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Bruce K. Miller

Western New England University School of Law, bmiller@law.wne.edu

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THE PLACE OF LAW IN IVAN ILLICH'S VISION OF SOCIAL TRANSFORMATION

BRUCE MILLER*

INTRODUCTION: WHY ILLICH NOW?

In the spring of 2011, when this conference on the thought of Ivan Illich was convened, the New Deal consensus in American politics seemed finally to be played out. Its apparent atrophy had been a long time coming. Beginning with the electoral triumph of Ronald Reagan in 1980, and perhaps sooner, anti-liberal politicians had successfully appealed to the American electorate with increasingly forceful attacks on the reformist ideology fashioned during the long presidency of Franklin Roosevelt. This ideology was adhered to by Roosevelt's Democratic successors, and would be successors, through the administrations of John Kennedy and of Lyndon Johnson and the candidacy of Hubert Humphrey.¹

At first, these attacks were mainly indirect. For example, President Reagan, despite his pithy and memorable criticism of the capacity of government, especially the national government, to improve American domestic life (“[G]overnment is not the solution to our problem[s]; government is the problem[,]”)² took care never to urge the dismantling of the specific institutional achievements of New Deal liberalism.³ If he was more than adept at using the infa-

* Professor of Law, Western New England University School of Law. Thanks to Jennifer Levi and the members of the Illich Reading Group for organizing this Conference and Symposium; to Raquel Babeu, J.D. Western New England University 2012, for exceptional research help; to the editors and staff of the *Western New England Law Review* for expert editing; and to Marcella Haynes for patience and painstaking production help far beyond the call of duty.

1. See generally THOMAS FRANK, *PITY THE BILLIONAIRE: THE HARD-TIMES SWINDLE AND THE UNLIKELY COMEBACK OF THE RIGHT* (2012); TONY JUDT, *ILL FARES THE LAND* (2010); JEFF MADRICK, *AGE OF GREED: THE TRIUMPH OF FINANCE AND THE DECLINE OF AMERICA, 1970 TO THE PRESENT* (2011).

2. *Inaugural Address, January 20, 1981*, RONALD REAGAN PRESIDENTIAL LIBRARY, <http://www.reagan.utexas.edu/archives/speeches/1981/12081a.htm> (last visited May 24, 2012).

3. See Mark W. Peacock, *Ronald Reagan Quotes on Government and Liberty*, APPALACHIAN CONSERVATIVE (Apr. 4, 2009, 8:45 AM), <http://appalachianconservative.wordpress.com/2009/04/04/ronald-reagan-quotes-on-government-and-liberty/> (providing a list of famous Reagan quotations).

mous welfare queen caricature to stoke the outrage of those who would now be called his base,⁴ Reagan was quick to reassure that same base of his firm commitment to the preservation of the social safety net, and especially of Social Security and Medicare, the pillars that held that net aloft.⁵ Similarly, although President Reagan also successfully promoted significant deregulation of the banking industry,⁶ the safeguards offered by public insurance agencies established during the New Deal protected depositors, with his blessing, from losses caused by the resulting scandals and excesses.⁷

President Reagan is further often credited (or blamed) for triggering the now three-decade decline in the power and rights of organized labor, because of the exemplary force of his decision to end the strike of unionized air traffic controllers that greeted his inauguration by terminating the strikers.⁸ Nevertheless, though willing to act forcefully against the interests of labor, Reagan never criticized the legal foundations of collective bargaining enacted by the Wagner Act, and often spoke with pride of his own background as a union leader.⁹ And, while publicly espousing the virtues of “supply-side” economic policies and Laffer curve-inspired tax cuts for the investing and managing classes,¹⁰ President Reagan did not hesitate to adopt expansionary fiscal policies (albeit chiefly in the form of deficit spending on military budgets) as an antidote to the deep 1982 recession that threatened his prospects for re-election.¹¹

By 2011, things were very different. Most Republican members of Congress had pledged never to permit an increase in federal

4. See Paul Krugman, *Republicans and Race*, N.Y. TIMES, Nov. 19, 2007, <http://www.nytimes.com/2007/11/19/opinion/19krugman.html?scp=17&sq=&st=nyt>.

5. See *id.* See generally BRUCE SCHULMAN, *THE SEVENTIES* 218-52 (2011).

6. SCHULMAN, *supra* note 5, at 231-32.

7. See generally Michael P. Malloy, *Foreword: . . . And Backward: Death and Transfiguration Among the Savings Associations*, 59 *FORDHAM L. REV.* S1 (1991).

8. SCHULMAN, *supra* note 5, at 233. See generally THOMAS FERGUSON & JOEL ROGERS, *RIGHT TURN: THE DECLINE OF THE DEMOCRATS AND THE FUTURE OF AMERICAN POLITICS* (1986).

9. Joseph A. McCartin, Op-Ed., *The Strike that Busted Unions*, N.Y. TIMES, Aug. 2, 2011, at A25, available at <http://www.nytimes.com/2011/08/03/opinion/reagan-vs-patco-the-strike-that-busted-unions.html?scp=1&sq=&st=nyt>.

10. See generally BRUCE R. BARTLETT, *REAGONOMICS: SUPPLY SIDE ECONOMICS IN ACTION* (1982) (providing a background and history of the Laffer Curve).

11. See generally LYNN TURGEON, *BASTARD KEYNESIANISM: THE EVOLUTION OF ECONOMIC THINKING AND POLICYMAKING SINCE WORLD WAR II* (1997); Leonard Silk, *Economic Scene; Is Reagan a Keynesian?*, N.Y. TIMES, June 19, 1985, § D, at 2, available at <http://www.nytimes.com/1985/06/19/business/economic-scene-is-reagan-a-keynesian.html>.

taxes on the wealthy, no matter the consequence.¹² In August, they showed themselves willing, even anxious, to enforce this pledge even if the U.S. Treasury defaulted for the first time on its obligations to creditors as a result.¹³ In the aftermath of the 2008 financial collapse and resulting panic, the federal government quickly socialized much of the resulting loss to capital with massive infusions of public funds to many of the very institutions whose policies produced the crisis.¹⁴ But notwithstanding widespread consensus among economists that these policies could never have been implemented but for the gradual demise of the banking and investment regulatory structure established by the New Deal,¹⁵ Congress remained unwilling to restore much, if any, of that structure.¹⁶ Many economists and fiscal experts thus believed that the practices and relationships which issued in the 2008 collapse remained largely intact and that another, similar crisis was likely to occur in the foreseeable future.¹⁷

The 2008 panic spawned a deep and ruinous recession, the worst since the Great Depression that ushered in Franklin Roosevelt's presidency.¹⁸ But despite the presumed (since the New Deal) efficacy of aggressive, counter-cyclical, Keynesian fiscal policies in countering the widespread unemployment the recession caused,¹⁹ President Obama proposed only very modest economic

12. Charles Postel, *Why Norquist's Pledge is Different*, POLITICO (Dec. 8, 2011, 9:33 PM), <http://www.politico.com/news/stories/1211/70111.html>.

13. Charles Babington, *Norquist Bullies GOP into No-Win Tax Position*, FISCAL TIMES (July 3, 2011), <http://www.thefiscaltimes.com/Articles/2011/07/03/AP-Norquist-Bullies-GOP-into-No-Win-Tax-Position.aspx#page1>.

14. David M. Herszenhorn, *Bailout Plan Wins Approval; Democrats Vow Tighter Rules*, N.Y. TIMES, Oct. 3, 2008, at A1, available at <http://www.nytimes.com/2008/10/04/business/economy/04bailout.html>.

15. Sewell Chan, *Financial Crisis Was Avoidable, Inquiry Finds*, N.Y. TIMES, Jan. 25, 2011, at A1, available at <http://www.nytimes.com/2011/01/26/business/economy/26inquiry.html?scp=2&sq=&st=nyt>.

16. Cyrus Sanati, *10 Years Later, Looking at Repeal of Glass-Steagall*, N.Y. TIMES (Nov. 12, 2009, 2:24 PM), <http://dealbook.nytimes.com/2009/11/12/10-years-later-looking-at-repeal-of-glass-steagall/>.

17. Hal Scott, *Little to Celebrate on Dodd-Frank's Birthday*, FINANCIAL TIMES (July 19, 2011, 11:45 PM), <http://www.ft.com/cms/s/0/7fcc735e-b257-11e0-8784-00144fea bdc0.html>.

18. Bob Willis, *U.S. Recession Worst Since Great Depression, Revised Data Show*, BLOOMBERG (Aug. 1, 2009, 12:00 EDT), <http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aNivTjr852TI>.

