distribution of property was not tampered with, let alone questioned by the new formation structure and doctrines, the existing class hierarchy with its attendant privileges and power was and is preserved.

The mechanism used in the contract law context to conceal the class hierarchy that contract law helps to maintain is the "free" market.[161] In the ostensibly "free" market, the baseline from which everyone starts is never discussed but is nevertheless premised on pre-existing and unequal distributions of prop-

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[153] *See* Omri Ben-Shahar, *The Myth of the "Opportunity to Read" in Contract Law* 1 (Univ. of Chi. Law & Econ., Olin Working Paper No. 415, 2008), *available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162922*http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1162922; Wiseman, *supra* note 44, at 475.

[154] Wiseman, *supra* note 44, at 475.

[155] Gabel & Feinman, *supra* note 73, at 504.

[156] *Cf.* Wiseman, *supra* note 44, at 476.

[157] *See supra* text accompanying notes 56–59.

[158] *See supra* text accompanying notes 71–75.

[159] *See* Larry A. DiMatteo & Bruce Louis Rich, *A Consent Theory of Unconscionability: An Empirical Study of Law in Action*, 33 FLA. ST. U. L. REV. 1067, 1097 (2006) ("Data revealed that in only 37.8% (56 out of 148) of the cases sampled unconscionability was found . . . ."); Grace M. Giesel, *A Realistic Proposal for the Contract Duress Doctrine*, 107 W. VA. L. REV. 443, 463–65 (2005) (An examination of published state cases of duress from 1996 through 2003 found that in "only nine of the eighty-eight [duress] cases did the court decide the matter in favor of the duress claim." Of those nine cases, an appellate court affirmed a lower court's finding of duress in only two cases.); *see also* text accompanying notes 97–103 (discussing the presumption of contract validity and the process problem associated with it); Hart, *Formation*, *supra* note 62, at 198–202 (explaining in detail why contract policing doctrines like unconscionability do not work very effectively).

[160] Good faith and unconscionability, for example, confer individual claims that, if successful, would give that contracting party individual relief. *See, e.g.*, U.C.C. §§ 1-203, cmt. (2004) (good faith and breach of contract claim) & 2-302 (unconscionability).

[161] *See supra* text accompanying note 104 (discussing the critical strand of Legal Realism). I have argued elsewhere that the market is not "free." *See* Hart, *Reality*, *supra* note 4, at 29–32.

erty.[162] Despite the fact that people do not start from the same baseline, the assumption is that the free market will be the great equalizer.[163] That is, everyone has the same chance to succeed because all it takes to succeed in a free market is individual merit.[164] And because success is made an entirely individual endeavor under market mythology, so is failure.[165] Consequently, if you have not succeeded in the market, something is wrong with you, not with the market in particular or society in general.

Notwithstanding the realities of the market, including the unequal baselines from which people start, the mystical but cherished belief is that, in the free market, anyone can acquire as much as anyone else and, hence, everyone can be equal. Of course, this belief is not true, given everyone's vastly different starting positions; and it only makes sense "in a society [like ours] that defines individualism as the highest good, and the 'market value' of the individual as the just and true assessment."[166]

Nevertheless, and as a result, everyone has a stake in maintaining the ideology of the free market as a way to separate me from you and "us" from "them." In other words, acknowledging that the free market is a myth and that the normalized baseline is anything but equal threatens self- and group-identity, the very personal understanding that I am better than you and "we" are better than "them" *because* I/we have done better than you/them in the market. To acknowledge that the market is not free and the baseline is not equal would expose the class hierarchy present in American society and also force everyone to confront the very real possibility that, absent the unequal distribution of property, that is, if I/we started from the same place as you/them, I/we might be no better than you/them. Worse still, I/we could be worse off (i.e., lower) than you/them in the hierarchy.[167] Hence, the myth of the free market persists and provides a powerful tool that not only reinforces the classical liberal trope of individual merit but also masks the class hierarchy that exists in society at large and contract law's role in helping to maintain it.[168]

Thus, the story of contract law is very similar to the collective story told by Siegel and Harris. The law, including contract law, tends to evolve in ways that end up preserving and privileging established hierarchies, thereby perpetuating existing unequal distributions of material and social goods. Siegel calls this phenomenon "preservation through transformation."[169] Preservation

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[162] *See supra* text accompanying notes 148–52.

[163] Hart, *Formation*, *supra* note 62, at 188.

[164] Harris, *supra* note 110, at 1778; C.B. MACPHERSON, THE RISE AND FALL OF ECONOMIC JUSTICE AND OTHER PAPERS 9 (1985); JOYCE APPLEBY ET AL., TELLING THE TRUTH ABOUT HISTORY 124 (1995).

[165] *See* APPLEBY ET AL., *supra* note 164, at 118–19, 124–25.

