ARTICLE

CHINESE JURISTS’ MISCONCEPTIONS OF CRITICAL LEGAL STUDIES

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Abstract  Critical Legal Scholarship was first introduced to Chinese legal academia in late 1980’s, and gained great attentions in the following decade. Later on, however, Chinese jurists showed little interest in exploring more of Critical Legal Scholarship because of their oversimplification of Critical Legal Scholars as indeterminists, deconstructionists, extremists and nihilists. This article points out the typical, gross misconceptions of Chinese jurists to Critical Legal Scholarship, and explores the reasons of such misconceptions. The author of this article hopes that his representation of Critical Legal Scholarship would help to reopen the door for further communications between the Critical Legal Scholarship and their audiences in China. Remarks on how to approach Critical Legal Scholarship further from a Chinese perspective are provided at the end of this article.

Keywords  Critical Legal Studies, determinacy, political preference, rule of Law

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This article is an extension of my presentation at Renmin University International Virtual Workshop in Mar. 2014, which weighed in on Professor Duncan Kennedy’s thoughts on the globalizations of law and legal thoughts (see GUO Rui & HU Xiaoqian, Duncan Kennedy’s Three Globalizations in Theory and in Practice: A Chinese Perspective, 9(4) Frontiers of Law in China, 536–559 (2014); HU Xiaoqian, Encounter: How Duncan Kennedy and Chinese Legal Scholars View Legal Transplants and the Rule of Law — A Commentary on the Harvard–Renmin Virtual Workshop on Duncan Kennedy’s Three Globalization and Legal Thought, 9(4) Frontiers of Law in China, 560–581 (2014)). I am grateful to Professors Duncan Kennedy, Joseph Singer, Henry Smith and Mark WU for the illuminating talks at Harvard Law School. The comments from Professors Bill Alford, Duncan Kennedy, Joseph Singer, ZHU Jingwen, GUO Rui, Charles Wharton, ZHU Mingzhe, YAN Tian, WANG Linghao and ZUO Zhenbin are also appreciated. I also thank Renmin University Research Funds on WTO DSB’s Interpretative Methods (Project No. 15XNB001) and Moral Conception and Social Welfare in National Legislation (Project No. 15XNF004), and Renmin-Geneva Seeding Funds (Project No. 16XNQ021) and Research Project Funded by National Social Science Foundation of China (Project No. 14CFX006) for generous supports in the writing of this article.
INTRODUCTION

Everyone is confused about what Critical Legal Scholars mean when we say that law or rights or legal theory is indeterminate.

— Joseph William Singer

Critical Legal Scholarship was first introduced to Chinese legal academia in 1987, and gained great attentions in the following decade. Later on, however, Chinese jurists showed little interest in exploring more of Critical Legal Scholarship probably because of their oversimplification of Critical Legal Scholars as indeterminist, deconstructionist and extremist. Such a reading of Critical Legal Studies not only disagrees with the Chinese colleagues’ strong expectation of social certainty and urgent pursuit of rule of law after drastic social changes in nearly half a century, but also contradicts, to some degree, their intuitive feelings about real courtroom operations.

It is indeed Critical Legal Scholars’ common belief that law is not apolitical and objective. Rather, according to Critical Legal Scholars, lawyers, judges, and legal...
academics often make highly controversial political choices, but use formalist legal reasoning to make their choices appear natural and neutral. 5 But Chinese legal theorists have oversimplified Critical Legal Scholarship in multiple significant aspects, which has prevented them, and later on their students, from having meaningful conversations with American Critical Legal Scholars. One prestigious legal theorist in China recently said “Critical Legal Theories are so radical, cynical and deconstructive that many legal professionals keep at a far distance from them,” which later squanders the opportunity to learn from Critical Legal Scholars’ insights. 6 China is hardly the only jurisdiction where Critical Legal Scholarship is oversimplified. Similar misconceptions also exist in the U.S. I have no intention to exhaust Chinese colleagues’ misconceptions by this article, nor will I defend or criticize the claims and arguments of Critical Legal Scholars. What I am going to do, in Part I and Part II, is to describe two co-related, gross misunderstandings of Critical Legal Scholarship, which are widely held among faculties in China’s law schools. In Part III, I will combine the theses in the first two parts, and locate the enterprise of Critical Legal Studies in a broader context. On the one hand, it helps to deepen the understanding of the first two theses, and on the other hand, serves as a window from which other misconceptions of Critical Legal Scholarship could be examined. 7 In Part IV, I explore possible reasons of Chinese colleagues’ misconceptions in 1980’s and 1990’s. I hope this article would help to reopen the door for further communications between the Critical Legal Scholarship and their audiences in China. I close this article with two remarks as to the way of exploring Critical Legal Scholarship by future Chinese audiences.

5 See Singer, fn. 1 at 5.
I. DETERMINACY, OBJECTIVITY AND NEUTRALITY OF THE LAW IN ADJUDICATION

A. Chinese Jurists’ Reading of Critical Legal Scholars’ Claim of Determinacy

The most serious misunderstanding of Chinese jurists to Critical Legal Scholarship is about the determinacy and indeterminacy of legal reasoning, especially legal interpretation in adjudication. More than three decades ago, Joseph Singer, a prestigious scholar of Critical Legal Theory and property law, said that almost “everyone is confused about what Critical Legal Scholars mean when we say that law or rights or legal theory is indeterminate.”8 Chinese jurists widely consider that Critical Legal Scholars believe judges’ legal reasoning and courtroom decision are completely indeterminate, subjective and arbitrary. There is no neutrality in judges’ legal reasoning.9 When Chinese colleagues talk about Critical Legal Theory and legal realism in general, they are likely to commence with the common caricature of realism that says the law is what the judge ate for breakfast,10 which is actually an oversimplification of the basic tenet of legal realism that non-legal factors have strong bearings on judges’ decision.11

According to Chinese colleagues, Critical Legal Theorists succeeded and radicalized the position of early legal realists, like Jerome N. Frank and Karl N. Llewellyn who emphasized the subjectivity and indeterminacy of legal interpretation in the courtroom.12 Legal practices, especially adjudications, are politically/ideologically motivated, and