19. Ezra Klein, *Paul Krugman vs. the White House: Stimulus Edition*, WASH. POST (Dec. 21, 2011, 4:11 PM), http://www.washingtonpost.com/blogs/ezra-klein/post/paul-krugman-vs-the-white-house-stimulus-edition/2011/08/25/gIQAQ5gt9O_blog.html; Paul Krugman, *The Obama-Keynes Mystery*, N.Y. TIMES (July 6, 2011, 12:15 PM), <http://>

stimulus measures, which were trimmed further by a skeptical Congress.²⁰ By the time of the Illich conference, Congress and the President seemed unable to envision what role, if any, the federal government might play in increasing economic demand or promoting employment. Instead their attention had turned to the nation's long-term fiscal deficit.²¹ And despite the clarity with which recent increases in this deficit could be traced to the nation's decisions to embark on two expensive overseas wars²² and simultaneously to adopt, then reinstate, significant cuts in federal income tax rates,²³ the focus of their fiscal concern was largely on the so-called entitlement programs—Medicare, Medicaid, and even the crown jewel of New Deal reform, Social Security.²⁴ By the late summer of 2011, one Republican candidate to oppose President Obama's 2012 reelection bid described Social Security as a "Ponzi scheme" based on a "monstrous lie," and seemed to call for its abolition.²⁵

The legal underpinnings of collective bargaining were also under siege by the time of the Illich Conference. President Obama's fainthearted proposal to strengthen organizing rights for a much diminished private sector labor movement had died a quick and mostly silent death in a hostile Congress.²⁶ Sector unions, whose membership ranks remained relatively robust in relation to their

/krugman.blogs.nytimes.com/2011/07/06/the-obama-keynes-mystery/. See generally PAUL KRUGMAN, *THE RETURN OF DEPRESSION ECONOMICS AND THE CRISIS OF 2008* (2008).

20. David M. Herszenhorn & Carl Hulse, *Deal Reached in Congress on \$789 Billion Stimulus Plan*, N.Y. TIMES, Feb. 11, 2009, at A1, available at <http://www.nytimes.com/2009/02/12/us/politics/12stimulus.html>.

21. Jackie Calmes, *Obama's Budget Focuses on Path to Rein in Deficit*, N.Y. TIMES, Feb. 15, 2011, at A1, available at <http://www.nytimes.com/2011/02/15/us/politics/15obama.html?pagewanted=all>; Carl Hulse, *House Republicans Propose \$4 Trillion in Cuts Over Decade*, N.Y. TIMES, Apr. 4, 2011, at A13, available at <http://www.nytimes.com/2011/04/04/us/politics/04spend.html>.

22. Teresa Tritch, Op-Ed., *How the Deficit Got This Big*, N.Y. TIMES, July 24, 2011, at SR11, available at <http://www.nytimes.com/2011/07/24/opinion/sunday/24sun4.html>.

23. See *id.*

24. See Michael A. Memoli, Lisa Mascaro & Christi Parsons, *Obama Again Presses for a 'Grand Bargain' on Debt Ceiling*, L.A. TIMES, July 21, 2011, <http://articles.latimes.com/2011/jul/21/nation/la-na-debt-white-house-20110721>.

25. Rachel Weiner, *Rick Perry Repeats Social Security is 'Ponzi Scheme' Statement*, WASH. POST (Sept. 7, 2011, 9:01 PM), http://www.washingtonpost.com/blogs/the-fix/post/rick-perry-and-mitt-romney-come-out-swinging-in-reagan-debate/2011/09/07/gIQAhygcAK_blog.html (internal quotation marks omitted).

26. See Steven Greenhouse, *Democrats Drop Key Part of Bill to Assist Unions*, N.Y. TIMES, July 16, 2009, at A1, available at <http://www.nytimes.com/2009/07/17/business/17union.html>.

private sector counterparts,²⁷ found themselves under ferocious political attack. Many politicians blamed the bargaining rights of teachers' unions for the problems plaguing the education of poor children.²⁸ State governors, most notoriously in Wisconsin²⁹ but also in other states,³⁰ successfully urged the repeal of collective bargaining rights for most public sector workers. And state and local government employee retirement pensions that were the frequent fruit of the exercise of these rights seemed in many places to be ripe for repudiation, with apparent public acquiescence.³¹

Worst of all, the achievements of the New Deal seem to be going down without a fight. Formerly self-identified liberal politicians ran from the label.³² More fundamentally, they were unwilling or unable to offer a coherent ideological defense of liberal reform.³³ As a consequence, an ever more confident and determined conservative assault on the programs and institutions created by the New Deal seemed immune from either theoretical or practical challenge.

But if the ideology that supported the New Deal was in tatters and its accomplishments in apparent disarray, for many Americans the reform impulse nevertheless burned brightly. The enthusiasm of the Occupy Wall Street Movement that was germinating as the Illich Conference convened provided strong evidence of its persis-

27. Robert Reich, *The Shameful Attack on Public Employees*, HUFFINGTON POST, (Jan. 5, 2011, 9:14 PM), http://www.huffingtonpost.com/robert-reich/the-shameful-attack-on-pu_b_805050.html.

28. Richard D. Kahlenberg, *Bipartisan, But Unfounded: The Assault on Teachers' Unions*, AM. EDUCATOR (Winter 2011-2012), at 14, available at <http://www.aft.org/pdfs/americaneducator/winter1112/Kahlenberg.pdf>; Saul Rubinstein, Charles Heckscher & Paul Adler, Op-Ed., *Moving Beyond 'Blame the Teacher'*, L.A. TIMES (Sept. 16, 2011), <http://articles.latimes.com/2011/sep/16/opinion/la-oe-adler-teachers-20110916>.

29. Monica Davey, *Wisconsin Court Reinstates Law on Union Rights*, N.Y. TIMES, June 14, 2011, at A14, available at <http://www.nytimes.com/2011/06/15/us/politics/15wisconsin.html>.

30. Sabrina Tavernise & Steven Greenhouse, *Ohio Vote on Labor is Parsed for Omens*, N.Y. TIMES, Nov. 9, 2011, available at <http://www.nytimes.com/2011/11/10/us/politics/ohio-vote-on-collective-bargaining-is-parsed-for-2012-omens.html>.

31. Corey Clark, *Pension Peril*, XVIV, No.2 ST. NET CAPITOL J. 1, 1-5 (Jan. 17, 2011), available at www.statenet.com/capitol_journal/01-17-2011/pdf.

32. See *Defining Liberals*, PBS (July 23, 2004), <http://www.pbs.org/now/politics/liberalism.html>; Paul Krugman, Op-Ed., *The Conscience of a Liberal: Ted Kennedy*, N.Y. TIMES (Aug. 26, 2009, 9:54 PM), <http://krugman.blogs.nytimes.com/2009/08/26/ted-kennedy/>.

33. FRANK, *supra* note 1.

tence.³⁴ And in the face of political defeat and ideological surrender, it made sense to wonder if this impulse might draw succor, or even inspiration, from reform traditions different from, and perhaps, even in tension with New Deal liberalism. When the ideology of the New Deal was at its political apex during the administrations of Presidents Kennedy and Johnson, and well before the current conservative counter-revolution had begun to gain momentum, a small group of American thinkers offered a distinct alternative to liberal social reform. This alternative, though not Marxist and perhaps not even situated to the left of liberalism, was nevertheless radical in that it rejected the concentration not only of corporate power, but also of the power of the national government on which the New Deal relied.

I. SITUATING IVAN ILLICH

Ivan Illich was one of those thinkers. Born in Vienna in the mid 1920s to a family of mixed ethnicity and religious backgrounds,³⁵ Illich trained to be a Roman Catholic parish priest.³⁶ He served in that role in Washington Heights, Manhattan, then a very poor community of recent, chiefly Puerto Rican, immigrants.³⁷ The Church subsequently assigned Illich to Puerto Rico,³⁸ where he first ran a language school for priests and then served as an administrator of the Catholic University.³⁹ Dismissed from the university post after expressing opposition to the church's position on contraception,⁴⁰ Illich settled in Cuernavaca, Mexico, where, in 1964, he established the language school he was to operate until 1976,⁴¹ and began to write essays of political and social criticism.⁴²

Illich's mature political thought emerged in the midst of the struggle to achieve basic civil rights for African Americans and just as the student movement that became the New Left was getting

34. See Mattathias Schwartz, *Pre-Occupied: The Origins and Future of Occupy Wall Street*, THE NEW YORKER (Nov. 28, 2011), http://www.newyorker.com/reporting/2011/11/28/111128fa_fact_schwartz.

35. Carl Mitcham, *The Challenges of This Collection*, in THE CHALLENGES OF IVAN ILLICH 9, 9 (Lee Hoinacki & Carl Mitcham eds., 2002).

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. Chase Madar, *The People's Priest*, THE AM. CONSERVATIVE, Feb. 1, 2010, <http://www.theamericanconservative.com/article/2010/feb/01/00024/>.