[166] Harris, *supra* note 110, at 1778; MACPHERSON, *supra* note 164, at 9 ("Distributive justice require[s] that a society's produce should be distributed in proportion to men's merits. But in a full-market society there is no measure of a man's merit other than what the market will award him . . . . So any actual distribution is by definition a distribution in proportion to men's merits, and hence just . . . .").

[167] *See* Hale, *Duress*, *supra* note 26, at 628 (suggesting that if the underlying rules were different, current reality could be very different too).

[168] *Cf.* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 833 (1983) (explaining why abandoning myths is difficult).

[169] Siegel, *supra* note 106, at 2119–20, 2184.

through transformation, therefore, gives concrete form to Audre Lorde's haunting maxim: "the master's tools will never dismantle the master's house."[170] At best, Lorde said, "They may allow us temporarily to beat him at his own game, but they will never enable us to bring about genuine change."[171] And so it is with contract law as well.

B. Some Thoughts on Law, Social Structures, and Agency

That law serves power seems to be a provable phenomenon. In and of itself, this is an important insight, particularly in the context of contract law where such things are not comfortably discussed. But two interesting questions lurk in the background of this preservation through transformation analysis. Specifically, *why* does this phenomenon happen at all, let alone happen so consistently over time and across disciplines? And what explains Karl Llewellyn's role in all of this, given that his own convictions and commitments suggest that he would not have consciously tried to increase the coercion present in contract law?[172] This essay will sketch out brief answers to these questions.

According to French social philosopher Pierre Bourdieu, conflict and competition define social life.[173] At stake in this contest is the power to determine what will be deemed legitimate in the social world, where legitimacy means deciding who and what has value *and* the amount of that value.[174] Systems of classification are thus produced that not only make up and order the social world, but also constitute and order the people within it.[175]

The competition and struggle to define legitimacy take place in social structures called fields.[176] Fields are sites of contestation with boundaries that extend only so far as the capital at stake within each field is given effect.[177]

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[170] Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER 110, 112 (2007) (emphasis omitted).

[171] *Id.*

[172] *See, e.g.*, Mooney, *supra* note 49, at 222, 244–46 (discussing the importance of good faith to Llewellyn's conception of Article 2); Wiseman, *supra* note 44, at 492 (arguing that Llewellyn's vision of Article 2 "also encompassed a normative belief that the law should encourage the better practices and control the worst abuses of the market"); *id.* at 505 (arguing that Llewellyn's decision to carve out special rules applicable only to merchants "was explicitly premised on the unfairness of imposing burdens and obligations on nonmerchant buyers and sellers with different needs and . . . knowledge."); *accord* Hillinger, *supra* note 54, at 1163; *see also supra* notes 76–103 (discussing coercion and contract law).

[173] Patricia Thomson, *Field*, *in* PIERRE BOURDIEU: KEY CONCEPTS 67, 69 (Michael Grenfell ed., 2008).

[174] PIERRE BOURDIEU, OUTLINE OF A THEORY OF PRACTICE 169, 170 (1977) [hereinafter BOURDIEU, OUTLINE]; Nick Crossley, *Social Class*, *in* PIERRE BOURDIEU: KEY CONCEPTS, *supra* note 173, at 87, 96; Mustafa Emirbayer & Victoria Johnson, *Bourdieu and Organizational Analysis*, 37 THEORY & SOC'Y 1, 15 (2008).

[175] BOURDIEU, OUTLINE, *supra* note 174, at 164; J. Daniel Schubert, *Suffering/Symbolic Violence*, *in* PIERRE BOURDIEU: KEY CONCEPTS, *supra* note 173, at 183, 185.

[176] *See generally* PIERRE BOURDIEU & LOÏC J.D. WACQUANT, AN INVITATION TO REFLEXIVE SOCIOLOGY 94–115 (1992); Moishe Postone et al., *Introduction: Bourdieu and Social Theory*, *in* BOURDIEU: CRITICAL PERSPECTIVES 6 (Craig Calhoun et al. eds., 1993); Thomson, *supra* note 173, at 79.

[177] BOURDIEU & WACQUANT, *supra* note 176, at 100; Thomson, *supra* note 173, at 71.

