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LEGAL INDETERMINACY, POLITICS, AND THE SUPREME COURT: Critical Legal Studies and Lawrence v. Texas

Taylor M. Dix

Imagine a man who holds up a gas station and steals all the money in the drawer and safe. Or, suppose a man is caught driving while severely inebriated. Lastly, consider a university student who is caught cheating on a final exam. The Western legal worldview which gives our society security and predictability dictates that the three people in the above examples should all be punished for their actions; they broke the law—in these cases written statutes that declare: “If one shall commit A then punishment B will follow—and common sense, based on the myriad legal experiences that one appropriates through life, says that the perpetrators should not profit from their crimes. Not only should they not profit, but society should also reprove them and, through such reprobation, deter them and society at large from committing the same crimes in the future.

However, not all legal cases are as clear-cut as the previously cited examples seem to be. While some interpretations of civil and criminal laws are straightforward and preclude any protracted debate about their correctness, conflicting statutes and principles can often muddy the water. For example, if a doctor is prosecuted for assisting his patients in committing suicide, two principles naturally clash. Furthermore, similar situations are found in legal situations involving the separation of church and state and in those times in which one’s actions are taken by one group to be an expression of free speech, while another group simultaneously takes the same actions as displays of oppression and offense. Suddenly, abstract principles that our society holds as important are conflicting with a strict interpretation of the statutes. This is not to say that the people in the first examples should be exonerated without question; they committed wrongdoings and should receive some sort of punishment. But should certain principles—aiding those in need, promoting equality and fighting oppression, and striving to educate people from all levels of society—convince judges to mitigate their punishments?
Many noted legal theorists claim that a nation's legal system is rarely defined by those cases that never go to court; in these cases, conflicts are not resolved and overarching principles are not outlined. Rather, the cases that are adjudicated and decided upon by the judiciary often define the nature of a nation's legal system. But how are these cases decided, and what does this say about our modern legal system? What guidelines does the judiciary follow in the adjudicative process? It is possible that judges are bound by metaphysical principles, common agreement, economic utility, or the weight of precedent to make certain decisions. Legal determinism, as this point of view is known, states that, given a certain case, an external causal chain uses its force to bind the judiciary—thereby controlling the human decision process.

One modern school of thought rejects the legal deterministic viewpoint and argues that any appeal to metaphysical principles carries inherent problems. In the twentieth century, legal realism gave way to the Critical Legal Studies (CLS) movement, which attacked the foundation of every prevailing legal theory and claimed that the modern legal process is intrinsically indeterministic. Not only did the CLS school argue for the indeterminacy of law, but it also asserted that the legal scene was nothing more than a mere extension of the political battleground. This essay will examine the primary tenets of CLS theory and will argue, through a study of modern Supreme Court cases, that law is intrinsically indeterminate and that the modern judicial system is primarily an extension of the political debate.

The Shape of CLS

As noted above, the CLS movement was, in its largest scope, a reaction to the idea of legal determinism that comprised the mainstream of legal thought. Both H.L.A. Hart and Ronald Dworkin argue that, although law could be open to interpretation at its fringes, the great majority of legal cases were closed to interpretation. That is, such cases are primarily fixed in their outcomes either by a "soundest theory" or by some other method. Such theorists believe that any form of objectivity surrounding legal adjudication. The CLS school, however, rejects this notion of objectivity by attacking its metaphysical and epistemological foundations. Roberto Unger attacks those who still uphold the Platonic world of forms and who claim to have access to an absolute knowledge of the essences of right and wrong (1975, 130). Because no metaphysical categories are thus preset, any attempt to describe and understand the world (be it linguistically, scientifically, etc.) can be only partial, and Unger uses this starting point to make one realize that the way in which we categorize the world is wholly self-determined (130–31). The implications of Unger's writings for legal validity are far reaching and destructive; they remove all connection between laws and reality because "reality is put together by the mind" (130). Unger finds fault with the prevailing legal theories because they are all bound by theory-based concepts—theories that have internal contradictions that produce paradoxes. Unger does not deny that theories are beneficial for producing knowledge, but he claims that this knowledge is never complete. Because theoretical underpinnings always contain some form of incoherence, total understanding is never possible.
The metaphysical problems presented by Unger inductively lead to equally important epistemological problems that demand a response from legal determinists. The chief among these problems surfaces when a case is presented in which different rules or principles conflict. The facts of any case may leave room for two different phenomenological appeals that may invariably demand two different decisions. In criticism of Hart’s theories Andrew Altman argues that in such cases one cannot know which rule is the “correct rule” to use as the foundational standard (1999, 122). In reaction to Dworkin’s claim that one can objectively adjudicate because of principles that will differentiate between competing rules, Altman emphatically denies that one can discover any semblance of a “metaprinciple for assigning weights” among competing rules (133).