41. Mitcham, *supra* note 35.

42. Mitcham, *supra* note 35, at 9-10.

underway in the United States. Though his published work acknowledges no direct influence from either of these sources, Illich's critique of both industrial capitalism and the then hegemonic ideology of the New Deal articulated many of the ideas that shaped these movements of the 1960s.⁴³

Along with such contemporaries as Paul Goodman,⁴⁴ Karl Hess,⁴⁵ Jane Jacobs,⁴⁶ Christopher Lasch,⁴⁷ Robert Parris Moses,⁴⁸ and Charles Reich,⁴⁹ Illich offered a direction for social reform that rejected the then-reigning oppositions between market ordering and traditional social values, represented by the Republican Party, and the New Deal commitment to government-led economic and social progress generally associated with the Democrats. Instead, Illich and his cohort claimed to identify a different set of oppositions, which, they argued, showed the failure of modern industrial society, in either its conservative or liberal iterations, to serve the most basic human needs. If the contemporary American political economy offered the prospect of freedom from material want, it did so only by holding out a fundamentally alienating consumer identity as its alternative.⁵⁰ If technological advances promised an end

43. See IVAN ILLICH, *TOOLS FOR CONVIVIALITY* 10-11, 91-92 (Harper & Row 1973) [hereinafter ILLICH, *TOOLS FOR CONVIVIALITY*].

44. See generally PAUL GOODMAN, *COMPULSORY MIS-EDUCATION* (1964) (criticizing the impact of corporate culture on youth); PAUL GOODMAN, *GROWING UP ABSURD: PROBLEMS OF YOUTH IN THE ORGANIZED SYSTEM* (5th prt. 1960); PAUL GOODMAN, *NEW REFORMATION: NOTES OF A NEOLITHIC CONSERVATIVE* (1970) (exploring the dehumanizing impact of technology); PAUL GOODMAN, *THE COMMUNITY OF SCHOLARS* (1962) (providing an anarchist perspective on educational theory).

45. See generally KARL HESS, *DEAR AMERICA* (1975) (providing an autobiographical account of moving away from conservatism toward participatory democracy).

46. See generally JANE JACOBS, *THE DEATH AND LIFE OF GREAT AMERICAN CITIES* (1961) (portraying and celebrating the diversity and self sufficiency of community life in various American cities).

47. See generally CHRISTOPHER LASCH, *HAVEN IN A HEARTLESS WORLD* (1975) (discussing how the professionalization of human services has led to a decline in the integrity and competency of families); CHRISTOPHER LASCH, *THE CULTURE OF NARCISSISM* (1979) (exploring narcissism from various social perspectives and lamenting its impact on political participation).

48. See generally ERIC BURNER, *AND GENTLY HE SHALL LEAD THEM: ROBERT PARRIS MOSES AND CIVIL RIGHTS IN MISSISSIPPI* (1994) (providing a biographical depiction of the ideology of Robert Moses); *THE ALGEBRA PROJECT*, <http://www.algebra.org/history.php> (last visited May 24, 2012) (outlining an organization committed to school reform founded by Robert Moses).

49. See generally CHARLES A. REICH, *THE GREENING OF AMERICA* (1970) (arguing for a new, more participatory, form of politics based on a counter-cultural consciousness (Consciousness III) which rejects both traditional conservatism (Consciousness I) and New Deal liberalism (Consciousness II)).

50. See ILLICH, *TOOLS FOR CONVIVIALITY*, *supra* note 43, at 10-11, 91.

to drudgery, the price was a growing physical and spiritual distance between workers and the work they did.⁵¹ Though experts might point the way towards a more efficient use of economic resources and more harmonious social, even family, relations, increasing reliance on expertise undermined both popular democracy and the competence of ordinary people to solve their own problems.⁵² And if the centralized administrative state ushered in by the New Deal served as a counterweight to concentrated corporate power, it nevertheless imposed its own set of hierarchical relationships that supplanted more participatory forms of political and economic decision-making.⁵³

Ivan Illich's particular elaboration of this critique is developed most fully in a very short book, *Tools for Conviviality*, published in 1973.⁵⁴ Illich's primary aim in *Tools* was to issue a jeremiad calling for an end to the industrial age and its modes of production.⁵⁵ Illich's targets were development (especially large-scale industrial and agricultural development), technology, and the exploitation of nature.⁵⁶ In some cases, his attack anticipated the argument of some current radical environmental activists that the abundant living standards achieved in first world countries during the 20th century must be jettisoned, on the ground that they are incompatible with the survival of the earth's atmosphere, and thus, of its inhabitants.⁵⁷ But Illich's objection to industrial society was focused less on its threat to biological sustainability than on its destruction of healthy social relationships and, perhaps, the very possibility of human flourishing.⁵⁸

Drawing from his studies of the health care industry,⁵⁹ public education,⁶⁰ and public transportation systems,⁶¹ Illich, in *Tools*, argued that the organizational structures created by these and other

51. *Id.* at 91, 96-97.

52. *Id.* at 91.

53. *Id.*

54. *See generally id.*

55. *Id.* at IX-XII.

56. *Id.* at 91.

57. *See id.*

58. *See id.*

59. *See generally* IVAN ILLICH, *LIMITS TO MEDICINE: MEDICAL NEMESIS: THE EXPROPRIATION OF HEALTH* (Marion Boyars 2002) (1975) (discussing why modern medicine has not had positive effects on health).

60. *See generally* IVAN ILLICH, *DESCHOOLING SOCIETY* (Ruth Nanda Anshen ed., Harper & Row 1971) (criticizing the hierarchical and bureaucratic organization of schools and arguing for the recognition of the competency and natural curiosity of students as central educational values).

economic institutions characteristic of the developed world are both counterproductive and inimical to the natural “conviviality” of the human spirit.⁶² His assault on these structures was as comprehensive as it was fundamental. Illich’s central claim was that they transferred power from independent people to anonymous bureaucracies.⁶³ More specifically, they protected formal, hierarchical educational arrangements at the expense of actual learning;⁶⁴ exploited nature rather than recognizing its preservation as a “convivial” value;⁶⁵ created material abundance while undermining the possibility of meaning in ordinary life;⁶⁶ fostered social mobility at the expense of personal security and a sense of place;⁶⁷ and, finally, insisted on perpetual innovation at a pace which precludes the sustenance of an organic tradition.⁶⁸ Above all, Illich insisted that prevailing corporate forms of industrial production degrade social relations, monopolize imagination and motivation, and eventually commodify every aspect of human life.⁶⁹

Against this dispiriting picture, Illich urged what he called the “inversion” of the social arrangements and institutions of industrial society.⁷⁰ By this, he meant a political process by which people become enlightened about the necessity to opt for a more “frugal” standard of living, enter into social movements aimed at reclaiming more convivial ways of life, and, finally, rediscover and revalue the political and legal tools that can help establish and protect these convivial life forms as they emerge.⁷¹

II. THE ROLE OF LAW IN ILLICH’S PROPOSED POLITICAL INVERSION

Illich’s identification of the convivial tools that might help bring about the inversion of industrial society strove for a consistency between ends and means.⁷² He sought to reclaim, or, as he

61. See generally IVAN D. ILLICH, *ENERGY AND EQUITY* (Calder & Boyars 1974) (discussing how political control of energy leads to social injustice).

62. See ILLICH, *TOOLS FOR CONVIVIALITY*, *supra* note 43, at 91.

63. *Id.* at 91.

64. *Id.* at 61-73.

65. *Id.* at 51-54.

66. *Id.* at 54-61.

67. *Id.* at 73-79.

68. *Id.* at 79-82.

69. *Id.* at 91.

70. *Id.* at 108.

71. *Id.* at 108-09.

72. *Id.* at 91-92.

put it, to recover, three key cultural institutions: science,⁷³ language,⁷⁴ and law.⁷⁵ Illich argued that the ways in which these institutions approach and apprehend the world can not only generate new social structures, but, just as importantly, can do so using means that are themselves examples of the more convivial forms of life these new structures encourage.⁷⁶

The rule of law, through both the habits of thought it relies on and its central institutional invention—formal adjudication—lay at the heart of Illich’s vision of social change.⁷⁷ For Illich, law’s radical potential was a function of its blend of procedural formality and substantive openness.⁷⁸ The formal equality of adjudication under the adversary system meant that every argument, every idea, no matter how apparently novel or even subversive, had to be evaluated exclusively on its own merits, rather than filtered through legislative processes controlled by corporations or the bureaucratic imperatives of administrative agencies.⁷⁹ The commitment of adjudication to offer “disinterested” tribunals, staffed by judges without pre-conceived commitments to particular substantive outcomes, reinforced this formal equality by neutralizing the capacity of corporations and governments to dominate individuals and communities through the sheer force of their vastly greater resources.⁸⁰

For Illich, the equality assured by its procedural formality was augmented by the inherent substantive openness of adjudication. Illich’s argument here began, perhaps paradoxically, by assuming the validity of the traditional distinction between the creation of legal norms and their subsequent application by judges.⁸¹ For Illich, adjudication was essentially a backward looking process, which draws on already established sources of law to justify the outcomes it reaches in particular cases.⁸² This reliance on past value judgments is its greatest strength. In celebrating it, Illich at first glance seemed to ally himself with the well-known conservative critique of “judicial activism,” defined by its critics as the illegitimate creation

73. *Id.* at 92-95.

74. *Id.* at 95-99.

75. *Id.* at 99-107.

76. *Id.* at 91-92.