Capital is broadly defined to mean "all forms of power,"[178] and therefore includes *any and all* resources that "become objects of struggle as valued resources."[179] Typical kinds of capital include: economic (money and property),[180] cultural (which "covers a wide variety of resources, such as verbal facility, general cultural awareness, aesthetic preferences, scientific knowledge, and educational credentials"),[181] social (acquaintances, networks, family),[182] and symbolic ("capital in any of its [other] forms insofar as it is accorded positive recognition, esteem, or honor by relevant actors within the field").[183] The values and types of capital at stake differ from field to field.[184]

Regardless of the field, however, a cardinal principle applicable to every field is that each actor has to buy into that field. Specifically, in order to participate in a given field, each actor tacitly agrees to the rules of the game,[185] including the value given to the capital at stake in that field. This "buy-in" is made possible because each actor who participates in a field shares unquestioned opinions and perceptions about the social world that are mediated by the relatively autonomous fields in which she or he participates.[186] These taken-for-granted assumptions or orthodoxies not only determine what constitutes "natural" practice within a field,[187] they also condition and inform each actor's internalized sense of limits and aspirations.[188] In short, these internalized self-evident and unquestioned but tacitly accepted rules of the game in each field determine to a large extent what can and cannot be done within that field and by whom. Equally as important, and specifically because of these self-evident beliefs, the social world as represented in each field is perceived to be completely natural and not arbitrary.[189] Consequently, actors within the field often perceive it to be in their best interest "to act in ways that end up both lending credence to, and reproducing," the practices within that field.[190]

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[178] *See* BOURDIEU & WACQUANT, *supra* note 176, at 118–20; DAVID SWARTZ, CULTURE AND POWER 73 (1997); Postone et al., *supra* note 176, at 4.

[179] SWARTZ, *supra* note 178, at 73–74.

[180] *Id.* at 74; Thomson, *supra* note 173, at 69.

[181] SWARTZ, *supra* note 178, at 43.

[182] BOURDIEU & WACQUANT, *supra* note 176, at 119; SWARTZ, *supra* note 178, at 74; Thomson, *supra* note 173, at 69.

[183] Emirbayer & Johnson, *supra* note 174, at 12 (emphasis omitted).

[184] Cécile Deer, *Doxa*, *in* PIERRE BOURDIEU: KEY CONCEPTS, *supra* note 173, at 119, 122 ("[S]ocial fields . . . have their own specific logic and necessity.") [hereinafter Deer, *Doxa*]; Postone et al, *supra* note 176, at 5; Edward LiPuma, *Culture and the Concept of Culture in a Theory of Practice*, *in* BOURDIEU: CRITICAL PERSPECTIVES, *supra* note 176, at 14, 16.

[185] *See* BOURDIEU & WACQUANT, *supra* note 176, at 98–99; *see also* Deer, *Doxa*, *supra* note 184, at 122; Emirbayer & Johnson, *supra* note 174, at 11; Thomson, *supra* note 173, at 68–69.

[186] Deer, *Doxa*, *supra* note 184, at 120. (These unstated, fundamental beliefs are what Bourdieu calls "doxa."). *See generally* BOURDIEU, OUTLINE, *supra* note 174, at 159–71.

[187] Deer, *Doxa*, *supra* note 184, at 120.

[188] BOURDIEU, OUTLINE, *supra* note 174, at 164–66; Deer, *Doxa*, *supra* note 184, at 121; Karl Maton, *Habitus*, *in* PIERRE BOURDIEU: KEY CONCEPTS, *supra* note 173, at 49, 58.

[189] BOURDIEU, OUTLINE, *supra* note 174, at 164–66; Robert Moore, *Capital*, *in* PIERRE BOURDIEU: KEY CONCEPTS, *supra* note 173, at 101, 104.

[190] Schubert, *supra* note 175, at 185.

Furthermore, all action taken by actors within a field is "interested."[191] In capitalist societies, *interest* is generally associated with material forms of accumulation.[192] The pursuit of economic capital would be the primary example. But according to Bourdieu, "interest" is much more broadly defined to include "*all* . . . goods, material as [well as] symbolic, without distinction, that present themselves as *rare* and worthy of being sought after."[193] That said, Bourdieu also takes the position that "practice never ceases to conform to economic calculation, even when it gives every appearance of disinterestedness by departing from the logic of interested calculation . . . and playing for stakes that are non-material and not easily quantified."[194] To say that all action is interested, therefore, means that every action an actor takes within a field is designed to maximize his or her economic and symbolic profit.[195] Significantly, and specifically because "the game" taking place within each field is always competitive, actors strive to maintain or improve their field position.[196]

While there are many different types of capital, economic capital is the most efficient and powerful.[197] Consequently, economic capital, particularly in capitalist societies, is the most coveted.[198] But economic capital is not distributed equally, since it is a product of accumulation and inheritance.[199] This unequal distribution of economic capital results in the unequal accumulation of other types of capital, as economic capital can and is easily convertible.[200] For example, economic capital enables an actor to obtain cultural capital in the form of educational credentials. Formal education also results in the establishment of acquaintances and networks, which is social capital.[201] Agents, therefore, do not enter fields with the same kinds or amounts of capital.[202]

Because of this unequal accumulation of capital, there are two poles within each field—the dominant and dominated poles.[203] Dominant actors are therefore the actors (i.e., individuals, groups, institutions, entities, corporations) with the most capital of the right type(s) as defined by the field. Conversely,

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[191] SWARTZ, *supra* note 178, at 66.