Brian Leiter takes the metaphysical and epistemological foundations laid by Unger and Altman and uses them to expand the phenomenological implications of CLS thought. He agrees that determinism, or “mechanical jurisprudence,” cannot hold and that no specific set of background conditions and rules can produce a causally predetermined outcome (Leiter, 275). Keeping in line with realist and CLS tradition, Leiter argues that law is not a knowable body of concrete knowledge, existing separate from man and waiting to be tapped. Instead, law is the creation of judicial action; law is what judges say it is. In short, the foundation of law is empirical rather than metaphysical (264).

Leiter argues that realists and proponents of CLS thought agree on two theses. First, “The law is rationally indeterminate locally not globally.” Second, “The law is causally indeterminate in the cases where it is rationally indeterminate” (265). The first of these theses attacks the efficacy of precedence in adjudication because it asserts that no set of preconditions can demand a certain outcome. This view holds that there are too many conflicting, yet equally legitimate ways of interpreting the sources (statutes, precedent, principles, etc.) and the facts of any case, thus allowing judges to draw a host of different conclusions from the same facts. This thesis destroys the value of precedent because former cases were not decided mechanically, and precedent, therefore, “can be interpreted to stand for more than one rule, and so justify more than one outcome” (266). The second thesis is merely the logical extension of the first. If the law is rationally indeterminate on some point, and legal reasons justify more than one decision, then we must look at extra-legal sources to determine why a judge decided in some particular way (267). The move to describe law from an extra-legal standpoint results in a normative theory of law that can only describe what happens. It lacks the power to prescribe what ought to happen.

What, then, is law, if not a knowable set of rules that can be used in a predictive fashion? Prussian military philosopher Carl von Clausewitz said that war is nothing more than an extension of politics on the battlefield, and Altman takes the same position with law. For the CLS school, law is a patchwork of ideologies, pieced together for the benefit of political parties and special interest groups (Altman 1999, 134). “In other words,” Altman writes, “the spectrum of ideological controversy in politics is reproduced in the law” (134). Before considering a court case that demonstrates the validity of CLS theory, I will first show how the presupposition that law is an extension of political maneuvering clearly infects the
decisions of those who control the interplay between the highest levels of executive and judicial power in our country.

**The Politics of Federal Judicial Nominees**

Given the prevailing philosophical streams of the twentieth century, one should not be surprised to observe the erosion of legal philosophy's metaphysical underpinnings. Existentialism, deconstructionism, and other continental schools of thought all question man's ability to have absolute knowledge of any concept or category. These philosophies have caused society to perceive reality in terms other than absolutistic and causal. Instead, reality is seen in subjective terms of individual power, ambitions, and financial rewards. Against this backdrop, the structure of our legal system appears to be a vehicle for the realization of personal and collective political goals.