77. *Id.* at 91, 99-107.

78. *Id.* at 99-107.

79. *Id.* at 101.

80. *Id.* at 104.

81. *Id.* at 101-02.

82. *Id.* at 102.

of law by reform minded judges.⁸³ And Illich did unquestionably locate the legitimacy of adjudication in its separation of the process from the substance of law, attainable only through the rigorously formal application of pre-existing legal values by dispassionate, disinterested tribunals.⁸⁴

This separation did more than just underwrite the legitimacy of adjudication. It also assured the continuity of the content of the substantive law applied by judges.⁸⁵ Here again, Illich appeared to embrace another tenet of conservative legal thought, that the gradual, glacially accreting development of law that inheres in case-by-case adjudication guarantees its stability, predictability, and, most important, its accessibility and visibility to the polity it serves.⁸⁶

Characteristically though, Illich derived radical potential from his conservative account of the rule of law. The stability of law conferred by adjudication was, for Illich, not the same as stasis. Indeed the two were antithetical. The continuity of legal norms allows, even obligates, the participants in adjudication—the parties, the lawyers, the judges—constantly to adapt these norms, or what Illich called the “social experience” of our legal forebears, to our deepest present controversies.⁸⁷ This wholly conventional application of established legal values to contemporary disputes entails the radical (if gradual) malleability of the content of the particular legal doctrines enforced by judges at any given time.

In Illich’s view, the opportunity provided by adjudication to reassess present legal doctrines in light of past values precluded, by definition, the final settlement of any controversy over a matter of public concern.⁸⁸ Every basic question of political and social organization could be framed as a question of law and tested through the crucible of adversarial adjudication.⁸⁹ And given the formal commitment of the adjudicative process to openness, substantive disinterestedness, and equal respect for all parties, even the most fundamental challenges to current social arrangements had to be taken seriously, and could never be summarily dismissed because of the relative powerlessness of their proponents.⁹⁰ Thus were the

83. *See id.* at 102-07.

84. *Id.* at 104.

85. *Id.* at 102.

86. *Id.* at 102-03.

87. *Id.* at 103.

88. *Id.* at 103-04.

89. *Id.*

90. *Id.* at 104.

tools for radical social change embedded in the conventional application of settled legal principles to the changed (and dismal) conditions that were the object of Illich's social criticism.

III. ILLICH'S DOUBTS ABOUT LAW

If Illich was optimistic about the law's role in generating social change, he was not naïve. Even as he hoped for law's "inversionary" potential, he saw many obstacles to the realization of that hope.⁹¹ Foremost among these was the distance Illich observed between the ideal form of adjudication that grounded his cautious optimism and the actual courts he saw operating in the United States.⁹² The latter were staffed by judges who were anything but the disinterested servants of the openness to argument, equal respect for all parties, and "due procedure" that Illich saw as essential to the transformation of substantive legal doctrines.⁹³ Instead, judges were mostly ideologues, shaped by and devoted to the preservation of the social structures that produced and elevated them.⁹⁴ In late 20th century America, this meant that nearly all judges were reflexively oriented towards corporate power and the promotion of limitless economic growth.⁹⁵ The content of the substantive doctrines articulated and defended in the decisions handed down by these judges would inevitably embody this outlook and would, accordingly, most often reinforce existing class structures, social hierarchies, and ethical norms.

The ideological hostility of judges was not the only impediment Illich saw to the strategic use of adjudication to achieve legal and social change.⁹⁶ Beyond the limits imposed by their substantive orientation, judges were also distracted from serious consideration of cases raising challenges to social structures or to the distribution of power by the day-to-day demands of their position.⁹⁷ Most ordinary civil litigation, Illich believed, probably rightly, involved relatively prosaic struggles over distribution of the material proceeds of the existing system.⁹⁸ The channeling of these disputes into the formal adversarial process of adjudication misused this process in

91. *Id.* at 101.

92. *Id.* at 101-02.

93. *Id.* at 102.

94. *Id.* at 104.

95. *Id.* at 104.

96. *Id.* at 101-02, 104.

97. *Id.* at 102, 104.

98. *Id.* at 99-100.

three important ways. First, most individual and even group conflicts did not require adversarial adjudication in order to be resolved justly and accurately.⁹⁹ Especially when the disputants were relatively equal in resources, more informal methods of conflict resolution could produce faster, cheaper, and probably better outcomes.¹⁰⁰ Second, the resort to formal adjudication for matters where it was unnecessary risked pointless escalation of conflict, made the disputants dependent on lawyers and other experts instead of their own judgment, and interposed an alienated distance between the disputants and the process used to resolve their conflict.¹⁰¹ And third, the allocation of public resources to the formalization of disputes that could be settled informally starved the formal adjudication process of the resources needed to do what that process, ideally and alone, can do best: address and decide cases presenting challenges by individuals and communities to the power of corporations and centralized government institutions to control the production and distribution of social goods.¹⁰²

In the face of these formidable barriers standing between the world Illich saw (in most respects, still, the world we see as well) and his idealized conception of what law might accomplish, it is reasonable to wonder why he remained even cautiously hopeful about the prospects for realizing his conception. Part of the explanation for Illich's persistent, if tenuous, optimism lay in his view of the relationship between adjudication and ideology. The ideological character of the law declared and enforced by judges was not limited to the particular doctrines that buttressed the social structures Illich criticized. The content of the law in effect at any and all times was inescapably a function of ideology.¹⁰³ But the inevitability of ideological bias in legal doctrine was also the very source of the dynamism and, hence, the malleability of that doctrine. If the results of adjudication were ideological, what was needed, and possibly achievable, was a different, more convivial, ideology.¹⁰⁴

For Illich, the conscious actions of three social groups could gradually usher in that ideology by generating the adoption of the legal principles needed to support the social change he sought.¹⁰⁵

99. *Id.* at 101.

100. *Id.*

101. *Id.* at 101-02.

102. *Id.* at 102.

103. *Id.* at 99.

104. *Id.* at 99-100.

105. *Id.* at 105-06.

The first of these groups was ordinary citizens insisting on judicial enforcement of their individual and collective rights against the domination of corporations, especially those rights which, though unrecognized, were nevertheless embedded in our legal traditions.¹⁰⁶ The second and third were what Illich called “exceptional” lawyers and judges.¹⁰⁷ The exceptional vocations each of these sets of legal actors could pursue were, however, quite different, reflecting their different respective roles in the process of adjudication. An exceptional lawyer was one who tried to use litigation strategically to invert existing power relationships by arguing for the case-by-case transformation of the doctrines that sustain these relationships.¹⁰⁸ Exceptional judges on the other hand, were not, and could not legitimately be, intentional partisans of legal or social change.¹⁰⁹ Illich’s hope was that some (no doubt small) number of them would, through an abiding devotion to the formal ideals of adjudication—equal respect for all parties and for due procedure—transcend the corporate ideological commitments which would otherwise shape their decisions.¹¹⁰ These few exceptional judges would be open to apprehend, appreciate, and sometimes become convinced by the arguments presented to them by exceptional lawyers advancing the claims of committed citizens.¹¹¹ They would also be attuned to critiques of the misuse of adversarial adjudication to process conflicts that could and should be resolved informally, either by the disputants themselves or with the aid of non-adversarial mediation.¹¹² Illich hoped that their receptivity to these critiques would prompt these “exceptional” judges to fashion more convivial institutions for the resolution of these ordinary disputes.¹¹³

The efforts of committed citizens and “exceptional” professionals are no doubt thin reeds on which to build a movement for radical legal change. Illich’s caution against high hopes for such change essentially concedes this point. But, paraphrasing Margaret Mead, Illich might ask in response whether radical change has ever been achieved in any other way.¹¹⁴

106. *Id.*

107. *Id.* at 106.

108. *Id.*

109. *Id.*

110. *Id.* at 106-07.

111. *See id.* at 104-07.

112. *See id.* at 101.

113. *Id.*

114. *See* Jone Johnson Lewis, *Margaret Mead Quotes*, ABOUT.COM, http://womenshistory.about.com/cs/quotes/a/qu_margaretmead.htm (last visited May 24,

IV. ILLICH'S IMPACT ON THE PRACTICE OF LAW

To be sure, Illich's brief for the transformative potential of the rule of law is idealistic, perhaps touchingly so. It depends on an explanation of the content of our past settled legal norms that he never directly provided. It is possible that Illich's reliance on the application of past law to "invert" present doctrine is illusory. Our received legal norms may be so open-ended or internally contradictory in content as to be vacuous. As suggested by some critical legal studies scholars a generation ago, adjudication may really be an empty, purely formal game, offering no grounds for justifying its results that are worthy of public trust.¹¹⁵ This skeptical view would be consistent with the malleability and inevitably ideological character of extant legal doctrine that Illich identified, but would rule out his argument's deep respect for the wisdom conferred by tradition, and thus for the legitimacy he saw in change through law reform litigation. Illich's response to this critique would likely have rested on his conviction that the roots of a more convivial way of life than the one offered by modern industrial society are immanent in the values, including the legal values, of the past, and lie waiting to be unearthed and deployed by "exceptional," reform-minded lawyers and open-minded judges.¹¹⁶ This optimistic conviction may be unwarranted, but it is one that has been shared by at least some lawyers who have fallen—some consciously, some not—under Illich's influence.

