

## Teaching *Local 1330*—Reflections on Critical Legal Pedagogy

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I have admired Staughton and Alice Lynd's commitment to social justice and their faith in participatory, grass-roots mobilization since I attended the "Assembly of Unrepresented People" in Washington, DC, in 1965, an early protest against the Vietnam War. It is no surprise that, as Staughton recounts the story, the idea of a community right to industrial property emerged organically from the struggles and collective resistance of the steelworkers and their families, sympathetic clergy, and other community leaders.<sup>1</sup> I am sure he would insist that how he drafted the pleadings is the least important aspect of *Local 1330*.<sup>2</sup>

Nevertheless, this article focuses on what the case can teach us about legal work and legal education. My job for the past thirty-four years has been training future lawyers. While I try to serve all my students faithfully, the emotional payoff comes from working with students who want to become social justice lawyers. I have devoted most of my career to law teaching because, rightly or wrongly, I believe that training and empowering students who want to become social justice lawyers makes a contribution to the struggle for a better world.

It may seem odd to think of the law school classroom as a site of empowerment. Most students do not experience legal education that way. I have the good fortune to teach at Northeastern University Law School where we treat our students like grown-ups, we do not use fear and competitiveness as teaching tools, the political culture leans toward the left, and many of our students aspire to put their training and ability to work for social change movements. But even at NUSL, legal education can be disempowering. It is very difficult for beginning law students to discern the open texture and plasticity in law or to locate room for maneuver within it. In my experience, law students greatly exaggerate the inflexibility of law and legal reasoning. The progressive students often see legal discourse as a strait-jacket. They stoically resign themselves to what they imagine will be a professional lifetime spent wearing that strait-jacket because they hope that doing so will enable them occasionally to assist a movement for social change by invoking "legal technicalities."

One can't be an imaginative or effective social justice lawyer holding the view that the best we can do is to get favorable results from time to time by taking advantage of technicalities. That approach sets the bar too low. While I preach skepticism and

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<sup>1</sup> Staughton Lynd, *The Genesis of the Idea of a Community Right to Industrial Property in Youngstown and Pittsburgh, 1977-1987*, 74 J. AM. HIST. 926 (1987).

<sup>2</sup> *United Steel Workers, Local 1330 v. U.S. Steel Corp.*, 492 F.Supp. 1 (N.D. Ohio), *aff'd in part, vacated and remanded in part* 631 F.2d 1264 (6th Cir. 1980). In this paper, *Local 1330* refers to the District Court decision.

modesty about what legal work can accomplish and sensitivity to how law both constitutes and reflects illegitimate class, racial, gender, and sexual domination, my teaching also aims to challenge my students' overblown sense of the constraining power of legal discourse.

The *Local 1330* case offers unique opportunities to do that. Professors Joseph Singer and Michael Fischl and I have been teaching the case for thirty years. I was teaching Contracts when *Local 1330* came down, so at first I taught it as a contracts case. When I switched to teaching Torts, I re-packaged it as a torts case. Currently I teach Employment Law, and *Local 1330* is a perfect lead-in to the section of the course covering the WARN Act.<sup>3</sup> If I were assigned to teach marine insurance, wills and estates, or commercial transactions, I would figure out some way to include *Local 1330* in the syllabus. I do some of my best teaching when covering *Local 1330*, and these sessions allow me to remain true to my belief that the law school classroom can be a site for the empowerment of students oriented to social justice.

I realize that all of this provides precious little comfort to the steelworkers. Nevertheless, the Youngstown struggle left a small, unexpected legacy to legal education, one that enriched my professional life and, I hope, my students' learning experience. Subordinated and marginalized people will always need creative legal representation of the kind Staughton provided in the plant shutdown struggles. When my former students rise to the occasion, they "shout Youngstown" all the way into the courtroom.

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I tweak my classes on *Local 1330* to reflect the particular course I happen to be teaching, the length of the class-hour (usually eighty or ninety minutes), and my evolving views. The following description is a composite of my approaches over the years. The core of the session is always the same. I ask the students to imagine themselves as members of Staughton's legal team, and I challenge them to devise an alternative, winning legal theory on behalf of the workers and the community. I give my opinion that the plaintiffs' common law theories were sound and should have prevailed.<sup>4</sup> But I ask the class to accept for purposes of the exercise that Judge Lambros has already ruled against these theories, so that an alternative approach is required.

I begin by discussing mass dismissals. Mass dismissals have a variety of causes including natural disaster, but most commonly they occur in connection with economic change and capital mobility. I define "capital mobility" broadly to mean adjustments in the uses to which investors put capital, for example, when an owner decides to disinvest in one enterprise or facility and re-invest the proceeds elsewhere. Capital mobility and mass dismissals are normal side effects of economic change. I cite Bureau of Labor Statistics data to show that mass dismissals occur in the United States with great

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<sup>3</sup> Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109 (2006).

<sup>4</sup> See generally Joseph William Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND: HARV. J. LEGAL LEFT 79 (2011); Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988); Jay M. Feinman, *Critical Approaches to Contract Law*, 30 U.C.L.A. L. REV. 829 (1983).

frequency even when we are not in the midst of a major recession.<sup>5</sup> A mass dismissal does not necessarily indicate that the closing business was not viable. Capital might migrate away from a viable business if that use of capital is not *as profitable* as an alternative investment. An alternative investment may be more profitable for a variety of reasons that do not necessarily reflect badly on the viability or social usefulness of the original investment. An investment might promise a higher return for one potential investor than for another because of other lines in which that particular investor is currently engaged or because of the investor's tax posture. Rates of return must also be assessed in light of the amount of risk an investor is prepared to assume.

I then discuss U.S. Steel's decision to leave Youngstown, the worker and community resistance, the workers' attempt to buy the plant, the company's refusal to sell on the preposterous basis that a worker-owned entity would enjoy tax subsidies of a kind that routinely benefited U.S. Steel, and finally, the company's decision to blow up the plant. I display the iconic photograph of the demolition. I describe some of the social outcomes that occurred in the aftermath of the departure of the steel industry from the Mahoning Valley. The population of Youngstown declined from 115,511 in 1980 to 82,026 by 2000.<sup>6</sup> The local economy went on life support. Dramatic increases in family breakdown, mental illness admissions, domestic violence, child abuse, and welfare reciprocity occurred.<sup>7</sup>

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<sup>5</sup> See generally *Mass Layoff Statistics*, BUREAU OF LABOR STATISTICS, <http://www.bls.gov/mls/> (last visited November 13, 2011). A study published by the HELDRICH CTR. FOR WORKFORCE DEV., RUTGERS UNIV., entitled *The Disposable Worker: Living in a Job-Loss Economy*, HELDRICH WORK TRENDS SURVEY, Summer 2003, found that one-fifth of all U.S. workers suffered job loss between 2000 and 2003 (the numbers include both individual and mass dismissals). Among laid-off workers in that period, sixty-four percent received less than two weeks' notice, and three-four percent received no advance warning at all. Sixty-five percent received no severance pay or compensation of any kind from the employer. Over fifty percent of workers laid off in the previous three years were ineligible for unemployment benefits.

