# The Jurisprudential Movements of the 1980s*

GARY MINDA**

CONTENTS

I. INTRODUCTION
II. UNDERSTANDING THE DIFFERENCES THESE ACADEMIC MOVEMENTS EXHIBIT
  A. *Law and Economics*
  B. *Critical Legal Studies*
  C. *Feminist Legal Thought*
III. THE INTELLECTUAL BOND BETWEEN LAW AND ECONOMICS, CLS, AND FEMINIST LEGAL THOUGHT
  A. *Legal Realist Thought*
  B. *The Realist Heritage*
  C. *What is New About the Movements of the 1980s*
IV. MAINSTREAM LEGAL THOUGHT
  A. *Process Theorists*
  B. *Law as Interpretation and the New Rights Theorists*
  C. *How Each Movement Critiques the Mainstream*
V. HOW SOME LEGAL SCHOLARS HAVE REACTED TO THE NEW MOVEMENTS
  A. *The Plea for Commitment to the "Rule of Law"*
  B. *The Plea for Shared Values and Public Morality*
  C. *The Pleas for New Comprehensive or Comprehensible Discourses*
VI. CONCLUSION

## I. INTRODUCTION

Every so often in the history of jurisprudence, a new idea, perspective, or conceptual structure appears on the academic scene purporting to cast doubt on the legitimacy of the way the legal profession has come to understand law and adjudication. Sometimes the emergence of a new jurisprudential perspective or theory gives rise to a new intellectual and political movement resulting in paradigmatic shifts and real revolution in legal theory and practice. More often than not, it is quickly absorbed by the prevailing legal paradigm, resulting in modification, perhaps revision, but not in revolution. Invariably, resolution will depend upon the degree of discontent, ferment, and commitment spurred by both critics and advocates of the prevailing paradigm.[1]

One of the more interesting developments in American legal thought of the

---

* ©Gary Minda, 1989

** Professor of Law, Brooklyn Law School. Thanks and affection go to Melanie E. Meyers, David Kennedy, Robert J. Glennon, Judy Greenberg, Mary Joe Frug, Tom Morawetz, Martha Minow, Joe Singer, David Carlson, and Gary Peller. The research for this essay was supported by the Brooklyn Law School's Summer Research fund.

1. The development of jurisprudential theories is not likely to be different from the development of scientific theories. *See generally* T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1970) (describing revolutionary paradigm shifts in scientific thought).

1980s has been the almost simultaneous emergence and maturation of *three* influential jurisprudential movements—*law and economics* (L/E), *critical legal studies* (CLS), and *feminist legal thought*.[2] Each movement has introduced a new form of legal scholarship which departs radically from the perspectives and methods of mainstream legal thought.[3] Law and economics scholars argue for judge-made law structured by quasi-scientific economic methods to reach the proper legal outcome. Critical legal studies employs insights and methods from eclectic sources such as critical theory, literary criticism, structuralism, feminism, and Marxism in advocating that the law should be "transformed" to create real democratic decisionmaking.[4] Modern feminist legal theory seeks, in turn, to establish a distinct "feminist method" of "engendered" or "unmodified" jurisprudence[5] by developing insights and

---

2. Until recently, legal scholars have not regarded law and economics, critical legal studies, or feminist theory as jurisprudential movements or theories. Today, however, these new movements in legal theory are regarded as offering distinctively unique and radically different conceptions of law and adjudication. *See, e.g.*, Fiss, *The Death of the Law?* 72 CORNELL L. REV. 1 (1986); Kornhauser, *The Great Image of Authority*, 36 STAN. L. REV. 349 (1984); Minow, *Law Turning Outward*, 73 TELOS 79 (1986); Posner, *The Decline of Law as an Autonomous Discipline: 1962–1987*, 100 HARV. L. REV. 761 (1987); Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826 (1988); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); White, *Economics and Law: Two Cultures in Tension*, 54 TENN. L. REV. 161 (1986). One purpose of this essay is to identify and analyze the concept of law and adjudication—the "theory of jurisprudence"—projected within the dominant scholarship of law and economics, CLS, and feminist legal thought.

There have been other academic legal movements of the 1980s such as law and society, law and literature, and law and interpretation, which have made significant contributions to legal scholarship. I have chosen to focus on law and economics, CLS, and feminist legal theory because these movements have generated forms of critique that share common differences and similarities which render them unique when compared to other movements and schools of legal theory. For example, the law and society movement is much more eclectic than law and economics and considerably less political than either CLS or feminist legal theory. *See infra* note 202. Law and interpretation is less a school of thought than a scholarly view about the relation between legal interpretation and literary theory. *See, e.g.*, *Interpretation Symposium*, 58 S. CAL. L. REV. 1 (1985). Law and interpretation has come to describe various eclectic approaches that mainstream scholars and others have used for developing constructive approaches to law. *See* Kennedy, *Turn Toward Interpretation*, 58 S. CAL. L. REV. 251 (1985). Literary debates concerning law and literature are also the subject matter of modern mainstream scholars who associate with the law and interpretation school of thought. *See, e.g.*, Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984). *See also Symposium on Law and Literature*, 60 TEX. L. REV. 373 (1985).

3. There is probably no single theory of jurisprudence which could be characterized as *the* mainstream view. There is, however, an existing body of eclectic post-Realist theory and scholarship—legal process theory, rights theory, and law and interpretation—which has come to define the mainstream jurisprudential positions of modern legal scholars. *See, e.g.*, B. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1983); R. DWORKIN, LAW'S EMPIRE (1986); J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980); J. RAWLS, A THEORY OF JUSTICE (1971); Fiss, *Objectivity in Interpretation*, 34 STAN. L. REV. 739 (1982). For a discussion and examination of the mainstream view of legal thought see Hutchinson & Monahan, *Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought*, 36 STAN. L. REV. 199, 202–13 (1984); Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW 29–37 (D. Kairys ed. 1982); Singer, *Legal Realism Now*, 76 CALIF. L. REV. 465, 505–13 (1988). *See also infra* Part IV.

4. For a description and analysis of some of the dominant methodologies of CLS see Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209 (1985–86).

5. While sharp differences exist within the feminist community over the meaning and scope of "feminist jurisprudence," a number of feminist legal scholars have sought to define feminist legal theory in terms of an "engendered" or "unmodified" form of jurisprudence. It has been suggested that "[j]ustice is engendered when judges admit the limitations of their own viewpoints, when judges reach beyond those limits by trying to see from contrasting perspectives, and when people seek to exercise power to nurture differences, not to assign and control them." Minow, *Foreword: Justice Engendered*, 101 HARV. L. REV. 10, 95 (1987). *See also* West, *supra* note 2, at 72 ("Masculine Jurisprudence must become humanist jurisprudence, and humanistic jurisprudence must become a jurisprudence unmodified."). *See generally* C. MACKINNON, FEMINISM UNMODIFIED (1987).

theoretical criticism from perspectives shaped by the lived-experiences of women whose interest feminist theory seeks to affirm.[6]

Without doubt, the basic goals of the individual movements, and the perspectives of those espousing them, are the source of deep disagreement about the nature of law and politics. Despite the distinctions, the three movements can be understood to establish quite similar modes of legal criticism, both in their method of attack on mainstream legal values and in their method of advocacy of their particular perspectives. This essay will characterize the three new jurisprudential movements by identifying both their *differences* and *similarities*. By first focusing on their distinctive modes of thought, language, and patterns of reasoning, I will show how the three movements appear to be fundamentally different. I will then identify characteristics of each movement which unite the movements in fundamental ways. My objective is to offer a characterization that takes into account both differences and similarities and that provides a rationale for understanding the concurrent development of the methodologies. My thesis is that the differences and similarities between these new legal movements can be understood in terms of how they have defined themselves in relation to the criticism they raise about mainstream views of jurisprudence. All three movements reject the traditionalists' claim that there is a proper and correct "legal" analytic for understanding law and adjudication.

For some scholars and practitioners, law and economics, critical legal studies, and feminism are naive, wrongheaded, threatening, and even *dangerous* movements. Legal scholars have criticized these movements for being either too "theoretical" or too "simplistic" in their claims or methods.[7] A distinguished liberal scholar, Owen M. Fiss, has argued that law and economics *and* CLS are dangerous "jurisprudence movements" because they may "mean the death of the law, as we have known it throughout history, and as we have come to admire it."[8] Still others have simply denied the claims of the new theories without bothering to consider whether such claims have creditability or substance.[9] In this essay I will develop a somewhat different account of the movements, one more hopeful and optimistic, focusing on their contributions to a more complex and rich understanding of what "law" and "adjudication" will mean in the 1990s—an understanding which is making it increasingly difficult to accept the existing liberal jurisprudence of mainstream legal scholars.

6. *See* MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 643 (1983).

7. At least one law school dean has suggested that so-called "nihilistic" members of one of these movements, CLS, should be banned from the legal academy because their message is too "radical" or "subversive" for legal education. *See* Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984). For responses to Dean Carrington's plea, see Martin, *"Of Law and the River," and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985).

8. *See* Fiss, *supra* note 2, at 16. Fiss believes that the new "jurisprudential movements of the seventies" are threatening because they are "united in their rejection of the law as public ideal." *Id.* Fiss's views are more fully developed in Fiss, *The Supreme Court, 1978—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979) [hereinafter *Foreword*]. *See also* Fiss, *supra* note 3. For a critical review of Fiss' view see Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765 (1982); Fish, *supra* note 2. For Fiss' reply to Fish see Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985) [hereinafter *Conventionalism*].

9. Sunstein, *supra* note 2, at 826 ("[T]he basic claims of feminist theory are in many circles denied creditability and respect, or even a fair hearing.").

## II. UNDERSTANDING THE DIFFERENCES THESE ACADEMIC MOVEMENTS EXHIBIT

Most legal scholars today have come to understand law and economics, critical legal studies, and feminism as radically different approaches or "theories of law" occupying the borders of traditional legal studies. Law and economics is commonly associated with the right-wing economic philosophy of the "Chicago School" whereas CLS is usually type-cast as the "New Left" intellectual offspring of the radical counterculture of the 1960s.[10] Feminist legal theory is more often than not ignored, but sometimes ridiculed as being anti-male, anti-law, and anti-theory.[11]

Opponents use these impressionistic views to dismiss the intellectual substance of each movement and to classify these jurisprudential approaches as marginal or fringe "schools" working outside the profession's established academic tradition.[12] Because the law and economics movement is often associated with the work of conservative economists at the University of Chicago, law and economics is frequently dismissed as extremist even though other law and economics "schools" exhibit different perspectives.[13] Standard treatment and descriptions of CLS and

---

10. Law and economics is thus characterized as a reactionary movement of the right; CLS is frequently identified as a radical movement of the left. These impressions are, of course, not without some basis in fact. *See, e.g.*, Binder, *On Critical Legal Studies As Guerilla Warfare*, 76 GEO. L. REV. 1 (1987) (discussing how CLS theorists practice a type of academic "guerilla warfare"); Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) (discussing why efficiency and the goal of wealth maximization should be the prevailing norm in common law adjudication) [hereinafter *Ethical*].

11. "Feminism is a dirty word.... Feminists are portrayed as bra-burners, man-haters, sexists, and castrators. Our sexual preferences are presumed. We are characterized as bitchy, demanding, aggressive, confrontational, and uncooperative, as well as overly demanding and humorless." Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988).

12. Stereotyping, caricature, and over-simplification are typically the product of preconceived and misinformed opinions about the nature of difference. It is "one form of the failure to imagine the perspective of another." Minow, *supra* note 5, at 51 n.201. Minow reports that "[s]ocial psychologists who study stereotyping and stigmatizing attitudes point to the needs that these techniques of denigration serve for both individuals and social groups who have the power to label others." *Id.* (citing K. ERIKSON, WAYWARD PURITANS 4-15, 69-81, 114, 196-99 (1966)); S. GILMAN, DIFFERENCE AND PATHOLOGY: STEREOTYPES OF SEXUALITY, RACE, AND MADNESS 12, 18-23 (1985); IN THE EYE OF THE BEHOLDER: CONTEMPORARY ISSUES IN STEREOTYPING (A. Milner ed. 1982). Minow argues that "[o]thers have rejected as irrelevant or relatively unimportant the experience of 'different' people and have denied their own partiality, often by using stereotypes as though they were real." Minow, *supra* note 5, at 51.

13. *See infra* notes 26-28 and accompanying text. Liberal law and economic scholars at New Haven have utilized the insights of the right-wing scholarship of the "Chicago School" to advance mildly reformist policy solutions that acknowledge the necessity of state intervention and planning to correct market failures. *See, e.g.*, G. CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970); Calabresi & Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

Other L/E scholars have sought to break loose from the influence of the Chicago School of Economics by developing a new reformist branch of law and economics. *See, e.g.*, Cooter & Ulen, *An Economic Case for Comparative Negligence*, 61 N.Y.U. L. REV. 1067 (1986) (developing a normative theory based on Rawls' A THEORY OF JUSTICE to argue in favor of the comparative negligence standard); Rose-Ackerman, *Progressive Law and Economics—and the New Administrative State*, 98 YALE L.J. 341 (1988) (developing a new progressive L/E approach to argue for a more constructive approach to administrative law).

At least one commentator has argued that the creative insights of law and economics may support a left-wing understanding of law and its relation to economics. *See* Schlag, *An Appreciative Comment on Coase's* THE PROBLEM OF SOCIAL COST: *A View From the Left*, 1986 WIS. L. REV. 919 (argues that the Coasian insights of the "Chicago School" ultimately raise left-wing implications for law and the legal system).

Despite the diversity of perspectives and approaches within the law and economics movement, most observers tend to identify L/E with the work of *conservative* lawyer-economists at the University of Chicago. Practitioners of the "Chicago School" tend to view law and the legal system as a mere supplement to the market: a necessary but minor vehicle for perfecting market-like solutions. *See* Ackerman, *Symposium on Law and Economics – Foreword: Talking and Trading*, 85 COLUM. L. REV. 899 (1985).

feminism are similarly dismissive. Conventional argument, relying upon male experiences as an implicit reference point, has either ignored the claims of feminist legal theory or rejected them without a fair hearing.[14] While CLS scholarship is sometimes acknowledged in the work of mainstream scholars, it is quickly dismissed as "crude Marxism" or "empty nihilism."[15]

Certainly more than misinformed stereotypes and offhand generalizations are needed to assess the ideas of these new legal movements. Stereotyped thinking and mischaracterization frequently involve "over-simplification, inattention to individual characteristics, lack of seriousness, invariance."[16] They also hide ignorance, prejudice, and unwillingness to accept honest differences. We must take seriously the theories and arguments of competing perspectives so that we can honestly evaluate the validity and persuasiveness of their claims. Once the air is cleared of stereotyped thinking and of the rhetoric of condemnation, there may be an opportunity to offer sincere characterizations. It may then be useful to try to distinguish the new jurisprudential movements by describing particular "forms of thought and life" or "perspectives" projected by each movement about law, adjudication, and human behavior. What follows will be an attempt to sketch the distinctive academic or intellectual discourses of each movement.[17]

---

14. *See* Minow, *supra* note 5, at 39–45 (discussing how the Supreme Court's sex discrimination cases have been decided under an unstated and implicit male norm). *See also* Sunstein, *supra* note 2, at 826 (commenting on the dismissive attitude mainstream legal scholars have exhibited toward feminist legal theory).