One of these lawyers is a Waltham, Massachusetts, general practitioner named Eugene Burkart,¹¹⁷ who actually attended the Illich symposium. Burkart first read *Tools for Conviviality* as an idealistic but alienated law student in the late 1970s.¹¹⁸ Illich's critique of industrial society rang true to Burkart, and Illich's hopes

2012) ("Never doubt that a small group of thoughtful, committed citizens can change the world. Indeed, it is the only thing that ever has.").

115. See generally DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (1997); ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (1975); ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* (1986); Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 *YALE L.J.* 1, 10-14 (1984); Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 *STAN. L. REV.* 509, 560-67 (1984).

116. See ILLICH, *TOOLS FOR CONVIVIALITY*, *supra* note 43, at 106.

117. Eugene J. Burkart, *From the Economy to Friendship: My Years Studying Ivan Illich*, in *THE CHALLENGES OF IVAN ILLICH* 156 (Lee Hoinacki & Carl Mitcham eds., 2002).

118. *Id.* at 154.

for its inversion inspired him to see the practice of law as a potentially transformative calling.¹¹⁹ In an essay recalling Illich's influence on him, Burkart reports that his first step after reading "Tools" was to abandon law "schooling" for a more practically useful legal education. "The book was also helpful; it gave me the courage to skip most of my classes the last year of law school, so that I could work as much as possible in a legal aid office, learning the skills of a practicing attorney."¹²⁰ Burkart also drew on Illich's celebration of immersion in a local, organic way of life over the impersonality of a commitment to personal advancement. Burkart "wanted to know and be a part of the community where I worked; I wanted to be rooted in a place."¹²¹

At the same time, *Tools for Conviviality* offered Burkart a path to use his chosen work to address the injustices he saw in the established political order. Thus, he "began the practice of law in the hopes that [he] could use law as an instrument for [radical] social change."¹²² Burkart's hopes were gradually chastened. He described his early life as a lawyer this way:

Over the course of the next five years or so I was immersed in learning the ropes of a legal practice. The kind of law we did, general practice, put me in touch with the way law affects the lives of the great majority of people: through wills, divorce, criminal defense, disability claims, auto accidents, buying and selling homes, tenant and consumer cases. While I received a lot of satisfaction from seeing a good result achieved for individual clients, I began to be troubled by something: A good result might benefit someone in the short term, but I did not see it having any larger effect. I saw that the ordinary practice of law did not work so much to make society more just but rather kept things as they were, and running smoothly.¹²³

Eventually, Burkart began to fear that Illich's critique of the potentially baleful effects of professional expertise might apply to his own work. "[S]ervice providers," he observed,

see people as being in need of their services. . . . All of this is good for business[,] . . . [but] insidious since service systems take away from people what they could do on their own, . . . los[ing] . . . self-reliance and independence[.] . . . After a while, I saw the

119. *See id.* at 156.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 156-57.

joke. When people asked me, "How's work going?" I would answer, "Never been better. Families are falling apart, so there is plenty of divorce and juvenile delinquency; arrests are up . . . auto accidents and injuries at work are high . . . [b]usiness is good."¹²⁴

Some years later, during Illich's intermittent academic sojourns in the United States, Burkart and Illich became acquaintances, and eventually friends.¹²⁵ By then (the 1980s), Burkart reports, Illich himself had concluded that legal work would not likely lead to fundamental social change. For both Burkart and Illich, law only served as a "guide through the[] thicket[]."¹²⁶ Law was still a convivial tool, but one which could only help lawyers, clients, and communities settle with, rather than transform, the alienation of modern industrial society.¹²⁷

If Eugene Burkart came to doubt the capacity of law and lawyers to alter, or as Illich would put it, invert, existing social structures, there was another group of lawyers, roughly Burkart's contemporaries, who based their professional identities on the transformative potential of law reform litigation. These lawyers were the staff attorneys of the legal services programs and the regional and national support centers established by the White House Office of Economic Opportunity (OEO) between about 1964 and 1974, when OEO was dismantled and legal services for the poor professionalized by Congress's creation of the Legal Services Corporation.¹²⁸ These early Legal Services programs were inspired in part by the exemplary success of Charles Houston, Thurgood Marshall, and their colleagues with the NAACP Legal Defense and Education Fund in urging a revised understanding of the Equal Protection Guarantee¹²⁹ to prompt the Supreme Court to declare officially sanctioned racial segregation unconstitutional.¹³⁰ The strategy of the litigation campaign against segregation was an appli-

124. *Id.* at 157-58.

125. *Id.* at 157.

126. *Id.* at 160.

127. *Id.* at 156-57.

128. JOHN A. DOOLEY & ALAN W. HOUSEMAN, LEGAL SERVICES HISTORY I.4, I.15, I.22 (1984).

129. *See* *Pearson v. Murray*, 182 A. 590, 594 (Md. 1936); *see also* RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF Brown v. Board of Education and Black America's Struggle for Equality 192-94* (Vintage Books 1977) (1975) (describing the litigation campaign to abolish de jure segregation).

130. *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 495 (1954); *see* KLUGER, *supra* note 129, at 702-08.

cation, long before he set it out in *Tools for Conviviality*, of Illich's argument for the transformative potential of the inherent conservatism of case-by-case adjudication. Drawing on a venerable source of settled law, the Equal Protection Clause of the Fourteenth Amendment, Houston and Marshall famously argued that a proper application of that settled legal norm actually invalidated the very political and social practices that conventional legal and social thought had taken it to support.¹³¹ Through the gradual accretion of precedents achieved through carefully constructed lawsuits, they subjected an entrenched social institution first to re-evaluation, then to (formal, at least) dissolution.¹³² It was hard to imagine a more striking example of successfully applying established legal values to invert present legal doctrine.

The Legal Services programs and support center lawyers strove to repeat Houston and Marshall's strategy in the many areas of law which affected the lives of their impoverished clients.¹³³ Their goals were ambitious. They saw their task as blending the enforcement of previously unrecognized legal norms and the reform of established legal doctrine to change the conditions under which poor people were obliged to live.¹³⁴ Representing client groups such as farm workers, welfare recipients, tenants, students, and the elderly poor, legal services lawyers believed they could prompt judges to transform the legal rules governing landlord-tenant relations, public assistance programs, workplace conditions, and public schools for the benefit of their clients.¹³⁵ For a time, they achieved some notable successes, especially in the areas of employment,¹³⁶ housing,¹³⁷ and public benefits¹³⁸ law. But the accomplishments of this drive towards social reform through law reform litigation began to dwindle.

131. *Pearson*, 182 A. at 590; see KLUGER, *supra* note 129, at 191-94.

132. See *Brown*, 347 U.S. at 495; *Pearson*, 182 A. at 594; see KLUGER, *supra* note 129, at 186-94.

133. See DOOLEY & HOUSEMAN, *supra* note 128, at I.13-15. (1984); see also SUSAN E. LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* 22, 30 (1990).

134. LAWRENCE, *supra* note 133, at 22, 30.

135. See *id.*; DOOLEY & HOUSEMAN, *supra* note 128, at I.15, I.22.

136. See generally *United Farm Workers Org. Comm. v. Monterey Cnty.*, 94 Cal. Rptr. 263 (Cal. 1971).

137. See *Thorpe v. Hous. Auth. of City of Durham*, 386 U.S. 670, 673-74 (1967); see also LAWRENCE, *supra* note 133, at 12 & n.30.

138. See *Goldberg v. Kelly*, 397 U.S. 254, 270-71 (1970); *Shapiro v. Thompson*, 394 U.S. 618, 641-42 (1969); *King v. Smith*, 392 U.S. 309, 333-34 (1968); see also MARTHA DAVIS, *BRUTAL NEED* 68, 80, 110-18 (1993).

dle by the mid 1970s,¹³⁹ and the effort itself had ebbed considerably by the close of that decade.¹⁴⁰ Still, the impetus to law reform continues to inform, at least in part, the identity and aspirations of many legal services lawyers.¹⁴¹ And the strategy of deploying traditional legal values to transform extant legal doctrine has been taken up by more contemporary cause-oriented lawyers, most notably in the women's,¹⁴² disability rights,¹⁴³ and gay, lesbian, and transgender rights movements.¹⁴⁴

The law reform litigation effort shared (and still shares) Ivan Illich's idealism about the possibility of fundamental social change and law's role in bringing about this change. In the early legal services period, this idealism could be remarkably naïve. A personal anecdote offers a not atypical example of this naiveté. As new lawyers with a legal services support center focused on the rights of elderly poor clients, a colleague and I were charged with designing a strategy to reform the legal doctrines which governed the rights of workers governed by private pension plans. This was during the early 1970s, before the enactment of the Employee Retirement Income Security Act, which provides a measure of federal statutory regulation of these plans. We saw our task as daunting, to be sure. But in our eyes, the path to success was completely clear. We would first write a law review article for the *Clearinghouse Review*, a specialized journal for legal services lawyers. The article, called *Litigation as a Tool for Private Pension Reform*,¹⁴⁵ would show how long established values embedded in the common law, especially principles drawn from the law of trusts and contracts, could be deployed in new ways to revise then prevalent legal doctrine in ways that would assure more rights, and greater justice, for the re-

139. Harry P. Stump, Book Review, 1 *LAW & POL. BOOK REV.* 1, 25 (1990) (reviewing SUSAN E LAWRENCE, *THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING* (1990)), available at <http://www.bsos.umd.edu/gvpt/lpbr/subpages/reviews/lawrence.htm>.