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8 See Singer, fn. 1.
9 See WU, fn. 3 at 146–148; ZHU, Challenges to Western Legal Traditions, fn. 3 at 116–117; JI, fn. 6 at 29. Actually, many American critics of Critical Legal Scholars also misinterpret them as advocates for complete indeterminacy of the law. They take Critical Legal Studies movement as the continuation of the realist project, which mainly emphasizes on the linguistic uncertainty of rules. See Kelman, fn. 7 at 12–14.
10 This is true not only in academic writings, e.g. KE Lan, 法律方法中的形式主义与反形式主义 (On the Formalism and Anti-Formalism in the Legal Methods), 2 法律科学 (Science of Law) 31, 32 (2007), but also in daily classroom teaching.
11 The breakfast trope is often erroneously attributed to early legal realist Jerome Frank. See Charles M. Yablon, Justifying the Judge’s Hunch: An Essay on Discretion, 41 Hastings Law Journal, 236 (1990), “While this is perhaps the most popular formulation of the strong rule-skeptical position, and is still widely used, I have not been able to locate its precise origins. I suspect, however, that it may derive from a statement by [Roscoe] Pound in which he contrasts a system of law to the arbitrariness of ‘cadi’ justice.” Also see Shai Danziger, Jonathan Levav & Liora Avnaim-Pesso, Extraneous Factors in Judicial Decisions, available at http://www.pnas.org/content/108/17/6889.full.pdf (last visited Mar. 9, 2017), an experimental study suggesting that “judicial rulings can be swayed by extraneous variables that should have no bearing on legal decisions.”
12 See JI, fn. 6 at 29; DENG Jinting, 新法律现实主义的最新发展与启示 (The New Legal Realism’s Latest Developments and Its Inspirations), 4 法学家 (The Jurist) 1, 2 (2014) (“To support the claims that public organs shall intervene in private fields to protect weak parties’ interests, Critical Legal Scholars strengthened legal realism and proved the uncertainty of law to an extreme extent”). As to the relationship between legal realism and Critical Legal Scholarship, see Round and Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 Harvard Law Review 1669, 1673–1682 (1982).
entirely dependent on actors’ subjective, political/ideological preferences. They also lay emphasis on the manipulability of law (both rules and standards) as the centrality of Critical Legal Scholarship. Judges just interpret law as they prefer, and mask their subjective preferences with formalistic arguments based on legal texts. The so-called judges’ fidelity to law or neutral application of law without subjective preferences is no more than an illusion and self-deception.

But such an understanding of Critical Legal Scholarship is overly simplified. At most, it tells a small part of the story. Some Chinese colleagues have already noted that Critical Legal Studies is not a school of unitary thoughts, but a group of leftists who aim to break the yoke of paradoxical legal thoughts, especially liberal legalism. The ultimate goal of the left project is “to change the existing system of social hierarchy, including its class, racial, and gender dimensions, in the direction of greater equality and greater participation in public and private government.” Nonetheless, few Chinese colleagues have perceived that American critical scholars split widely in terms of their understandings of the influence of judges’ ideological preferences on adjudication, ranging from an ideological actor in a very strong sense, to a judge who is truly faithful to a method of interpretative fidelity with no ideological pollution. There are many critical theorists in between the two extremes who are settled in multiple directions and degrees. It is too much of an abstraction to simply take critics’ positions of law as either determinate or indeterminate.

B. Critical Legal Scholarship and Its Target

Before representing the real critiques of Critical Legal Scholars on the determinacy, objectivity and neutrality of law, it is worthwhile to sketch the view of their major target — liberal legalism. Liberal legalists, the mainstream of legal thoughts before the movement of Critical Legal Studies, believe that law is internally clear, coherent and

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13 I use “ideological preference” and “political preference” interchangeably throughout this article. Both concepts should be employed with care and precision. Herein, they denote judges’ conscious biases in issues of how certain society should be organized, how private parties and public officers should behave, and so forth. For one example, in the context of market transactions, judges may prefer individualism, or altruism, or others preferences sitting in between. For another example, judges may prefer liberal market economies to coordinated market economies, or vice versa.

14 See Kennedy, A Critique of Adjudication, fn. 7 at 6, 8–11.

15 Id. at 158–159.

16 I take the term of liberal legalism from Singer’s article, in which it points to, in a very broad sense, three schools of traditional legal theory: “(1) positivism, represented mainly by H. L. A. Hart, see H. L. A. Hart, The Concept of Law (1961); (2) rights theory, including consensus theorists such as Ronald Dworkin, see Ronald Dworkin, Taking Rights Seriously (1977), and Bruce Ackerman, see Bruce Ackerman, Social Justice in the Liberal State (1980), and social contract theorists such as John Rawls, see John Rawls, A Theory of Justice (1971), and Robert Nozick, see Robert Nozick, Anarchy, State, and Utopia (1974); and (3) law and economics, represented by Richard Posner, see Richard Posner, Economic Analysis of Law (2nd edition 1977), Richard Posner, The Economics of Justice (1981), and many others.” Liberal legalists can be both conservative legalists and liberal non-legalists, who, however, hold the same belief in the existence of transcendent, objective foundations of law, and determinate decision procedures to discover and apply such foundations. The Critical Legal Scholarship is in the meantime a critique to any form of liberalism and legalism.
determinate. In the opinion of liberal legalists, judges could reach neutral decisions by applying some sorts of rational analytical methods to law even when encountering ambiguity, conflicts or gaps. The application of formalistic interpretative techniques such as syllogism and analogy to law would naturally dictate a sole, right answer for each legal issue, or “at least define a narrow range of alternatives and thus severely constrain the possible outcomes.” It could “tell us once and for all what we are supposed to believe and how we are supposed to live.”\textsuperscript{17} Even if liberal legalists acknowledge the inevitability and desirability of some indeterminacy, liberal legal theory “requires a relatively large amount of determinacy as a fundamental premise of the rule of law,”\textsuperscript{18} or treat the indeterminacy of the law as a peripheral phenomenon.

The deep reason undergirding such position of law’s objectivity, and subsequently neutrality and determinacy,\textsuperscript{19} comes from liberal legalists’ belief in the existence of an ultimate, objective, and apolitical foundation of legal system and its social operations. Such foundation, no matter in the form of natural law or positivism, is a matter of transcendent knowledge, which not only transcends but also shapes individual interests or values.\textsuperscript{20} By applying rational interpretive techniques, judges are able to ascertain objective knowledge of the problem at hand, and resolve it neutrally and determinately.

To Critical Legal Scholars, however, such transcendent foundation does not exist at all.\textsuperscript{21} They argue that law is not a matter of transcendent knowledge but conversation,

\textsuperscript{17} See Singer, fn. 1 at 10, 57.
\textsuperscript{18} Id. at 13, quoting H. L. A. Hart’s statement of law’s determinacy.
\textsuperscript{19} It is worth noting that “unlike the critique of claims of determinacy, the critique of objectivity is for the most part an external critique. Rather than a demonstration that traditional theory does not live up to its own promises, it is a dispute about what the fundamental premises of law and legal reasoning should be.” See Singer, fn. 1 at 26. But liberal legalists’ claims of law’s objectivity have strong bearing on (perhaps reinforce) their positions of law’s neutrality and determinacy. Thus, this article put the claims of objectivity, neutrality and determinacy together here. The internal critique of determinacy is going to be presented right now.
\textsuperscript{20} See Singer, fn. 1 at 8, 25, 27.
\textsuperscript{21} When rejecting any claim of law’s ultimate foundation, Critical Legal Scholars not only draw a line between Critical Legal Scholarship and liberal legalism, but also mark a departure from the views of their realist predecessors, like O. W. Holmes and Karl N. Llewellyn. Holmes and Llewellyn, representative figures of two generations of early legal realism, also put legal conceptualism and doctrinairism (and legal formalism in general), especially in the realm private law, into serious questions. But both of them faced similar indictment they had leveled at legal conceptualists and doctrinaires that there was an objective and predictable foundation of law. Legal conceptualists and doctrinaires entrusted legal reasoning to legal concepts and their logic, while Holmes took the “dominant ideology among members of a dominant class” at a given time as the ultimate foundation of law, and Llewellyn argued that judicial decisions should be made according to “the shared understandings and norms of a particular industry or to those norms that were emerging with respect to a given mode of social interaction.” I borrowed the term of “dominant ideology among members of a dominant class” from Goldberg who uses it to describe Holmes’ thoughts. See John C. P. Goldberg, \textit{Introduction: Pragmatism and Private Law}, 125 Harvard Law Review 1640, 1643–1644 (2011–2012), arguing that previous legal realists were conducting “brass-tacks pragmatism” in the sense of attributing the real stake of law to one single factor, and invoking “a very different variant of pragmatism — ‘inclusive pragmatism’ — in support of the less skeptical ‘new’ private law.” I think this term is basically an accurate description of Holmes, see O. W. Holmes, \textit{The Path of the Law}, 10 Harvard Law Review, 457, 466, 469, 471–472 (1896–1897). For a treatment of Llewellyn, see Goldberg, id. at 1643–1645.
expression, persuasion and conviction. Legal system is a matter of commitment, which both influences and is influenced by individuals’ preferences.\(^\text{22}\) The problem of such grand theories of rational foundation subsequently undermines liberal legalists’ claim of law’s objectivity, and subsequently neutrality and determinacy. Unlike what liberal legalists believe, judges’ subjective tastes play complicated roles in their real experiences of legal reasoning.