In fact, the public and the upper echelons of political power both realize that our nation's courts can be used to formalize political ideologies as law, and this realization has become more pronounced in the past half century. Not since the nineteenth century, when the Senate took a far more active role in appointing federal judges, have presidents had to personally fight, having the real possibility of defeat looming on the horizon, to have their nominations pass congressional review. Indeed, President Lyndon B. Johnson was the first president since the pre-Depression era to have a nominee fail to gain senatorial approval. Johnson attempted to have Abe Fortas elevated to the position of chief justice, but the Republicans refused to consider the nomination because Fortas's views were too similar to those of his predecessor, Earl Warren, whose views were particularly damaging to Republican ideologies. From this moment, when the modern politicization of judicial nominees began, political ideologies have dominated the formation process of our nation's judiciary. Democrats vowed revenge after the Fortas fiasco, and they exacted their revenge by blocking the appointment of Clement Haynsworth, one of Nixon's protégés. As Senator Gale McGhee, a Democrat, then conceded: “Had there been no Fortas affair . . . a man of Justice Haynsworth's attainments . . . undoubtedly would have been confirmed” (qtd. in Shenkman 2001). However, this act only provoked the Nixon Administration to continue the political games by “ind[ing] a good federal judge further south and further to the right [than Haynsworth]” (Shenkman 2001).

Vying for political ideological supremacy in Washington, far from subsiding, has only increased in intensity and has aided greatly to the dividing and polarizing of the political parties. Each believes that “packing” the Court will provide future political dividends. However, Washington will likely not admit that it is playing this game, even though any casual observer can easily note otherwise. For example, take the senatorial furor that has surrounded President Bush's most recent federal nominees. Filibustering, used by Democratic senators solely to block judges that they expect to adjudicate in one specific way (ried, of course, to political affiliation), proves that politicians assume judges are not restrained by metaphysical principles, but are rather merely pawns of the larger political organizations. This view casts the Supreme Court of the United States, the one institution vested with the power to defend and uphold the Constitution and the rule of law, as nothing more than an
extension of the political battleground on which major policy issues are driven by money, prestige, and potential votes rather than on a strict interpretation of the law.

The Democrats are not the only group that falls into this camp. Recently, the Republicans were accused of believing that "judging is an apolitical task only as long as judges do the right thing by administration lights," even though the Bush Administration argued that "nominees should not be stalled because of politics and that senators should confirm qualified judges who will observe the law, irrespective of ideological differences" ("Editorial" 2002). It seems as though the right hand hypocritically calls for apolitical adjudication, while the left hand offers federal support to those judges who decide in favor with the Republican agenda. No real assent to a cognitively tenable body of legal knowledge is made, and the actions of politicians and judges alike betray that sociological, political, and personal reasons drive the adjudication process towards rulings that, given the same facts and rule but viewed by an absolutely external and objective judge (an obvious impossibility), might not be made otherwise. Is this not one of the key claims of the CLS school of thought? This state of affairs destroys the notion that the highest Court of the land is a mere bystander in the dialectic evolution of American culture. Rather, the Court is active in writing and rewriting laws to fit certain political ideologies, liberal and conservative alike.

**Lawrence v. Texas**

We will now examine a recent case to analyze the remaining tenets of CLS theory. Is the modern American legal system both rationally and causally indeterminate? Does the judiciary pick and choose which rules and principles have precedence in a given case? Does the judiciary act, in defiance of constitutional precedent, as a legislative body? Finally, is the court really an additional battleground for political supremacy? A review of *Lawrence v. Texas*, a case decided in June 2003, will answer these questions.

*Lawrence v. Texas* considers the case of two men who were caught having consensual sexual relations, a violation of Texas law at the time. To rule in this case, the Supreme Court drew on rules and principles outlined in three previous cases: *Roe v. Wade*, *Bowers v. Hardwick*, and *Planned Parenthood of Southeastern Pennsylvania v. Casey*. In *Roe*, as many know, the Court gave women a fundamental right to control every aspect of their pregnancies by extending federal protection to those who choose to abort their unborn children. *Bowers*, ruled in 1986, states that a Georgia law classifying sodomy as a criminal act is constitutionally permissible. The ruling in *Liturra* effectively overturned any precedent set in *Bowers*. *Casey*, ruled in 1992, at heart, reaffirms the holding that the state can not interfere with the abortion of unborn children, even to the point of striking down provisions that require spousal consent to abortions. The manner in which the Supreme Court interpreted the three cases in the *Lawrence* decision serves as evidence for both the indeterminacy of law and for the supreme role that political ideology plays in modern adjudication. We will first examine rational legal indeterminacy.