[192] BOURDIEU, OUTLINE, *supra* note 174, at 176–77; SWARTZ, *supra* note 178, at 91; Moore, *supra* note 189, at 101.

[193] BOURDIEU, OUTLINE, *supra* note 174, at 178.

[194] *Id.* at 177.

[195] *Id.* at 42, 183; Postone et al., *supra* note 176, at 5; Michael Grenfell, *Interest*, *in* PIERRE BOURDIEU: KEY CONCEPTS, *supra* note 173, at 153, 154–55.

[196] Patricia Thomson, *Field*, *in* PIERRE BOURDIEU: KEY CONCEPTS, *supra* note 173, at 69; Grenfell, *supra* note 195, at 154; LiPuma, *supra* note 184, at 16–17.

[197] *See* Postone et al., *supra* note 176, at 5 (It is the most efficient and powerful because "it alone [of the various types of capital] can be conveyed in the guise of general, anonymous, all-purpose, convertible money from one generation to the next.").

[198] *See* SWARTZ, *supra* note 178, at 79; *cf.* BOURDIEU, OUTLINE, *supra* note 174, at 195.

[199] Lucille A. Jewel, *Bourdieu and American Legal Education: How Law Schools Reproduce Social Stratification and Class Hierarchy*, 56 BUFF. L. REV. 1155, 1164 (2008).

[200] Postone et al., *supra* note 176, at 5.

[201] *See* Craig Calhoun, *Habitus, Field, and Capital: The Question of Historical Specificity*, *in* BOURDIEU: KEY PERSPECTIVES, *supra* note 176, at 61, 70.

[202] Postone et al., *supra* note 176, at 5; Jewel, *supra* note 199, at 1164.

[203] *See* Thomson, *supra* note 173, at 69–71; *cf.* Emirbayer & Johnson, *supra* note 174, at 6.

dominated actors are the people and entities with the least amount of the right type of capital.[204]

But to reiterate, economic capital is the most powerful and determinant, and as a result, it must be symbolically mediated,[205] meaning it must be disguised. It must be disguised because leaving the reproduction and accumulation of economic capital undisguised "would reveal the arbitrary character of the distribution of power and wealth" in society.[206] Hence, the reproduction of domination in modern capitalist and highly differentiated societies is largely left to symbolism.[207]

Critical to Bourdieu's theory of reproduction, therefore, is the idea that interest (discussed above) is often misrecognized;[208] that is, *none* of the actors in the field recognize it as an action designed to maximize profit.[209] This suggests that even though action is always interested, the actor undertaking the action may not be consciously aware that his action is interested.[210] For example, a person may want to become a scientist for the seemingly altruistic purpose of finding a cure for AIDS. Becoming a scientist requires certain educational credentials. Obtaining the educational credentials enables the actor to accumulate social capital (i.e., networks formed with classmates and colleagues in various post-doctoral positions). And given that scientists are held in high esteem in society, the actor also accumulates symbolic capital.[211] All of this symbolic profit (social and symbolic capital, together with any economic capital associated with being a scientist) would result, even unknowingly, in either a more secure or an improved field position (depending on the actor's original field position) for the newly minted scientist, his altruistic desire to cure AIDS notwithstanding.

Significantly and as a result of misrecognition, the actor whose interested action is misrecognized is able to accumulate symbolic capital,[212] which to Bourdieu "is perhaps *the most valuable form of accumulation* in society."[213] Symbolic capital, defined as "capital in any of its [other] forms insofar as it is accorded positive recognition, esteem, or honor by relevant actors within the field,"[214] is simply a "*disguised* form of physical 'economic' capital."[215] As such, it plays a pivotal role in Bourdieu's theory of reproduction not only

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[204] Emirbayer & Johnson, *supra* note 174, at 6; Scott Lash, *Pierre Bourdieu: Cultural Economy and Social Change*, *in* BOURDIEU: CRITICAL PERSPECTIVES, *supra* note 176, at 193, 201.

[205] BOURDIEU, OUTLINE, *supra* note 174, at 171–73, 176–77; *see also* Postone et al., *supra* note 176, at 5; Moore, *supra* note 189, at 113.

[206] BOURDIEU, OUTLINE, *supra* note 174, at 171–73; Postone et al., *supra* note 176, at 5.

[207] BOURDIEU, OUTLINE, *supra* note 174, at 195; SWARTZ, *supra* note 178, at 90.

[208] SWARTZ, *supra* note 178, at 89 ("[M]isrecognition denotes 'denial' of the economic and political interests present in a set of practices.").

[209] Moore, *supra* note 189, at 104.

[210] Grenfell, *supra* note 195, at 155.

[211] *See supra* text accompanying note 183 (defining symbolic capital).