The notoriety surrounding the recent tenure offer extended by the University of Michigan Law School to feminist scholar Catharine MacKinnon is indicative of the marginalization of feminism in legal education. The New York Times reported that MacKinnon's offer of tenure was a historical event—"a kind of turning point for legal academia." *Job Offer to Feminist Scholar May Mark Turn*, N.Y. Times, Feb. 24, 1989, at B5. According to the *Times* story, feminist legal scholars "often find themselves bouncing from one visiting professorship to another, with their research and writing dismissed as marginal to mainstream legal studies." *Id.* MacKinnon remarked that her tenure offer from Michigan was "a victory for women" because it represented the "expression of the seriousness with which they take the kind of work I do, and their willingness to recognize other models of scholarship than the traditional ones." *Id.* However, not all law schools have been so accepting of MacKinnon and her brand of feminism. During her visit at Yale Law School, there were considerable doubts raised about Ms. MacKinnon's scholarship. Professor Geoffrey Hazard, for example, is reported to have stated in a memorandum circulated to the Yale faculty that it was "not clear that [MacKinnon] has genuine comprehension of law." *Id.*

15. *See, e.g.*, Carrington, *supra* note 7, at 227; Fiss, *supra* note 2. *But see* Frug, *Argument As Character*, 40 STAN. L. REV. 869 (1988) [hereinafter *Argument*]; Minda, *Of Law, the River and Legal Education*, 10 NOVA L.J. 705 (1986); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984). While it is true that a number of CLS scholars have traced their intellectual heritage to ideas associated with Marx and modern continental philosophers, it is wrong to conclude that CLS can be equated with vulgar marxism or sixties anarchism. Of course, the fact that CLS is openly a "leftist" academic movement is partly responsible for generating a new "politics of mischaracterization." As Robert Gordon has suggested, "[f]or one thing, for all that use it makes of conventional academic argument, CLS is a radical movement and of the left, and that's enough in itself to make some fellow lawyers see Red." Gordon, *Law and Ideology*, 3 TIKKUN 14, 84 n.1 (Jan./Feb. 1988). For a history of anti-left repression in legal academia, see Frug, *McCarthyism and Critical Legal Studies* (Book Review), 22 HARV. C.R.-C.L.L. REV. 665 (1987) [hereinafter *McCarthyism*].

16. *See* Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1394 (1986) (discussing the use of stereotyping by feminist legal scholars in coping with problems of inequality of the sexes). *See also* Bender, *supra* note 11, at 5 n.5 ("As soon as labels are imposed, stereotypes and preconceived images are generated, and ideas become fixed instead of remaining fluid and growing."). *See also* Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 52–53 (1988) ("The dominant culture has established certain criteria for theories, for legal arguments, for scientific proofs—for authoritative discourse. These established criteria are the governing rules." (footnote omitted)).

17. Any attempt to describe the perspective of others is bound to be influenced by the observer's vantage point. My particular perspective has undoubtedly been influenced by my personal commitment to the political, professional, and personal network associated with the critical legal studies movement. This essay reflects the belief, however, that it is

A. *Law and Economics*

Law and economics (L/E) appeared on the academic scene in the early 1970s when a number of law and economics scholars developed a "new" methodology and jurisprudential theory for undertaking economic analysis of law. What was "new" about the law and economics of the early 1970s was that it purported to offer a new theoretical framework for *systematically* describing and reformulating adjudication and legal decisionmaking. A central claim of the *new* law and economics[18] was that common law adjudication could be analyzed and reformed through the application of a relatively small number of fundamental economic concepts.[19]

Tension and struggle have occurred between orthodox and reformist stands of law and economics scholarship. The orthodox position of L/E developed from a common methodology based upon the Chicago School perspective of economics.[20] It

possible to identify and understand other perspectives embedded within organized bodies of thought and knowledge even though it may be difficult to transcend one's own perspective. The concept of perspective has been utilized by others to understand the "culture" of academic movements; *see, e.g.*, White, *supra* note 2; to appreciate the "difference" between points of view, see, e.g., Minow, *supra* note 5; to critique claims of objectivity in interpretation, see, e.g., Fish, *Still Wrong After all These Years*, 6 LAW & PHIL. 401 (1987) (Book Review of Dworkin's LAW'S EMPIRE); and to understand unstated assumptions in child custody law, see, e.g., G. LAKOFF, WOMEN, FIRE AND DANGEROUS THINGS 80–81 (1987). The point of such work is to show how perspectives reinforce assumptions, attitudes, and modes of reasoning, and to show how perspectives shift and change. While I reject the idea of a "neutral perspective," I believe that it is possible to honestly evaluate differences in the perspectives of others and to try to control the ways in which our own perspectives distort as well as direct our perceptions of the world.

18. Introductory discussions about law and economics typically begin by distinguishing the "old" law and economics from the "new" law and economics. The old law and economics is associated with the economic analysis of antitrust law and the law of taxation and corporations: subjects where substantive issues often turn on economic questions involving the regulation and operation of explicit markets. While the use of economic analysis in legal subjects such as antitrust remains rich and dominant, commentators are quick to note that much of what now goes under the name of law and economics developed within the last two decades. *See, e.g.*, R. POSNER, THE ECONOMIC ANALYSIS OF LAW 19 (3d ed. 1986). The new law and economics involves the application of economic analysis to common law subjects such as tort, contract, and property, where the relevance of economics is less apparent. *See* Posner, *The Economic Approach to Law*, 53 TEX. L. REV. 757 (1975). The difference between new and old versions of law and economics appears to be breaking down as practitioners of the old have incorporated the new learning of economics into their work. *See, e.g.*, P. AREEDA & D. TURNER, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION (Vols. 1–8) (1986). *See also* B. ACKERMAN, *supra* note 3, at 60 n.15. The birth of the new law and economics movement is said to have occurred sometime in the early 1960s, when Ronald Coase published his seminal article on English nuisance law, *see* Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960), and Guido Calabresi published his first piece on torts, *see* Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961). However, law and economics as an academic movement did not "coalesce" until Calabresi published his widely acclaimed book on accidents law in 1970, *see* G. CALABRESI, *supra* note 13. Richard Posner published his textbook for law students in 1972, *see* R. POSNER, *supra*, the same year in which a scholarly journal, *Journal of Legal Studies*, was dedicated to "the application of scientific methods to the study of the legal system."

19. The most influential work advancing the idea that economic analysis can be instrumentally applied to law "across the board" is Posner's THE ECONOMIC ANALYSIS OF LAW, *supra* note 18.

20. *See, e.g.*, Minda, *The Lawyer-Economist at Chicago: Richard A. Posner and the* ECONOMIC ANALYSIS OF LAW, 39 OHIO ST. L.J. 439, 462 (1978) [hereinafter *Lawyer-Economist*]. The Chicago School in law and economics is usually associated with the *law-and-efficiency* hypothesis, or principle of *wealth maximization*. *See, e.g.*, R. POSNER, *supra* note 18; R. POSNER, THE ECONOMICS OF JUSTICE (1981). *See also* Minda, *The Law and Economics And Critical Legal Studies Movements in American Law*, in LAW AND ECONOMICS 87 (N. Mercuro ed. 1989) [hereinafter *Movements*]; Minda, *Toward A More 'Just' Economics of Justice* (Review Essay in forthcoming issue of CARDOZO L. REV.). By far the most significant work in the field of law and economics has been done by lawyer-economists associated with the "Chicago School."

The influence of the first generation of Chicago School L/E scholars "peaked" as a new generation developed alternative approaches to the economic analysis of law. *See, e.g.*, Rose-Ackerman, *Law And Economics: Paradigm, Politics, or Philosophy*, in LAW AND ECONOMICS 233 (N. Mercuro ed. 1989). The second generation of L/E scholarship is quite diverse. For a recent examination of the developments, tensions, and new prospects of L/E scholarship see LAW AND ECONOMICS (N. Mercuro ed. 1989). One strand of second generation L/E scholarship has attempted to construct a

was these "hardliners" of the Chicago School (the founding fathers) who throughout the 1970s and early 1980s advocated strong claims based on the *law-and-efficiency* hypothesis. This hypothesis, normally associated with the views of Judge Richard A. Posner, asserts that the common law is, or at least should be, a primary vehicle for promoting efficiency—what Posner has called the principle of *wealth maximization*.[21] This approach was premised upon the argument that the structure of the common law serves to maximize the value of legal entitlements as measured in dollar equivalents.[22]

By the mid-1980s, the influence of the Chicago School peaked.[23] A new generation of L/E scholars has emerged who have distanced themselves from the orthodoxy of the Chicago School and begun developing alternative methodologies for

---

more sophisticated understanding of the Chicago School approach by developing non-market theories to explain bureaucratic and institutional behavior. *See, e.g.*, Romano, *Metapolitics and Corporate Law Reform*, 36 STAN. L. REV. 923 (1984) (developing an interest group analysis of the corporate board to explain bureaucratic corporate behavior). *See also* O. WILLIAMSON, ECONOMIC INSTITUTIONS OF CAPITALISM (1986) (positing an economic argument of institutional behavior based on new assumptions of human nature—that people possess bounded rationality and act opportunistically). L/E scholars associated with the *Virginia* School have in turn adopted the Chicago School's conservative perspective by advancing theories of relational contract and strategic behavior to explain long-term bargaining relations. *See infra* note 31. Another group of second generation L/E scholars embraces the Chicago School perspective in developing a new theory of public choice based on game theory of bargaining or interest group theory for analyzing the behavior of legislators and the institution of legislation. *See, e.g.*, Rowley, *Public Choice, Law and Economics*, in LAW AND ECONOMICS 123 (N. Mercuro ed. 1989) [hereinafter *Public Choice*]. *See also* Rose-Ackerman, *supra*, at 236. Moreover, there is now a new group of second generation L/E scholars who reject the law and efficiency hypothesis associated with the Chicago School and advance a different normative framework for economic analysis of law. These L/E scholars have developed a new form of *liberal* law and economics which offers economic analysis to realize the liberal conception of law as public morality. *See, e.g.*, Rose-Ackerman, *supra*, at 241–44. *See also infra* note 30. Although the second generation of L/E scholarship has developed in part on the basis of methodological disagreements with the founding members of the first generation, the tension between first and second generation L/E scholarship has been marked mainly by tonal differences in style and anxieties about the distinctively conservative agenda of the Chicago School. *See, e.g.*, Rose-Ackerman, *supra*, at 236 (arguing that the reformist school of L/E bridges the gap between the extremism of the Chicago School and open-ended policy analysis).

21. *See* Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Posner, *Ethical*, *supra* note 10.

22. The wealth maximization principle generally provides that common law adjudication can best be explained in terms of the *law-and-efficiency* hypothesis—that common law adjudication is merely an instrument for enhancing efficiency of the common law; if a "value" is to be achieved it is the sole value of "wealth maximization." The principle of *wealth maximization* is premised upon two distinct yet seemingly related claims—positive and normative. The positive claim asserts that wealth maximization is a primary legal norm which helps describe the nature and operation of common law adjudication. *See, e.g.*, R. POSNER, *supra* note 18, at 20–22. The normative claim asserts that maximization of wealth *should* be the prevailing legal norm for the common law. *See, e.g.*, Posner, *Ethical*, *supra* note 10.

The distinction between descriptive and normative claims tends to break down in practice as the description of efficient states become the evaluative criteria for favoring the "justice" of outcomes which maximize wealth. As Judge Posner once put it: "Since efficiency is a widely regarded value in our world of limited resources, a persuasive showing that one course of action is more efficient than the alternatives may be an important factor in shaping public choice." R. POSNER, THE ECONOMIC ANALYSIS OF LAW 6 (2d ed. 1977).

23. Even Judge Posner has softened his original hard line. He now argues that efficiency and wealth maximization is just one of several social values to be promoted by law. *See* Posner, *Wealth Maximization and Judicial Decisionmaking*, 4 INT'L. REV. L. & ECON. 131 (1984); Posner, *The Ethics of Wealth Maximization: Reply To Malloy*, 36 KANSAS L. REV. 261, 263 (1988). Judge Posner has also softened his positivistic perspective of jurisprudence. In his earlier scholarship, Judge Posner argued a strong positivistic line, defending his view that wealth maximization should be the primary criterion for judging. *See e.g.*, R. POSNER, THE ECONOMICS OF JUSTICE 115 (1981). Judge Posner has now embraced an infinitely more skeptical perspective of judging. *See* Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 862 (1988) (arguing that judges should abandon the goals of certainty and formal accuracy and instead embrace a more practical form of jurisprudence which would require judges to reach the most "reasonable" results under the circumstances, and citing the work of Kent Greenwalt of Columbia University as an example. *See* Greenwalt, *Discretion and Judicial Decision: The Elusive Quest for the Fetters That Bind Judges*, 75 COLUM. L. REV. 359 (1975)).

approaching economic analysis of law.[24] Although most L/E scholars now agree that efficiency analysis of economics is a fruitful way for understanding behavior under law, many current practitioners reject the notion that efficiency should be regarded as the only legal norm in common law adjudication.[25]

Moreover, there is now a new breed of L/E scholar who argues in favor of a "genuinely reformist law and economics" to "address the problems of the modern welfare, regulatory state."[26] These L/E scholars no longer believe that legal rules should be affirmed or rejected solely on the basis of efficiency. Instead, a growing number of second generation L/E scholars have shifted their attention away from the common law to an examination of public law and the normative justifications for the activist state.[27] This second wave of L/E scholarship has helped to finally establish a *liberal* school of law and economics, sometimes known as the *New Haven* or *Reformist* School.[28]

---

24. Second generation L/E scholars have attempted to distance themselves from the Chicago School to deflect the dismissive attitudes of those legal scholars who have associated law and economics with the extremism of the Chicago School. *See, e.g.*, Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451 (1974). Second generation L/E scholars argue that such critics *mischaracterize* the movement. *See, e.g.*, Rose-Ackerman, *supra* note 20, at 237, 251; Ulen, *Law and Economics: Settled Issues And Open Questions*, in LAW AND ECONOMICS 210 (N. Mercuro ed. 1989).

Distancing was also necessary for those L/E scholars who reject the conservative research agenda of the Chicago School. In drawing from the methodology of the Chicago School without adopting its hard line position on the *law-and-efficiency* hypothesis, the second generation of L/E scholars have attempted to develop more acceptable forms of law and economics. *See, e.g.*, Ulen, *supra*, at 210 (arguing that there are many practitioners of law and economics who are now *agnostic* about the claims of the *law-and-efficiency* hypothesis of the Chicago School); Rose-Ackerman, *supra* note 20, at 241–44 (arguing that a new *reformist* school of law and economics has developed which explicitly rejects the Chicago School perspective).

However, while the second generation of L/E scholars have sought to distance themselves from the conservative influence of their founding fathers, their underlying vocabulary and methodology remains heavily embedded within the vocabulary and theoretical perspective of the Chicago School. The right-wing tilt which observers attribute to the movement is probably the result of the continuing influence of the Chicago School's claims. By far, one of the most popular slogans of the movement continues to be that "law is efficient."