<sup>6</sup> Evan Hudson-Plush, *WARN's Place in the FLSA/Employment Discrimination Dichotomy: Why A Warning Cannot Be Waived*, 27 CARDOZO L. REV. 2929, 2929-30 n.2 (2006) (citing US CENSUS BUREAU, COUNTY AND CITY DATA BOOK 2000, at 657 (2000)). See also MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, *WORK LAW: CASES & MATERIALS* 278 (2d ed. 2010) (citing Timothy Aepfel, *As Its Population Declines, Youngstown Thinks Small*, WALL ST. J., May 3, 2007, at A1, A15), reporting that Youngstown city planners adopted a redevelopment plan known as "controlled shrinkage." The plan targets blighted areas for demolition, calls for unused streets to be dug up and turned into green space, reduces infrastructure in sparsely populated areas labeled as transitional, and reallocates resources to repair and develop more stable neighborhoods.

<sup>7</sup> See Dan Swinney, *Documenting the Social Cost of Unemployment*, LAB. RES. REV., vol. 1, no. 3, Summer 1983, at 52, reporting that the number of persons seeking help at the Battered Persons Crisis Center in Youngstown almost doubled between 1980 and 1982; child abuse had climbed thirty-five percent in Youngstown area since 1979; welfare cases increased thirty-eight percent in 1982; in nearby Warren, Ohio, mental health center admissions were up fifteen percent in 1982, and in Youngstown, the caseload soared ninety percent since 1978. See also Theodore J. St. Antoine, *A Seed Germinates: Unjust Discharge Reform Heads to Full Flower*, 67 NEB. L. REV. 56, 67 text at note 71, which states that "[n]umerous studies document the

The plaintiffs relied on three principal theories to resist the plant closing. One was that U.S. Steel violated the antitrust laws by refusing even to consider selling the plant to a worker-owned entity.<sup>8</sup> The District Court rejected this contention.<sup>9</sup> To simplify class discussion, I ask the students to put antitrust aside and focus only on common law theories. In that branch of the case, plaintiffs alleged, first, that U.S. Steel breached an express, unilateral contract stipulating that the company would remain in Youngstown if the workers made the plant profitable. Second, plaintiffs pleaded a promissory estoppel theory, namely, that the workers had reasonably relied to their great detriment on U.S. Steel's alleged promise to stay in Youngstown if the plant were profitable. Judge Lambros rejected the express contract theory on two grounds: (1) that the person alleged to have made the promise, the local plant manager, lacked authority to bind the company; and (2) that a condition precedent failed because the plant had not in fact been made profitable. The workers insisted that they had, indeed, made the plant profitable through extra work-effort and wage and benefit concessions. However, the court accepted U.S. Steel's definition of "profitability," which cast doubt on the workers' more optimistic accounting. The promissory estoppel theory was rejected because, even assuming that the plant manager's statements were binding on the company, they were in the nature of a well-intended "pep talk" rather than a promise upon which a reasonable person might rely. The court repeated its finding that the plant had not been made profitable, a point seemingly irrelevant to the promissory estoppel claim.

In a stunning development at the pretrial conference, Judge Lambros suggested *sua sponte* "the possibility [that] the relationships between the steel industry and the surrounding community generat[ed] a property right[.]"<sup>10</sup> and he requested argument on the point. His subsequent opinion made a very convincing argument for relief; namely, that U. S. Steel had "draw[n] from the lifeblood of the community for so many

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increases in cardiovascular deaths, suicides, mental breakdowns, alcoholism, ulcers, diabetes, spouse and child abuse, impaired social relationships, and various other diseases and abnormal conditions that develop . . . in the wake of . . . permanent layoffs resulting from plant closures." According to a news report, a "2006 study by a group of epidemiologists at Yale found that layoffs more than doubled the risk of heart attack and stroke among older workers." Michael Luo, *For Workers at Closing Plant, Ordeal Included Heart Attacks*, N. Y. TIMES, February 25, 2010, at A1. This article also reports a 2009 study that "found that a person who lost a job had an eighty-three percent greater chance of developing a stress-related health problem like diabetes, arthritis, or psychiatric issues" and another 2009 study that "concluded that death rates among high-seniority male workers jumped by fifty percent to one hundred percent in the year after job loss, depending on the worker's age." At a panel discussion of findings, one researcher studying "older workers" (ages fifty one to sixty one at the outset of the study) found in six and ten-year follow-ups that "workers who had lost their jobs had more than double the risk of heart attack and stroke when compared with those who had steady employment." Michael Rose, *Unemployment Can Have Long-Term Effects On Physical and Mental Health, Speakers Say*, 24 LAB. REL. WEEK (BNA) 1863 (2010).

<sup>8</sup> *Local 1330*, 492 F.Supp. at 10.

<sup>9</sup> *Id.* at 11-13.

<sup>10</sup> *Id.* at 9.

years.”<sup>11</sup> In substance, Judge Lambros took an unjust enrichment approach, reasoning that because the workers had invested their human capital in the firm and because the community had invested other resources, “United States Steel should not be permitted to leave the Youngstown area devastated[.]”<sup>12</sup> However, with heartfelt regret, Judge Lambros eventually rejected the property theory on the ground that “the mechanism to . . . recognize this new property right[ ] is not now in existence in the code of laws of our nation.”<sup>13</sup> The District Court’s key rulings were affirmed by the Sixth Circuit in due course.<sup>14</sup>

At this point, I pause to take a straw-poll of the class on whether the common law issues in *Local 1330* were correctly decided. Invariably, students immediately ask whether I mean “correctly decided” in a legal sense or in terms of morals and politics. Feigning surprise, I ask the students whether they can still believe after a year or two of law study, indeed, whether they still believed after a week or two of law study, that a bright-line distinction can be drawn between legal considerations and moral/political considerations. Most students are prepared to agree that law and morals/politics are intertwined, but they insist that their question about how I meant for them to cast their votes is meaningful: “You know very well what we are talking about.” I profess that I do not. Conversation ensues about whether there is a boundary between law and morality/politics and if so, what is the nature of the distinction.

Eventually, I make a show of offering a big concession and allow the straw poll to proceed in two stages. First, was the case correctly decided in a moral/political sense? And, second, was the case correctly decided in “purely” legal terms? Typically, a majority shares the moral intuition that the result was unjust and that the workers and community deserved *some* remedy—perhaps damages in the form of a transition package or an order that U.S. Steel enter good faith negotiations with worker and community representatives on sale of the plant to a new worker-owned entity. Invariably, an even larger majority votes that Judge Lambros was legally correct in dismissing the plaintiffs’ claims. In other words, almost every time I have taught the case, many or even most students are torn between what they think of as a just outcome to the case and what they think the law required.

By now it has begun to dawn that one of the subjects of this class session is how lawyers translate their moral intuitions and sense of justice into legal arguments. Most beginning students have found themselves in the situation of wanting to express their moral intuitions in the form of legal arguments but of feeling powerless to do so. A common attitude of Northeastern students is that a lawyer *cannot* turn moral and political convictions into legal arguments in the context of case-litigation. If you are interested in directly pursuing a moral and/or political agenda, at a minimum you need

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<sup>11</sup> *Id.* at 10.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Local 1330, United Steel Workers v. U.S. Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980). The Sixth Circuit vacated the District Court’s dismissal of the antitrust claim and remanded on the basis that the case was not ripe for summary judgment on the record presented. Subsequently, nothing came of the antitrust claim.

to take up legislative and policy work, and more likely you need to leave the law altogether and take up grass roots organizing instead. I insist that we keep the focus on litigation for this class period.