[212] *See generally* BOURDIEU, OUTLINE, *supra* note 174, at 171–83; SWARTZ, *supra* note 178, at 90; Emirbayer & Johnson, *supra* note 174, at 12 (defining symbolic capital).

[213] BOURDIEU, OUTLINE, *supra* note 174, at 179, 183.

[214] Emirbayer & Johnson, *supra* note 174, at 12.

[215] BOURDIEU, OUTLINE, *supra* note 174, at 183.

because it conceals its own economic origins,[216] but also because all practice in the social world conforms to economic calculation, even when it appears disinterested.[217] Because accumulation of symbolic capital creates a certain distance (i.e., time and resources) from necessity (the need to satisfy basic biological requirements like food, shelter, etc.),[218] actors within the dominant group are most likely the ones who will be able to accumulate symbolic capital.[219]

Symbolic capital thus enables the misrecognized but nevertheless interested actions of the dominant actor to be legitimated, which means that the misrecognized act or the thing produced by that action is given value by all the actors in the field. One consequence of this process is that the dominant actor has now acquired even more capital. More capital, of course, translates into a better or at least a more secure field position within the dominant group. So, this portion of the hierarchy is maintained.

Another important consequence of misrecognition, however, is that because the dominant actor's misrecognized action now has value, meaning that it is now symbolic capital, it is something to be sought, emulated, or adopted by the other actors within the field. And in seeking to acquire, adopt, or emulate this symbolic capital, the dominated actor essentially reproduces the hierarchy (dominant/dominated) that already exists in the field. The hierarchy is reproduced by virtue of the fact that the dominated have implicitly (unconsciously) ceded to the dominant actor (or group) the power to determine what is legitimate in the social world. An example will help illustrate this point.

Harvard and Yale law schools account for nearly half of all professors in the legal academy.[220] The orthodoxy is that having a law degree of some kind (i.e., J.D., LL.M., S.J.D.) from one of these two law schools will make getting a job as a law professor much easier.[221] A law degree from one of these two schools, therefore, constitutes two types of capital: social (in the form of educational credentials) and *symbolic* because symbolic capital is simply capital in *any of its other forms* including social capital, that "is accorded positive recognition, esteem, or honor by relevant actors within the field."[222] It is in its role as symbolic capital that the Harvard or Yale law degree enables the aspiring law professor to get her foot in the door in the legal academic field. Some people in this field will remain dominated because they simply lack the capital necessary (economic, social, cultural) to acquire a law degree from either Harvard or Yale. Other people, however, will be able to acquire such a degree. Perhaps not as intuitively, if these people acquired their Harvard or Yale law degree simply because of its value as symbolic capital, they, too, remain dominated. "Hierarchies and systems of domination are . . . reproduced to the extent that the domi-

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[216] *Id.*
[217] *Id.* at 177.
[218] Crossley, *supra* note 174, at 93.
[219] *Id.* at 94.
[220] *See* Brian R. Leiter, *Where Current Law Faculty Went to Law School*, BRIAN LEITER'S L. SCH. RANKINGS, (Mar. 17, 2009) http://www.leiterrankings.com/jobs/2009job_teaching.shtml.
[221] *See, e.g.*, *What You Need to Know About Law Professorships*, LAWCROSSING, http://www.lawcrossing.com/article/4510/What-You-Need-to-Know-about-Law-Professorships/ (last visited Dec. 8, 2011).
[222] Emirbayer & Johnson, *supra* note 174, at 12.

nant and the dominated perceive these systems to be legitimate, and thus think and act in their own best interests within the context of the system itself."[223]

Significantly, the symbolic capital can be and often is converted into economic capital, which to reiterate, is the most powerful and determinant.[224] In fact, this is one of the aspects of symbolic capital that makes it so important in Bourdieu's theory of reproduction.[225] In the example above, the Yale or Harvard law degree (the symbolic capital) may very well be the ticket that enables an actor to obtain the relatively high paying job (vis-à-vis other professors in the academy) as a law professor.[226] More economic capital plus the symbolic capital associated with being a law professor translates into either a more secure or improved field position, and, as a direct result, the professor's voice is given more weight in determining the legitimacy of the social world specifically because of her position.