140. *Id.*

141. *Id.*

142. See generally *Califano v. Westcott*, 443 U.S. 76 (1979); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *FAQs: The ACLU Women's Rights Project and Women's History Month*, ACLU.ORG (Feb. 26, 2007), <http://www.aclu.org/womens-rights/faq-aclu-womens-rights-project-and-womens-history-month>.

143. See generally CENTER FOR PUB. REPRESENTATION, <http://www.centerforpublicrep.org/> (last visited May 24, 2012).

144. See generally *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941 (Mass. 2003); *Baker v. State*, 744 A.2d 864 (Vt. 1999); GAY & LESBIAN ADVOCATES & DEFENDERS, <http://www.glad.org/> (last visited May 24, 2012).

145. National Senior Citizens Law Center, *Litigation as a Tool for Private Pension Reform*, 6 *CLEARINGHOUSE REV.* 593 (1973).

tirees we and other legal services lawyers would then represent in litigation. We had no doubt that we would find the roots of contemporary justice in ancient principles of law. It was simply a matter of digging them out, showing how they could be applied, and then filing lawsuits to apply them. Houston and Marshall had shown the way in the desegregation struggle. We believed we could use their convivial tools in our very different arena of law reform.

About six months after my colleague and I finished our article, we filed our first case.¹⁴⁶ A month later, I read Illich's account of law's role in achieving social change in *Tools for Conviviality*. I had no doubt that he was describing and endorsing our work, even if he seemed considerably more cautious about its prospects for success than we were.

V. ILLICH'S ENDURING RELEVANCE

Ivan Illich lived long enough to see the waning of the influence of his ideas and the apparent (though, of course, perhaps temporary) demise of the prospects for the sorts of basic change he hoped for. Nonetheless, his ideas about the law and the relationship of litigation and social change provide a lens that can illuminate some developments in the culture of civil adjudication in the United States since his death.

Significantly, Illich's image of ideologically self-conscious lawyers, whether "exceptional" or not, pursuing social change through law reform litigation continues to shape the identity of "cause oriented" lawyers today as much as it did forty years ago.¹⁴⁷ The extent to which the efforts of these lawyers have generated (or can generate) the fundamental change in social structures Illich sought is, of course, a matter of considerable dispute. The greatest successes of law reform litigation have been the eradication of formal legal inequalities, first those based on race,¹⁴⁸ then gender,¹⁴⁹ and now sexual identity and orientation.¹⁵⁰ Moreover, all of these successes have been achieved largely through a straightforward application of Illich's mode of law reform through adjudication. Lawyers representing the civil rights, women's, and LGBT movements have each proceeded by urging the case-by-case application

146. *Ponce v. Constr. Laborers Pension Trust for S. Cal.*, 628 F.2d 537 (9th Cir. 1980).

147. See ILLICH, *TOOLS FOR CONVIVIALITY*, *supra* note 43, at 106.

148. See *Brown v. Bd. of Ed. of Topeka*, 347 U.S. 483, 495 (1954).

149. ACLU.ORG, *supra* note 142.

150. GAY & LESBIAN ADVOCATES & DEFENDERS, *supra* note 144.

of principles long embedded in our legal tradition (here the prohibition against unjust discrimination on the basis of ascribed status) to prompt first reconsideration, and eventually repudiation, of apparently settled contemporary legal doctrine.

In contrast to formal inequalities, more complex structural barriers to social and political change have proven far more resistant to law reform litigation strategies. Although championed convincingly by such scholar/litigators as Abram Chayes¹⁵¹ and Owen Fiss,¹⁵² the use of litigation to effect fundamental institutional reform has been only sporadically and, perhaps, temporarily successful. Commentators such as Donald Horowitz and Gerald Rosenberg have argued, contrary to Illich, that adversarial litigation is ill-suited to and perhaps incapable of contributing significantly to such reform.¹⁵³

On the other hand, Illich's early identification of the distorted application of adversarial adjudication to conflicts which might be better resolved informally anticipated changes in American dispute resolution processes that are taken for granted today. The rise of the Alternative Dispute Resolution (ADR) movement and the embrace of alternatives to litigation by judges, lawyers, institutional actors, and ordinary citizens has changed the legal landscape in ways Illich might well endorse, at least to a degree. ADR has effectively moved many of what Illich considered prosaic struggles over the distribution of the existing economic pie into more informal settings that are seen as more accessible to the disputants, less costly, and less dependent on professional expertise than formal adjudication. Many businesses have, with court approval, required their customers and employees to submit disputes, even those concerning rights protected by federal law, to resolution by arbitration rather than litigation. Even federal courts have reoriented themselves, through both rules and changed cultural practices, toward heavy reliance on ADR and an expectation that nearly all civil cases will be resolved without trial.¹⁵⁴ If anything, this de-emphasis on formal adjudication may have gone too far, perhaps depriving relatively powerless litigants of their only real opportunity to press serious

151. See generally Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976).

152. See generally Owen M. Fiss, *The New Procedure*, 54 REV. JUR. U.P.R. 209 (1985).

153. See generally DONALD HOROWITZ, *THE COURTS AND SOCIAL POLICY* (1977); GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (1991).

154. Judith Resnik, *Many Doors? Closing Doors? Alternative Dispute Resolution and Adjudication*, 10 OHIO ST. J. ON DISP. RESOL. 211, 225-28, 230-34 (1995).

claims of right to a single decision-maker capable of giving them a fair hearing; the disinterested judge praised by Illich for his or her commitment to due procedure, equal respect for all parties, and openness to every substantive argument. The measured yet trenchant critiques of the ADR movement offered by such commentators as Judith Resnik,¹⁵⁵ and again, Owen Fiss,¹⁵⁶ are in any event based substantially on the same values Illich saw in the rigorous formalism of the judicial decision.

But a more significant threat in our time to Illich's hopes for the transformative potential of the rule of law may lie in the diminished stature of the ideal of disinterested adjudication. Illich took for granted that the aspirations to procedural neutrality, equal treatment of all litigants, and openness to all substantive arguments were inherent in the institution of formal adjudication. As a practical matter, though, he could not help but observe that these aspirations were inevitably compromised, sometimes even corrupted, by the ideological commitments of judges.¹⁵⁷ Still, for Illich, pursuit of the ideal virtues of adjudication nevertheless abided as a regulative ideal, adhered to faithfully by the "exceptional" judges, and as a matter of occasional necessity by the rest.¹⁵⁸

Illich's faith in the enduring character of these virtues may, however, have been too optimistic. For example, it is a truism, or nearly so, that appointments to the Supreme Court have for at least a generation been significantly influenced by the perceived ideological commitments of those nominated to serve. And though this influence is unquestionably bipartisan, its effects on the appointment process have been very different in Republican as compared to Democratic administrations. Starting with President Reagan's ultimately unsuccessful nomination of Robert Bork, Republican presidents have appeared usually to offer nominees they believed to be extremely conservative precisely because of their extreme conservatism, daring Democratic senators to oppose these nominees on ideological grounds.¹⁵⁹ The one significant exception to this strategy, President George H.W. Bush's nomination of Justice David Souter, prompted his son's redoubled commitment to it, as

155. *See generally id.*

156. *See generally* Owen M. Fiss, *Against Settlement*, 93 *YALE L.J.* 1073 (1984); Fiss, *supra* note 152, at 210.

157. ILLICH, *TOOLS FOR CONVIVIALITY*, *supra* note 43, at 102.

158. *Id.* at 106.

159. MICHAEL J. GERHARDT, *THE FEDERAL APPOINTMENT PROCESS: A CONSTITUTIONAL & HISTORICAL ANALYSIS*, 58-60 (Duke University Press 2003).

evidenced by the appointment of Justice Samuel Alito and Chief Justice John Roberts. Democratic presidents, on the other hand, faced with (or fearing) threatened ideological opposition from Republican senators, have eschewed the appointment of obvious ideological liberals, offering instead nominees who either seemed politically centrist, had lower court judicial records that evinced moderation, or both.