Nonetheless, it is wrong to think that Critical Legal Scholars are arguing that judges’ legal reasoning and decisions are completely arbitrary and indeterminate when they say that law, right or legal theory is indeterminate. Critical Legal Scholars’ claim of law’s indeterminacy is an empirical assessment of existing legal theories and arguments of law’s determinacy advanced by liberal legalists. Critical Legal Scholars do not consider that it is impossible to invent determinate theories, nor do they claim about the nature of reason or the human mind or anything of that kind.\(^\text{23}\) They consider law’s determinacy as a contextual question.

In Kennedy’s critique, for example, legal reasoning can be both determinate and indeterminate, depending on the specific contexts in which we raise and answer the question. In Kennedy’s words, “the study of ideology in law has to be undertaken at retail, as Dworkin might say, rather than wholesale.”\(^\text{24}\) In a methodologically typical fashion, Kennedy, like many other critical theorists before him (e.g. French philosopher Michel Foucault), avoids pursuing any grand, abstract answers to the determinate or indeterminate questioning of law.\(^\text{25}\) He neither answers nor rejects such general questions, but shifts the investigation from the questions, like “is law determinate or indeterminate/are judges really bound/unbound by law? and if so, how much determinacy or indeterminacy is there in law/how often do judges feel bound/unbound?,” to contextual inquiries, like “in what senses is the law determinate or indeterminate/what specific elements make judges feel bound/unbound by law?”\(^\text{26}\) In this way, Kennedy eschews any claim of law’s nature of determinacy or indeterminacy which is so abstract that audiences could interpret in completely divergent directions.

\section*{C. Good Faith, Bad Faith and Self-Unconscious Judges}

Kennedy argues that there are three types of judges under the same umbrella of liberal legalism, good faith judges, bad faith judges and self-unconscious judges, and each type

\(^{22}\) See Singer, fn. 1 at 21, 57–66; Singer, Legal Realism Now, fn. 7 at 474.

\(^{23}\) See Singer, fn. 1 at 10, 13–14.

\(^{24}\) See Kennedy, A Critique of Adjudication, fn. 7 at 172.

\(^{25}\) In this regard, Kennedy bears a striking resemblance to Foucault. “For Foucault, there is no external position of certainty, no universal understanding that is beyond history and society. His strategy is to proceed as far as possible in his analyses without recourse to universals.” Paul Rabinow ed. The Foucault Reader, Pantheon Books (New York), at 4 (1984).

\(^{26}\) See Kennedy, A Critique of Adjudication, fn. 7 at 171–172; for similar position, see Singer, fn. 1 at 60.
of them accommodate their subjective preferences differently. The determinacy of their legal operations varies drastically from one to another.

In complete contrast with Chinese colleagues’ reading of Critical Legal Theorists, Kennedy does not deny the existence of judges who conduct legal reasoning, in his term, legal works, with good faith at all. They interpret law with good faith in the sense that they are committed to preclude personal, ideological stakes in adjudication, especially legal interpretation. Therefore, they faithfully choose and employ rational methods that are well accepted (at least to themselves at the time of conducting certain legal works). For judges with good faith, legal works are constrained by the methods they follow, and decisions are determinate but only in the sense that ideological preference has no effect in adjudication.

Nonetheless, as a matter of empirical observation, the analytical methods proposed by liberal legalists can hardly make the interpretation of the same law and ruling on the same fact determinate. It is mainly because different legal methods, no matter textualism or purposivism, do point to conflicting results in many occasions. But there are few super-mechanisms that could guarantee the uniformity of judges’ choice and application of so-called rational methods. For some judges who are committed to (perhaps sometimes obsessed with) certain interpretative techniques, their legal works are self-monitored and predictable to a relatively high degree. But for many other adjudicators who do not hold stable methodological preferences of legal interpretation, their choices of interpretative methods (and subsequently judicial decisions) are, to a large extent, only as predictable as the weather’s influences on two rival military groups in ancient time. Professor Unger’s observation of classroom experience tells the same story:

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\text{[E]very branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals...A common experience testifies to this possibility: [without such a guiding vision of human social life], every thoughtful law student or lawyer has had the disquieting sense of being able to argue too well or too easily for too many conflicting solutions.}\]

In terms of judges with bad faith who have strong ideological preferences and tend to make use of every opportunity to manipulate the interpretation of law, their adjudications are not necessarily indeterminate or arbitrary. It is anti-intuitive to think that judges could decide cases simply by following their psychological make-up. After all, judges

\[27\] John Manning, *What Divides Textualists from Purposivist?*, 106 Columbia Law Review, 70 (2006). A response to recent scholarship that has questioned whether there remains a meaningful distinction between modern textualism and purposivism. Professor Manning argues, from a modern textualist perspective, that statutory interpretation according to “semantic context (evidence about the way a reasonable person uses words),” in lieu of “policy context (evidence about the way a reasonable person solves problems),” presents high-level determinacy.

\[28\] See Unger, *The Critical Legal Studies Movement*, fn. 7 at 570.

have to carry out their legal operations in certain social contexts, which form and constrain judges’ psyche.\textsuperscript{30} The efforts to work out a legal interpretation they prefer may or may not succeed, no matter how sophisticated they are. Being blinded to their conscience and audiences, judges are always possible to find arguments for a ruling “on either side of a new case.”\textsuperscript{31} But even early legal realists, the predecessor of Critical Legal Scholars, realized that “there are not so many that can be built defensibly”\textsuperscript{32} either to themselves or their audiences. The constraints that prevent them from reaching a preferred interpretation come from both internal and external dimensions.

In many cases, judges would redraft the rule if they were in the legislature. The internal constraint takes place when they fail to come up with a sound argument for the interpretation of rule they like. In other words, they fail to make sufficient formalistic arguments to make such rule appear natural and neutral.\textsuperscript{33} For one example, it is hardly possible to recognize an oral agreement when the written form is explicitly set as a precondition of the contract’s validity. For another example, when handling tort cases, judges are impossible to justify compensation to the victims for an amount exceeding legally specified caps on punitive damages, no matter how culpable the infringer should be, or how sympathetic they feel to the victim.\textsuperscript{34} The external constraint may happen when judges take the audiences’ reactions into consideration. If the argument in their favor does not look good to the audiences, judges may not persuade them to accept at all but settle or surrender the case straightforwardly. More constraints arise in jurisdictions where judges’ decisions are monitored by higher-level judges or superior courts.