25. *See, e.g.*, Ulen, *supra* note 24, at 210 (arguing that there are many practitioners of L/E who are agnostic on both the normative and positive claims of the *law-and-efficiency* hypothesis). *See generally* R. COOTER & T. ULEN, ECONOMICS OF LAW (1988). The skeptical position of these scholars can be traced to the L/E scholarship associated with Guido Calabresi. *See, e.g.*, Calabresi, *supra* note 18.

26. Ulen, *supra* note 24, at 253. *See also* Rose-Ackerman, *supra* note 13, at 358 (developing a progressive L/E approach to administrative law which purports to follow a "middle ground between the Chicagoan's faith in free markets and the present regulatory system under the Occupational Safety and Health Act.").

27. *See, e.g.*, Rose-Ackerman, *supra* note 20, at 241–46 (arguing that a reformist law and economics has developed to rival the free-market advocates of the Chicago School). *See also* Rose-Ackerman, *supra* note 13 (arguing a similar position in defending a new constructive approach to administrative law); Fiss, *supra* note 2, at 7 (arguing that the practitioners of the New Haven School "contemplate a larger role for the state and for adjudication" by acknowledging the significance of market failure and by refocusing their attention to the "great public law cases of our day."). *See generally* B. ACKERMAN, *supra* note 3 (for the argument in favor of a new *reformist* vision of law and economics).

28. *See, e.g.*, Fiss, *supra* note 2, at 7; Rose-Ackerman, *supra* note 13; Rose-Ackerman, *supra* note 20, at 241–46. There is some disagreement about what to call this new school of law and economics. Rose-Ackerman, for example, has taken issue with me for having used the label "New Haven School" to describe the liberal branch of L/E scholarship (*see* Minda, *Movements*, *supra* note 20, at 111 n.3) because she believes that this school is "not pervasive enough at Yale Law School to warrant using [her] hometown as a label." *Id.* at 253 n.1. However, at least one member of Yale Law School, Owen M. Fiss, has used the *New Haven* label to describe what Rose-Ackerman identifies as the "Reformist" school; suggesting that at least some members of the Yale faculty perceive the existence of this new school of economics at New Haven. Moreover, much of the methodology of New Haven liberal practitioners can be traced to the work of Guido Calabresi, the Dean of Yale Law School. *See, e.g.*, G. CALABRESI, *supra* note 13; Calabresi & Melamed, *supra* note 13. Finally, the term "reformist" may itself be confusing since it could just as easily be claimed by the Chicago School practitioner who is seeking to "reform" the law in light of a vastly different "reform" program.

The current generation of L/E scholarship tends to be more modest in its own claims about the role of economics in law and less accepting of the conservative orientation of property rights analysis of the Chicago School founders.[29] Only a small number of methodological issues appear to be settled; including claims that microeconomic theory is a basis for analyzing law, that demand curves are downward sloping, and that cost-benefit analysis and the economic definition of cost (opportunity cost) are essential for intelligent policymaking. Second generation L/E scholars have retreated from the orthodoxy of "efficient" answers for nearly every legal question; instead, the second generation thinkers admit that "[m]ost law and economics questions are still open and likely to remain so for a long time."[30]

Second generation law and economics scholarship is also more eclectic theoretically and much more sophisticated than the work of the L/E founding fathers.[31] The new generation of L/E scholars has developed microeconomic theories which promise a more realistic, yet inchoate, understanding of the bureaucratic, institutional, and relational contexts of modern transactions, legal relations, and adjudication. New theories of relational contract and strategic behavior have thus been offered to modify or replace the static models and assumptions of neoclassical microeconomic theory utilized by Chicago School practitioners.[32]

---

29. *See, e.g.*, Rose-Ackerman, *Inalienability and The Theory of Property*, 85 COLUM. L. REV. 931 (1985) (proposing equality and efficiency justifications for inalienability rules). According to Rose-Ackerman, "[a] reformist law and economics denies the primacy of the existing distribution of property rights while retaining the assumption of methodological individualism that is central to the economic approach." Rose-Ackerman, *supra* note 13, at 343.

Much of the theoretical support for the Chicago School can be traced to transactional analysis of the *Coase Theorem* that first wave L/E scholars applied in their research of common law fields of tort, contract, and property law. *See, e.g.*, Rose-Ackerman, *supra* note 20, at 236. This so-called "theorem" has undermined the confidence in the "interventionist" programs of welfare economics of the 1960s and thereby strengthened the influence of the free market conservatives at the University of Chicago and elsewhere. *See* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981). The Coase Theorem's preoccupation with private property rights committed the first generation of L/E scholars to an underlying conservative political perspective in favor of laissez-faire capitalism and a theory of jurisprudence which claimed that law should facilitate free choice and private contract, and should protect the integrity of private property. In remaining agnostic on distributional consequences of its analysis, the theorem served to legitimate the interest of the status quo. While the second generation of L/E scholars have distanced themselves from the conservative influence of their founding fathers at Chicago, underlying vocabulary and methodology of the "new" L/E scholars remain heavily embedded within the market concept bequeathed by Coase.

30. Ulen, *supra* note 24, at 224–25.

31. *See, e.g.*, R. COOTER & T. ULEN, *supra* note 25. The Cooter and Ulen book is a good example of second generation law and economics scholarship. The book embraces the hypothesis that "law is rational" without explicitly accepting the extreme claims of the *law-and-efficiency* hypothesis. *Id.* at 12. Unlike Richard Posner's textbook, THE ECONOMIC ANALYSIS OF LAW, *supra* note 18, the Cooter and Ulen book attempts to be more eclectic in accepting philosophical and humanistic traditions of legal thought. As Cooter and Ulen explain, "[o]ur approach in this book will be to try to bring economics into contact with the philosophy of law in order to connect the analytical methods for explaining rational behavior with the sensibilities motivating reasonable behavior." R. COOTER & T. ULEN, *supra* note 25, at 12.

32. *See, e.g.*, Goetz & Scott, *Principles of Relational Contracts*, 67 VA. L. REV. 1089 (1981); MacNeil, *Contracts: Adjustments of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U.L. REV. 854 (1978). *See also* O. WILLIAMSON, THE ECONOMICS OF DISCRETIONARY BEHAVIOR: MANAGERIAL OBJECTIVES IN A THEORY OF THE FIRM (1964).

The methodology of the Chicago School, based on the assumptions of the neoclassical model of microeconomics, analyzes problems from the universal perspective of the homogeneous, autonomous economic actor who approaches a market, engages in a *discrete* transaction, and then goes on about his or her business. The new economics of relational contract and strategic behavior seeks to provide an understanding of market transactions in the context of long-term relations, where bargains are never discrete and where strategic advantage may influence behavior.

Relational contract analysis asserts that there are some types of contractual relations, those of long-term duration,

A new group of Public Choice theorists has in turn offered a theory of interest groups for understanding the economics of statutory law and the behavior of legislators.[33] Other L/E scholars, associated with the New Haven School,[34] have since sought to resuscitate a liberal, reformist vision of law by using economic analysis to defend various liberal conceptions of law and adjudication.[35] Clearly, the tribe of law and economics has grown to encompass a host of divergent theoretical perspectives and normative conceptions about law and adjudication.

Even though the L/E movement is diverse in theory and perspective, there are some common premises which all L/E scholars accept and utilize in various degrees. Lewis Kornhauser, a second generation law and economics scholar, has recently identified four theses that he claims describe the corpus of law and economics scholarship: (1) A "*behavioral claim*" which asserts that "[e]conomic theory can provide a good theory for predicting how people will behave under rules of law;"[36]

---

which represent important exceptions to the model of discrete transaction found in neo-classical microeconomics. *See generally Symposium: Law, Private Governance and Continuing Relationships*, 1985 WIS. L. REV. 461–757. A relational contract is one where "future contingencies are peculiarly intricate or uncertain" making it difficult for contract parties to "allocate all risks at the time of contracting." Goetz & Scott, *supra*, at 1090. For these contracts, the analysis of discrete transactions is not a "feasible contracting mechanism" because it is impossible to allocate risks optimally in terms of well-defined contract promises. *Id.* While Goetz and Scott seek to build on the Chicago model by utilizing a relational economic analysis to defend efficient contracts, other scholars have discovered the possibility of a different, more critical relational analysis based on the values of relation, security, and solidarity. *See* Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565.

Strategic behavior is an essential aspect of bargaining strategy which occurs whenever a party attempts to decipher an opponent's moves and thereafter acts accordingly. R. COOTER & T. ULEN, *supra* note 25, at 101. Strategic behavior raises complex problems in bargaining theory because economists have been unable to define equilibrium solutions for bargaining exhibiting such behavior. *Id.* at 101 n.10.

33. *See, e.g.*, Rowley, *supra* note 20, at 123; M. OLSEN, THE LOGIC OF COLLECTIVE ACTION (1965). *See generally Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988). Public choice theory attempts to explain how political and bureaucratic bodies actually make collective choices under models which assume that political actors, like economic actors, are self-interested maximizers of something. *See* D. MUELLER, PUBLIC CHOICE (1979); Rose-Ackerman, *supra* note 13, at 344–45. Chicago School practitioners utilize public choice theory to justify a deregulatory, court-centered approach to the study of legislation. *Id.* at 348. *See also* Easterbrook, *Statutes Domain*, 50 U. CHI. L. REV. 533 (1983); Posner, *Economics, Politics and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 262 (1982). Other public choice scholars, however, de-emphasize the role of the courts and instead look to social decisionmaking of legislatures and ideals of limited government for understanding public law. *See, e.g.*, DeBow & Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993, 1005, 1011 (1988). Liberal or progressive L/E scholars utilize public choice theory to develop a more realistic understanding of the legislative process and to thereby provide theoretical support for new forms of welfare regulation. *See, e.g.*, Rose-Ackerman, *supra* note 13 (developing an economic argument based partly on public choice theory to defend a legislative-centered approach to occupational health and safety problems).

34. *See supra* note 28.

35. A good example of such work is Cooter & Ulen, *supra* note 13 (advancing an economic argument based on Rawlsian notions of justice to support the normative case in favor of the comparative negligence standard). *See also* Rose-Ackerman, *supra* note 20, at 241 (arguing that there is now a reformist law and economics which "begins by denying the primacy of the existing distribution of property rights."); Ulen, *supra* note 24, at 210 (arguing that modern L/E scholars have "found room in their analyses for shared values, a sense of community, and morality.") This new form of normative L/E is important for it represents the emergence of a liberal law and economics wedded to the process values and rights theories of mainstream legal scholars. *See, e.g.*, Rose-Ackerman, *supra* note 13 (developing a new economic approach to administrative law which complements the process-oriented approach to judicial review of John Ely). It is the liberal branch of the second generation of L/E scholarship, not the Chicago School, which best represents what Roberto Unger has described as the link between "law and economics and the rights and principles schools" of legal scholarship. *See* R. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT 12 (1983). The development of a liberal, more reformist branch of law and economics appears to be in the formative stages of development.

36. Kornhauser, *supra* note 2, at 353.

(2) A "*normative claim*" which asserts that the "law ought to be efficient;"[37] (3) A factual or "*positive*" claim that argues that the "(common) law is in fact efficient;"[38] and (4) a "*genetic*" claim that argues that the "common law tends to select efficient rules, although not every rule will, at any given time, be efficient."[39] According to Kornhauser, "[e]very article in law and economics adheres, explicitly or implicitly, to one or more of [these] logically distinct [claims]."[40]

Only the scholarship of the Chicago School founding fathers, who adopted the *law-and-efficiency* hypothesis, embraced *all* four claims of law and economics Kornhauser identified. These L/E practitioners accepted the behavioral claim that individuals respond rationally to incentives and that legal rules affect behavior. Because these scholars asserted that "the normative claim identifies efficient behavior as the criterion for choosing among rules,"[41] they utilize the behavioral claim of economics to identify legal rules which induce efficient behavior. For these practitioners, judging becomes an exercise in cost-benefit analysis, transaction cost reduction, risk assessment, and wealth maximization. Such an economic perspective places the judge in the role of the "social engineer" with the distinctive purpose of shaping rights and liabilities in the name of efficient resource allocation.[42]

The *positive* and *genetic* claims identified by Kornhauser describe the position of Chicago School practitioners who view the common law as a system of rules having a factual or natural (genetic) tendency to induce efficient behavior under law.[43] Their underlying legal perspective is the product of a world view which pursues truth about law within a paradigm that evaluates legal rules under the single universal standard of wealth maximization. For these practitioners, the *law-and-efficiency* hypothesis becomes a comprehensive organizational principle for understanding the nature of legal relations.[44]

Second generation L/E scholars, however, either reject the *normative* and *genetic* efficiency claims identified by Kornhauser *or* they remain *agnostic* on

---

37. *Id.* at 354.
38. *Id.*
39. *Id.* at 355.
40. *Id.* at 353.
41. *Id.* at 354.
42. Unlike Roscoe Pound's conception of social engineering, see Pound, *A Survey of Social Interest*, 57 HARV. L. REV. 1 (1943); the Chicago School approach of first generation L/E scholars understands legal decisionmaking as an exercise in wealth maximization to the exclusion of other social interests and values. The idea that judges should design the law for the specific purpose of achieving wealth maximization seems to run contrary to mainstream views of adjudication. The traditional jurisprudential view neither presumes that judges preside over a committee of economic welfare nor does the traditional view contemplate that judges consciously weigh overriding social interest in resolving conflicting claims of right. *See, e.g.*, Greenwalt, *supra* note 23.
43. According to Kornhauser, the *positive* claim "merely requires that the law in fact induces efficient behavior, even if economic theory does not explain how the law induces such behavior." Kornhauser, *supra* note 2, at 354-55. The *genetic* claim "provides a comprehensive economic theory of political institutions, a theory of how these institutions come to be and how they persist." *Id.* at 355.
44. Thus, these L/E scholars engage in a form of rational fact-gathering and categorization generated by a theoretical construct of the world which pursues truth through assumptions and preconceptions about efficient behavior. The *positive* and *genetic* claims about the common law are asserted by Chicago School practitioners to be "objective" and "descriptive" even though they are the product of the particular theoretical perspective of the law and economics observer. *See, e.g.*, White, *supra* note 2, at 168.

whether these claims are persuasive.[45] While the new breed of L/E scholars adopts a *positive* claim about economic analysis of law, it is different from the one identified by Kornhauser. Second generation L/E scholars merely claim that "a given rule can be fruitfully examined using microeconomic theory,"[46] and that the tools of microeconomic theory provide "explanations of the law and predictions of the consequences of legal rules."[47] The *positive* claim of the new breed of L/E scholar is thus more modest; it merely assumes that law can be understood as a rational system of behavior based on economic interest. Instead of adopting the *law-and-efficiency* hypothesis, these scholars embrace the hypothesis that "law is rational."[48]

Thus, the only claim identified by Kornhauser which can be said to *characterize* the dominant methodology of the movement today is the behavioral claim.[49] This claim commits *all* L/E scholars to the view that rational, self-interested calculations

---

45. *See, e.g.*, Rose-Ackerman, *supra* note 20, at 237; Ulen, *supra* note 24, at 210.