Together, interest, misrecognition, symbolic capital, and legitimation create what Bourdieu calls "symbolic violence."[227] Symbolic violence, which Bourdieu understands "as the capacity to impose the means for comprehending and adapting to the social world by representing economic and political power in disguised, taken-for-granted forms,"[228] results when actors *misrecognize as natural* the hierarchies and systems of domination produced through the struggle within fields to determine legitimacy,[229] and agree to play by the rules of the game as laid out for them.[230] Symbolic violence is an effective and efficient form of domination because the dominant group and the various actors within it "have only to *let the system they dominate take its own* course in order to exercise their domination."[231] Schematically, Bourdieu's theory of domination might look something like this:

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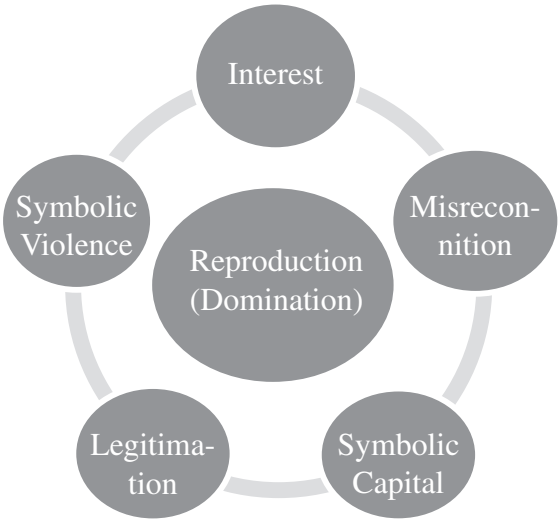
[223] Schubert, *supra* note 175, at 184.
[224] *See supra* text accompanying notes 200–02.
[225] BOURDIEU, OUTLINE, *supra* note 174, at 179, 183; *see also* SWARTZ, *supra* note 178, at 92; Richard Terdiman, *Translator's Introduction*, to Pierre Bourdieu, *The Force of Law: Toward a Sociology of the Juridical Field*, 38 HASTINGS L.J. 805, 812 (Richard Terdiman trans., 1987) [hereinafter Bourdieu, *Force*].
[226] *See e.g.*, *2009-10 CUPA-HR National Faculty Salary Survey*, C. & UNIV. PROF. ASS'N FOR HUM. RESOURCES, http://www.cupahr.org/surveys/nfss_surveydata10.asp (last visited Dec. 8, 2011).
[227] *See generally* BOURDIEU, OUTLINE, *supra* note 174, at 183–97; *see also* BOURDIEU & WACQUANT, *supra* note 176, at 167–68.
[228] SWARTZ, *supra* note 178, at 89.
[229] Moore, *supra* note 189, at 104.
[230] Schubert, *supra* note 175, at 185; Jewel, *supra* note 199, at 1162–63.
[231] BOURDIEU, OUTLINE, *supra* note 174, at 190 (emphasis in original); *see also id.* at 184; Schubert, *supra* note 175, at 184.



Symbolic violence thus replaces physical coercion as the means by which the dominant continue to dominate. And the dominated become complicit in their own domination, because collective misrecognition, which is essentially a "collective denial of the economic reality of exchange,"[232] "is only possible . . . when the group lies to itself in this way" and everyone believes those lies.[233]

Change within a field, such as changing established values or assessments of capital, is certainly possible. Crises (like the Cold War)[234] and the development of new technologies (like the digital and bio-technology revolutions)[235] can force changes in a field.[236] Change is also possible, however, because of the way fields are constructed. Since fields are sites of perpetual struggle, there will never be an ultimate winner because the "game" that is the struggle taking place in a given field will be unending.[237] This means that changing demographics may lead to changes in individual strategies within a field, which, in turn, could also change values within a given field.[238]

In the specific context of the field of law, which Bourdieu calls the "juridical field,"[239] the struggle is over the right to determine the law and for control of access to legal resources.[240] The dominant actors in this field are the lawyers and judges (still mostly white men)[241] because they possess the right kinds of

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[232] BOURDIEU, OUTLINE, *supra* note 174, at 196; Moore, *supra* note 189, at 104.
[233] BOURDIEU, OUTLINE, *supra* note 174, at 196.
[234] *See, e.g.*, MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 3 (2002).
[235] Emirbayer & Johnson, *supra* note 174, at 16–17.
[236] BOURDIEU, OUTLINE, *supra* note 174, at 169.
[237] Thomson, *supra* note 173, at 79.
[238] *Id.*; Emirbayer & Johnson, *supra* note 174, at 18–21.
[239] Terdiman, *Translator's Introduction*, in Bourdieu, *Force*, *supra* note 225, at 805–06.
[240] Bourdieu, *Force*, *supra* note 225, at 817.
[241] *See Lawyer Demographics*, AM. BAR ASS'N, http://new.abanet.org/marketresearch/PublicDocuments/Lawyer_Demographics.pdf-2009-12-15 (last visited Dec. 8, 2011) (i.e., American Bar Association demographic chart shows, for example, the following statistics: 1980: 92% men; 1991: 80% men; 2000: 73% men; 1990: 92.6% white; in 2000: 88.8% white).

capital—namely, cultural *and symbolic* (in the form of educational credentials, training, and knowledge of legal processes and texts), social (networks), and economic. The dominated actors are clients[242] because they lack the right kinds of capital, particularly cultural capital.