In a word, only given the specific context, could we make that the law bounds judges, and that the law and the adjudication present the property of determinacy. Nevertheless, it

\textsuperscript{30} See Singer, \textit{Legal Realism Now}, fn. 7 at 470.


\textsuperscript{32} Id. at 73.

\textsuperscript{33} See Singer, fn. 1 at 5, 32, “It is understandable that the more controversial and politicized the decision, the more a court will want to appear above controversy. Such false appeals to neutrality are, nonetheless, illegitimate.”

\textsuperscript{34} In order to prevent excessive incentives to potential wrongdoers, some jurisdictions, like China, set caps on punitive damages. For example, Art. 55 of China’s Consumer Rights and Interests Protection Law stipulates: “(1) Where proprietors fraudulently provide goods or services, they shall follow consumers’ requests to increase the compensation for their losses, with the increased compensation being three times the price paid by a consumer for purchased goods or the services received, or RMB 500 if the increase as calculated before is less than RMB 500, except as otherwise provided for by the law. Where the law otherwise provides, follow those provisions. (2) Where proprietors clearly know goods or services are defective but still continue to provide them to consumers, causing death or serious damage to the health of consumers or other victims, the victims shall have the right to demand proprietors compensate them for losses in accordance with Articles 49 and 51 of this Law and other provisions of laws, and have the right to demand punitive compensation up to double the amount of losses incurred.” Even if a judge thinks three-times-the price or RMB 500 is insufficient to deter potential fraudulent goods or services providers, he/she is unlikely able to put aside such clear caps established by the legislature.
would be an exaggeration to assert determinacy beyond specific contexts, because constraint, no matter internal or external, is a matter of degree. Judges’ time, energy and skill to produce persuasive arguments in support of an interpretation they prefer vary from one to another. Some of them may still come up with different interpretations of the same rule even if they feel bounded internally or externally.

In addition, there is another constraint that contributes to the determinacy of law. Such constraint applies to good faith judges and bad faith ones equally. That is, in Kennedy’s words, the experience of “unselfconscious rule-following.”35 “In societies which are well-integrated in common experience social criteria of justice can emerge of pronounced stability based on socio-ethical pressures, and providing in turn a stable basis for the going legal system.”36 In this situation, all actors, regardless of their sex, professions and ideologies, are so used to understanding and practicing in the same way that there is no disagreement with a certain interpretation of law. It looks as if it is the law that dictates a ruling of consensus automatically.37 To generalize slightly, actors then share the same value or intuition with each other, and seem to be bounded by the rule in the book. But still, according to Critical Legal Scholars, the property of law’s determinacy due to unselfconscious rule-following never supports any general claim of the ontology of determinacy or indeterminacy.

II. DECONSTRUCTION AND RECONSTRUCTION OF THE IDEAL OF RULE OF LAW

A. The Charges of Deconstructionism and Nihilism

The first misapprehension that law and judges’ legal interpretation are completely indeterminate leads to the second misconception. Namely, Critical Legal Scholars are deconstructionists with no alternatives to offer. Critics of Critical Legal Theories committing to the first misconception are likely to conclude that Critical Legal Scholars (and their followers) would make it hopeless to pursue the ideal of rule of law, since the indeterminacy “nature” of judges’ legal interpretation strongly betrays the expectations of stability and predictability championed by the ideal. Though Chinese jurists are sympathetic to some of critical theorists’ sharp attacks towards liberal legalism (e.g. the incoherence of law, the false necessity of the liberal theorists in capitalist states), they are more concerned about alternative theories Critical Legal Scholars could proffer to substitute old practices.

It is not uncommon for Chinese jurists to charge Critical Legal Scholars with dissociating deconstruction and reconstruction. As one representative literature remarked,

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35 See Kennedy, A Critique of Adjudication, fn. 7 at 160.
37 See Kennedy, A Critique of Adjudication, fn. 7 at 160, “When you ask me to close the door, I don’t, typically, see myself as having to make a difficult interpretation. I know what you mean without thinking about it. You don’t hesitate to say I haven’t closed the door when I close the window.”
“Critical Legal Scholars have pointed out the problems of traditional legal thoughts rightly, and give us reasons to expect some scientific conclusions. Unfortunately, they are so obsessed with deconstructing existing legal thoughts that they are likely to step away from possible rightness.”

Likewise, many critics in the U.S. accuse Critical Legal Scholars of betraying the ideal of rule of law, or reason itself. Others straightforwardly charge Critical Legal Scholarship with nihilism. In the opinion of critics, Critical Legal Scholars’ view on political and objective nature of law raises the danger that no rational and objective criteria can govern how we make legal decisions, and, in a broader sense, how we shall live together. Judges are idiosyncratic in the process of judicial decision-making. They can decide cases in whatever way they personally prefer.

Nonetheless, the charge of nihilism against Critical Legal Theories is first reminiscent of the response of a Chinese critical theorist (DENG Zhenglai) to similar charges from Chinese colleagues: “please do not ask me to send you back to the tiger’s mouth after saving you from it with great efforts.” Even since the dawn of China’s reform era in late 1970’s, Chinese jurists have made painstaking efforts to explore the ideals of Chinese legal system and jurisprudence. In 2011, it is announced that a socialist, legal system that is headed by Constitution, with laws related to the Constitution, civil and commercial laws and several other branches as the mainstay, was established. Meanwhile, Chinese jurists have provided many recipes for the future of Chinese jurisprudence with the rights-oriented theory and the legal culture theory and the theory of domestic resources of law is the most influential establishments. Soon, DENG broke most of them (including their logic, contents and structures) into pieces with arguments that are not unconvincing to many of Chinese colleagues. Still, DENG was accused as deconstructionist because

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38 See WU, fn. 3 at 152.
39 Owen Fiss, Objectivity and Interpretation, 34 Stanford Law Review, 739, 741 (1982), “The nihilist would argue that for any text...there are any number of possible meanings...and that in this selection process the judge will inevitably express his own values. All law is masked power.” For critical Legal Scholars’ responses to the charge of nihilism, see Singer, fn. 1; Kennedy, A Critique of Adjudication, fn. 7 at 12; Kelman, fn. 7 at 12.
40 See Singer, fn. 1 at 3–5, “As a theory of morality, nihilism claims that there is no meaningful way to decide how to live a good life. Any action may be described as right or wrong, good or bad...Because all actions that we think are good are just as likely to be bad, we have no rational way to decide what to do.”
43 See For intensive debates over the ideal of Chinese jurisprudence, see DENG Zhenglai, Rethinking Chinese Jurisprudence and Exploring Its Future: A Sociology of Knowledge Perspective, World Scientific Publishing Company (Singapore), (2014); DENG, id. It is a pity that Prof. DENG passed away in early 2013 when his reconstruction efforts of Chinese jurisprudence were still under way.
of his failure to come up with a clear and alternative establishment. Given the contextual similarity of the critical histories in China and the U.S., DENG’s tiger’s-mouth response applies equally to the charges against U.S. Critical Legal Scholars.