After the straw poll, I ask the students to simulate the role of Staughton Lynd's legal assistants and to assume that the court has just definitively rejected the claims based on contract, promissory estoppel, and the notion of a community property right. However, they should also assume, counter-factually, that Judge Lambros stayed dismissal of the suit for ten days to give plaintiffs one last opportunity to come up with a theory. I charge the students with the task of making a convincing common law argument, supported by respectable legal authority, that the plaintiffs were entitled to substantial relief. Put another way, I ask the students to prove that Judge Lambros was mistaken—that he was *legally wrong*—when he concluded that there was no basis in existing law to vindicate the workers' and community's rights. In some classroom exercises, I permit students to select the side for which they wish to argue, but I do not allow that in this session. All students are asked to simulate the role of plaintiffs' counsel and to make the best arguments they can—either because they actually believe such arguments and/or because in their simulated role they are fulfilling their ethical duty to provide zealous representation.

A recurring, instant reflex is to say: "it's simple—the workers' human rights were violated in the Youngstown case." I remind the class that the challenge I set was to come up with a common law theory. The great appeal of human rights discourse for today's students is that it seems to provide a technical basis upon which their fervent moral and political commitments appear to be legally required. "What human rights?" I ask. The usual answers are (1) "they had a right to be treated like human beings" or (2) "surely there is *some* human right on which they can base their case." To the first argument I respond: "well, how they are entitled to be treated is exactly what the court is called upon in this case to decide. Counsel may not use a re-statement of the conclusion you wish the court to reach as the legal basis *supporting* that conclusion." To the second response I reply: "it would be nice if some recognized human right applied, but we are in the Northern District of Ohio in 1980. Can you cite a pertinent human rights instrument?" (Answer: "no.")

The students then throw other ideas on the table. Someone always proposes that U.S. Steel's actions toward the community were "unconscionable." I point out that unconscionability is a *defense* to contract enforcement whereas the plaintiffs were seeking to *enforce* a contract (the alleged promise not to close the plant if it were rendered profitable). In any case, we have assumed that the judge has already ruled that there was no contract.

Another suggestion is that plaintiffs go for restitution. A restitution claim arises when plaintiff gives or entrusts something of value to the defendant, and the defendant wrongfully refuses to pay for or return it. But here we are assuming that Judge Lambros has already ruled that the workers did *not* endow U.S. Steel with any property or value other than their labor power for which they were already compensated under the applicable collective bargaining agreements. If the community provided U.S. Steel with value in the nature of tax breaks or infrastructure development, the effect of Judge Lambros' ruling on the property claim is to say that these were not investments by the

community but no-strings-attached gifts given in the hope of attracting or retaining the company's business.

At this point I usually give a hint by saying, "if we've ruled out contract claims, and we've ruled property claims, what does that leave?" Aha, torts! A student then usually suggests that U.S. Steel committed the tort of intentional infliction of emotional distress (IIED).<sup>15</sup> I point out that, even if it were successful, this theory would provide plaintiffs relief only for their emotional injuries, but not their economic or other losses, and most likely would not provide a basis for an injunction to keep the plant open. In any event, IIED is an intentional tort. What, I ask, is the evidence that U.S. Steel *intends* the plant shutdown to cause distress? The response that "they *should* know that emotional distress will result" is usually not good enough to make out an intentional tort. An astute student will point out that in some jurisdictions it is enough to prove that the defendant acted with reckless disregard for the likelihood that severe emotional distress would result. I allow that maybe there's something to that, but then shift ground by pointing out that a *prima facie* requirement of IIED is that the distress suffered go beyond what an "ordinary person" may be expected to endure or beyond the bounds of "civilized behavior."<sup>16</sup> Everyone knows that plants close all the time and that the distress accompanying job-loss is a *normal* feature of American life. A student half-heartedly throws out negligent infliction of emotional distress, to which my reply is: "In what way is U.S. Steel's proposed conduct negligent? The problem we are up against here is precisely that the corporation is acting as a *rational* profit-maximizer."

A student always proposes that plaintiffs should allege that what U.S. Steel did was "against public policy." First of all, I say, "public policy" is not a cause of action; it is a backdrop against which conduct or contract terms are assessed. Moreover, what public policy was violated in this case? The student will respond by saying "it is against public policy for U.S. Steel to leave the community devastated." I point out once again that that is the very *conclusion* for which we are contending—it is circular argument to assert a statement of our intended conclusion as the *rationale* for that conclusion.

This dialogue continues for awhile. One ineffective theory after another is put on the table. Only once or twice in the decades I have taught this exercise have the students gotten close to a viable legal theory. But this is not wasted time—learning occurs in this phase of the exercise. The point conveyed is that while law and morals/politics are inextricably intertwined, they are not the same. For one thing, lawyers have a distinct way of talking about and analyzing problems that is characteristic of the legal culture of a given time and place. So-called "legal reasoning" is actually a repertoire of conventional, culturally approved rhetorical moves and counter-moves deployed by lawyers to create an appearance of the legal necessity of the results for which they contend.

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<sup>15</sup> See RESTATEMENT (SECOND) OF TORTS § 46(1) ("One who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress").

<sup>16</sup> See *id.*, cmt. d (liability only where "the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community").

In addition, good lawyers actually possess useful, specialized knowledge not generally absorbed by political theorists or movement activists. Legal training sensitizes us to the many complexities that arise whenever general norms and principles are implemented in the form of rules of decision or case applications. Lawyers know, for example, that large stakes may turn on precisely how a right is defined, who has standing to vindicate it, what remedies it provides, how the right is enforced and in what venue(s), and so on. We are not doing our jobs properly if we argue, simply, “what the defendant did was unjust and the plaintiff deserves relief.” No one needs a lawyer to make the “what the defendant did was unjust” argument. As Lynd’s account shows, the workers of Youngstown *did* make that argument in their own, eloquent words and through their collective resistance to the shut-downs. If “what the defendant did was unjust” is all we have to offer, lawyers bring no added value to the table.

Progressive students sometimes tell themselves that law is basically gobbledygook, but that you can assist movements for social change if you learn how to spout the right gobbledygook. In this view of legal practice, “creativity” consists in identifying an appropriate technicality that helps your client. But in the Youngstown situation, we are way past that naïve view. There is no “technicality” that can win the case. In this setting, a social justice lawyer must use the bits and pieces lying around to generate new legal knowledge and new legal theories. And these new theories must say something more than “my client deserves to win” (although it is fine to commence one’s research on the basis of that moral intuition).

The class is beginning to get frustrated, and around now someone says “well, what do you expect? This is capitalism. There’s no way the workers were going to win.” The “this-is-capitalism” (“TIC”) statement sometimes comes from the right, sometimes from the left, and usually from both ends of the spectrum but in different ways. The TIC statement precipitates another teachable moment. I begin by saying that we need to tease out exactly what the student means by TIC, as several interpretations are possible. For example, TIC might be a *prediction* of what contemporary courts are most likely to do. That is, TIC might be equivalent to saying that “it doesn’t matter what theory you come up with; 999 US judges out of 1,000 would rule for U. S. Steel.”<sup>17</sup>

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<sup>17</sup> Notwithstanding all of the nonsense written by critics about the “indeterminacy” thesis advanced within the critical legal studies tradition, CLS scholars always accepted that legal outcomes are often highly predictable in a statistical or sociological sense. No one in CLS argued that legal outcomes are random or that they exhibit no patterns or regularities, and no one argued that legal authorities or texts can be given any meaning a legal interpreter wishes to impose on them. The indeterminacy thesis was the much more modest claim that legal outcomes are often logically under-determined by existing rules, authorities, and decision-procedures. Properly trained and acculturated members of the legal community can often and without great difficulty derive different, even conflicting, conclusions from the rules and authorities utilizing perfectly respectable legal reasoning techniques. This does not mean that jurists and advocates cannot talk about or decide cases in an intellectually and morally satisfying manner. It means only that to reach an appropriate conclusion about how a general norm applies to a particular case, the lawyer must, consciously or unconsciously, rely on intermediate judgments and choices that implicate her moral and political sensibilities. *See generally* DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION [FIN DE SIÈCLE] (1997); *see also* Dennis



I allow that this is probably true, but not very revealing. The workers knew what the odds were before they launched the case. Even if doomed to fail, a legal case may still make a contribution to social justice if the litigation creates a focal point of energy around which a community can mobilize, articulate moral and political claims, educate the wider public, and conduct political consciousness-raising. And if there is political value in pursuing a case, we might as well make good legal arguments.