In predicting the consequences of behavior under law, L/E scholars are confronted with fundamental questions about whether law should encourage a particular form of behavior. Much of the current debate between first and second generation L/E scholars centers on this basic question. It is at this point that serious differences appear as a result of the *positive*, *normative*, and *genetic* claims of efficiency advanced by Chicago School practitioners.

While refusing to embrace the normative and genetic claims of efficiency, some L/E scholars remain "undecided" on whether efficiency or some other legal norm should be adopted by the L/E analyst in evaluating the consequences of behavior under law. *See, e.g.*, Ulen, *supra* note 24, at 210 (citing the "extensive literature on the death penalty" [reviewed in] R. COOTER & T. ULEN, *supra* note 25). *See also* Kornhauser, *Legal Rules As Incentives*, in LAW AND ECONOMICS 27 (N. Mercuro ed. 1989) (developing a theory of economic behavior under law without advancing a normative position about the theory's directive consequences on behavior); Rowley, *supra* note 20, at 123. These scholars may be the *nihilists* of the law and economics movement.

Another growing group of second generation L/E scholars rejects the normative and genetic claims of efficiency and instead adopts other, more philosophical values. These L/E scholars, associated with the New Haven, reformist, or *liberal* schools, acknowledge that there is room in their theory for "shared values, a sense of community, and morality." Ulen, *supra* note 24, at 210. They are thus much more in sympathy with the mainstream view of traditional legal scholars who argue in favor of a "public ideal" conception of law. The emergence of a liberal school of L/E represents the most serious challenge to the conservative perspective of the founding fathers.

Finally, a new breed of Chicago School practitioner, associated with the Virginia and strands of the Public Choice Schools, has rejected the property rights orientation and transactional analysis of the Chicago School in favor of a more sophisticated understanding of institutions and strategic behavior of bargaining. *See, e.g.*, Rose-Ackerman, *supra* note 20, at 236. However, because the new theories of institutional economics and strategic behavior have failed to produce determinant theories, these scholars have accepted the possibility of more openness in their analysis than that tolerated by the first generation of L/E scholars. The possibility of indeterminacy has in turn encouraged the second generation of Chicago School scholars to remain relatively agnostic on the strong version of the *law-and-efficiency* hypothesis of the founding fathers.

One important difference then between first and second generation Chicago School scholars centers on the somewhat different research agendas pursued and the degree to which methodologies allow for indeterminant results. While the new breed of Chicago School practitioner believes that the *law-and-efficiency* hypothesis is a useful analytical device, these practitioners are far from convinced that the normative and genetic efficiency claims of the L/E founding fathers continue to make sense in the face of a more sophisticated, less transactional form of law and economics.

46. Ulen, *supra* note 24, at 210.

47. R. COOTER & T. ULEN, *supra* note 25, at 11.

48. *See, e.g.*, *id.* at 12 ("The fundamental hypothesis of the economic analysis is that law is rational.").

49. The behavioral claim of economic analysis holds that legal rules direct behavior by establishing implicit prices or costs for various forms of behavior regulated under law. *See* Kornhauser, *supra* note 45, at 29. The behavioral hypothesis of the new law and economics is said to depart from the so-called *naive* theory of behavior found in traditional legal scholarship. *Id.* at 34. The naive theory of behavior assumes that legal actors conform their behavior *perfectly* to the directives of legal rules found in legal texts. The *naive* theory thus characterizes the methodology of traditional legal scholars who are said to focus on "the study of legal texts: statutes, administrative regulations, and judicial opinions." *Id.* Hence, the traditional legal analyst "scrutinizes these texts to determine what behavior they command, or argues that a text ought to announce some right or duty. In either instance, words, not actions, are the focus of concern." *Id.*

of individual cost and benefit is the *key* to understanding and evaluating legal relations and various rule systems. The behavioral claim of economics establishes the consensus view that "law is rational, and hence analyzable by economic concepts."[50] All practitioners of the movement appear to believe that "rules of law [are] like prices and legal actors [are] like perfectly rational individuals."[51]

If there is an ideological tilt to the law and economics movement it is no longer the result of the conservative perspective of the Chicago School *or* the *law-and-efficiency* hypothesis. Rather, the ideology of this movement can best be explained today in terms of a particular world view which assumes that rationality and economic self-interest establish a universal principle for understanding law and adjudication.[52] The behavioral and positive claims of second generation scholars commit these observers to the view that law and the larger social world can be understood as a system of rational behavior, sometimes influenced by impulses toward efficiency, other times not, but always a product of "objective" reason. In this way, the tenet that "law is rational" characterizes a particular world view based on the belief in a universal, objective knowledge about a particular form of individual motivation.[53]

In the spirit of logical positivism, legal economists maintain a perspective about the world that assumes the necessity of *abstraction*, *universalism*, and *rationality*.[54]

---

50. R. COOTER & T. ULEN, *supra* note 25, at 12.

51. Kornhauser, *supra* note 2, at 353. "Thus, a liability rule, which imposes costs on individuals for various actions, may be seen as setting the price for engaging in those activities." *Id.* at 354. *See also* R. COOTER & T. ULEN, *supra* note 25, at 11. Hence, "the rule that gift promises are generally unenforceable raises the implicit price to those who truly wish to make such a promise and also raises the price of taking action in reliance on such a promise's being fulfilled; the rule that grants an exclusive property right, good against the world, to the person who authors an original novel lowers the costs to the author of defending her work against expropriation and thereby induces her to expend additional resources in writing; the rule that imposes liability on some who fail to take a reasonable amount of precaution raises the price of being careless and thereby increases the amount of precaution consumed." Ulen, *supra* note 24, at 211.

52. Critical legal scholars argue that the ideology of law and economics can best be understood by focusing on the dominant discourse which advocates of this movement utilize to articulate, describe, and conceive of the way the law operates in the world. *See* Kelman, *Misunderstanding Social Life: A Critique of the Core Premises of 'Law and Economics'*, 33 J. LEGAL EDUC. 274 (1983); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1268 (1985) ("In the law and economics approaches, the laws of supply and demand as reflected in price theory, or the processes of free-riding and holdout in institutional economics, are seen simply as facts inherent in social relations, to which law can instrumentally and neutrally adapt.").

53. Roberto Unger has called this the view of *objectivism*—"the belief that the authoritative legal ideas—embody and sustain a defensible scheme of human association." R. UNGER, *supra* note 35, at 2. The perspective of objectivism assumes that "laws are not merely the outcome of contingent power struggles or of practical pressures lacking in rightful authority." *Id.*

Unger's analysis is helpful for understanding the perspective of L/E scholars because it seeks to identify the relationship between methodological methods, professional discourse, and world view. When L/E scholars converse about law they employ a host of metaphors, analogies and cultural symbols to shape opinion, organize perceptions, and defend factual and normative perspectives. *See, e.g.*, Peller, *supra* note 52, at 1151, 1153 (discussing how "legal reasoning is political and ideological in the manner in which legal discourse excludes (or suppresses) other modes of discourse, the way in which it differentiates itself from 'mere' opinion or will."). Embedded within the law and economics vocabulary are a series of assumptions and preconceptions about law and the social world. These assumptions and preconceptions influence the way law and economic scholars categorize facts about reality and behavior under law. They are the unstated points of the analysis which structure the law and economics perspective. *Cf.* Minow, *supra* note 5, at 13 ("such assumptions work in part through the very structure of our language, which embeds the unstated points of comparison inside categories that bury their perspective and wrongly imply a natural fit with the world.").

54. Law and economics scholars do not deny that their claims are "to some extent" oversimplified and unrealistic. *See* R. POSNER, *supra* note 18 ("But it is true that the assumptions of economic theory are one-dimensional and pallid when viewed as *descriptions* of human behavior. . . . However, abstraction—reductionism if you like—is of the essence

The language of law and economics continues to assume that legal analysis must proceed in the way that scientific inquiry proceeds—the reduction of complex phenomena into simplified abstractions of universal law. This quasi-scientific perspective argues that there is an acceptable standard for judging legal arguments.[55] It presumes that lawyers can discover a relatively stable basis for justifying legal results by universalizing propositions about the law from speculations about the economic motivations of homogeneous individuals. The "law is rational" hypothesis becomes an acceptable, unproblematic standard for judging legal argument.[56]

Unlike traditional legal scholars who focus their research on authoritative legal texts, L/E scholars look beyond legal texts in developing economic predictions based on what they expect rational, self-interested legal actors to do when confronted with the directive force of legal rules.[57] Most L/E members incorporate into their research a "naive" understanding of the behavioral claim which assumes that the directive force of legal rules has no effect on the underlying preference structure of legal actors.[58] In focusing on the consequences of behavior under law, the L/E observer

---

of scientific inquiry."). Others, including myself, have been critical of the methodological claim of law and economics. *See, e.g.*, Minda, *Lawyer-Economist*, *supra* note 20, at 466–72 (arguing that the lawyer-economists' methodological claims are only one side of a continuing debate about the role of simplifying assumptions in economic theory); Sen, *Rational Fools: A Critique of Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317, 326–29 (arguing the current economic models fail to reflect important behavioral characteristics). *See also* Fletcher, *Fairness and Utility and Tort Theory*, 85 HARV. L. REV. 537 (1972); Tribe, *Policy Science: Analysis or Ideology?*, 2 PHIL. & PUB. AFF. 66 (1972); Tribe, *Technology Assessments and the Fourth Discontinuity: The Limits of Instrumental Rationality*, 46 S. CAL. L. REV. 617 (1973). L/E scholars, however, defend their claims by arguing that what they claim about behavior and the nature of the common law can be justified methodologically as hypothetical assumptions useful for prediction. They assert that their claims are methodologically valid because they predict behavior with reasonable accuracy. However, critics claim that practitioners of this movement appeal to the prestige of the natural sciences in their effort to create a system of legal thought that is "objective, neutral, and apolitical." Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980).

55. According to law and economics, legal arguments must be judged in terms of whether they logically support the predictions or claims of law and economics. *See* White, *supra* note 2.

56. Rejected is the idea of legal argument as an example of *commitment* or what Jerry Frug has called "argument as character." *See* Frug, *Argument*, *supra* note 15, at 872 ("Argument as Character . . . involves examining the elements of [legal argument] such as facts, precedents and principles, not in terms of how they support the argument's conclusion but in terms of how they form attitudes or induce actions in others." (footnotes omitted)). In his critique of the behavioral foundations of economic theory, Amartya Sen has argued that the assumption of egoistic self-interest, which is central to the economic theories of revealed preference and rational choice, fails to account for behavioral characteristics based on the concept of commitment. Sen, *supra* note 54, at 326–29. Commitment is defined by Sen "in terms of a person choosing an act that he believes will yield a lower level of personal welfare to him than an alternative that is also available to him." *Id.* at 27. The behavioral characteristic of commitment may have its counterpart in the notion of lawyer as partisan, or public-interest notions of lawyering.

57. The behavioral claim of economic analysis assumes that legal actors conform their behavior *imperfectly* to legal rules because the relationship between law and behavior depends on the actor's rational calculation of self-interest of legal rules. *See, e.g.*, Kornhauser, *supra* note 45, at 34; Ulen, *supra* note 24, at 211. A legal rule may influence behavior, *ex ante*, by influencing the choice to engage in a particular form of conduct, or influence action *ex post*, by structuring subsequent bargaining in settlement negotiations between the parties. Kornhauser, *supra* note 45, at 31.

58. At least one L/E scholar has noted that there is a problem with this *naive* view of economic behavior in that it assumes that the autonomous legal actor has a utility preference function which is independent of the directive force of law. *See, e.g.*, Kornhauser, *supra* note 45, at 43–44. The *naive* theory of economic behavior thus assumes that there is an objective prior self to which could be assigned preferences and attitudes, measured and evaluated a priori. If law affects the preference structure of legal actors by influencing their utility preferences, then the *naive* theory of economic behavior is difficult to conceive or sustain.

A more sophisticated view of the behavioral claim assumes that legal rules may have normative force in influencing behavior by altering the legal actor's desires or preferences. *See* Kornhauser, *supra* note 45, at 43–44. Kornhauser argues that legal rules can have normative force by appealing to the legal actor's preference for law conforming behavior or by directly influencing the actor's preferences. *Id.* The more sophisticated understanding of the behavioral claim of

also places less attention on the legal concepts of rights, as a normative framework for establishing correlative duties, and instead focuses on behavioral consequences of various bundles of legal entitlements. Consequently, "rights and their correlative duties no longer hold center stage" in the economic analysis of law.[59]

The new power talk of economics has encouraged lawyers to make a shift in their analytical perspective to a new normative perspective of rationality that recharacterizes legally relevant facts as costs and benefits and frames normative issues in the narrow context of microeconomic theory.[60] This shift in analytical perspective has allowed the legal theorist to restructure legal categories in fundamental ways. Lawyers employing the insights of the lawyer-economist might argue that the seemingly unrelated subjects of contract, property, tort, and criminal law can be analyzed from a more universal perspective. Lawyers may claim that securities fraud problems are not unlike nuisance problems caused by air pollution.[61]

Law and economics also offers a new approach to legal scholarship. L/E scholars argue that legal scholarship should concentrate on formulating and then testing falsifiable, law-like generalizations about social life.[62] The underlying approach appears to be that law can be studied and understood as a "science." While law and economics scholars appear to agree that traditional legal scholarship is flawed by ambiguity in purpose and method, they argue that the current doctrinal justifications of the law can be *grounded* by economic analysis. While only the Chicago School founders argue that the principle of wealth maximization can ground legal analysis, all L/E scholars believe that judges can employ an understanding of rational behavior as a universal standard for analyzing law "objectively." It is in this important sense that the "new" law and economics purports to provide a universal method for achieving a comprehensive understanding of legal issues.[63]

---

economics thus requires the analyst to look beyond behavior to politics. Hence, Kornhauser's development of a more sophisticated understanding of the behavioral claim of economics draws from Critical Theory of Gramsci and his concept of hegemony. *See* Kornhauser, *supra* note 2, at 375–76 (citing A. GRAMSCI, SELECTIONS FROM THE PRISON NOTEBOOKS 53–60, 206–09, 228–29, 245–46 (1971)). This aspect of Kornhauser's L/E scholarship is unique. He appears to be the only L/E scholar developing an economic analysis of law that synthesizes concepts in economic theory with related ideas that CLS scholars use. *But see infra* note 70. In acknowledging that legal rules may establish *hegemonic* structures that shape and legitimize economic behavior, Kornhauser has uncovered a theoretical point raised by critical legal scholars which has gone largely unnoticed in the law and economics literature. This development in L/E scholarship raises the possibility of a synthesis or partnership between the reformist wing of the second generation of L/E scholars and CLS.

59. *See, e.g.*, Kornhauser, *supra* note 45, at 31 (discussing the role of the behavioral claim of economics in the economics of property rights).

60. The new economic analysis of law has therefore established what Bruce Ackerman has called "a new form of power-talk" which lawyers have utilized to restructure the framework of traditional legal analysis. B. ACKERMAN, *supra* note 3, at 46. *See also* Gjerdingen, *The Coase Theorem and the Psychology of Common Law Thought*, 56 S. CAL. L. REV. 711 (1983). While Ackerman's focus was on explaining the influence of the Chicago School, the general point he makes has relevance for understanding the new forms of law and economics developing in the wake of the second wave of L/E scholarship.