B. The Problem of Dichotomies

My second reaction to the charge of nihilism against Critical Legal Scholarship is that deconstruction and reconstruction are two concepts of relativity. It is true that criticism is first reactive and destructive, rather than constructive. But a thorough critique of outworn vocabularies is the starting point for reconstruction. A complete disclosure of the role ideological/political preferences play in law and adjudication does not necessarily betray the ideal of rule of law, let alone the fear of nihilism. Rather, it provides an opportunity to think about law and lawyering from a different version, and then to reset the expectation of, and the way we pursue, the ideal of rule of law, at least in a way with less false necessities than what liberal legalists have been advocating. This version is “a conception of legal reasoning that is divorced from the search for [illusory] certainty” and determinacy, emancipating lawyers from being obsessed to transcendent foundations and formalist legal reasoning.46

Nonetheless, the break of rational foundation does not necessarily relegate lawyers’ legal analyses to arbitrariness, insecurity, physical and emotional harm and tyranny. Our daily experiences not only suggest that people care freedom to pursue personal happiness, but also evidence that “people are often caring, supportive, loving and altruistic, both in their family lives and in their relations with strangers.” Nor does it mean that the formality of law and logic reasoning is useless for legal reasoning. The critics of Critical Legal Theory simply assume that “we face a simple choice,” either the strong belief of some ultimate permanent foundation for law and objective, neutral, and determinate process of legal decision, or the hopeless resignation to the view that everything is as good as every other thing and it does not matter what judges think and choose. Actually, this simplification is associated with a series of dichotomies that purport to divide the world into objective dimension and subjective dimension, such as reason and desire, law and politics, law and morality, public and private, universal and particular.49

However, Critical Legal Scholars argue that these dichotomous divisions are misleading because the purported dimension of transcendent objectivity does not exist at

44 See Kennedy, A Critique of Adjudication, fn. 7 at 12–18; YU, fn. 4.
45 See Singer, fn. 1 at 8.
46 See Unger, Social Theory, fn. 7, ch. 5, for a systemic treatment of the problem of false necessity in social theory).
47 See Singer, fn. 1 at 51, 54.
48 Id. at 51, 55, 59.
49 Id. at 40–41, for a review of literatures criticizing dichotomies.
The construction of various dichotomies is no more than an effort to scare us into accepting the mysterious power of objective scales and rational techniques that can save us from pseudo subjective conflicts. As a matter of social theory, there are multiple options to image and choose between the simply dichotomy.

C. The New Vision of Rule of Law

Unlike what critics of Critical Legal Scholarship fear, the break of ultimate foundation and objective standards serves as an opportunity to bring the dream of ideal social life and the design of effective institutions back into the center of legal analyses. Lawyers in a broad sense have to take the substance of legal system seriously when dealing with the form. The formality of law and formalist legal theory serve as an important vehicle to express the values we care and pursue. It helps to structure our longings in a manner that limits our available options. But it does not create and determine subjective values by itself. Critical theorists argue that, when conducting legal analyses, lawyers should give up the illusion of finding pre-established answers from transcendent foundation by formal logic, but view the law as made for pragmatic reason. Legal analyses should be carried out in a situation-type, and based on human experience, emotion, introspection and conversation in a social and historical context. Lawyers can perform “an edifying role” by committing themselves to constantly criticizing outworn institutions and broadening legitimate institutional alternatives.

For example, Kennedy argues that the rule of law is not a foundational notion of some kind (or does not have absolute value by itself), but an instrument for other things the ruled people would like to obtain. For a general example, citizens would like to enjoy and practice rights through the rule of law, which also means both private parties and public apparatuses have to honor justiciable legal restraints on what they can do to others. The instrumental nature of the rule of law decides that rules (whether embodied in a code or in common law) do not dictate any answers to legal issues solely by themselves. But

50 See Unger, *Knowledge and Politics*, fn. 7, for a thorough critique of various dichotomies in social theory.

51 It is worth noting that Critical Legal Scholars’ reconstruction programs are not equally ambitious. After breaking down the illusion of apolitical and neutral law, the majority of them like Kennedy, aim to reform the notion and practice of legal reasoning in adjudication, while some others like Unger, make efforts to change the whole system of political philosophy and political economy. See Unger, *The Critical Legal Studies Movement*, fn. 7 at 576–601; Unger, *Democracy Realized*, fn. 7. This article does not cover Unger’s projects on political philosophy and economy. For a commentary from Chinese colleague on Unger’s theoretical establishment of “superliberalism,” see KE Lan, 自由主义与超自由主义——对昂格尔法哲学的批判分析 (*Liberalism and Superliberalism — A Critical Study of Unger’s Legal Philosophy*), 5 北大法律评论 (Peking University Law Review), 101 (2017).


53 See Singer, fn. 1 at 26, 57–58; Singer, *Legal Realism Now*, fn. 7 at 473–474.

rather, the effectiveness of the rules largely hinges on the institutional contexts where rules are employed (chosen, interpreted and applied). It depends on the legal players who play the cards of rules and the institutional environments that accommodate (and confine) legal-cards playing.

The disclosure of possible roles of subjective factors in adjudication could not only change our view of legal decision process, but also help to improve the environment and the predictability of such process.\textsuperscript{55} As Kennedy argues, the alternative recipe is “a procedural or institutional definition of the rule of law, rather than a definition that builds in or entails a particular substantive legal regime.”\textsuperscript{56} One way to improve judicial process is to replace formalistic deduction from abstract concepts and logics with express policy, ethic, moral and institutional analyses. People are entitled to appeal to judges against fellow citizens and governmental agencies (and sometimes legislatures) when they feel the sued have violated their rights illegally. Then, the way of separation of powers among various apparatuses (e.g. the legislature, the government, the judiciary and other political forces) plays a key role in enforcing legally prescribed rights and restraints. In this sense, as long as relevant institutions work, both rights and legal restraints could exist even if in the absence of recognitions in legislative documents. Another way to constrain judges’ subjective preferences is to make rules more specific or situation-typed, for example, by creating different rules for contracts between businessmen, and between businessmen and consumers.

Nonetheless, it is too much of an illusion to claim or require that legal operators, in given institutional contexts, interpret legal rules in a sole, right direction (and consequently find out the sole, right answer for each legal issue). Such claimers fail to acknowledge two essential facts.

First, legal rules (e.g. legislations, regulations or whatever else) that structure public and private life constitute “a mechanism for creating and legitimating configurations of economic and political power.”\textsuperscript{57} Such rules empower some groups at the expense of others, and, when taken for granted, tend to reinforce certain social structure/hierarchy and social order. As Singer puts, the design of completely determinate rules is not impossible.\textsuperscript{58} For example, an absolutely predictable liability rule could state that “no one is liable to anyone else for anything and everyone is free to do whatever he/she wants without the government interference.” This rule would make legal decision fully predictable and the plaintiff would always lose. But such rules would inevitably over-generalize the complexity of social situations, pursuing determinacy at the expense


\textsuperscript{56} See Kennedy, \textit{A Critique of Adjudication}, fn. 7 at 13.

\textsuperscript{57} See Singer, fn. 1 at 6.

\textsuperscript{58} Id. at 11–13.
of other competing well beings like security and privacy. It merely prevents one type of arbitrariness with another. This explains the invention of more complicated and open rules to accommodate our contradictory political preferences.

Second, it is not abnormal that judges find gaps, conflicts, and ambiguities with legal rules since there are few super-rules or meta-rules that could predefine such occasions only with formality. When such occasions happen, as Part I of this article represents, adjudicators would pursue their ideological projects consciously, half-consciously, or unconsciously in gap filling, conflict resolving and ambiguity clarification. When consciously pursuing their ideological agenda, judges employ formalistic interpretative techniques as tools for “simultaneously articulating and masking political and moral commitment.”