On an alternative reading, the TIC observation is more ambitious than a mere prediction. It might be a claim that a capitalist society *requires* a legal structure of a certain kind, and that therefore professionally acceptable legal reasoning within capitalist legal regimes *cannot* produce a theory that interrogates the status quo beyond a certain point. Put another way, some outcomes are so foreign to the bedrock assumptions of private ownership that they cannot be reached by respectable legal reasoning. A good example of an outcome that is incompatible with capitalism, so the argument goes, is a court order interfering with U.S. Steel's decision to leave Youngstown. This reading of the TIC comment embodies the idea that legal discourse is encased within a deeper, extra-legal structure given by requirements of the social order (capitalism), so that within professionally responsible legal argument the best lawyers in the world could not state a winning theory in *Local 1330*. Ironically, the left and the right in the class often share this belief.

I take both conservative and progressive students on about this. I insist that the claim that our law is constrained by a rigid meta-logic of capitalism—which curiously parallels the notion that legal outcomes are tightly constrained by legal reasoning—is just plain wrong. Capitalist societies recognize all sorts of limitations on the rights of property owners. Professor Singer's classic article catalogues a multitude of them.<sup>18</sup> The claim is not only false, it is a dangerous falsehood. To believe TIC in this sense is to limit in advance our aspirations for what social justice lawyering can accomplish.

Now the class begins to sense that I am not just playing law professor and asking rhetorical questions to which there are no answers. The students realize that I actually think that I have a theory up my sleeve that shows that Judge Lambros was wrong on the law. If things are going well, the students begin to feel an emotional stake in the exercise. Many who voted in the straw poll that the plaintiffs deserved to win are anxious to see whether I can pull it off. Other students probably engage emotionally for a different reason—the ones who have been skeptical or derisive of my approach all term hope that my “theory,” when I eventually reveal it, is so implausible that I will fall flat on my face.

I begin to feed the students more hints. One year I gave the hint, “What do straying livestock, leaking reservoirs, dynamite blasting, and unsafe products have in common?”—but that made it too easy. Usually my hints are more oblique, as in “does anything you learned about accident law ring a bell?” Whatever the form, the students take the hints, and some start cooking with gas. Over the next few minutes, the pieces usually fall into place.

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M. Davis & Karl Klare, *Transformative Constitutionalism & the Common & Customary Law*, 26 SO. AFR. J. ON HUM. RTS. 403 (2010).

<sup>18</sup> Singer, *Reliance Interest*, *supra* note 4.

The legal theory toward which I have been steering the students is that U.S. Steel is strictly liable in tort for the negative social effects of its decision to disinvest in Youngstown. I contend that that is what the law provided in Ohio in 1980, and therefore a mechanism *was* available for the District Court to order substantial relief.

A basic, albeit contested theme of modern tort law, which all students learn in first year, is that society allows numerous risky and predictably harmful activities to proceed because we deem those activities, on balance, to be worthwhile or necessary. In such cases, the law often imposes liability rules designed to make the activity pay for the injuries or accidents it inevitably causes. For more than a century, tort rules have been fashioned to force actors to take account of all consequences proximately attributable to their actions, so that they will internalize the relevant costs and price their products accordingly. The expectation is that in the ordinary course of business planning, the actor will perform a cost/benefit analysis to make sure that the positive values generated by the activity justify its costs. Here, I remind the students of the famous Learned Hand *Carroll Towing* formula<sup>19</sup> comparing B vs. PL, where B represents the costs of accident avoidance (or of refraining from the activity when avoidance is impossible or too costly); and P x L (probability of the harm multiplied by the gravity of the harm) reflects foreseeable accident costs.<sup>20</sup> The tort theory that evolved from this and similar cost/benefit approaches is called “market deterrence.” The notion is that liability rules should be designed to induce the actor who is in the best position to conduct this kind of cost/benefit analysis with respect to a given activity to actually conduct it. Such actors will have incentives to make their products and activities safer and/or to develop safer substitute products and activities.<sup>21</sup> Actors will then pass each activity’s residual accident costs on to consumers by “fractionating” and “spreading” such costs through their pricing decisions. As a result, prices will give consumers an accurate picture of the true social costs of the activity, including its accident costs. Consumers are thus enabled to make rational decisions about whether to continue purchasing the product or activity in light of its accident as well as its production costs. In principle, if a particular actor produces an unduly risky product (in the sense that its accident costs are above “market level”), that actor’s products will be priced above market, and he/she will be driven out of business.<sup>22</sup>

Tort rules have long been crafted with an eye toward compelling risky but socially valuable activities or enterprises to internalize their external costs. My examples—to which the students were exposed in first year—are the ancient rule imposing strict

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<sup>19</sup> U.S. v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

<sup>20</sup> *Id.* at 173.

<sup>21</sup> See generally GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL & ECONOMIC ANALYSIS (1970).

<sup>22</sup> The theory of fractionating and spreading accident costs through the price system is also supported by fairness and distributional equity rationales in addition to allocative efficiency concerns. See generally FOWLER V. HARPER, FLEMING JAMES, JR. & OSCAR GREY, 3 THE LAW OF TORTS § 13.2 (2d ed. 1986) (including equitable distribution of losses as an objective of no-fault tort schemes based on the principle of social insurance).

liability for crop damage caused by escaping livestock;<sup>23</sup> strict liability under the doctrine of *Rylands v. Fletcher* for the escape of dangerous things brought onto one's property;<sup>24</sup> strict liability under *Restatement (Second) § 519* for damage caused by "abnormally dangerous activities" such as dynamite blasting;<sup>25</sup> and most recently, strict products liability.<sup>26</sup> Of course, there are many exceptions to this approach. For example, "unavoidably unsafe" or "Comment k products" are deemed non-defective and therefore do not carry strict liability. And of course the U.S. largely rejected *Rylands*. Why was that? Because, as was memorably stated in *Losee v. Buchanan*: "We must have factories, machinery, dams, canals and railroads. They are demanded by the manifold wants of mankind, and lay at the basis of all our civilization."<sup>27</sup> In assuming that entrepreneurial capitalism would be stymied if enterprises were obliged to pay for the harms they cause, the *Losee* court accepted a strong version of TIC. Time permitting, I touch briefly on the debate about whether the flourishing of the negligence principle in the U.S. subsidized 19th century entrepreneurial capitalism,<sup>28</sup> the possible implications of the Coase Theorem for our discussion of *Local 1330*,<sup>29</sup> and the debate about whether it is appropriate for courts to fashion common law rules with an eye toward their distributive as well as efficiency consequences.<sup>30</sup>

With this as background, I argue that the District Court should have treated capital mobility—investors' circulation of capital in search of the highest rate of return—as a risky but socially valuable activity warranting the same legal treatment as straying cattle and dynamite blasting. Capital mobility *is* socially valuable. It is indispensable for economic growth and flexibility. Capital mobility generates important positive externalities for "winners," such as economic development and job-creation at the new

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<sup>23</sup> See RESTATEMENT (SECOND) OF TORTS § 504(1) (stating that, with exceptions, "a possessor of livestock intruding upon the land of another is subject to liability for the intrusion although he has exercised the utmost care to prevent them from intruding").