The result has been a Supreme Court which, especially since Justice O'Connor's retirement in 2005, is deeply divided, yielding up one 5-4 decision after another, with the justices divided along predictably partisan lines.¹⁶⁰ The division seems ideological, to be sure, but oddly so. The ideologues appeared to be the five justices appointed by Republican presidents who constitute the Court's usual majority in closely decided cases. The dissenters, now comprised of the four justices appointed by the last two Democratic presidents, have largely retained their pre-appointment reputations for moderation. It is as if a pitched battle is underway over the content of American law, but only one side has taken up arms.

This characterization of the diminished status of judicial disinterestedness on the current Supreme Court may be tendentious, based as it is on appearances. Appearances can deceive, of course, and in any event are themselves hardly ideologically neutral. Nevertheless, on at least two notable occasions, the Court's five justice Republican majority has issued decisions that overtly disavow Illich's prized virtues of equal treatment of parties, due procedure, and openness to all substantive arguments. The first and more notorious of these decisions was *Bush v. Gore*, in which the Court called a halt to the recount of popular votes in Florida,¹⁶¹ thereby securing the 2000 presidential election for George W. Bush. The Court's decision to intervene in a closely contested presidential election was widely criticized as imprudent, especially in light of the procedures for political resolution of the dispute prescribed by the 12th Amendment¹⁶² and the Electoral Count Act.¹⁶³ And the plurality opinion invalidating the Florida recount¹⁶⁴ rested on a much

160. *Infra* notes 161, 167; see, e.g., *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2547, 2561 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744, 1756 (2011); *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010); *D.C. v. Heller*, 554 U.S. 570 (2008); *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 551 U.S. 701 (2007).

161. *Bush v. Gore*, 531 U.S. 98, 110 (2000).

162. U.S. CONST. amend. XII; *Bush*, 531 U.S. at 153-54.

163. Electoral Count Act of 1887, 3 U.S.C. §§ 1-21 (2006); *Bush*, 531 U.S. at 154.

164. *Bush*, 531 U.S. at 110.

more robust reading of the Equal Protection guarantee¹⁶⁵ than any of its subscribers had previously suggested was applicable to state voting procedures. But the infamous portion of the *Bush v. Gore* holding, for purposes of Illich's model form of adjudication, was the plurality's admonition that its ruling and the rationale offered to justify it were applicable only "to the present circumstances." Its authors would not regard the ruling as precedent in future cases that might otherwise be analogous, "for the problem of equal protection in election processes generally presents many complexities."¹⁶⁶ It is difficult to imagine a more direct or complete repudiation of the value of precedent, the obligation to treat similarly situated litigants equally, and the stability and predictability of substantive law that inheres in its gradual accretion through case by case adjudication. *Bush v. Gore* is, in short, is by its own terms an openly lawless decision.

The second, more recent abnegation of the rule of law by a five justice Republican Supreme Court majority is only slightly less blatant than *Bush v. Gore*. In *Ashcroft v. Iqbal*, decided in 2009, the Court changed the rules for the pleading of complaints filed by plaintiffs in civil cases in the federal district courts.¹⁶⁷ Before *Iqbal*, all factual allegations asserted in civil complaints had long been entitled to a temporary presumption of truth for purposes of a defendant's challenge to their legal sufficiency. Chief Justice Roberts's opinion for the court in *Iqbal* limited this presumption to only those factual allegations deemed "plausible" by the federal district judge considering the challenge.¹⁶⁸ The plaintiffs in *Iqbal* were a class of immigrants from majority Arab and/or Muslim nations of origin who were taken into custody and detained indefinitely by American immigration authorities as part of Attorney General Ashcroft's effort to prevent further terrorist acts in the immediate aftermath of the attacks of September 11, 2001.¹⁶⁹ They argued that Ashcroft had unconstitutionally singled them out for arrest and investigative detention on the basis of their religion and/or national origin.¹⁷⁰ In order for this claim to succeed, the *Iqbal* plaintiffs needed to prove (and thus to allege in their complaint) that the Attorney General's policy was not only discriminatory in effect (not contested by the

165. *See id.* at 103-11.

166. *Id.* at 109.

167. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009).

168. *Id.*

169. *Id.* at 1943.

170. *Id.* at 1944.

Iqbal defendants) but also that it was prompted, in part at least, by a prohibited discriminatory purpose.¹⁷¹ Of course, the plaintiffs made these necessary allegations.¹⁷² But under the new standards announced by Chief Justice Roberts, their assertion that the treatment they suffered was influenced in any way by an improper discriminatory purpose was deemed implausible and their claim was accordingly directed to be dismissed.¹⁷³ For the Chief Justice, Attorney General Ashcroft was motivated exclusively by his commitment to forestall additional terrorist attacks on the United States in the wake of September 11.¹⁷⁴ That motivation conclusively ruled out the “plausibility” of any contamination of his policy by discriminatory animus.

Chief Justice Roberts recognized that this new pleading standard required judges to make dispositive determinations of disputed and controversial factual questions (in *Iqbal* whether a policy with an overwhelmingly disparate effect on an unpopular minority could have been infected by a discriminatory purpose) at the onset of litigation and without any discovery or formal consideration of evidence.¹⁷⁵ How were judges to do this in a manner consistent with their formal obligations to openness, equal respect for litigants, and due procedure? For Roberts, the answer was to apply their “judicial experience and common sense[,]” formed by judicial experience.¹⁷⁶ How this directive to rely on judicial common sense as the basis for refusing to examine the merit of claims presented by an injured party differs from an open invitation to indulge the ideological predilections so deplored by Illich remains unexplained. In light of the Chief Justice’s application of the “plausibility” standard to the *Iqbal* claims themselves, perhaps this is because no explanation is possible.

The possibility of an epistemic distinction between law and politics, between applying and creating law, or as Illich would put it, between ideology and disinterest, has been under attack by legal philosophers for more than a century. Beginning with Justice Holmes, extending through the legal realists and on to their theoretical heirs in the critical legal studies movement, many thinkers have found this distinction impossible to sustain because of the in-

171. *Id.* at 1952.

172. *Id.* at 1951.

173. *Id.* at 1950-51.

174. *See id.* at 1953.

175. *Id.* at 1950.

176. *Id.*

ability of judges to derive provably correct resolutions of competing legal arguments through a mechanical application of pre-existing legal sources.¹⁷⁷ The exercise of what Alexander Hamilton called “judgment” is inevitable.¹⁷⁸ And distinguishing judgment from its philosophical opposite, will (or to put it slightly more gently, judicial discretion) continues to pose a serious problem to the legitimacy of adjudication.¹⁷⁹

The problem has so far been largely a theoretical one, in the literal sense of that adjective, as most judges publicly practice their craft as though unaware of it, publishing opinions that relentlessly purport to rest on the application of pre-existing law to the case at hand.¹⁸⁰ These judges may, of course, be philosophically naïve. Perhaps more likely, they may be convinced that their practice rests on a fiction, albeit one which must be concealed in order to preserve public faith in the ideal of a “government of laws not men.”¹⁸¹ There is, however, a third possibility, one more congenial to Illich’s optimism about adjudication. Perhaps it is the critique of the law/politics distinction that is naïve, resting as it does on the all too easy demonstration that there are not provably correct answers to contested legal questions. Perhaps the exercise of judgment to resolve these questions is not illusory, at least from the internal perspective of a judge who sees his or her responsibility as deciding particular cases through the application and interpretation of pre-existing sources of law.¹⁸² Such a judge may experience the disinterestedness so prized by Illich, even if he or she is also only too aware of the inevitable fallibility of all (legal) judgments.

The philosophical critique of legal justification has until recently been associated more with progressive or liberal than with conservative thought. Justice Holmes, for all his hard bitten skepticism about political and social reform, saw efforts to achieve it as inherent in self-government.¹⁸³ The Realists were nearly all politi-

177. RICHARD A. POSNER, *HOW JUDGES THINK* 40-43 (2008).

178. *See id.* at 157; THE FEDERALIST NO. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (“The courts must declare the sense of the law; and if they should be disposed to exercise WILL instead of JUDGMENT, the consequence would equally be the substitution of their pleasure to that of the legislative body.”).

179. POSNER, *supra* note 177, at 157.

180. *Id.* at 40-43.

181. *Id.* at 41 (citations omitted).

182. *See generally* RONALD DWORKIN, *JUSTICE FOR HEDGEHOGS* (The Belknap Press of Harvard University 2011); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (Harvard University Press 1977).

183. *See* *Coppage v. Kansas*, 35 S.Ct. 240, 248 (1915) (Holmes, J., dissenting), *overruled in part by* *Phelps Dodge Corp. v. N.L.R.B.*, 61 S.Ct. 845 (1941); *Adair v.*

cal liberals, many affiliated with the New Deal.¹⁸⁴ Critical Legal Studies was, without doubt, a movement of the political left.¹⁸⁵ The contemporary defense of the law/politics distinction has been taken up largely by conservatives.¹⁸⁶ Adherents to techniques of interpretation such as discerning the plain meaning of legal texts and discovering the intentions of the authors of these texts have claimed to solve the problem of judicial ideology by anchoring the grounds for judicial decision in sources outside the judge's own values.¹⁸⁷ Their claims have mostly been convincing only to audiences who approve of the results reached by judges who claim to follow these preferred techniques, perhaps because textualism and originalism, whatever their virtues, are no more capable of mechanical application to generate provably correct resolutions to legal questions than are any other, ostensibly less objective methods of decision.