All of the actors within the field tacitly accept "the field's fundamental law . . . which requires that, within the field, conflicts can only be resolved *juridically*—that is, according to the rules and conventions of the field itself."[243] Actors thus assume without question, and therefore misrecognize, that the law is neutral, apolitical, and objective.[244] They also mistakenly believe that conflicts between people can be converted into clearly defined legal claims[245] that can then be decided by independent and objective third-party professional proxies (specifically by the parties' lawyers and the judge) who know and understand the law because of their education and training,[246] and hence can properly and correctly resolve the disputes to achieve justice under the law.[247] Actors also agree to accept "the rules of legislation, regulation, and judicial precedent by which legal decisions are ostensibly structured"[248] as part of the rules of the game. As a result, case outcomes or "solutions are accepted as impartial because they have been defined according to the formal and logically coherent rules of a doctrine perceived as independent of the immediate antagonisms."[249]

Because the objectivity, neutrality, and universality of the law and its processes are taken for granted and assumed, all the actors misrecognize that the legal field is actually set up to serve the dominant group's interests. For instance, actors in the dominant group share a closeness of interest resulting from their similar holdings of social (family) and cultural (educational backgrounds) capital.[250] This identity of background and interest fosters similar dispositions[251] and kindred world-views. As a result, "the choices which those in

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[242] The exception is clients who have a lot of economic capital. In this circumstance, the client is the dominant actor, and the lawyer is dominated. The reason for this role reversal is because economic capital is the most powerful kind of capital in every field. *See supra* text accompanying notes 197–206 (discussing importance of economic capital). Hence, it is not hard to imagine that there are numerous subfields within the legal field where the client is the dominant actor. The exception may therefore be bigger than the rule stated in the text. But in the subfield of law dealing with identity politics, specifically, claims based on race, gender, class, etc., chances are the client will not be a powerful economic actor and will therefore be the dominated actor.

[243] Bourdieu, *Force*, *supra* note 225, at 831.

[244] *Id.* at 813.

[245] *Id.* at 833.

[246] *Id.* at 834, 844.

[247] *Id.* at 818.

[248] Terdiman, *Translator's Introduction in id.* at 807.

[249] *Id.* at 830.

[250] *Id.* at 842.

[251] An actor's dispositions are the product of what Bourdieu calls *habitus*. *See, e.g.*, BOURDIEU, OUTLINE, *supra* note 174, at 78–87. There is no easy and straightforward way to explain or describe habitus. That said, Karl Malton describes it thus: "*habitus* focuses on our ways of acting, feeling, thinking, and being. It captures how we carry within us our history . . . and how we then make choices to act in certain ways and not others." Karl Malton, *Habitus*, *in* PIERRE BOURDIEU: KEY CONCEPTS, *supra* note 173, at 49, 52; *see also* SWARTZ, *supra* note 178, at 100–01.

the legal realm must constantly make between differing or antagonistic interests, values, and world-views are unlikely to disadvantage the dominant forces."[252]

The problem, of course, is that the field of law also adheres to precedent. This adherence to precedent ties the present to the past and "guarantee[s] that . . . the future will resemble what has gone before, that necessary transformations and adaptations will be conceived and expressed in a language that conforms to the past."[253] The language and the world views expressed in legal precedents protect and continue to protect the dominant group's interests. Hence, despite the changes wrought in the law based on evolving demographics and the identity politics surrounding race, gender, and class,[254] the law going forward was and is unlikely to upset the hierarchy by disadvantaging the dominant group's interests.

This is obviously an overly simplified explanation of the intricacies of how the legal field works.[255] But it should suffice to make the basic point that symbolic violence is perpetrated on all the actors in the field of law because the actors—clients, lawyers, judges—end up *misrecognizing as natural* the hierarchies and systems of domination produced within that field[256] and agree to play by the rules of the game as laid out for them. And because they tacitly agree to play by rules of the game, the arbitrariness present in the taken-for-granted and self-evident assumptions in the field of law remain concealed. As a result, the hierarchies (men over women, rich men over poor men, and white men over Black men) get reproduced consistently, over time and across disciplines.[257]

As for Llewellyn, his capital holdings (economic, cultural, social, and symbolic)[258] would have ensconced him firmly within the dominant group in the legal field. He therefore would have possessed, consciously *and subconsciously*, similar predispositions and world-views with other members of the dominant group.[259] And because Llewellyn was also an actor in the legal field, he, too, would have internalized the rules of the game and tacitly agreed to play by them. All of these things—his position as a dominant actor, his predisposition and world view, and the orthodoxies of the field—make certain things, such as disturbing the status quo, difficult, if not unthinkable. Hence, none of the changes Llewellyn implemented disturbed the status quo.[260]