61. "While a layman might think that there is almost nothing in common between, say, the problems raised by securities fraud and those raised by air pollution, a common externality analysis makes it possible for lawyers in one field to learn from the regulatory experience in the other." B. ACKERMAN, *supra* note 3, at 59.

62. *See, e.g.*, Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1211 (1981).

63. The idea of law as a universal body of discoverable principle is not new. *See* C. LANGDELL, PREFACE TO SELECTION ON CASES ON THE LAW OF CONTRACTS (1879). *See also* Horwitz, *supra* note 54; Minda, *Lawyer-Economist*, *supra* note 20, at 439–40 (1978). In Langdell's view, law was a "science" consisting of fundamental "principles or doctrines" that could be discovered by examining a relatively small number of appellate decisions. *See generally* B. Ackerman,

If economic analysis can be applied "across the board" to every legal subject,[64] then lawyers have a powerful tool for understanding law and legal development. This new tool, however, questions the idea that law can be studied "autonomously" through traditional methods of legal analysis. The "new" economic analysis of law requires the legal profession to look beyond the law to discover a new medium for resolving contested views of policy, which in turn requires a new understanding of law's legitimacy.[65]

### B. *Critical Legal Studies*

While law and economics began attracting the attention of legal scholars, a distinct movement in legal studies established itself as a major critic of both traditional and law and economics scholarship. This new academic movement—*Critical Legal Studies* (CLS)—surfaced in the late 1970s when a group of legal scholars formed a social and professional network called *The Conference on Critical Legal Studies* and began publishing critical essays on various legal subjects.[66] Like the law and economics scholar, the CLS scholar seeks to develop a totalistic critique of legal doctrine, but does so by using different nonlegal methodologies and insights. But unlike L/E, CLS is an intellectual, social, and political movement which links its intellectual projects with the political and social aspiration of its membership.

According to a CLS conference statement, CLS seeks "to explore the manner in which legal doctrine and legal education and the practices of legal institutions work

---

*Introduction: On the Role of Economic Analysis in Property Law*, in ECONOMIC FOUNDATIONS OF PROPERTY LAW (B. Ackerman ed. 1975).

64. *See* R. POSNER, *supra* note 18.

65. *See also* Minow, *supra* note 2, at 89 (arguing that behind each of the new trends in law, including law and economics, is "a brooking doubt about whether law deserves a privileged place in resolving conflict and ordering society").

66. Critical legal studies emerged as an identifiable movement with the foundation of the Conference on Critical Legal Studies in 1977. The scholarship of this movement also exhibits generational conflicts. The "first wave" of critical legal studies scholarship appeared on the academic scene during the late 1970s when a handful of legal scholars on the "left" sought to develop various critical strands of post-realist scholarship. The "first wave" turned to interdisciplinary traditions of continental philosophy and literary criticism to develop a new left critique of mainstream scholarship. The "second wave" of CLS scholarship has been generated by a new group of critical scholars, many of whom studied under CLS scholars, "a generation which sees its work as a response to both (mainstream and CLS scholars) and often writes in the argot of 'post-modernism,' 'post-structuralism,' or 'feminism.'" D. Kennedy, A Rotation in Contemporary Legal Scholarship (Bremen conference paper, 1986 Conference of American and German Traditions of Sociological Jurisprudence and Critical Legal Thought, Bremen, Germany) (unpublished manuscript by David Kennedy on file with The Ohio State Law Journal) [hereinafter *Rotation*]. The post-modern CLS scholar associated with the "second wave" tends to prefer interdisciplinary sources which respond to and challenge the critical literature relied upon by the first generation of CLS scholars. The move from first wave to the post-modern scholarship of the second wave has been a move from the critique of indeterminacy to the study of argument, rhetoric, and conversation. *See, e.g.*, Berman, *Sovereignty in Abeyance: Self-Determination and International Law*, 7 WIS. INT'L L.J. 51 (1989); Frug, *Argument*, *supra* note 15; Kennedy, *A New Stream of International Scholarship*, 7 WIS. INT'L L.J. 1 (1989). This shift within generations of CLS "has been conducted far more overtly as a transformation in the political commitments and deployments of the movement than as a change in interdisciplinary focus." Kennedy, *Rotation*, *supra*, at 52. For various internal views of the critical legal studies movement see M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 114–50 (1987); R. UNGER, *supra* note 35; Schlegel, *Notes Toward an Intimate, Opinionated and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1984). For the psycho-social history commenting on the "state of the movement," see Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 CARDOZO L. REV. 1013 (1985) [hereinafter *Psycho-Social*]. The intellectual component of CLS is described in R. UNGER, *supra* note 35. For a bibliography of CLS scholarship see Kennedy & Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

to buttress and support a pervasive system of oppressive, inegalitarian relations."[67] While CLS scholarship evinces a richly diverse set of opinions and perspectives, CLS scholars (CRITS) as a group generally attempt to show how the dominant tradition in legal scholarship (as well as the emerging tradition represented by the law and economics movement) has served to justify domination and privilege through an abstract discourse which claims neutrality in process and outcome.

A number of commentators have suggested that the intellectual component of CLS is difficult to characterize because CRITS only share antipathy toward traditional views of law and do not advocate a common method or approach to legal scholarship.[68] It has been said that "while law and economics scholars seem 'divided by a common methodology,' critical legal scholars seem united only in a shared antagonism."[69] Critical legal studies is thus typically characterized as a "negative" or "destructive" movement; one that criticizes without offering either a constructive program or specific standard of reference for judging.[70]

Martha Minow, however, has argued that the CLS "school is recognizable in its commitment to explain both that legal principles and doctrines are open-textured and capable of yielding contradictory results, and that legal decisions express an internal dynamic of legal culture contingent on historical preferences for selected assumptions and values."[71] She has identified four "activities" in which CLS scholars are known to engage: (1) "[t]he critical scholar seeks to demonstrate the indeterminacy of legal doctrine: any given set of legal principles can be used to yield competing or contradictory results;"[72] (2) "[t]he critical scholar engages in historical, socioeconomic analysis to identify how particular interest groups, social classes, or entrenched economic institutions benefit from legal decisions despite the indeterminacy

67. Statement of Critical Legal Studies Conference, *quoted in* CRITICAL LEGAL STUDIES (P. Fitzpatrick & A. Hunt eds. 1987).

68. *See, e.g.*, Kornhauser, *supra* note 2, at 352.

69. *Id.* at 64. Kornhauser's description of critical legal studies is both *tentative* and somewhat *inaccurate*. His understanding of critical legal studies is tentative because he was unable to "characterize" the CLS program or "list, as [he] did for law and economics, a small number of theses commonly presented by critical legal scholars." *Id.* at 364. His tentative conclusions about critical legal theory are somewhat inaccurate because much of what he has to say about critical legal theory derives from a book by Raymond Guess, THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL (1981) which is, as its title suggests, about the social theories associated with Habermas and the German philosophers associated with what is known as the "Frankfurt School." Most critical legal scholars in America would take issue with much of the scholarly enterprise of the Frankfurt School and its attempt to construct an empirically informed theory of moral truth. The Guess book does not even mention critical legal studies nor does it discuss any of the current CLS literature. It is difficult to understand why Professor Kornhauser believes that the Guess Book is relevant to "[t]hose seriously interested in understanding Critical Legal Studies." Kornhauser, *supra* note 2, at 372. Indeed, the Guess book may in fact give the uninformed reader a *misleading* impression that the critical legal studies movement is linked with the Frankfurt School movement associated with Habermas.

70. Kornhauser, *supra* note 2, at 372. ("Both the diversity of views among members of the Critical Legal Studies movement and the largely destructive nature of their writings thus far forestall a neat characterization of the Critical Legal program." *Id.* at 364.) *See also* Fiss, *supra* note 2, at 10 ("Critical Legal studies scholars want to unmask the law, but not to make law into an effective instrument of good public policy or equality."); Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 260 (1984) ("Critical legal writing systematically evades the question, 'Compared to what?' ").

71. Minow, *supra* note 2, at 83.

72. *Id.* at 84. "To assist this demonstration, the critical scholar may adopt a method-like structuralism developed in linguistics, anthropology, psychology, and literary analysis. The scholar unearths a deep structure of categories or tensions at work behind the surface layer of legal talk, and develops a grammar or guide to those underlying tensions and to the techniques by which they are masked or expressed." *Id.* (footnote omitted).

of the legal doctrines;"[73] (3) "the critical scholar tries to expose how legal analysis and legal culture mystifies outsiders and legitimates its results;"[74] and (4) "the critical scholar may elucidate new or previously disfavored social visions and argue for their realization in legal or political practice in part by making them part of legal discourse."[75]

The "four activities" depicted by Minow contain implications drawn from the different projects of various critical legal scholars. For example, scholars following Duncan Kennedy's notion of a "fundamental contradiction"[76] have sought to demonstrate the "indeterminacy" of legal doctrine by describing in minute detail how various legal doctrines rotate around contradictory values or opposing polarities such as objective/subjective, public/private, and so forth.[77] In describing how legal rights favor particular interest groups or "mystify" their results, critical legal scholars develop critiques based on the psychoanalytic concept of denial[78] or the Gramascian notion of legitimation and hegemony.[79] Still others seek to develop a new historiography to describe how American legal history can be understood as a "winner's story" about how a long-term political tradition displaced other traditions and how law developed to serve the needs of American corporate enterprise and industrialization.[80] Hence, there is no single method or epistemology which describes critical legal theory.[81]

---

73. *Id.* at 84–85. "This activity may involve identifying competing visions or possibilities alive in particular legal debates and reforms, detailing the ways in which one vision prevails over others, and describing the difference between legal norms as self-expressed and the law in practice." *Id.* at 85 (footnote omitted).

74. *Id.* at 85. "This inquiry takes the scholar back to legal materials, instead of social and historical ones, but the scholar asks expressly, how does the legal community construct itself through a system of shared meanings, made to look natural rather than chosen and how do legal roles and the level of legal discourse distance legal officials and readers from their own experiences and moral judgments." *Id.* (footnotes omitted).

75. *Id.* at 84–85. "For this enterprise, the scholar may seize upon literature, anthropology, and other expressions of human aspirations and achievements." *Id.* at 85–86. Mark Kelman has recently offered a somewhat similar description of what he calls the "four-part critical method of CLS." *See* Kelman, *supra* note 52, at 3–5. *See also* Tushnet, *Critical Legal Studies: An Introduction to Its Origins and Underpinnings*, 36 J. LEGAL EDUC. 505 (1986).

76. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979) [hereinafter *Blackstone's*].

77. *See, e.g.*, Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Kennedy, *Theses about International Law Discourse*, 23 GERMAN YEARBOOK OF INTERNATIONAL LAW 353 (1980); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

78. *See, e.g.*, Gabel, *The Phenomenology of Rights-Consciousness and the Part of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

79. *See, e.g.*, Gabel & Feinman, *Contract Law as Ideology*, in THE POLITICS OF LAW 172 (D. Kairys ed. 1982); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937–1941*, 62 MINN. L. REV. 265 (1978).

80. *See, e.g.*, M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780–1860 (1977); M. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810–1860: CONSIDERATION OF HUMANITY AND INTEREST (1981); Horwitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57 (1987).

81. As Minow has noted, "Critical legal scholars often resist or reject efforts to systematize their work, as they seek to express claims of textual ambiguity and historical contingency in the very methods of their work." Minow, *supra* note 2, at 83. An illustration of this tendency in CLS scholarship can be seen in Duncan Kennedy's recanting of the "fundamental contradiction" which is attributed to his own work. *See* Kennedy & Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 36 (1984) ("I've recanted the fundamental contradiction, and also altruism versus individualism. I think I'm also on the verge of recanting the critique of rights.").

It may also be evident that critical legal theory, or at least the various approaches which serve to characterize critical theory, need not be exclusively a left-wing enterprise even though it has been associated with the political left aspirations of CLS. There is no theoretical reason why the critiques of indeterminacy, legitimation, or even the new historiography could not be used by right-wing lawyers to attack progressive legal reform programs. Indeed, liberal lawyers have

Perhaps the strongest feature of CLS theory and practice is the presence of an on-going internal critique. For example, women and racial minorities within CLS have shown how law can be understood as a political discourse of power contextualized within a social and legal description established by white male discourse.[82] Such critiques have challenged the dominance of white male discourse and have transformed the intellectual and political nature of the movement into a movement embracing race, class, and gender differences. Hence, a new wave of CLS scholarship has surfaced which reacts against progressive theories of antidiscrimination law and challenges the ability of white elites of all political persuasions to understand how racist attitudes and assumptions have actually operated within legal ideology to reinforce social domination on the basis of class and race.[83] Feminist legal scholars associated with CLS have also challenged and transformed CLS discourse by bringing the gender perspective into wider view. The internal dynamic of such criticism within the CLS movement has strengthened the nature of the external critique made by CRITS in their response to other legal perspectives.

In critiquing law and economics scholarship, for example, CLS scholars have asserted that law is "rational" or "efficient" only because it appears to conform to a particular political ideology which seeks to justify and explain race, class, and gender disadvantage and privilege as the logical consequence of rational private choice.[84] The "normative" and "genetic" claims of Chicago School L/E scholars are thus seen by CLS scholars as highly refined statements of the particular world

---

objected to CLS scholarship because they assume the critiques of CLS will undermine and destabilize the legal justifications for believing in the coherence of the liberal conception of rights.

Hence, liberal legal scholars assert that a coherent theory of rights is necessary to restrain the exercise of arbitrary power. *See, e.g.*, Fiss, *supra* note 2, at 11 ("when I read a case like *Brown v. Board of Education*, for example, what I see is not the unconstrained power of the justices to give vent to their desires and interests, but rather public officials situated within a profession bounded at every turn by the norms and conventions that define and that constitute profession."). *See also* Carrington, *supra* note 7; Hegland, *Goodbye to Deconstruction*, 58 S. CAL. L. REV. 1203 (1985).

CRITS argue that the liberal conception of rights is simply too indeterminant to sustain the claims liberal scholars make. On the other hand, CRITS utilize liberal formulations of community and justice in arguing for the social transformation of liberalism. *See, e.g.*, Kennedy & Gabel, *supra*, at 4 (Duncan: "My line . . . is that it's a good idea to call on and evoke all historic formulations, the rhetorics, the preacherly or the hortatory or demagogic rhetorics of social transformation movements.").

82. Nearly everyone within the CLS movement has come to a sharpened awareness of gender and race perspectives. Fem-Crits have struggled to reveal and change those aspects of CLS discourse and culture which have established inequality of power between men and women. The transformative project of Fem-Crits has solidified a distinctively feminist edge to CLS theory and practice despite the dominant but changing influence of white male discourse. *See, e.g.*, Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School"*, 38 J. LEGAL EDUC. 61 (1988). *See also* Kennedy, *Psycho-Social*, *supra* note 66. People of color have recently advanced powerful critiques of progressive theories of racism to show how critical scholars have failed to appreciate the reality of the racially oppressed and the choices actually available to racial minorities. *See, e.g.*, Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV 1331 (1988); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L.L. REV. 323 (1987). Some have questioned the validity of critical legal strategies which reject the language of legal "rights." *See* Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L.L. REV. 401 (1987); Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L.L. REV. 301 (1987). In exposing the racial and sexual politics of CLS and the larger culture, minority groups within CLS have provoked the movement to address issues from the racial, gender, and class perspective. The dynamic of this internal critcism has been fueled, in part, by a pervasive theoretical skepticism. *See, e.g.*, Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 773–78 (1985).