There are now signs, however, that the critique of the law/politics distinction may be becoming more bipartisan. Richard Posner, a deservedly respected federal appellate judge, prolific author, and eminent conservative thinker, has recently published a book-length argument against the possibility of the sort of judicial disinterest valued by Illich.¹⁸⁸ Posner's book claims both that arguments from pre-existing legal sources cannot generate persuasive answers to contested legal questions, and that most judges know that this is so.¹⁸⁹ Posner admits that judges (including him) nearly always present their opinions as applications of pre-existing law to the dispute in issue and not as impositions of their political will.¹⁹⁰ But this mode of presentation is no more than a disingenuous convention made necessary by an unsophisticated public's naïve belief

United States 208 U.S. 161, 190-92 (1908) (Holmes, J., dissenting), *overruled in part* by *Phelps Dodge Corp. v. N.L.R.B.*, 61 S. Ct. 845 (1941); *Lochner v. New York*, 198 U.S. 45, 74-76 (1905) (Holmes, J., dissenting); *overruled in part* by *Ferguson v. Skrupa*, 83 S. Ct. 1028 (1963). *See generally* Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

184. THE OXFORD COMPANION TO AMERICAN LAW 450 (Kermit L. Hall et al. eds. 2002).

185. *See* Grey, *supra* note 183, at 813-14. *See generally* UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT, *supra* note 115.

186. *See* ROBERT H. BORK, SLOUCHING TOWARD GOMORRAH, 109-19 (1996); ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW, 9-19, 44-49 (Amy Gutmann ed. 1997).

187. *See* Grey, *supra* note 183, at 794.

188. *See generally* POSNER, *supra* note 177.

189. *See id.* at 39-45; *see also* Eric J. Segall, *The Court: A Talk with Judge Richard Posner*, THE NEW YORK REVIEW OF BOOKS (Sep. 29, 2011), <http://www.nybooks.com/articles/archives/2011/sep/29/court-talk-judge-richard-posner/>.

190. *See* POSNER, *supra* note 177, at 39-45; *see also* Segall, *supra* note 189.

in the rule of law.¹⁹¹ Posner plainly subscribes to the more cynical of the possible explanations suggested above for the apparent obliviousness of judges to the central threat to their professional legitimacy. He, nevertheless, sees his book as a useful public service, exposing the emperor's nakedness for all to see, while urging a sympathetic understanding of, and acquiesce in, the pretense that he is clothed.¹⁹²

Posner believes that the legitimacy of adjudication will easily survive his revelation, since the public will be content to accept political decisions by judges, so long as these decisions are wise and show appropriate deference to the prerogatives of other major holders of political and economic power in our society.¹⁹³ He may well be right. Decisions such as *Bush v. Gore*,¹⁹⁴ accepted instantly by the public (and defended by Posner himself) despite withering criticism from within the legal profession, and *Ashcroft v. Iqbal*,¹⁹⁵ are signs that he is right. But if Posner is right, particularly if his claim that most judges see their role as he does is empirically accurate, the premise of Illich's hope for the transformative potential for law has disappeared. Unless judges have reason to maintain an internal commitment to Illich's virtues—due procedure, dispassionate openness to all arguments, and equal respect for all parties, all that will remain is their ideology.

CONCLUSION: NOTHING IS EVER PERMANENTLY SETTLED

Ivan Illich invested hope in his ideal form of adjudication not only because he saw it as a convivial tool in itself, but also, equally importantly, because he believed that it meant that no issue of legal doctrine, and therefore, of social and political structure, could ever be permanently settled. On this second point, the inherent malleability of American legal doctrine, there is ample evidence that Illich was accurate even if this malleability is not necessarily traceable to the gradual accretion of precedent Illich envisioned. Consider the constitutional fate of the individual insurance purchase mandate contained in the Patient Protection and Affordable Care Act enacted by Congress, signed by the President in the spring of 2010.¹⁹⁶

191. See POSNER, *supra* note 177, at 89.

192. See *id.* at 1-15.

193. See Segall, *supra* note 189.

194. *Bush v. Gore*, 531 U.S. 98, 110 (2000).

195. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-50 (2009).

196. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010).

Prompted by a new social movement called the Tea Party,¹⁹⁷ lawsuits were filed almost immediately to challenge the constitutionality of the purchase mandate as beyond the enumerated power of Congress to regulate interstate commerce and to buttress such regulation with measures necessary and proper to its success.¹⁹⁸ When this litigation was commenced, the conventional wisdom among almost all legal observers, scholars, commentators, and practitioners—in other words among nearly everyone with an informed opinion except for the lawyers who filed the suits and their clients—was that it was so meritless as to be nearly laughable.¹⁹⁹ Commerce power doctrine which had been settled since the New Deal made clear that of course Congress could impose the insurance purchase mandate as part of a comprehensive measure to regulate the very substantial interstate market in health insurance.²⁰⁰

By the fall of 2011, those federal courts which had considered the issue were divided on its constitutionality.²⁰¹ A split between two federal appellate courts on the question²⁰² prompted the Supreme Court to take it up during its 2011-12 term. By the time the question was orally argued in March of 2012, it had become clear that a significant plurality, perhaps even a narrow majority, of the justices were sympathetic to the challenge to the individual purchase mandate. These justices seemed poised to revisit, perhaps

197. *What is the Tea Party?*, TEAPARTY.ORG, <http://www.teaparty.org/about.php> (last visited May 24, 2012).

198. See Associated Press, *13 Attorneys General Sue Over Health Care Overhaul*, USA TODAY (Mar. 23, 2010, 1:53 PM), http://www.usatoday.com/news/nation/2010-03-23-attorneys-general-health-suit_N.htm; N.C. Aizenman & Amy Goldstein, *Judge Strikes Down Entire New Health-Care Law*, THE WASH. POST (Feb. 1, 2011, 9:32 AM), <http://www.washingtonpost.com/wp-dyn/content/article/2011/01/31/AR2011013103804.html>; Josh Funk, *AG Bruning Says Health Reform Violates Constitution*, JOURNAL-STAR.COM (Mar. 22, 2010, 12:42 PM), http://journalstar.com/news/local/govt-and-politics/article_cdf483b6-35c9-11df-a053-001cc4c03286.html.

199. See, e.g., Andrew Koppelman, *Bad News for Mail Robbers: The Obvious Constitutionality of Health Care Reform*, 121 YALE L.J. ONLINE 1 (2011).

200. See generally U.S. CONST. art. I, § 8, cl. 3; Wickard v. Filburn, 317 U.S. 111 (1942).

201. See Florida ex rel. Attorney Gen. v. U.S. Dep't of Health & Human Servs., 780 F.Supp.2d 1256, 1306 (N.D. Fla. 2011), *reversed in part*, 648 F.3d 1235 (11th Cir. 2011), *cert granted*, 132 S.Ct. 604 (2011); Liberty Univ., Inc. v. Geithner, 753 F.Supp.2d 611, 635 (W.D. Va. 2010), *vacated*, 671 F.3d 391, 397-98 (4th Cir. 2011); Thomas More Law Ctr. v. Obama, 720 F.Supp.2d 882, 895 (E.D. Mich. 2010), *aff'd*, 651 F.3d 529 (6th Cir. 2011).

202. See Florida ex rel. Attorney Gen., 648 F.3d at 1311. See generally Thomas More Law Ctr., 651 F.3d at 529.

reconsider, and maybe even revise some of that well settled New Deal era doctrine.²⁰³

In the end, as we know, five justices were indeed prepared to hold the purchase mandate beyond Congress's power to regulate interstate commerce.²⁰⁴ This view did not provide the basis for the Court's decision, however, because one of the five, Chief Justice Roberts, saw the mandate as a federal tax authorized by Article I, Section 8, Clause 1 of the Constitution.²⁰⁵ His opinion, added to those of the four justices who viewed the mandate as within the commerce power, provided the fifth vote necessary to sustain its constitutionality.²⁰⁶

We might wonder, of course, whether Illich would see the Court's resolution of the Affordable Care Act litigation as an example of the ideological approach to adjudication he deplored, or as reflective of the dispassionate process of open reevaluation of old questions that he prized. For that matter, given his low regard for the medical services distribution system in general and the health insurance industry in particular, we might also wonder whether Illich would see the nearly successful challenge to the purchase mandate as an effort to entrench, or to invert, a distinctly unconvivial political and economic hierarchy.

203. *Dep't of Health & Human Servs. v. Florida*, No. 11-398, 80 U.S. Law Week 3553 (April 3, 2012).

204. *Nat'l Federation of Independent Businesses v. Sebelius*, No. 11-393, 567 U.S. ___, 2012 WL 2427810 (2012).

205. *Id.*, slip op. at 31.

206. *Id.*