It therefore seems fairly safe to say that elites, like Llewellyn, do not necessarily conspire to maintain their dominant position in society. Instead, Llew-

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[252] Bourdieu, *Force*, *supra* note 225, at 842.
[253] *Id*. at 845.
[254] *See supra* Part III.A.
[255] *See generally* Bourdieu, *Force*, *supra* note 225.
[256] Moore, *supra* note 189, at 104.
[257] *See supra* Part III.A.
[258] Llewellyn was a graduate of Yale Law School and taught at some of the most prestigious law schools in the country. His cultural capital (i.e., his credentials, experience, etc.) enabled him to become, among other things, the primary architect of the U.C.C. *See generally* TWINING, *supra* note 13, at 87–113, 367; Mooney, *supra* note 49, at 223; Wiseman, *supra* note 44, at 467.
[259] *See supra* text accompanying note 242 (discussing the identity of background and interest by the dominant group).
[260] *See supra* text accompanying notes 44–61.

ellyn, his predecessors in the legal field, and his contemporaries, were probably acting in good faith.[261] But even if true, good faith does not absolve Llewellyn—or any of us, for that matter—for our roles in perpetuating the reproduction of hierarchies and domination or the inequality that is part and parcel of them.[262] It goes without saying, however, that while we may all be complicit, we do not all share equally in the adverse consequences that result from this collective complicity.

CONCLUSION—USING THE MASTER'S TOOLS

One thing is clear from the foregoing discussion. Audre Lorde is correct: We cannot dismantle the master's house using the master's tools[263] because *all* tools are the master's tools, and as a result, they all end up serving the master.[264]

Audre Lorde may be correct, but if all tools are the master's tools, what is left to work with? The social world (reality) with its hierarchies, its domination, and its ever present adverse material consequences, remains and must be confronted. Law is one of the master's tools, one that has proven to be a double-edged sword. It both changes and reifies.[265] But if the only choice is to use one of the master's tools or no tool at all, it seems clear that the tool must be used.

The final question, then, is to decide how best to move forward. An important ongoing step is to be continually aware of the arbitrary ways in which the social world is constructed and to expose that arbitrariness.[266] Public exposure may destroy the legitimacy of embedded interests, or at least help in that endeavor, thereby creating the space to first consider other possibilities and then, ultimately, to alter existing social arrangements.[267] This is not a new approach. The Crits (including the Legal Realists) have been doing this for a very long time,[268] which is not surprising, given the way domination is repro-

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[261] Siegel, *supra* note 106, at 2180.

[262] *Id.* at 2181–83.

[263] LORDE, *supra* note 170, at 110.

[264] *See supra* Part III.B.

[265] *See supra* Part III.A.

[266] PIERRE BOURDIEU, LANGUAGE & SYMBOLIC POWER 1, 170 n.8 (John B. Thompson ed., Gino Raymond & Matthew Adamson trans., Harvard University Press 1991); Schubert, *supra* note 175, at 196.

[267] SWARTZ, *supra* note 178, at 10; Harris, *supra* note 110, at 1715.

[268] *See, e.g.*, *supra* text accompanying notes 13–46 (the Legal Realists); *see also* SIMONE DE BEAUVOIR, THE SECOND SEX 726–27 (Constance Borde & Sheila Malovany-Chevallier trans., Alfred A. Knopf 2009) (1949) (Feminism); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 237–39, 241–42 (1989) (Feminism); Crenshaw, *supra* note 105, at 1382 (Critical Race Theory); Ian F. Haney López, *White By Law*, *in* CRITICAL RACE THEORY: THE CUTTING EDGE 542, 543–47 (Richard Delgado ed., 1995) (Critical Race Theory); Harris, *supra* note 110, at 1715 (Critical Race Theory); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 63 (1984) (Critical Legal Studies); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561, 586–87 (1983) (Critical Legal Studies); Francisco Valdes, *Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of "Sex," "Gender," and "Sexual Orientation" in Euro-American Law and Society*, 83 CAL. L. REV. 1, 28–29 (1995) (Queer Legal Theory).

duced in society.[269] Notwithstanding the daunting nature of this task, it must continue. To gain traction, however, this effort cannot be carried out individually.[270] It must be a collective effort, organized by and around race, gender, class, sexual orientation, etc., and in which strategies of action by actors in one field are shared with similarly situated actors in other fields.[271] At stake in this struggle, of course, is the power to determine what will be deemed legitimate in the social world. As such, this is a struggle worth undertaking.

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[269] *See supra* Part III.B.

[270] Cecile Deer, *Reflexivity*, *in* PIERRE BOURDIEU: KEY CONCEPTS, *supra* note 173, at 199, 202.

[271] *Id.*; *see* Emirbayer & Johnson, *supra* note 174, at 20–21; Thomson, *supra* note 173, at 68.