<sup>24</sup> See *Fletcher v. Rylands*, L.R. 1 Ex. 265 (Exchequer Chamber 1866), *aff'd* by *Rylands v. Fletcher*, L.R. 3 H.L. 330 (House of Lords 1868).

<sup>25</sup> See RESTATEMENT (SECOND) TORTS, § 519(1) ("One who carries on an abnormally dangerous activity is subject to liability for harm to the person, land or chattels of another resulting from the activity, although he has exercised the utmost care to prevent the harm").

<sup>26</sup> Classic statements of the doctrine appear in *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal.2d 453, 150 P.2d 436 (1944) (Traynor, J., concurring), and *Greenman v. Yuba Power Products, Inc.* 59 Cal.2d 57, 377 P.2d 897, 27 Cal.Rptr. 697 (1963) (Traynor, J.).

<sup>27</sup> *Losee v. Buchanan*, 51 N.Y. 476, 484 (1873).

<sup>28</sup> For a seminal contribution, see Morton J. Horwitz, *The Subsidization of Economic Growth through the Legal System*, in *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 63-108 (1977).

<sup>29</sup> See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1 (1960).

<sup>30</sup> Compare, e.g., STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 654 ("[g]iven the availability of the income tax system for achieving distributional goals, legal rules should generally not be chosen on the basis of their distributional effects") with Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) (asserting that distributional effects should be considered in fashioning legal rules).

site of investment. However, capital mobility also predictably causes negative external effects on “bystanders” (the ones economists quaintly label “the losers”). We discussed some of these externalities at the outset of the class—the trauma associated with income interruption and pre-mature retirement, waste or destruction of human capital, multiplier effects on the local economy, and social pathologies and community decline of the kind experienced in Youngstown.

The plaintiffs should have argued that capital mobility must internalize its social dislocation costs for reasons of economic efficiency, and that this can be accomplished by making investors strictly liable in tort for the social dislocation costs proximately caused by their capital mobility decisions. An investor considering shifting capital from one use to another will compare their respective rates of return. In theory, the investment with the higher return is socially optimal (as well as more profitable for the individual investor). The higher-return investment enlarges the proverbial pie. But investors must perform accurate comparisons of competing investment opportunities in order for the magic hand of the market to perform its magic. A rational investor bases her analysis primarily on price signals reflecting estimated rates of return on alternative investment options. This comparison will yield an irrational judgment leading to a socially suboptimal investment decision unless the estimated rate of return on the new investment reflects its external effects, both positive and negative. Investors often have public-relations incentives to tout the positive economic consequences promised at the new location. To guarantee rational decision making, the law must force investors contemplating withdrawal of capital from an enterprise to also carefully consider the negative social dislocation costs properly attributable to the activity of disinvestment. This can be achieved by making capital mobility strictly liable for its proximately caused social dislocation costs.<sup>31</sup>

This approach erects no inefficient barriers to capital mobility, nor does it bar all disinvestment decisions that may cause disruption and loss in the exit community. Other things being equal, if the new investment discounted by the social dislocation costs of exit will generate a higher rate of return than the current use of the capital, the capital *should be* disinvested from the old use and transferred to the new use. However, if investors are not forced by liability rules to take into account the social dislocation costs of disinvestment, the new investment opportunity will appear more attractive than it really is in a social sense.

The situation involves a classic form of market failure. The market is imperfect because investors are not obliged to take into account the negative social dislocation costs proximately caused by their decisions. Inaccurate price signals lead to the overproduction of capital movement and therefore to a suboptimal allocation of resources. Apart from any severance and unemployment benefits received by workers at the old plant, the social dislocation costs of disinvestment are almost entirely externalized onto the workers and the surrounding community. Strict tort liability will

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<sup>31</sup> The estimated value of any positive external effects of moving the capital to the new use must be adjusted to account for any governmental subsidies to the new activity, such as tax breaks offered by the destination community. Likewise, negative external effects at the original location must be adjusted to reflect any government ameliorative measures, such as the provision of unemployment insurance benefits.

induce investors and their downstream customers to fractionate and spread the dislocation costs of capital mobility when pricing the products of the new activity. This will provide those who use or benefit from the new activity at the destination community more accurate signals as to its true social costs and oblige them to fractionally share in the misfortunes afflicting the departure community. Suppose, for example, that U.S. Steel invested the money it took out of Youngstown toward construction of a modern, high-tech steel mill in a Sunbelt state. The price of steel produced at the new mill should fractionally reflect social dislocation costs in Youngstown.

According to legal “common sense” and mainstream economic theory, the movement of capital from a lesser to a more profitable investment is an unambiguous social good. Allowing capital to migrate to its highest rate of return guarantees that society’s resources are devoted to their most productive uses. Society as a whole is better off if capital is permitted freely to migrate to the new investment and there to grow the pie. In short, the free mobility of capital maximizes aggregate welfare. We are all “winners” in the long run, even if some unfortunate “losers” might get hurt along the way. It follows as an article of faith that any legal inhibition on the mobility of capital is inefficient and socially wasteful. This is why mainstream legal thinking refuses to accord long-term workers or surrounding communities any sort of “property interest” in the enterprise which a departing investor is obliged to buy out before removal.<sup>32</sup> An unwritten, bed-rock assumption of US law is that capital is not and should not be legally responsible for the social dislocation costs occasioned by its mobility.<sup>33</sup> Such costs are mostly externalized onto employees and the surrounding

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<sup>32</sup> See, e.g., *Charland v. Norge Div. Borg-Warner Corp.*, 407 F.2d 1062, 1065 (6th Cir.), cert. denied, 395 U.S. 927 (1969) (addressing “the fundamental question whether or not there is a legally recognizable property right in a job which has been held for something approaching a lifetime” and concluding that “the claimed property right [has not] been recognized to date in this country”). *Charland* holds, in effect, that if an employee invests commitment and human capital in a firm without obtaining suitable protections against expropriation of that capital, he/she invests at their own risk. This state of the law exacerbates a major social problem. One protects against investment risk by diversifying one’s portfolio of assets. For most employees their primary asset—human capital—cannot easily be diversified. In the abstract, workers can diversify their human capital portfolios by acquiring training in multiple or easily transferable skills. In practice this is often difficult and expensive. The abstract possibility of diversifying human capital rarely gives workers in industry much protection against the risk of plant closure. *Charland* was the only legal authority cited by Judge Lambros in *Local 1330* for the proposition that a workers’ or community property right in the steel plant “is not now in existence in the code of laws of our nation.” *Local 1330*, 492 F.Supp at 10.

<sup>33</sup> Some assumptions of public policy are so deeply engrained in US legal culture, so taken for granted, that courts feel able to rely upon them as grounds of decision without citation to any positive legal authority. Among these is the assumption that an entrepreneur has an absolute right to go out of business, as was vividly illustrated by Justice Harlan’s opinion for a unanimous Court in *Textile Workers Union v. Darlington Mfg. Co.*, 380 U.S. 263 (1965) (Goldberg and Stewart, JJ., not participating). *Darlington Mfg.* involved a plant closing shortly after a union won an NLRB representation election. The Court held, on one view of the facts, that “when an employer closes his entire business, even if the liquidation is motivated by vindictiveness toward

community, even if the exit community had subsidized the old investment with tax breaks and similar forms of corporate welfare.