First, the violation of personal privacy is offered as one of the primary reasons for striking down the Texas sodomy law in *Lawrence* (Kennedy 2003). However, beginning with *Roe*,
the line of thinking that grants an inalienable right to privacy to all American citizens is faulty. The right to privacy is not a fundamental right granted by the Constitution but is rather a contrived right produced by the Court, and the *Bowers* decision upholds this view. The majority opinion in *Bowers* pointed out that the Supreme Court rests on dangerous grounds when it discovers "new fundamental rights imbedded in the Due Process Clause. . . . The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language . . . of the Constitution" (White 1986). Justices can choose either to see the right as fundamental or not. In either case, conflicting rules are present from the beginning, and the justices must reach outside of the law to further defend any legal position. One's personal political leanings would provide the most rational basis for defending or attacking this right to privacy, which only strengthens the CLS standpoint that law is fundamentally rationally indeterminate.

Second, a clause written by Sandra Day O'Connor was used as key defense in the *Lawrence* decision. In her majority opinion in *Casey*, Justice O'Connor wrote that everyone has "the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life" (O'Connor 1992). Using this reasoning, the majority decided that two consenting adults have the right to decide on the nature of their relationship, and the State has no right to interfere in that creative process. However, one can obviously use the above reasoning to defend nearly any claim about civil rights, criminal actions, actions demanded by religion, and general statements on the nature of reality and humankind. In the same vein, Anthony Kennedy wrote in his *Lawrence* opinion: "As the Constitution endures, persons in every generation can invoke its principle in their own search for greater freedom" (Kennedy 2003). Can anyone who clings to a formalist legal approach hold that such an interpretation of the Constitution demands a certain course of action? In essence, the above clauses allow for any interpretation on nearly any subject resulting in a state of affairs that offers no help to judges and only encourages them to seek extra-legal sources to base adjudication on, once again showing the rational indeterminacy of law.

Third, Justice Kennedy shows yet another position in the *Lawrence* majority opinion whereupon judges must seek extra-legal help to interpret a legal principle. Kennedy accepts the principle that rulings should follow traditions that are deeply ingrained in the fabric of our nation, as do the Justices who dissented, but this legal principle makes no definitive statement as to how such rulings should be interpreted. The majority used certain evidence to show that an aversion to sodomy between consenting adults was not an integral part of American heritage, while the dissenting side used counterevidence to show that the American public and political machine have always been opposed to such actions. Again, extra-legal principles and historical evidence are needed to provide grounds for a legal ruling.

The point at issue is that both sides had to resort to historical evidence to interpret a certain legal principle, and equal, yet diametrically opposed, conclusions were reached. Even when presented with evidence that would show that sodomy was abhorred by the constitutional framers and early Americans, Kennedy writes, "In all events we think that our laws and traditions in the past half century are of most relevance here" (Kennedy
Dix 109

2003). The Justice has introduced yet another extra-legal lens through which to view the case as a whole. By narrowing the temporal requirement of honoring traditions, Kennedy is able to manipulate the judicial outcome to fit his personal political opinions.

Fourth, Kennedy criticizes the legal methodology used to support Bowers and later uses the same legal principle to support Lawrence, which effectively overturned Bowers. He writes the following:

*Bowers*’ rationale does not withstand careful analysis. In his dissenting opinion in *Bowers* Justice Stevens came to these conclusions: "... First, the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice." (Supreme Court 2003)

In short, the majority's view on morality should not be a deciding factor in the constitutionality of statutes. Nonetheless, the Court majority then reorders its position and says that *Lawrence* should be upheld because a majority of citizens has "an emerging awareness" (Supreme Court 2003) that homosexual acts should not be criminalized. Kennedy is, in essence, picking and choosing the times when one should allow the principles that form the majority’s opinion to be legalized. If the *Bowers* Court is not allowed to use an extra-legal principle to support their case, why is Kennedy then justified in his decisions? It seems that two mutually exclusive, yet equally rational, conclusions were reached.