But once again, in the revised vision of rule of law, to be candid about judges’ ideological preferences and stakes in legal interpretation does not bring the risk of judicial arbitrariness because there are multiple constraints judges are unable to put aside during their legal operations. Rather, putting judges’ ideological projects above the table would make judicial processes more transparent and understandable to audiences than denying ideological impacts intentionally or unintentionally. Such acknowledgment not only enables audiences to capture a real picture of the process of judicial decisions, but more significantly, promotes further critiques and debates over controversial decisions in candid manners. It could foster more future consensus (maybe compromise) among those who hold divergent views on court decisions.

III. DE-POLITICIZATION AND RE-POLITICIZATION OF THE JUDICIARY

In a broader context of the enterprise of Critical Legal Studies, the two critical theses clarified in Part I and Part II can be packaged together as one movement to re-politicize the judiciary. The central agenda of liberal legalists is to de-politicize judicial processes, positioning that legal rules are internally clear, coherent and determinate and judges could interpret legal rules objectively. Even if legal rules have defects (gaps, conflicts and ambiguities), judges could resolve them (formally) with the guidance of formalistic methods. They could (and should) get rid of their political preferences in adjudication, especially legal interpretation.

In 1950’s and 1960’s in the U.S., the legal process school grew up and gradually took part of the place of liberal legalism. The school acknowledged that liberal legalism (formalism) did not hold water in addressing the defects of legal rules. Instead, the focus

59 See Kennedy, A Critique of Adjudication, fn. 7 at 13. But one qualification must be added to the first phenomenon. When the status of empowered groups/individuals is frequently interchangeable with that of the restrained, the reinforcement effect of social structure does not apply. See Mark Kelman, fn. 7 at 56–59.

60 See Singer, fn. 1 at 6.

on judges’ formalistic methods to operate the law should be shifted to institutional establishments, which allocates decision-making powers to institutions suited to decide particular questions. It has become a slogan for legal process theorists that judiciary is inferior to legislature and the government in terms of their capacities of decision-making (e.g. investigating, hearing and accounting). Therefore, judiciary should honor the decisions of capable institutions, even if judges would reach different conclusions had they made them. Under a broader social context, the emergence of the legal process school and the decline of early legal realism are partly associated with the U.S. government’s new policy to build up an administrative state and reconstruct the country after the Second World War.62

But in essence, Critical Legal Scholars argue that it has inherited the gene of liberal legalists to de-politicize judiciary, though by arguments of institutional establishments. It is the construction of another transcendent foundation. To Kennedy and his critical fellows in the U.S., this is basically not true. It is no more than establishing another illusion (perhaps self-deception) to deny judges’ political stakes in legal operations, either by way of portraying a self-contained, self-evident image of legal rules or emphasizing institutional settlements.

The project of Critical Legal Scholars to re-politicize judiciary is twofold. One fold is an internal critique from the inside of judiciary, disclosing how politics dances with law in judges’ legal operations. The other fold is an external critique from the outside of judiciary. That is law school faculties’ teaching that law is culture but not politics.

The determinate/indeterminate thesis in Part I and the deconstructive/reconstructive thesis in Part II are essential components of the internal critique. In spite of judges’ denial of the role political ideology plays in part of judicial activity (no matter intentional or unintentional), judges indeed have many options in legal interpretation. When such options take place, they can either follow their political ideologies or get them locked and resort to so-called “scientific” interpretative methods. But the attempt to entrust the complicated configuration of economic and political power to mere formalistic, interpretive methods is no more than turning discretionary normative statements into non-discretionary descriptions. It undermines the legitimacy of legal reasoning as an ideal channel to produce good social life.63

When an honest judge realizes the incapacity and illegitimacy of “scientific” legal methods and intends to break the fetish of them, she is likely to take her political ideology (if she has) seriously in legal interpretation. But under the framework of liberal legal theory, judges have long been facing the charge of making law in adjudication, which means usurping the power of legislature. Then, honest judges would fall into a dilemma

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62 LU Yufeng, 美国法律现实主义：内容、兴衰及其影响 (American Legal Realism — Its Contents, Vicissitudes and Influences), 4 清华法学 (Tsinghua Law Journal), 85, 96–97 (2010), assessing “the decline and impacts of early legal realism in the U.S.”

63 See Singer, fn. 1 at 9.
between being honest to her heart and respecting the supremacy of legislation.

When the latter amounted to a judicial morality that few judges have courage to challenge, the best choice for honest judges was to act in dishonesty (bad faith in another sense), in the sense of hiding their political preferences with “scientific” interpretative methods that they do not believe at all. By so doing, judges create and legitimate configurations of economic and political power without accepting the responsibility thereof.64 It is not only true in domestic courts, but also applies in international courts and tribunals where adjudicators are committed to ascertaining the real intents of contracting parties in interpreting international treaties.65

Kennedy’s internal critique not only acknowledges the role of political ideology in adjudication candidly, but more importantly, demystifies the meaning and effects of political preferences in adjudication. Kennedy makes it clear that ideologically oriented legal work in adjudication is different from ideologically oriented legislative work (sometimes battle) in legislation.66 Judges make law in the context of structure of legal rules, in the face of a particular gap, conflict, or ambiguity within the structure. But such ideological conducts are subject to many constraints as elaborated in Part I. Law-making is unavoidable (at least for honest judges), but do not amount to the usurpation of legislative power as some commentators (especially legal process theorists) have always charged politically in one form or another.

Through the disclosure of judges’ real experiences of ideological impulse and constraint in adjudication, Kennedy suggests an alternative way of thinking and expecting judges’ legal operations (and the rule of law) in which the political charge of judges’ law-making is demystified. Judges do not have to make an ideological choice in a discourse with strong custom that denies such choice, nor do honest judges have to behave dishonestly. Instead, judges’ law making activity in adjudication will be carried on in a more transparent fashion,67 and becomes compatible with public accessing, understanding and debating. Judges’ legal reasoning is an activity more of expression than determination. “They should feel free and honest to express what they are really thinking when they decide the case.”68 This would prevent judges from exercising the political power without acceptance of the responsibility thereof.69 It would, at least, make it possible for public audiences to get a clear picture of what is really going on in

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64 Singer, fn. 1 at 6, “law is not neutral: It is a mechanism for creating and legitimating configurations of economic and political power”; Stone, fn. 36 at 349, “The indulgence of such fictions…is to invite the exercise the power without acceptance of the responsibility therefore.”


66 See Kennedy, A Critique of Adjudication, fn. 7 at 1.

67 Id. at 4.

68 See Singer, fn. 1 at 32, 62–63.

69 See Stone, fn. 36 at 349.
adjudication, and initiate candid and meaningful debates over judges’ legal decisions.

The main targets of Critical Legal Theorists’ external critique are law school faculties who teach and reinforce the notion that law is a phenomenon independent of politics. In general, academic discourse largely decides the belief of the ideal of rule of law. Both liberal legalists and legal process theorists in the U.S. have advanced notions to dissociate judiciary with politics. They persist that politically and economically controversial issues must be decided in an apolitical and neutral manner. In this manner, they provide judges with original sources to deny the role of political ideology in adjudication by the vehicle of legal education, and later collude with some of their former students in de-politicizing judiciary. They together contribute to a strong convention of denial which reinforces as time goes on.70

Nonetheless, “there is more than one way to teach a case [or a rule].”71 According to critical theorists, law teachers should not take the dissociation of law with politics for granted. Their refusal (perhaps failure) to observe and assess real practices of judiciary has resulted in theories that make honest judges dishonest/bad-faith. In stark contrast, the project advanced by Critical Legal Scholars views legal theory as a form of political activity, instead of something radically distinct from politics. They bring legal discourse back to the arena of political debates. The internal critique and external critique are co-related. Once the fetish of apolitical judges is broken, the opportunity to reconstruct apolitical jurisprudence in law schools is not far.