The legal common sense about capital mobility is mistaken. It is not *a priori* true that the movement of capital toward the greatest rate of return unambiguously enhances aggregate social welfare. Free capital mobility maximizes aggregate welfare and allocates resources to their most productive uses *only* in a perfect market; that is, only in the absence of market failure. The claim that free capital mobility is efficient is sometimes true, and sometimes it is not. It all depends on the particular facts and circumstances on the ground.

*Voilà.* Judge Lambros was wrong. In 1980, a mechanism *did* exist in our law to recognize the plaintiffs' claims and afford them substantial relief for economic, emotional, and other losses.<sup>34</sup> All that was required was a logical extension of familiar

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the union, such action is not an unfair labor practice." *Id.* at 273-74. Why is that? Because, Justice Harlan tells us:

A proposition that a single businessman cannot choose to go out of business if he wants to would represent such a starting innovation that it should not be entertained without the clearest manifestation of legislative intent or unequivocal judicial precedent so construing the Labor Relations Act. We find neither.

*Id.* at 270. That's it. That is essentially the entire explanation provided, save for the dubious and speculative observation, unsupported by any evidence of record or, indeed, any evidence, that an employer gains no future benefit from liquidation under these circumstances. That employers as a class might benefit from vindictive plant closings was beyond Justice Harlan's scope.

It is true that Congress left no unambiguous signal that it intended to bar vindictive total plant shutdowns, but neither did Justice Harlan cite a single authority—statutory language, legislative history, or case law—for the proposition that Congress intended to permit a business to victimize hundreds of workers for the sole and undisputed reason that they had exercised a statutory right in a secret ballot election conducted by the Government. Apparently this is one of those things that every "responsible" lawyer "just knows."

<sup>34</sup> Exposure to substantial liability would undoubtedly cause U.S. Steel to delay the closure at least long enough to reassess its options. The prospect of such recovery would give the workers some leverage to bargain for a settlement that might include a commitment to keep the plant open, at least in the short run. However, what the plaintiffs sought most urgently was a court order to keep the mill running. In the abstract, injunctive relief fits well with the strict liability theory, the underlying rationale of which is to encourage investors to perform the cost-benefit analysis before moving capital. But injunctive relief is unusual in torts cases apart from nuisance and certain other land-use claims. There are exceptions, but courts are generally reluctant to grant equitable relief to protect personal (as opposed to property) interests. Additional barriers are posed by the rules of equity that the injury to be enjoined must be "irreparable" and that equity will not grant relief where an adequate remedy is available at law.

Courts sometimes hold that legal remedies are "inadequate" where it is too difficult to measure the damages, a consideration that might apply here. However, courts are reluctant to consider loss of employment to be "irreparable injury." Injunctive relief in cases involving or growing out of a labor dispute is generally barred by the Norris-LaGuardia Act §§ 4 & 7, 29 U.S.C. §§ 104, 107. However, since the Supreme Court's landmark decision in *Boys Markets, Inc. v. Retail Clerks' Union, Local 770*, 398 U.S. 235 (1970), federal and state courts have regularly granted injunctions in aid of labor arbitration. In addition to labor-policy

torts thinking. Had Judge Lambros correctly applied well-known and time-honored torts principles, he would have treated the social dislocation costs of the plant closure as an externality that must be embedded in U.S. Steel's calculations regarding the relative profitability of the old and new uses to which it might put its capital. This would close the gap between private and social costs, thereby tending to perfect the market. Notice an important rhetorical advantage of this theory—its core value is economic efficiency.

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considerations, the grant of such injunctions is subject to the ordinary principles of equity. *Id.*, at 254 (1970) (Brennan, J.) (quoting *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 228 (Brennan, J., dissenting)). Accordingly, courts are frequently called upon to consider whether profits an employer loses during a strike and/or whether the consequences suffered by a terminated employee constitute “irreparable injury.” In practice, courts take for granted that lost profits qualifies as irreparable injury. But with equal regularity, they hold that the hardships employees suffer when terminated or laid off do not qualify as irreparable injury, and that employment-loss can be adequately remedied by a back pay award (at least where eventual reinstatement is possible). Reinstatement to a job in Youngstown would be impossible if U.S. Steel closed the plant. Conceivably, therefore, the prospect of vast but difficult-to-measure damages resulting from the plant closing might support an injunction within the confines of the strict liability theory.

Occasionally, a creative student suggests that we consider a public nuisance theory, an approach with the considerable advantage of being injunction-friendly. (An unjust enrichment or restitution theory, had it been viable, might also be conducive to equitable remedies.) Public officials—perhaps Youngstown municipal officials—have standing to seek to enjoin a public nuisance. *See* RESTATEMENT (SECOND) OF TORTS § 821C(2)(b). Even private individuals may seek to abate a public nuisance, but only upon meeting demanding, special requirements. *See id.* § 821C.

The public nuisance theory is intriguing, but in my view the strict liability approach is sounder theoretically. Moreover, the public nuisance approach faces numerous doctrinal barriers. The crux of public nuisance is “an unreasonable interference with a *right common* to the *general public*.” RESTATEMENT (SECOND) OF TORTS § 821B(1) (*italics added*). In the Youngstown situation, what is the right common to the general public? The general public does not have a right to continued employment by U.S. Steel. A court may find a public nuisance based on a significant interference with “public health” or “public comfort,” particularly where this “produce[s] a permanent or long-lasting effect.” *See id.* §§ 821B(2)(a) & (c). Interference with public health commonly refers to on-going conditions like keeping diseased animals or a maintaining a malarial pond on one’s land. But suppose for purposes of discussion that the plaintiffs could successfully analogize the community health consequences of a plant shutdown to more familiar public health threats. The counter-argument is that the *general public* is not at health-risk from a plant closing, just those unlucky enough to work for U.S. Steel or to own a lunch counter across the street from the mill. Moreover, private standing to enjoin a public nuisance requires that the individual has “suffered a harm of a kind different from that suffered by other members of the public exercising the” common, public right. *See id.* §§ 821C(1) & 2(a). Even if a major plant closing were treated as a general public health catastrophe, those most directly affected—the steelworkers and their families—would suffer the *typical* injuries by virtue of which we would consider the closing a health risk. Might the general risk be deemed to be the economic ripple effects of a plant closing leading to community decline and thence to deleterious health consequences (e.g., lots of high blood pressure and depression), in which case the heart attack or suicide of a steelworker discharged in middle-age after thirty years in the mill might be deemed unique harm?

The plaintiffs can get this far along in their argument without mentioning “fairness,” “equity,” or “justice,” let alone “human rights,” values that are often fatal to legal argument in U.S. courts today.<sup>35</sup>

I now brace myself for the “you gotta be kidding me” phase of the discussion. Objections cascade in. The progressive students want to be convinced that this is really happening. The mainstream students want to poke holes and debunk. A few of them are grateful at last for an opportunity to show how misguided they always knew my teaching was.

Always, students assert that my summary discussion of the cost/benefit analysis omitted various costs and benefits. For example, one year I omitted to say that the social dislocation costs in the exit community must be discounted by ameliorative public expenditures such as unemployment insurance benefits. My response to this type of objection is always the same: “you are absolutely right, that cost or benefit should be included in the analysis. And here are a few more considerations we would need to address to perfect the cost/benefit analysis which I left out only in the interest of time.” But I learn from this discussion; not infrequently, students contribute something I had not previously considered.