83. *See* Crenshaw, *supra* note 82, at 1366–87.

84. *See infra* notes 121–23 and accompanying text.

view embedded within the elite legal culture which law and economics seeks to explain and refine.[85] Critical legal analysts have thus argued that there is no politically neutral, coherent way to talk about law and economics because its internal logic depends upon concepts which are artificially constructed from a particular world-view perspective which fails to appreciate the contextual consequences of race, class, and gender differences.[86] CLS scholars contend that the concept of transaction *costs* found in first generation L/E scholarship fails to identify what counts as a disutility[87] or whether *value* should be measured from the perspective of possession or expectation.[88] The efficiency claims of L/E scholars are thus seen to be too contestable to support the types of claims the scholars advanced about law.[89]

CLS scholars thus present a picture of the world that seeks to reveal the diversity of culture: the differences of race, class, and gender. They argue that the richness of human experiences cannot be captured by abstract, universal values, or by rational desires. According to one of the founders of this movement, Duncan Kennedy, human beings are simultaneously pulled by two opposing values and desires: "One is the need to preserve independence from the outside world. The other demand is the equally basic need of the self to live in a world transparent to its mind and responsible to its concern, a world with which it can therefore be at one."[90] Kennedy argues that all theories of individualism must struggle to combine the negative felt experience of alienation and isolation with the positive yearning for connection and community.[91]

Liberal legalism,[92] the label CLS attributes to mainstream legal scholarship, is

---

85. *See, e.g.*, M. KELMAN, *supra* note 66, at 114.

86. *See id.* at 142. ("The CLS claim, quite simply, is that there is no absolutely politically neutral, coherent way to talk about whether a decision is potentially Parieto efficient, wealth maximizing or, whether its benefits outweigh its costs.").

87. "Cost means no more than disutility . . . . If you are a liberal, and believe that there is a lot of good as well as a lot of bad in human nature, it is possible to construct, on this model, an efficiency argument for every one of the state interventions the conservatives claim are paradigmatically inefficient." Kennedy, *supra* note 29, at 398, 400.

88. This is the "offer-asking problem" advanced by CLS scholars to critique conservative interpretations of the Coase Theorem. *See* Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669, 678–95 (1979); Kennedy, *supra* note 29, at 401–21. Liberal L/E scholars seek to deflect the criticism of CRITS by arguing that CRITS excoriate "strawmen"—the first generation of Chicago School practitioners who are no longer representative of the L/E movement. *See, e.g.*, Rose-Ackerman, *supra* note 20, at 251.

89. *See, e.g.*, Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

90. R. UNGER, KNOWLEDGE AND POLITICS 205 (1975). *See also* Kennedy, *Blackstone's*, *supra* note 76.

91. "It is that essential human condition which carries the seeds of our twin fears of alienation and annihilation, as well as our twin desires for autonomy and attachment." West, *supra* note 2, at 51 (describing the "fundamental contradiction" in the work of Duncan Kennedy). *See also* R. UNGER, *supra* note 90, at 217 (describing the "paradox of sociability" as the "problem posed by the relation between self and others").

92. Karl Klare has defined the term *liberal legalism* as follows:

> Legalism has been defined as "[t]he ethical attitude that holds moral conduct to be a matter of rule following, and moral relationships to consist of duties and rights determined by rules." "Liberal Legalism" is a particular historical incarnation of the legalist outlook, which characteristically serves as the philosophical foundation of the legitimacy of the legal order in capitalist societies. Its essential features are the commitment to general, democratically promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics, and personality from judicial action. Liberal legalism also consists of a complex of social practices and institutions that complement and elaborate upon its underlying political philosophy and jurisprudence. With respect to its modern Anglo-American form, these include adherence to precedent, separation of the legislative (prospective) and the judicial (retrospective) functions, the obligation to formulate legal rules on a general basis (the notion of ratio decedendi), adherence to complex procedural formalities and the search for specialized methods of analysis ('legal reasoning') . . . . The rise and elaboration of the ideology,

said to deny the values of community and human connection by a universal perspective that emphasizes the importance of only certain values—the value of autonomy and of individual self-interest. A central goal of CLS scholarship is to reveal how traditional modes of legal analysis prioritize the values of autonomy and self-interest and thus belie the phenomenological experience of living within a society that values autonomy, but yearns for community; glorifies reason, but longs for passion. Hence, while law and economics offers a new technocratic discourse to legitimate the universal perspective of mainstream legal thought, CLS interjects a new phenomenological discourse of political critique.

The behavioral claim adopted by most CRITS assumes that law is a culture which shapes beliefs and attitudes about the status quo. The CLS view assumes that the preferences of legal actors are shaped by the ruling orthodoxy.[93] Adherents of CLS movements thus assert that "[l]ike religion in previous historical periods, the law becomes an object of belief which shapes popular consciousness toward a passive acquiescence or obedience to the status quo."[94] What CLS scholars purport to do is to identify certain values characterized as part of the *ideal* of law and then to show how the dominant discourse in law has obstructed the realization of those ideals.[95] CLS scholars say that they seek to reveal how a commitment to the ideals of law would require more, not less, discussion about how people can learn to actually realize the ideals of a democratic society within the legal system.[96]

Most CRITS practice a form of *oppositional existence* in that they seek to challenge and transform the very practices which define *their* profession.[97] Some, but not all, reject the idea of liberal scholars that legal analysis and argumentation can be grounded in, or rendered determinant by, a mode of discourse claiming to be humanistic, fair, and just.[98] Some critical theorists, referred to within the movement as the "rationalists" or "northerners," argue that critical theory can be used to re-rationalize mainstream legal doctrine and provide a normative basis for "recon-

---

practices, and institutions of liberal legalism have been accompanied by the growth of a specialized, professional caste of experts trained in manipulating legal reasoning and the legal process.

Klare, *supra* note 79, at 276–77 (footnotes omitted).

93. The behavioral claim of CLS, which assumes that preferences are not exogenous but influenced by law, has been recognized in the work of non-CLS legal scholars. *See, e.g.*, Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1131 (1986).

94. Gabel & Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369, 374 (1982–83).

95. *See* Minda, *supra* note 15, at 719.

96. As Jerry Frug has put it, "what we need to discuss is our different conceptions of what our profession and our nation should become; we need to build ways of talking that allow us—all of us—to argue about our future while still making practical decisions about alternative courses of action." Frug, *Language as Power*, 84 COLUM. L. REV. 1881, 1895–96 (1984).

97. *See, e.g.*, Binder, *supra* note 10, at 35–36 ("Their aim is to persuade people in power that violent protest by underprivileged people in America is rational, justifiable, even inevitable."). Duncan Kennedy has advanced this form of practice as a method for resisting hierarchical power of legal institutions. *See* D. KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY—A POLEMIC AGAINST THE SYSTEM (1983). *See also* Kennedy, *Legal Education and the Reproduction of Hierarchy*, 32 J. LEGAL EDUC. 591 (1982). The idea behind Kennedy's proposal for legal education has been described as "a sort of law school cultural revolution." Menkel-Meadow, *supra* note 82, at 69.

98. CLS members, for example, have claimed that traditional legal scholarship has helped create and legitimate a world that tolerates wide discrepancies in wealth, class, and social position. *See* Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275 (1981).

struction" after the demise of liberal legalism.[99] Other critical theorists, known as the "irrationalists" or "southerners," argue that all reconstruction efforts are doomed because attempts at reconstruction are all subject to the indeterminacy critiques.[100] The southerners thus apply critical techniques relentlessly to all descriptive and normative rationalization endeavors.[101]

Nearly everyone within the CLS movement has sought to demonstrate the *indeterminacy* or *incoherence* of many of the legal profession's traditional beliefs and theories. The "hallmark" of CLS is unceasing *critique*, sometimes called "*trashing*,"[102] of liberal claims that seek to establish the coherence and benevolence of established theory and doctrine.[103] In attacking the idea that it is possible to objectively demonstrate the "truth" of abstract claims about law and the legal

---

99. *See, e.g.*, Dalton, *Book Review*, 6 HARV. WOMEN'S L.J. 229 (1983) (reviewing THE POLITICS OF LAW (D. Kairys ed. 1982)) (describing the rationalist/irrationalist split); D. Kennedy, The American Critical Legal Studies Movement In a Nutshell 3 (June 1984) (unpublished manuscript on file with The Ohio State Law Journal) (describing north/south split). The use of such terminology within CLS (rationalist/irrationalist, northerners/southerners) has perhaps had unfortunate consequences, resulting in confusion.

100. D. Kennedy, *supra* note 99, at 3. *See also* Kennedy, *Spring Break*, 63 TEX. L. REV. 1377, 1417–23 (1985) [hereinafter *Spring Break*].

101. D. Kennedy, *supra* note 99, at 6. The debate between the northerners and southerners within CLS has involved nearly every critical methodological issue, but has been especially prevalent in the famous "rights debate" within critical legal studies. *See Symposium—Rights Debate*, 62 TEX. L. REV. 1363 (1984). The northern position on rights accepts the idea that rights can support progressive efforts even though the liberal conception is rejected. The southern position on rights argues that all attempts to define and implement a theory of rights have failed to establish a coherent analysis and that "rights imagery projects an imaginary world of abstracted social harmony that will always be false." D. Kennedy, *supra* note 99, at 3.

102. *See* Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984). *See also* Binder, *supra* note 10 (describing how CLS advocates practice a confrontational form of legal criticism).

103. More recently a new breed of second generation CLS scholar, the *postmodern*, has sought to break loose from all claims seeking to demonstrate that legal texts are either "indeterminant" or "determinant." *See, e.g.*, Kennedy, *Spring Break*, *supra* note 100, at 1420. *See also* Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Peller, *supra* note 52. The *postmodern* critics have argued that the various left, liberal, and right-wing legal scholar's positions on the supposed determinacy or indeterminacy of the law are the products of highly contested interpretations of law and social structures. For example, to discredit "vulgar" and "dogmatic" accounts of indeterminacy associated with the founders of CLS, a second generation CRIT, David Kennedy, has argued that the indeterminacy thesis of CLS may rest on unstable or "indeterminant" positions. *See* Kennedy, *Spring Break*, *supra* note 100, at 1420. *See also* D. Kennedy, *Rotation*, *supra* note 66. David Kennedy's scholarship deliberately resists all tendencies to locate legal criticism in some authoritarian practice. He thus appears to be constantly reexamining his positions, avoiding moments of closure and fixation. This aspect of postmodern scholarship drives some critical legal scholars "crazy." *See* Freeman, *Racism, Rights and the Quest of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295, 321 n.75 (1988) (arguing that David Kennedy's scholarship seems "simply academic—a congealed and reified by-product of a forgotten political moment."). Another postmodern critic, Gary Peller, has argued that the posture of postmodernism is necessary to "face the inevitability of politics in the fullest sense." Peller, *supra* note 52, at 1290.

Postmodernism has also become linked with feminist theory as feminists within CLS began to fashion a new powerful form of feminist criticism. Francis Olsen's work on gender and sexuality, for example, has utilized deconstructive methods to show how legal concepts of equality theory simultaneously privilege gender roles by classifying on the basis of male and female qualities such as rational/irrational, active/passive, thinking/feeling, and so forth. Olsen, The Sex of The Law (unpublished manuscript on file with The Ohio State Law Journal) (Olsen's paper is discussed in Menkel-Meadow, *supra* note 82, at 74.) In advocating a new strategy of sexuality based on *androgyny*, Olsen's work can be seen as an effort to upset the traditional understanding of sexual roles with the explicit goal of bringing about revolutionary change in gender relations. *See also* Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985) [hereinafter *Re-Reading Contracts*].

Postmodern critical legal scholars have thus elaborated upon the themes of openness and closure, sometimes in a playful spirit, and sometimes in a serious mode, to reveal the contingency in either the "text" or the "analysis" of others. Sometimes the form of criticism characteristic of postmodern work focuses on the notion of *movements* within the *text*—the way ideas and concepts become located within positions which constantly move between alternative positions which assert either negation or connection. *See, e.g.*, J. DERRIDA, SPEECH AND PHENOMENA (1973).

system, CLS challenges the liberal notion that law is distinct from politics and that knowledge is distinct from power.[104] A popular CLS slogan is that "law is politics."

In adopting a critical perspective to law practice, CLS scholars advance descriptions of the legal system showing how practices within the system "create a political culture that can persuade people to accept both the legitimacy and the apparent inevitability of the existing hierarchical arrangement."[105] Peter Gabel and Paul Harris have argued, for example, that the judicial function is "heavily laden with ritual and authoritarian symbolism" that "signifies to people that those in power deserve to be there by virtue of their majesty and vast learning."[106] They maintain that when "[t]aken as a whole, this display of legal symbolism lays the deep psychological foundation for a political culture that substitutes identification with authority for real democratic participation and substitutes fantasies of patriotic community for an actual community founded upon love and mutual respect."[107] The "conservative power of legal thought is not to be found in legal outcomes that resolve conflicts in favor of dominant groups, but in reification of the very categories through which the nature of social conflict is defined."[108]

As an alternative, critical legal thinkers have argued that lawyers must be trained to de-emphasize their role as technical experts by understanding the moral and political consequences of the work lawyers perform. William Simon has claimed that lawyers must represent clients to advance the clients' interests and values instead of the lawyer's interests.[109] The goal is to reconceptualize the attorney's facilitating role in the creation of "nonhierarchial communities of interests."[110] Instead of asserting their expertise as a function of hierarchical power, lawyers would serve to empower those who are disempowered by the cultural and intellectual hierarchies of the legal system.[111]

The CLS perspective about law also influences the way critical scholars understand adjudication. In his essay on the critical phenomenology of judging,[112] Duncan Kennedy describes the experience of a judge struggling to reach a specific

---

104. *See* R. UNGER, *supra* note 90, at 217 (describing the "paradox of sociability" as the "problem posed by the relation between self and others.").

105. Gabel & Harris, *supra* note 94, at 372.

106. *Id.* Hence, "[e]ach discrete conflict is treated as an isolated 'case'; the participants are brought before a judge in black robe who sits elevated from the rest, near a flag to which everyone in the room has pledged allegiance each day as a child; the architecture of the courtroom is awesome in its severity and in its evocation of historical tradition; the language spoken is highly technical and intelligible only to the select few who have been 'admitted to the Bar.'" *Id.*

107. *Id.* at 373.

108. *Id.* As Gabel and Harris have explained:

> In a genuinely humane social order, the law would express provisional forms of moral consensus about all aspects of social life, arrived at through a genuinely participatory process. In our current system, such discussion is foreclosed by virtue of the abstract or removed character of the political process. Instead, the legality of hierarchy is frozen in historical rules which assume that the social relations expressed through the existing institutions of property, contract, and the modern corporations are extensions of human freedom.

*Id.* Reification is defined as the "attribution of a thing-like or fixed character [given] to socially constructed phenomena." *Id.* at 373 n.10.

109. *See* Frug, *supra* note 96, at 1894; Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29 (1978).