IV. TWO CONCEPTS OF POLITICS: THE REASONS OF CHINESE JURISTS’ MISCONCEPTIONS

We, human beings, have been loyal to the pursuit of rule of law, which, in the most abstract sense, stands an ideal system of rules of predictability, stability and fairness. We wish that such an ideal could protect each of us from arbitrariness and tyranny. One critical dimension of this abstract notion of rule of law requires that the functioning of legal rules would not be intervened (or in a stronger tone, manipulated) by forces from the outside of legal rules, especially political influences. For the purpose of clearing up Chinese jurists’ misconceptions of Critical Legal Scholarship, it would be helpful to look into the conceptual differences on political forces between Chinese jurists and U.S. Critical Legal Scholars, which in turn serves as a starting point to explore the reasons of

70 To some extent, Critical Legal Scholars share this position with economists who argue that legal professionals should be cautious when laying independent weight on conception of convention, since convention disguises multiple variables in more than a few cases. See Louis Kaplow & Steven Shavell, Fairness versus Welfare, 114 Harvard Law Review, 961, 1304–1322 (2001). For my representation of this position, see XIONG Bingwan & ZHOU Yuansheng, 国家立法中的道德观念与社会福利 (Conceptions of morality and Social Welfare in Legislation and Adjudication), 法制日报 (Legal Daily), at 4 (2014).
71 See Singer, Legal Realism Now, fn. 7 at 473.
Chinese colleagues’ misconceptions and refusals to Critical Legal Theories.72

When Chinese lawyers criticize political intervention in law and court decisions, they primarily point to external forces which denote, first, politically motivated social movement, and second, public sectors or officials outside of the judiciary, e.g. governmental agencies, the ruling party’s sectors. The fear of the two external forces might be one explanation for Chinese colleagues’ misconceptions of Critical Legal Scholarship.

A sketch of China’s social background during the 1980’s and 1990’s might be helpful for this explanation. China has just walked out from the shadow of the Cultural Revolution and still held painful memory of the chaotic period of class criticism and struggle. During that period, class criticism, class struggle and the notion of “lawlessness” were prevalent and praised across the nation.73 The first impression of such terms as CRITICISM and CRITIQUE was neither the search for truth,74 nor the restoration of social order, but rather the cause of social chaos.

However, after the Cultural Revolution, Chinese intellectuals, especially legal scholars, restarted the efforts to search legal theories that would help prevent the tragedy of “lawlessness” and restore the order of society. Naturally, Chinese legal theorists were hyper-vigilant to such legal theories, like Critical Legal Theories that emphasizes on the uncertain and indeterminate dimension of law. It also explains the phenomenon that many Chinese legal professionals kept at a far distance from Critical Legal Scholarship at the very beginning.

Even to this day, a large part of China’s efforts to promote the rule of law are to ensure that judiciary could exercise judicial powers free from interference of other public organs or officials. The role of political ideology in adjudication is by nature negative in the context of legal discourse in contemporary China. One major direction of Chinese jurists’ academic efforts in the past three decades was borrowing and establishing a conception of independent and neutral judiciary and a set of formalistic interpretive methods. One aim of these efforts was to keep the science of law purely legal, instead of political.75

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72 At first glance, Chinese colleagues’ misunderstandings of Critical Legal Scholarship would be resulted from their failure to follow up with American Critical Legal Scholars’ later works, which extends their early critiques and begins the enterprise of reconstructing the ideal of rule of law. See materials cited in fn. 7. But this explanation would be too superficial.

73 “What you said is right! To you, we are indeed ‘lawless’…‘Lawlessness’ implied that the revolutionary masses hold their own destiny in their own hands.” XIN Wu, “无法无天”赞 (In Praise of “Lawlessness”), 人民日报 (People’s Daily), (1967).


75 See XIONG Bingwan, 法律的形式与功能: 以“知假买假”案为分析范例 (Formalism and Functionalism in Legal Reasoning: An Exemplary Study of Punitive Damages for Intentional Purchasers of Defective Products), 2 中外法学 (Peking University Law Journal), 300 (2017). But the young generation jurists in China tend to be growingly realistic and pragmatic because of their wide exposure to the debates in the West, especially in the U.S.
Another explanation of Chinese jurists’ misconception of Critical Legal Scholarship might be intentional misunderstanding. That is to say, Chinese colleagues know the real story of Critical Legal Scholarship, but do not wish to tell it in this way because of two possible considerations. First, they might fear that the political interpretations of law from an internal perspective would be manipulated as a pretext to endorse external political forces in interfering courtroom decisions. In a jurisdiction where judiciary is effectively independent from both the governments and the litigants, open acknowledgement of the role judges’ political preference plays in adjudication may not produce judicial arbitrariness in the sense of no external interferences. But in a country like China where judiciary is not sufficiently independent yet, legal theorists might take theoretical denial of the role politics and personal preferences play in adjudication as a check against external political forces and corruptive judicial behaviors.

Especially in 1990’s and the first decade of 20th century, the problems of external interferences in judiciary and judicial corruption imposed significant challenges on China’s project for the establishment of socialism rule of law. This domestic background of China might have contributed to Chinese jurists’ reluctances in embracing the real story of Critical Legal Scholarship. Second, they might simply not prefer Critical Legal Scholars’ straight-forward way of storytelling. Straight-forward storytellers might not be welcomed in the circle of legal academia or by judiciary, which complies with the time-honored moderation philosophy or the middle-of-the-road philosophy (中庸哲学) in China.

In addition to the two reasons above, there might be other possible explanations for Chinese colleagues’ misconceptions and refusals to Critical Legal Theories in 1990’s. Further explorations in future projects, such as interviews with Chinese colleagues who wrote of Critical Legal Scholarship, will help to improve our understanding in this regard. Nonetheless, Chinese jurists’ misconceptions in 1980’s and 1990’s have prevented later generations in China from appreciating the insights (and of course shortcomings) of Critical Legal Scholarships, and drawing implications for Chinese legal scholarship. At very least, Critical Legal Scholars’ serious treatments of the role judges’ personal preferences play in adjudication could enrich our understanding of what is really going on in the process of judicial decision-making.

Moreover, the political ideology of U.S. critics’ concern is an internal force, derived from judges’ inner preferences. The role of internal political force in adjudication is unavoidable to honest judges, which does not necessarily impede the pursuit of rule of law.