A frequent objection is that the task of quantifying the social dislocation costs associated with capital mobility is just too complicated and difficult. I concede that it is a complex task and that conservative estimates might be required in place of absolute precision. I ask, however, whether it is preferable to allow investors to proceed on the basis of price-signals we know to be wrong or to induce them to use best efforts to arrive at fair estimates.

Separation of powers always comes up, as it should. I go through the usual riffs. Yes, I concede, these problems cry out for a comprehensive legislative solution rather than case-by-case adjudication. But standard, well-known counter-arguments suggest that Judge Lambros should nevertheless have imposed tort liability in this case. For one thing, determining the rules of tort liability has always been within the province of courts. Deferring to the status quo (that those who move capital are not legally responsible for negative externalities) is every bit as much a choice, every bit as much “activism” or “social engineering,” as altering the status quo. Legal history is filled with cases in which the legislature was only prompted to address an important public policy concern by the shock value of a court decision. Particularly is this so in cases involving the rights and interests of marginalized, insular, and under-represented groups like aging industrial workers. I note that Congress eventually responded to the plant closing problem with the WARN Act, a modest but not unimportant effort to internalize to enterprises some of the social dislocation costs of capital disinvestment. The statute liquidates these costs into a sum equal to sixty days’ pay after an employer orders a

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<sup>35</sup> See generally Kennedy, *supra* note 30, at 565-90 (discussing the discursive hierarchy within U.S. legal culture of efficiency, equity, and paternalist motives in the development of legal rules). But see Richard Michael Fischl, *Labor Law, the Left, and the Lure of the Market* (forthcoming in *Marquette Law Review*, 2011) (warning that when progressives invoke efficiency arguments to justify egalitarian reforms “we are reinforcing ideas we should be challenging, and . . . we are seducing ourselves rather more than our intended audience”).



plant closing or mass layoff without giving proper notice.<sup>36</sup> I call the students' attention to the provision of WARN barring federal courts from enjoining plant closings<sup>37</sup> and ask why Congress might have included that restriction.

Another common objection concerns causation. A student will say: "The closedown of the mills, let alone the shutdown of any particular plant, could not have caused *all* of the suicides, heart failures, domestic violence, and so on, in Youngstown. Surely many such tragedies would have occurred anyway, even if U.S. Steel had remained. It isn't fair to impose liability on U.S. Steel for everything bad that happened in Youngstown during the statute-of-limitations period." I immediately say that this is a terrific point, and that I was hoping someone would raise it. I compliment

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<sup>36</sup> See WARN § 5(a)(1), 29 U.S.C. § 2104(a)(1). The statutory reference to sixty days has been the subject of much litigation. An employer ordering a plant closing or mass layoff without giving the required advance notice is liable to aggrieved employees for "back pay for each day of violation . . . for the period of the violation, up to a maximum of 60 days." The Courts of Appeals for several circuits have adopted the so-called "work-days rule" under which employees receive far less than sixty days back pay even in cases where the violation period is the full sixty days. These courts reason that "back pay" is not owed for days during the violation period on which the aggrieved employees would not ordinarily have worked, such as weekends and holidays. See *Burns v. Stone Forest Indus.*, 147 F.3d 1182, 1183 (9th Cir. 1998); *Breedlove v. Earthgrains Baking Co.*, 140 F.3d 797, 801 (8th Cir.), *cert. denied*, 508 U.S. 324 (1998); *Saxion v. Titan-C-Mfg., Inc.*, 86 F.3d 553, 561 (6th Cir. 1996); *Frymire v. Ampex Corp.*, 61 F.3d 757, 771-72 (10th Cir. 1995); *Carpenters Dist. Council of New Orleans & Vicinity v. Dillard Dep't Stores, Inc.*, 15 F.3d 1275, 1283-84 (5th Cir. 1994). The Third Circuit adheres to a "calendar-days approach" under which regular full-time aggrieved employees are entitled to pay for all days in the violation period, including weekends and holidays. *USWA v. North Star Steel Co.*, 5 F.3d 39 (3rd Cir. 1993), *cert. denied*, 510 U.S. 1114 (1994), reaffirmed in *UMWA v. Eighty-Four Mining Co.*, 2005 WL 3099643 (3rd Cir. 2005) (not selected for publication in the Federal Reporter).

The statutory text is ambiguous, and unfortunately Congress's use of the phrase "back pay" is misleading. In my view, the work-days reading adopted by most Circuits is incongruent with WARN's purposes. Back pay under the National Labor Relations Act is pay for work wrongfully denied an employee by virtue of an employer's unfair labor practice (e.g., discharging a union activist). That is, NLRA-back pay is a form of wage-replacement, and it is reasonable to credit only days that the employee would have worked in the ordinary course. Claimants under the NLRA must mitigate damages, and any actual earnings they receive from any employer while awaiting the Board's decision are deducted from back pay. Similarly, back pay under the Fair Labor Standards Act refers to wages wrongfully withheld when the employer pays a sub-minimum wage or fails to pay overtime premiums. Thus, FLSA-back pay is also a form of wage-replacement but in this case it is with respect to work *actually performed*.

WARN is *not* a wage-replacement statute. Aggrieved employees have no duty under WARN to mitigate back pay by seeking alternative work. Wages earned from other employers during the violation period are not deducted from WARN-back pay, only wages earned from the defendant employer. WARN uses the sixty day figure not as a measure of damages for earnings denied or underpaid but as a rough quantification or liquidation of a fraction of the social dislocation costs occasioned by a plant closure without proper notice.

<sup>37</sup> WARN § 5(b), 29 U.S.C. § 2104(b), denies federal courts that authority to enjoin a plant closing or mass layoff as a remedy in a WARN case.

the student by saying that the question shows that he/she is now tapping legal knowledge.

Typically, the class is concerned with causation-in-fact or “but for” causation. Their question is, how do we know that a plant shutdown caused any particular case of heart failure or suicide in Youngstown? Problems of causal uncertainty are a familiar issue, and I remind students that they were exposed to several well-known responses in Torts. A time-honored, if simplistic device is to shift the burden of proof regarding causation-in-fact to the defendant, when everyone knows full well that the defendant has no more information than the plaintiff with which to resolve the problem of causal uncertainty.<sup>38</sup> In recent decades, courts have developed more sophisticated responses to problems of causal uncertainty as, for example, in the DES cases. As the court stated in *Sindell*:<sup>39</sup>

In our contemporary complex industrialized society, advances in science and technology create fungible goods which may harm consumers and which cannot be traced to any specific producer. The response of the courts can be either to adhere rigidly to prior doctrine, denying recovery to those injured by such products, or to fashion remedies to meet these changing needs. Just as Justice Traynor in his landmark concurring opinion in *Escola* . . . recognized that in an era of mass production and complex marketing methods the traditional standard of negligence was insufficient to govern the obligations of manufacturer to consumer, so should we acknowledge that some adaptation of the rules of causation and liability may be appropriate in these recurring circumstances . . . .<sup>40</sup>

At this point, some of the progressive students are beginning to salivate. They came to law school with the hope that legal reasoning would provide them a highly refined and politically neutral technology for speaking truth to power. The first semester disabuses most of them of that crazy idea. They have learned that they will not find certainty or answers in legal discourse, and that legal texts are minefields of gaps, conflicts, and ambiguities with moral and political implications. I can tell from the glint in their eyes that they are beginning to ask themselves whether this economics stuff, which they formerly shunned like the plague, might provide a substitute toolbox of neutral technologies with which to demonstrate that redress for workers and other subordinated and marginalized groups is legally required. I cannot allow them to think that.