110. Frug, *supra* note 96, at 1894.

111. Gabel & Harris, *supra* note 94, at 374.

112. Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986).

outcome in the context of choosing between competing conceptions of law. Kennedy argues that the "experience" of judging "is a kind of work with a purpose, and here the purpose is to make the case come out the way [the judge thinks] justice tells [him] it ought to [come out], in spite of what seems at first as the *resistance* or *opposition* of the 'law.'"[113] Kennedy offers a phenomenological description of the reasoning process judges utilize in creating legal justifications for decisions they make based upon precedent, policy, and social and historical arguments. From the perspective of his hypothetical judge, Kennedy describes how judges are constrained by the "felt objectivity" of "applying the relevant rules," and yet are pulled by the contingent experience of arbitrariness in the process of selecting outcomes.[114] In this critical view of jurisprudence, adjudication is understood as a process for objectifying and rationalizing the felt-experience of rule indeterminacy.

CLS scholars also engage in a form of scholarship different from mainstream legal scholarship. The ambition of most CLS scholars is to describe the internal structure of doctrine as a "narrative" or "story." They are admittedly committed to the task of uncovering the hidden assumptions and values of the dominant legal discourse. By tracing the manner in which discourse is committed to a particular story or vision about the way the world is supposed, in reality, to operate, CLS scholars reveal how these narratives reflect underlying ideological biases about the world. In critical scholarship, other stories about law are told to evoke in the reader the experience that "things could be otherwise" and that the official stories of the law are just stories, nothing more or less. This type of critical scholarship thus uses alternative methods for establishing the "truth" of knowledge: a consciousness-based, or a phenomenological, form of legal scholarship.[115]

### C. *Feminist Legal Thought*

By the late 1970s, a powerful new theory of jurisprudence came on the scene offering a distinctively feminist perspective of law and adjudication. Feminist jurisprudence grew out of the women's liberation movement of the 1960s as women activists distanced themselves from leftist sexism and dogmatism by establishing critiques of law and society based on the experiences of women.[116] The emergence of a truly feminist jurisprudence can be traced to the scholarship of women who confronted and exposed the political and conceptual barriers to women's emancipation that were reflected within the theory and practice of mainstream legal theory.[117]

---

113. *Id.* at 526 (emphasis in original).

114. *Id.*

115. *See, e.g.*, Kennedy, *Spring Break*, *supra* note 100; Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985) [hereinafter *Turn*]; Peller, *supra* note 52; Frug, *Henry James, Lee Marvin and the Law*, N.Y. Times, Book Rev. Mag. (Feb. 16, 1986). "A phenomenological approach to legal interpretation stresses the importance of the individual's subjective experience in developing descriptions and critiques of law based upon the everyday experiences of social life." Minda, *Phenomenology, Tina Turner and the Law*, 16 N.M.L. REV. 479, 488 (1986).

116. *See, e.g.*, A. RICH, BLOOD, BREAD, AND POETRY: SELECTED PROSE 1979–1985, viii–ix (1986); Menkel-Meadow, *supra* note 82, at 62 n.4.

117. Feminist legal scholarship is diverse and voluminous. For an excellent discussion of some of the dominant views within the feminist movement in law, see Bender, *supra* note 11; Colker, *Feminism, Sexuality, and Self: A Preliminary Inquiry Into the Politics of Authenticity* (Book Review), 68 B.U.L. REV. 217 (1988); Finley, *Choice and*

Feminist legal theory, like CLS theory, has been diverse and anything but monolithic.[118] It is possible to understand modern feminist theory as a reaction to the jurisprudence of modern legal scholars (primarily male scholars) who tend to see law as a process for interpreting and nurturing a universal, gender-neutral public morality.[119] Feminist legal scholars, despite their differences, appear to be united in claiming that "masculine" jurisprudence of "all stripes" fails to acknowledge, let alone respond to, the values, fears, and harms experienced by women.[120]

Feminist legal thought is perhaps the most powerful of the contemporary movements in legal theory; first, because its foundation, like the civil rights movement of the 1960s, is sufficiently diverse to include and mobilize all women (and men); and, second, because feminism demands a fundamental re-examination and restructuring of existing legal and social arrangements. Feminism, as a movement in law like other great movements such as the civil rights movement, represents a transformative cause that challenges the attitudes and beliefs which have become basic to the professional discourse of the law. Yet, feminist legal theory is also deeply divided by sharp differences in method, approach, and perspective.

Feminist legal theorists represent a broad spectrum of political and social perspectives. One group, the *Fem-Crits*, have organized to encourage and foster the creation of a "feminist" perspective within CLS.[121] Although the Fem-Crits develop and rely upon CLS critique, their perspective also diverges from that of CLS. The crucial difference between Fem-Crits and CLS appears to be that the feminist critique emphasizes the perspective of women, sometimes relying primarily upon an experiential discourse,[122] as a basis for knowledge and critique to inform analysis of social structures, gender hierarchy, and sexual objectification. The CLS critique is

---

*Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914 (1987) [hereinafter *Choice*]; Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Work Place Debate*, 86 COLUM. L. REV. 1118 (1986) [hereinafter *Maternity*]; Karst, *Woman's Constitution*, 1984 DUKE L.J. 447; Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M.L. REV. 613 (1986); Minow, *supra* note 5; Rhode, *The "Woman's Point of View"*, 38 J. LEGAL EDUC. 39 (1988); Scales, *supra* note 16; Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); West, *supra* note 2. *See also* N. CHODOROW, THE REPRODUCTION OF MOTHERING (1978); D. DINNERSTEIN, THE MERMAID AND THE MINOTAUR (1976); C. GILLIGAN, IN A DIFFERENT VOICE (1982); C. MACKINNON, *supra* note 5.

118. "Feminism is not a monolithic concept but an ongoing conversation about women's subordination." Bender, *supra* note 11, at 5 n.5. One of the more recent revelations coming from within the feminist legal movement has been open discussion of the conflict and divisions within the movement. *See, e.g.*, Bartlett, Book Review, 75 CALIF. L. REV. 1559 (1987) (reviewing C. MACKINNON, FEMINISM UNMODIFIED (1987)); Echols, *The New Feminism of Yin and Yang*, in POWERS OF DESIRE, THE VOICES OF SEXUALITY (A. Snitow, C. Stonsell & S. Thompson eds. 1983); West, *supra* note 2.

119. *See, e.g.*, Scales, *supra* note 16, at 1385; West, *supra* note 2, at 27.

120. West, *supra* note 2, at 29 ("Nor does the Rule of Law recognize, in any way whatsoever, muted or unmuted, occasionally or persistently, overtly or covertly, the contradiction which characterizes women's, but not men's lives: while we value the intimacy we find so natural, we are endangered by the invasion and dread the intrusion in our lives which intimacy entails, and we long for individualization and independence." *Id.* at 59.).

121. *See, e.g.*, Frug, *Re-reading Contracts*, *supra* note 103; Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387 (1984); Minow, *Rights of One's Own* (Book Review), 98 HARV. L. REV. 1084 (1984); Dalton, *supra* note 103. The Feminist presence within the Conference on Critical Legal Studies heightened in 1985 when a group of Fem-Crits organized and planned the first national CLS feminist conference in Boston, Massachusetts. Carrie Menkel-Meadow provides a brief social history of the Fem-Crits in Menkel-Meadow, *supra* note 82, at 63–66.

122. For a discussion of the experiential perspective, see Schneider, Dunlap, Lavery & Gregory, *Lesbians, Gays, and Feminists at the Bar - Translating Personal Experience into Effective Legal Argument*, 10 WOMEN'S RTS. L. REP. 107 (1988). Not all feminists accept the experiential perspective. *See infra* note 128.

said to be a "male-constructed" form of left criticism "in which domination and oppression can be described and imagined but not fully experienced."[123] Hence, while CLS critics argue that "law is politics," the Fem-Crits assert that "law is *sexual* politics."

Other feminists have maintained their independence from other movements and academic associations by establishing a distinctive "feminist jurisprudence."[124] Today there are feminist legal scholars who could be characterized as conservative, liberal-center, or left-radical. Moreover, as the debate involving the equal rights movement illustrates, there are women who claim to be feminists and yet are also fierce advocates of political and social perspectives that other progressive feminists associate with male domination or right-wing causes. The diversity of political orientation within the feminist movement is possible because the feminist perspective is itself based upon different vantage points and methods.[125]

Like CLS, there may be no single "feminist method" or "feminist epistemology" which can be identified to characterize feminist legal theory.[126] Because the problems which concern women involve the experience of women, it is said that there can be no single method which could hope to capture the experience of all women.[127] If there is a "feminist method" to be described, it is the "method of consciousness-raising—personal reporting of experience in [a] communal setting to explore what has not been said."[128] The methodology of consciousness-raising has meant that feminists have resorted to the use of an experiential discourse in their legal criticism to validate the experiences of women.[129] As the feminist legal theorist Ann Scales has explained:

---

123. Menkel-Meadow, *supra* note 82, at 61. The difference between critical legal studies and feminism has also been distinguished on the ground that feminism is an "oppressed people's movement" and CLS is not. *See* Binder, *supra* note 10, at 34–35. Binder explains the difference as follows:

> What critical legal scholars do is combat ideology. Unlike feminists they do not combat ideology among the oppressed; but like feminists they combat ideology among their own class—in their case, the ruling class.

*Id.* at 35. It has been said that male critical legal scholars are not in the same position as Fem-Crits because they cannot assert their self-experience as a method of consciousness-raising for emphasizing and transforming the repressive structures of gender hierarchy. "Critical Legal scholars are not in the same social position [as feminists] and their conversations, regardless of content, cannot make the same contribution to social change." *Id. See also* Littleton, *Feminist Jurisprudence: The Difference Method Makes* (Book Review), 41 STAN. L. REV. 751, 783 (1989) (arguing that the CRIT "method of 'exploiting contradictions' privileges no particular group's position within the contradiction-riddled hegemonic structure, and thus ends up giving weight to one's own experience.").

124. *See, e.g.*, Colker, *supra* note 117; MacKinnon, *supra* note 6; Scales, *supra* note 16; West, supra note 2. *See also* Menkel-Meadow, *supra* note 82, at 64.

125. *See* Minow, *supra* note 5, at 62–64. Minow argues that there is an explanation why feminist discourse appears to be contradictory to the outside world. As Minow explains:

> The inconsistency lies in a world and set of symbolic constructions that have simultaneously used men as the norm and denigrated any departure from the norm. Thus, feminism demands a dual strategy. First, feminism must challenge the assumptions of female inferiority—the belief that women fall too short of the unstated male norm to enjoy male privileges and that women's own traits make male privileges or benefits inappropriate for them. Second, feminism must challenge the assumption of separate but equal spheres. Thus for more than a century, feminists have claimed that distinctive aspects of women's experiences and perspectives offer the resources for constructing more empathetic, more creative, and in general, better theories, laws and social practices.

*Id.* at 62 (footnote omitted). *See also* Minow, *supra* note 16, at 49.

126. *See, e.g.*, Menkel-Meadow, *supra* note 82, at 70.

127. *See, e.g.*, Minow, *supra* note 5, at 62–64.

128. *Id.* at 64.

129. Bender, *supra* note 11, at 9 ("Feminist consciousness-raising creates knowledge by exploring common experiences and patterns that emerge from shared tellings of life events. What were experienced as personal hurts

> Feminist method proceeds through consciousness raising. The results of consciousness raising cannot be verified by traditional methods, nor need they be. We are therefore operating from within an epistemological framework which denies our power to know. This is an inherently transformative process: It validates the experience of women, the major content of which has been invalidation.[130]

In developing a critique based upon the felt-experiences of women, feminists purport to develop a theory of jurisprudence which speaks directly to the "oppressed, dominated and devalued" experiences of women.[131] Like the CLS theorist, the feminist theorist utilizes an experientially based methodology encompassing a wide range of methodologies and perspectives. Feminists claim they can do more than just describe and imagine what it is like to be oppressed—they can actually report on the experience.[132] Feminists also emphasize that their method is aimed at explaining "attributes historically linked to women."[133] The objective of such work is to explain how the law subordinates women by relying upon theoretical distinctions which are both reified and ordered to favor male interests and values over those of women.[134]

---

individually suffered reveal themselves as a collective experience of oppression. Thus, the revelation of feminism is that the personal is political.").

130. Scales, *supra* note 16, at 1401 (footnotes omitted). Or as MacKinnon has explained:

> Feminism does not appropriate an existing method—such as scientific method—and apply it to a different sphere of society to reveal its preexisting political aspect. Consciousness raising not only comes to know different things as politics; it necessarily comes to know them in a different way. Women's experience of politics, of life as a sex object, gives rise to its own method of appropriating that reality: feminist method. As its own kind of social analysis, within yet outside the male paradigm just as women's lives are, it has a distinctive theory of the *relation* between method and truth, the individual and her social surroundings, the presence and place of the natural and spiritual in culture and society, and social being and causality itself. . . .
>
> Through consciousness raising, women grasp the collective reality of women's condition from within the perspective of that experience, not from outside it.

MacKinnon, *Feminism, Marxism and the State: An Agenda for Theory*, 7 SIGNS 515, 535–36 (1982) (emphasis in original, footnotes omitted) *cited in* Colker, *supra* note 117, at 241. *See also* Rhode, *supra* note 117, at 41 (discussing how feminists seek multiple accounts and multiple theories to illuminate cultural patterns of sexism).

131. *See, e.g.*, Menkel-Meadow, *supra* note 82, at 61.

132. Fem-Crit Menkel-Meadow, for example, argues that "the feminist critique starts from the experiential point of view of the oppressed, dominated, and devalued, while the critical legal studies critique begins—and, some would argue, remains—in a male constructed, privileged place in which domination and oppression can be described and imagined but not fully experienced." *Id.* Other feminists, however, have raised concerns about the use of an experiential discourse in feminist writing on the ground that it is too individualistic. *See* Colker, *supra* note 117, at 229, 241–42. *See also* Bottomley, Gibson & Meteyard, *Dworkin; Which Dworkin? Taking Feminism Seriously*, 14 J.L. & SOC'Y 47, 56 (1987) ("If we are right that patriarchy is constituted in more than the sum of individual lives then the response to it must be more than the sum of articulated individual experience.").