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76 This partly explains why China’s central government launched a comprehensive anti-corruption movement after XI Jinping took his position as Chinese president in the second decade of 21th century.
77 For example, in China, the employment of cognitive science in analyzing judicial behaviors is only a very recent phenomenon, see WANG Linghao, 走向认知科学的法学研究——从法学与科学的关系切入 (Towards a Cognitive Science of Law: On the Relationship of Law and Science), 5 法学家 (The Jurist), (2015). However there have been rich literatures in the U.S., which aim to disclose the black-box of judges’ decision-making.
law. No matter how legal theorists deny the role of internal political force in adjudication, it exists in reality. For Chinese jurists who would like to be honest with judges’ real experiences and the limits of formalistic methods, an alternative way of thinking about rule of law is to take both external political force and internal political force seriously.

CONCLUSION

I hope the portrayal of Critical Legal Scholarship in this article would help to reopen the door for further communications between the Critical Legal Scholarship and their audiences in China. At the end of this article, I would like to provide two tentative remarks on how to approach Critical Legal Scholarship by future Chinese audiences.

First, in this article, I neither exhaust the misconceptions of Critical Legal Scholarship in China, nor present all Critical Legal Scholars in the U.S. and their critical theories. I only point out Chinese jurists’ two gross misconceptions of Critical Legal Theories advanced by limited number of Critical Legal Scholars (especially Kennedy, Singer and Unger), partly because I took their courses during my study at Harvard Law School and became familiar with their writings I have quoted throughout this article. Though I believe that their writings are representative literatures of the critical legal studies movement in the U.S., I am also consciously aware of the fact that there are many other influential Critical Legal Theorists, such as Mark Tunshnet and David Trubek. Their claims and arguments, even if concerning the two misapprehended theses I address in this article, may or may not agree with those figures I have chosen. After all, Critical Legal Studies is not a school of thoughts, but an academic movement. Therefore, Chinese colleagues’ future exploration of Critical Legal Scholarship needs a broader view of Critical Legal Scholars and their thoughts.

Second, a careful treatment of Critical Legal Scholars’ realist predecessors and descendants would make the exploration of Critical Legal Scholarship more fruitful. From a historical perspective, Critical Legal Scholarship constitutes an important development in the century-long stream of American legal realism. Every since Justice Holmes put the well-known remark that “The life of the law has not been logic: it has been experience,” generations of American lawyers have devoted themselves to

78 I am glad that Professor Kennedy, in personal correspondence, wrote me on this article that: “I can say to you honestly and frankly that I thought it was excellent. All parts and particularly the rule of law discussion. I have no criticisms or suggestions. I am honored by the careful and accurate attention you paid my writing.”

79 When writing this closing remark, I draw much from Goldberg, See Goldberg, fn. 21; Henry E. Smith, Property as the Law of Things, 125 Harvard Law Review, 1708 (2012), arguing that property law should shift from “bundle” theory to “modularity” theory; Thomas W. Merrill, Property as Modularity, 1 Harvard Law Review, 158 (2012), a comment on Professor Smith’s modular theory.

80 In comparative jurisdictions, legal realism as an express way of legal thinking is also widely adopted in Scandinavian countries. See O. Lando, M.-L. Holle & T. Hastad eds. Restatement of Nordic Contract Law, DJOF Publishing (Copenhagen), at 23–24 (2016).

“pushing past the surface to get to what is ‘really’ at stake” behind the law.\textsuperscript{82} “Each new generation of leaders pays obeisance to prior leaders, then faults them for failing to see things through.”\textsuperscript{83}

For instance, New Privatists in the U.S.\textsuperscript{84} have argued very recently that both Kennedy and early legal realists are not sufficiently realistic. A large number of legal concepts and doctrines of private law cannot be simply defined as the mask of political positions, nor can they be sufficiently explained with the logic of public law. Many of them are time-honored and universally adopted across the world, not due to the sophistication of legal theorists, or the belief in ultimate foundations of law, but strong property to reflect and explain the real world. These private law concepts and doctrines, “while in need of constant improvement, are very worthy of explanation and a good deal of respect.”\textsuperscript{85} They can be constructively explicated in their own right even by legal theorists who hold divergent worldview.\textsuperscript{86}

The informational-cost explanation of \textit{numerus clauses} serves as a good example. The “bundle of rights” metaphor of property, a typical claim of legal realists, gives the impression that property can be chopped into infinite forms. In reality, however, property rights cross the world always come out in a limited number of standardized forms,\textsuperscript{87} though “the degree of standardization in the law varies depending on the identity of the person interacting with the property.”\textsuperscript{88} A persuasive explanation for the standardization phenomenon of property rights is what Merrill and Smith called informational costs.\textsuperscript{89}

No matter a lawyer stands in the political right or the left, she is unlikely to acknowledge

\textsuperscript{82} See Goldberg, fn. 21 at 1641–1642.
\textsuperscript{83} Id. at 1643.
\textsuperscript{84} By New Privatists, I first mean the group of legal academics who are engaged in the New Private Law movement beginning in the U.S. in 2011. The term of New Private Law is a shorthand for new thinking in private law, in lieu of new developments in substantive law, see Goldberg, fn. 21 at 1640. This academic movement has many symbols, such as New Private Law symposium taking place at Harvard Law School in the fall of 2011, available at http://blogs.harvard.edu/nplblog/ (last visited Mar. 13, 2017), and Project on the Foundations of Private Law at Harvard Law School, available at http://blogs.harvard.edu/privatelaw/events/#Workshop (last visited Mar. 13, 2017). Second, I denote that many influential Critical Legal Scholars, like Kennedy and Singer, and many early legal realists, like Holmes and Llewellyn, based their theoretical observations mainly on the domain of private law.
\textsuperscript{85} See Smith, fn. 79 at 1692.
\textsuperscript{86} See Goldberg, fn. 21 at 1663.
\textsuperscript{87} See Smith, fn. 79 at 1698.
\textsuperscript{88} See Merrill, fn. 79 at 157, “extreme standardization insofar as strangers are concerned, moderate standardization insofar as potential transactors are concerned, and virtually no standardization insofar as co-owners and other insiders are concerned.”
the exclusive power of property right in such form that does not come out with reasonable notification to her. Few people would like to spend too much energy and money in investigating and verifying the exclusive titles behind a piece of property before contracting with a purported owner.

Therefore, New Privatists in the U.S. call for a shift from brass-tacks pragmatism (or single-dimensional pragmatism) to inclusive pragmatism in legal thinking. They argue that the real society is not flat but complex, deserving exploration from multiple perspectives. Just like what Critical Legal Scholars have leveled at their realist predecessors and conventional legal theories in general, “there is more than one way to teach a case.” Law teachers should not take the association of law with politics for granted. Legal concepts and doctrines are not necessary products or masks of political preferences. There would be multiple angles to approach the relationship between law and politics, law and society, as long as such approaches are reflective of the real world and have explanatory power. Of course, Critical Legal Scholarship is not necessary in conflict with the new thinking of private law. Perhaps, Critical Legal Scholars and New Privatists have just set different academic agenda and chosen different perspectives to approach the law. Different approaches may lead to opposing conclusions in given issues but they may also well co-exist and converge at some points. For instance, a careful inquiry into what Kennedy categorizes as self-unconscious judges and their manner of rule following may reach the same understanding of *numerus clauses* advanced by New Privatists.

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90 See Goldberg, fn. 21 at 1641, “The label ‘brass-tacks pragmatism’ derives from the idiom ‘getting down to brass tacks.’ The idiom imports a notion of moving past idle chatter to what is genuine and important.”

91 See Goldberg, fn. 21 at 1648–1651.

92 See Singer, *Legal Realism Now*, fn. 7 at 473.