Lastly, the Kennedy decision in *Lawrence* supports rational legal indeterminacy by accusing the *Bowers* Court of “[h]aving misapprehended the claim of liberty” presented to them in the 1986 case (Kennedy 2003). This case of rational indeterminacy is blatantly obvious—the Justices themselves feel that they would have come to a different conclusion given the same facts. The root of this accusation lies in the fact that Kennedy and his supporters interpreted the legal definition of “liberty” differently than those who upheld the *Bowers* case. Here we see how rational legal indeterminacy fuels judicial revisionism and activism; judges believe their opinions and interpretations are more legally sound and impose them, in the form of precedent (which is, itself, metaphysically groundless), on ensuing generations.

Turning to causal legal indeterminacy, one can see that the plethora of conflicting rules and principles, all subject to equal weight and interpretation, will never dictate a single course of adjudicative action. In the *Lawrence* case, causal legal indeterminacy is most evident when one realizes the legal implications that stem from the majority’s ruling, namely the overturning of *Bowers*. In her opinion discussing the ruling in *Casey*, Justice O’Connor wrote the following:

(e) The *Roe* rule’s limitation on state power could not be repudiated without serious inequity to people who, for two decades of economic and social developments, have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail. The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives. The Constitution serves human values, and while the effect of reliance on *Roe* cannot be exactly measured, neither can the certain costs of overturning
Roe for people who have ordered their thinking and living around that case be dismissed. (Pp. 855–56)

(i) Overruling Roe’s central holding would not only reach an unjustifiable result under stare decisis principles, but would seriously weaken the Court’s capacity to exercise the judicial power and to function as the Supreme Court of a Nation dedicated to the rule of law. (Supreme Court 1992)

In 1992, O’Connor and the rest of the majority were not willing to sacrifice the integrity of the Court by overturning precedent decided less than two decades earlier. The social repercussions would likely be undesirable, and a major cultural upheaval would be expected should Roe be overturned. Additionally, they found the principle of stare decisis—basically, a respect for precedent—to be seemingly sacrosanct.

In his Lawrence dissention, Justice Antonin Scalia wrote,

“Liberty finds no refuge in a jurisprudence of doubt. . . .” That was the Court’s sententious response barely more than a decade ago, to those seeking to overrule Roe v. Wade [in Casey]. The Court’s response today . . . is very different. . . . I begin with the Court’s surprising readiness to reconsider a decision rendered a mere 17 years ago in Bowers v. Hardwick. . . . I do believe that we should be consistent [with precedent] rather than manipulative in invoking the doctrine. . . . There [in Casey], when stare decisis meant preservation of judicially invented abortion rights, the widespread criticism of Roe was strong reason to reaffirm it. (Scalia 2003)

Justice Scalia saw the hypocritical façade that the Lawrence majority was acting under, and his comments shed light on the causal legal indeterminacy that surrounded the court case. In one situation, the Court was reticent to overturn precedent because liberty found “no refuge in a jurisprudence of doubt.” Yet in Lawrence, the Court had to rule on moral rights dealing with sexuality and reproduction, and precedent was swiftly overturned because of “an emerging awareness” in America’s thinking on sex. Just one decade apart, one ruling defended the sanctity of precedent, while the other erased precedent because of its harm on “progressive” American social norms. Perhaps causal legal indeterminism’s greatest piece of evidence is Kennedy’s statement that “Bowers was not correct when it was decided, and it is not correct today” (Supreme Court 2003). Given all the same rules, principles, and background information, Kennedy would have decided contrary to the majority in Bowers. Because adjudication is inherently indeterminate, no given set of conditions can prescribe a singular judicial outcome.