Therefore, unless an alert student has spotted it, I now reveal my Achilles' heel. The weak link in my argument is the age-old question of *proximate* causation. Assume we solve the causation-in-fact problem. For example, assume that by analogy to the *Sindell* theory of market-share liability, the court arrives at a fair method of attributing to the plant shutdown some portion of the social trauma and injuries occurring in the wake of U.S. Steel's departure from Youngstown. How do we know whether the plant closing *proximately* caused these harms? What do we mean by “proximate causation” anyway, and why does it matter?

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<sup>38</sup> See, e.g., *Summers v. Tice*, 199 P.2d 1 (1948) (shifting burden of proof to defendants, where uncertainty as to which of two defendants was responsible for causing plaintiff's injury).

<sup>39</sup> *Sindell v. Abbott Laboratories*, 607 P.2d 924, cert. denied, 449 U.S. 912 (1980).

<sup>40</sup> *Id.* at 936.

These questions present another exciting, teachable moment. Naturally, the students haven't thought about proximate cause since first year. They barely remember what it is and how it differs from causation-in-fact. Some 3Ls shuffle uncomfortably knowing that the Bar examination looms, and they are soon going to need to know about this. I provide a quick review of proximate causation which addresses the question, how far down the chain of causation should liability reach? I illustrate my points by referring to *Palsgraf v. Long Island R.R.*,<sup>41</sup> which all law students remember. Perhaps U.S. Steel might fairly be held accountable for the suicide of steelworkers within ninety days of the plant closing, but we might draw the line before holding U.S. Steel liable for a stroke suffered by a steelworker's spouse five years later. Now keyed in to what proximate cause doctrine is about, the students eagerly wait for me to tell them what the "answer" is, that is, where proximate causation doctrine would draw the line in the Youngstown case.

That's when I give them the bad news. I explain that proximate causation doctrine does not provide a determinate analytical method for measuring the scope of liability. We pretend that buzzwords like "reasonable foreseeability" or "scope-of-the-risk" give us answers, but ultimately decisions made under the rubric of proximate causation are always value judgments.<sup>42</sup> The conclusion that "X proximately caused Y" is a statement about the type of society we want to live in. At this juncture, the 3Ls grumpily realize that I am not going to be much help in preparing them for their bar review course.

I now distribute a one-page hand-out on proximate causation prepared in advance. The handout reprints Justice Andrews' remarkable observation in his *Palsgraf* dissent:

What we . . . mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics . . . It is all a question of expediency. There are no fixed rules to govern our judgment. There are simply matters of which we may take account.<sup>43</sup>

I point out that causation-in-fact analysis, too, always involves perspective and value judgments.<sup>44</sup> Why assume that water escaping the reservoir diminished the value of the neighboring coal mining company's land? Why not assume that the coal company's decision to dig close to the border diminished the value of the manufacturer's land (by increasing the cost of using the type of reservoir needed in its production process)? For that matter, why assume that the cattle trample on the neighbors' crops? Why not assume that the crops get in the way of the cattle?

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<sup>41</sup> *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99 (1928) (unique and improbable chain of events provides basis for classic discussion of proximate causation).

<sup>42</sup> "[T]he requirement that there be in some sense a reasonably close connection between faulty conduct and the harm it occasions permits courts to make what is in essence an evaluative judgment that a defendant should or should not pay for the entire loss she has occasioned. However, judges often drape the notion of proximate cause in verbal formulations that obscure not only what they are really doing, but also the values that animate their decisions." JOSEPH A. PAGE, *TORTS: PROXIMATE CAUSE* 7 (2003).

<sup>43</sup> 162 N.E. at 103-04 (Andrews, J., dissenting).

<sup>44</sup> See generally Wex S. Malone, *Ruminations on Cause-In-Fact*, 9 STAN. L. REV. 60 (1956).

My handout also contains my variation on Robert Keeton's famous definition of proximate cause<sup>45</sup>:

When a court *states* that 'the defendant's conduct was the proximate cause of (some portion of) the plaintiff's injuries,' what the court *means* is that (1) the defendant's conduct was a cause-in-fact of that portion of plaintiff's injuries; and (2) the defendant's conduct and the plaintiff's specified injuries are so related that it is appropriate, from the moral and social-policy points of view, to hold the defendant legally responsible for that portion of the plaintiff's injuries.

What we mean when we ask whether the social dislocation costs associated with the shutdown of the steel plant were *proximately caused* by capital mobility is whether these costs are, in whole or in part, *properly attributable* from a moral/political point of view to U.S. Steel's decision to disinvest. Economic "science" does not and cannot establish in a value-neutral manner that the social dislocation costs of the plant shutdown are a negative externality of capital mobility. A conclusion of that kind requires a value judgment that we disguise under the rubric of "proximate causation," a value judgment about whom it is appropriate to ask to bear what costs related to what injuries.

The lesson is that in legal reasoning there is no escape from moral and political choice. If things have gone according to plan, time conveniently runs out, and the class is dismissed on that note.

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What am I trying to accomplish in a class like this? What are the objectives of critical legal pedagogy?

Legal education should empower students. It should put them in touch with their own capacity to take control over their lives and professional education and development. It should enable them to experience the possibility of participating, *as lawyers*, in transformative social movements. But all too often classroom legal education is deadening. The law student's job, mastering doctrine, appears utterly unconnected to any process of learning about oneself or developing one's moral, political, or professional identity. Classroom legal education tends to reinforce a sense of powerlessness about our capacity to change social institutions. Indeed, it often induces students to feel that they are powerless to shape and alter their own legal education. Much of legal education induces in students a pervasive and exaggerated sense of the constraint of legal rules and roles and the students' inability to do much about it.

In capsule form, the goals of critical legal pedagogy are—

- to disrupt the socialization process that occurs during legal education;
- to unfreeze entrenched habits of mind and deconstruct the false claims of necessity which constitute so-called "legal reasoning";

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<sup>45</sup> See ROBERT KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* (1963).

- to urge students to see their life's work ahead as an opportunity to unearth and challenge law's dominant ideas about society, justice, and human possibility and to infuse legal rules and practices with emancipatory and egalitarian content;
- to persuade students that legal discourses and practices comprise a medium, neither infinitely plastic nor inalterably rigid, in which they can pursue moral and political projects and articulate alternative visions of social organization and social justice;
- to train them to argue professionally and respectably for the utopian and the impossible;
- to alert them that legal cases potentially provide a forum for intense public consciousness-raising about issues of social justice;
- to encourage them to view legal representation as an opportunity to challenge, push, and relocate the boundaries between intra-systemic and extra-systemic activity, that is, an opportunity to work within the system in a way that reconstitutes it; and
- to show that the existing social order is not immutable but "is *merely possible*, and that people have the freedom and power to act upon it."<sup>46</sup>

The most important point of the class is that social justice lawyers never give up. The appropriate response when you think you have a hopeless case is to go back and do more work in the legal medium.

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<sup>46</sup> Peter Gabel & Paul Harris, *Building Power & Breaking Images: Critical Legal Theory & the Practice of Law*, 11 N.Y.U REV. L. & SOC. CHANGE 369, 384 (1982-83) (italics in original). See also Jeanne Charn, *Service & Learning: Reflections on Three Decades of The Lawyering Process at Harvard Law School*, 10 CLINICAL L. REV. 75, 86 (2003), quoting GARY BELLOW & BEA MOULTON, *THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY* 11 (1978) ("what is accepted as true and unalterable in the legal or any social system is, in fact, provisional and contingent—a product of change and particular social, economic and historical circumstances rather than immutable laws").