In all of these examples, the reader should not see any imposition of valuative judgments. I am not concerned with whether one interpretation is right and one is wrong. The crux of the argument rests solely with whether a window exists for equally differing legal interpretations that forces Justices to look to extra-legal sources for adjudicative purposes. If it does, then CLS theory has proven the rational indeterminacy of law. Similarly, I do not mean to judge the correctness of any Court decision, but wish rather to show that, given the same set of rules, principles, and conditions, judges will arrive at different decisions in different cases. This displays the second tenet of CLS theory—the causal indeterminacy of law.
**Law and Politics**

*Lawrence* clearly demonstrates both the rational and causal indeterminacy of law. After removing the traditional adjudicative foundations, however, one must be prepared to replace them with another superstructure. If law is not a causal chain of following statutes, then what is it? Turning again to the situation in *Lawrence*, the obvious answer seems to agree with the CLS opinion that law is an extension of the battle between competing political ideologies. Of course, one might not remove all uncertainty of political influence, but the preponderance of evidence points towards it as the most dominant force that manipulates the adjudicative process.

As explained above, the general public and many political leaders believe that law is influenced by politics. The statements of the Justices themselves also betray this opinion. The case in *Lawrence* quickly became as much about the political rights of a self-proclaimed minority group as it did about the legality of a Texas sodomy law. Sandra Day O'Connor explicitly stated that she ruled to strike the Texas law because doing so protected the rights of a "politically unpopular group" (qtd. in Scalia 2003). It is well known that the homosexual issue is charged with political ramifications—something that was relatively lacking twenty years ago—and that people are automatically labeled homophobic, intolerant, or politically incorrect should they oppose giving any and every right to those who have homosexual tendencies. Additionally, the Democratic Party has aligned itself with voters who describe themselves as homosexual, and liberal judges are therefore disinclined to rule unfavorably for such voters.

Perhaps the most scathing political accusation directed towards those who compose the majority in *Lawrence* comes from a fellow justice, Antonin Scalia. Finding no plausible distinction between upholding a right to abortion (in *Roe*) and overruling the condemnation of homosexuality (in *Bowers*), Justice Scalia concluded, "Today's opinion is the product of a Court, which is the product of a law-profession culture, that has largely signed on to the so-called homosexual agenda. . . . It is clear from this that the Court has taken sides in the culture war" (Scalia 2003). Judicial activism that takes a side on a hot political issue undoubtedly reveals the political influence that partisan leaders and platforms exert on the Supreme Court.

**Conclusion**

One can easily provide counterexamples to those who subscribe to a formalistic theory of law. Law, especially in those cases that actually reach the courtroom, is not mechanically determined; judges are not compelled to always adjudicate in a given way; different outcomes, replete with supporting reasons and facts, are always probable in any given situation. The very fact that the vast majority of federal rulings are not unanimous supports this theory; different judges rule differently in spite of identical background circumstances and applicable statutes. The CLS theory, when taken as a theory of adjudication, satisfactorily explains this phenomenon. Its stress on the indeterminacy of law, both rational and causal, illuminates the need for judges to reach out to extra-legal principles to formulate their rulings. This essay has shown how the Supreme Court, in the case of *Lawrence v. Texas*, was forced
to look beyond the written law to justify both the majority and minority opinions. Moreover, given the social and political conditions surrounding the ruling, one can confidently assume that the legal ruling, in this case, was derived from the political battle raging outside of the Court’s chambers.

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Taylor Dix is a senior at Brigham Young University majoring in philosophy and history, with a minor in Chinese studies. After graduation in April 2004, he plans on pursuing graduate degrees in both philosophy and law.

**ENDNOTES**

1. In this case, principle one would be something like: “If person x helps in causing the death of person y, then person x is guilty of murder.” Principle two would read something like: “If person x no longer has any desire to live, he is free to end his life.” Naturally, the two principles conflict.

2. The basic information in the preceding paragraph was gleaned from the body of his article.

3. “Packing”—a word used often by politicians and the media that betrays the fact that Justices are merely tools of political advancement who serve the political bosses who appointed them.


Leiter, Brian. Legal realism. In Letwin, unpublished manuscript, assigned for Philosophy 416 CLS group readings.