133. Rhode, *supra* note 117, at 42. Rhode calls this method "*relation feminism*" to stress the importance of relationships in explaining attributes historically linked with women." *Id.* She argues that the generic term relational feminism best describes the common link between all feminists despite their methodological differences. The underlying idea is that the work of all feminist scholars is "emblematic of the 'woman's point of view.'" *Id.*

134. Postmodern legal feminists utilize deconstructive techniques to validate alternative, suppressed perspectives, as a trasformative process for opening up new ways to understand issues beyond women and gender. *See, e.g.*, Minow, *supra* note 16, at 47–48. However, not all legal feminists agree that postmodernism is a useful strategy for feminism. Robin West, for example, has recently argued that postmodernism may frustrate, not further, a feminist understanding of patriarchy and patriarchal power because, she claims, postmodernism is skewed by the male point of view. *See* R. West, Postmodernism and Feminist Legal Theory, (1989) (unpublished manuscript on file with The Ohio State Law Journal). *See also* West, *Deconstructing the CLS-FEM Split*, 2 WIS. WOMEN'S L.J. 85 (1986). West argues that postmodernism fails to appreciate that *silence* as well as *discourse* can operate to oppress women. West, Postmodernism, *supra*. She claims that postmodernism fails to ground its perspective of criticism within a feminist morality or ethic. *Id.* Finally, West argues that postmodernism is directed to the task of deconstructing the liberal conception of self; whereas, the task of feminism has been directed toward another goal—the construction of a definition of a feminist self. *Id.* Postmoderns, however, reject the idea that postmodernism implies masculine notions of power, knowledge, morality, or concepts of

The experiential point of view is utilized by some women to discover their authentic sexuality and the reality of women's condition.[135]

The idea of a distinctively "feminist jurisprudence" can be approached by examining four principal strands of feminist critique developed from various critical sources: "equal treatment," "difference," "different voice," and "dominance." The "equal treatment" strand of feminist thought is associated with a variety of perspectives and approaches. The least controversial (linked to the debate over the Equal Rights Amendment and derived from the civil rights movement) argues that men and women should be treated alike and permitted to compete on equal terms in the public world.[136] The equal treatment approach seeks to narrow the different treatment afforded men and women under various gender-based distinctions recognized in law. Feminist advocates of this strand of feminist critique have challenged "the assumptions of female inferiority—the belief that women fall too short of the unstated male norm to enjoy male privileges and that women's own traits make male privileges or benefits inappropriate for them."[137]

Other feminists have defended "difference" as a basis for advocating "special treatment:" the idea that women deserve special benefits because they are different from men.[138] Martha Minow provides a more recent version of the difference approach. In her feminist scholarship, Minow focuses on the value of difference and argues for the creation of a new comprehensive discourse committed to the feminist goal of thoughtfully considering all minority perspectives.[139] "Taking minority perspectives seriously calls," according to Minow, "for a process of dialogue in which the listener actually tries to reach beyond the assumptions of one reality, one version of the truth."[140]

---

self. *See supra* note 98 and accompanying text. The disagreement between West and postmodern feminists may rest upon different understandings about the nature of postmodernism.

135. *See, e.g.*, Colker, *supra* note 117, at 241–47. *See also* Finley, *Choice*, *supra* note 117, at 941–43; MacKinnon, *supra* note 130, at 519.

136. *See, e.g.*, Freedman, *Sex Equality, Sex Differences, and the Supreme Court*, 92 YALE L.J. 913 (1983); Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265 (1984). *See also* Finley, *Maternity*, *supra* note 117; Sunstein, *supra* note 2, at 827.

137. Minow, *supra* note 5, at 62. *See also* Bartlett, *supra* note 118, at 1561; Sunstein, *supra* note 2, at 827.

138. This is often referred to as the "equal treatment vs. special treatment" debate. *See, e.g.*, Finley, *Choice*, *supra* note 117; Littleton, *Reconstructing Sexual Equality*, 75 CALIF. L. REV. 1267 (1987); Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. REP. 172 (1982). *See also* Menkel-Meadow, *supra* note 82, at 72.

Some Feminists seek to transcend the equal treatment-special treatment debate by arguing for an androgynous perspective in which aspects of male and female would both be valued by recognizing, for example, that "sometimes it is rational to be emotional, and that 'objective' claims are inevitably subjective." Menkel-Meadow, *supra* note 82, at 74 (discussing Fran Olsen's contributions to feminist theory). Still others argue that the tension between the "equal treatment" and "special treatment" approaches are really two sides of the same coin because the real issue on either side is power. *See* Minow, *supra* note 5.

139. *See, e.g.*, Minow, *supra* note 16; Minow, *supra* note 2; Minow, *supra* note 5, at 69–95. *See also* Minow, *Learning to Live with the Dilemma of Difference: Bilingual and Special Education*, LAW & CONTEMP. PROBS, Spring 1985, at 157; Minow, *Beyond State Intervention in the Family: For Baby Jane Doe*, 18 U. MICH. J.L. REF. 933, 989–1009 (1985).

140. Minow, *supra* note 5, at 69–70. The "difference" approach advocated by Minow seeks to place emphasis on the importance of "understanding misunderstanding" by establishing a way of talking which expresses differences and communicates "across differences in method, world view, and purposes." Minow, *supra* note 2, at 95. She asserts that her idea of a comprehensive discourse is premised upon "a feminist commitment to communication" because the discourse of difference is based upon "a willingness to relinquish the claim of exclusive truth, and a concomitant

The "different voice" strand of feminist legal thought is associated with the pathbreaking scholarship of Carol Gilligan.[141] The different voice perspective asserts that "there is a distinctively feminine way of approaching moral and legal dilemmas [that has] been ignored or downplayed in legal doctrine and scholarship."[142] The goal of such scholarship is to "expose biases in our knowledge due to unstated male norms."[143] Feminists who advocate the different voice perspective have been called "cultural feminists" because they tend to equate women's liberation with the development and maintenance of a female-centered counterculture. The best way to understand this strand of feminist critique is to consider the images of "the ladder" and "the web" in Gilligan's description of the responses of two eleven-year-old children who participated in a moral development study, the *Heinz* dilemma devised by Kohlberg.[144]

The two children, Jake and Amy, are presented with the following dilemma: "[A] man named Heinz considers whether or not to steal a drug which he cannot afford to buy in order to save the life of his wife."[145] The children are told that Heinz does not have the money for the drug and the druggist refuses to give him the drug without payment. The question posed is "should Heinz steal the drug?"[146] The boy, Jake, responds that Heinz should steal the drug because "human life is worth more than money."[147] Gilligan reports that Jake approaches the problem as "sort of like a math problem with humans."[148] He treats the problem as an algebraic equation and proceeds to work out the solution.[149] Jake's reasoning process is said to be based upon rational deduction or what Gilligan calls "a hierarchical ladder of values."[150]

Amy, on the other hand, offers a different response based upon a different reasoning process. Gilligan reports that Amy felt that Heinz "shouldn't steal the drug" *and* that "his wife shouldn't die either."[151] Instead of searching for a correct answer based upon a hierarchy of values, Amy saw the dilemma "not as a math problem with humans but a narrative of relationships that extended over time."[152] Thus, Amy suggested that "there might be other ways besides stealing:" Heinz could

---

willingness to hear competing vantage points, all of which are partial." *Id.* at 97. Minow has explained her feminist idea of difference in terms of commitment to take the perspective of another person seriously as a basis for understanding partiality of one's own perspective. "If you try to take the view of the other person, you will find that the 'difference' you notice is part of the relationship or comparison you draw between that person and someone else, with reference to a norm, and you will then get the chance to examine the reference point you usually take for granted." *Id.* at 72. While offered as a feminist perspective to difference, the approach Minow advocates is a broad-based critique which has application to non-feminist concerns.

141. *See* C. GILLIGAN, *supra* note 117.

142. Sunstein, *supra* note 2, at 827.

143. Bender, *supra* note 11, at 18–19.

144. *See* C. GILLIGAN, *supra* note 117, at 25–63. *See also* Menkel-Meadow, *supra* note 82, at 78; Spiegelman, *Integrating Doctrine, Theory and Practice In Legal Education: Balancing the Logic of Jake's Ladder with the Experience of Amy's Web*, 38 J. LEGAL EDUC. 243, 248 (1988).

145. C. GILLIGAN, *supra* note 117, at 25.

146. *Id.* at 26.

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* at 62. *See also* Spiegelman, *supra* note 144, at 247.

151. C. GILLIGAN, *supra* note 117, at 28.

152. *Id.*

talk to the druggist to explain his wife's situation and perhaps "borrow the money or make a loan or something" to get the drug.[153] In an attempt to resolve the dilemma in a way that gives emphasis to the relationship involved, Amy rejected the idea that Heinz should steal the drug because "[i]f he stole the drug, he might save his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good."[154] Ultimately, Amy concludes that "they [Heinz, the druggist, and the wife] should really just talk it out and find some other way to make the money."[155]

Gilligan argues that Amy's approach to the moral dilemma is based upon a very different way of looking at the world—a way that conforms to women's experiences and images of relationships. Gilligan calls this the experience of the image of the web. "[S]eeing a world comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through systems of rules, [Amy] finds the puzzle in the dilemma to lie in the failure of the druggist to respond to the wife."[156] According to Gilligan, "[b]oth children thus recognize the need for agreement but see it as mediated in different ways—[Jake] impersonally through systems of logic and law, [Amy] personally through communication in relationships." Gilligan thus uses the image of the hierarchy of the ladder to describe the perspective of Jake (the experience of males) and the connection of the web to describe the perspective of Amy (the experience of females).[157]

Cultural feminists who follow the different voice strand of feminist legal theory use these images to show how Jake's image of hierarchy is the dominant image of the law, and how Amy's image of the web is marginalized or excluded. Cultural feminists argue that the male perspective found in the discourse of law must be reconstructed to explicitly take into account feminine values of relationships and connection, or what Gilligan calls the "*ethic of care*."[158]

Finally, feminists who advocate the "dominance" approach, the "radical feminists," claim that gender inequality in law is not the result of irrational discrimination but rather the result of the systematic social subordination of women. Radical feminists, such as Catharine MacKinnon,[159] see gender hierarchy and sexual

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 29.

157. *Id.* at 62–63.

158. *Id.* Gilligan's "different voice" approach to feminist legal theory has been criticized by other feminists on a number of grounds. In suggesting that a new form of feminist jurisprudence should be structured around a feminine "ethic" called "care," Gilligan has been criticized for advocating a gender-based theory which seeks to reinforce the gender-based stereotypes by giving legitimacy to the belief that "women's role is to care for others while men do more important things." Bartlett, *supra* note 118, at 1569. *See also* Tronto, *Beyond Gender Difference to a Theory of Care*, 12 SIGNS 644, 645, 648–49 (1987). Others argue that the "different voice" approach is a good starting point for creating a distinctively feminist form of jurisprudence. Bartlett, *supra* note 118, at 1569. But other feminists wonder if the different voice approach is merely a description of feminine qualities and not a feminist theory at all. "An emphasis on sexuality within a woman's life may be feminine but not feminist." Colker, *supra* note 117, at 231. Feminine is thought to be what women have been allowed to be; whereas, feminism seeks to be politically transformative. *Id.* at 231 n.42 (citing C. MACKINNON, *supra* note 5, at 39 ("So I am critical of affirming what we have been, which necessarily is what we have been permitted, as if it is women's, ours, possessive.")).

159. Catharine MacKinnon has been acknowledged to be "the most original and uncompromising of contemporary

domination in legal and social relations and patterns of interaction between men and women that are taken as unobjectionable, natural, and even as "intrinsic" to traditional gender roles.[160] MacKinnon seeks to develop the very idea that sexuality has been socially constructed by men to establish *gender hierarchy*. Heterosexuality is said to be constructed upon the basis of social relations that create dominance and submission in gender roles.[161] Hence, the underlying social standard of sexuality is seen as the product of a culture controlled by men to protect male domination. MacKinnon argues that "[b]ecause the inequality of the sexes is socially defined as the enjoyment of sexuality itself, gender inequality appears consensual."[162] Thus, MacKinnon claims that women who find pleasure within heterosexuality find pleasure in their own subordination.[163]

According to MacKinnon, "[g]ender neutrality is thus simply the male standard, and the special protection rule is simply the female standard, but do not be deceived: masculinity, or maleness, is the referent for both."[164] In her view, gender is a question of power, "specifically of male supremacy and female subordination"[165] and sexual abuse is the "product of women's subordination in society."[166] In defining the dominance approach she champions, MacKinnon asserts:

> The goal of this dissident approach is not to make legal categories trace and trap the way things are. It is not to make rules that fit reality. It is critical of reality. Its task is not to formulate abstract standards that will produce determinant outcomes in particular cases. Its project is more substantive, more jurisprudential than formulas, which is why it is difficult for the mainstream discourse to dignify it as an approach to doctrine or to imagine it as a rule of law at all. It proposes to expose that which women have had little choice but to be confined to, in order to change it.[167]

In utilizing these four different "strands" of critiques, feminist legal scholars tell yet another story about law and adjudication. Those scholars who are associated with the "difference" approach claim that the prevailing notions about women in law deny women the opportunity to compete on equal terms with men. According to this approach, legal distinctions based upon gender are built upon a gender bias in favor of men. Other feminists seek to reveal how law has adopted a conception of human nature that uses "male as the reference point and treat[s] women as 'other,'

---

(feminist) thinkers." Bartlett, *supra* note 118, at 1560. According to MacKinnon, radical feminism is the only feminism. C. MacKinnon, *supra* note 5, at 137. *See also* Colker, *supra* note 117, at 226 n.27.

160. *See, e.g.*, C. MacKinnon, *supra* note 5, at 32–45; Sunstein, *supra* note 2, at 828.

161. C. MacKinnon, *supra* note 5, at 50. *See also* A. Dworkin, Intercourse (1987). *See also* Littleton, *Feminist Jurisprudence: The Difference Method Makes*, 47 Stan. L. Rev. 751, 754–63 (1989) (describing how "MacKinnon's project is one of searching for a path by which women might become 'a sex for ourselves.'" *Id.* at 755.).

162. C. MacKinnon, *supra* note 5, at 7.

163. *Id.* at 7–8. *See also* Colker, *supra* note 117, at 225. MacKinnon and Colker argue that women have been denied the opportunity to experience or define their own "authentic," as Colker refers to it, sexuality because sexuality has been defined on men's terms. *Id.* (citing MacKinnon, *supra* note 130, at 534).

164. C. MacKinnon, *supra* note 5, at 34.

165. *Id.* at 40.

166. *See generally* C. MacKinnon, Sexual Harassment of Working Women: A Case of Sex Discrimination (1979).

167. C. MacKinnon, *supra* note 5, at 40.

'different,' 'deviant,' 'exceptional,' or 'baffling.'"[168] Cultural feminists expounding on the important work of Carol Gilligan have argued that the prevailing legal concepts of law are based upon a male perspective which fails to recognize the "female voice"—the way women approach moral and legal issues. Radical feminists have argued that mainstream conceptions of law reflect social practices and structures that subordinate women. The radical stance of this view asserts, for example, that sexual harassment and pornography are a form of sex discrimination which reflects socially constructed practices that are highly destructive to women.[169]

Feminist jurisprudence attempts to tell the woman's story of law—what it feels like to be a woman living in a legal and social world that is defined and manipulated by male attitudes and experiences. The goal is to show how the prevailing conceptions of the rule of law fail to respect the experiences and harms of women by objectifying women under allegedly gender-neutral legal norms.[170] Feminist jurisprudence thus responds to the official stories of law told by traditional legal scholars by revealing the patriarchal values which those stories defend and reinforce. At the same time, feminist theorists offer alternative stories to reveal law not as a universal source of free choice and autonomy, but as an experience of contradictory truths, about "knowing one thing on one level, and a different, inconsistent thing on another."[171] In providing a feminist view of law, these critics focus on the value of love, intimacy, and relational commitment.

Feminist scholars also attempt to "name" mainstream jurisprudence as "masculine" or "patriarchal" jurisprudence in order to claim a new form of feminist jurisprudence, distancing themselves from the dominant, masculine forms of jurisprudence. The project of legal feminists has been described as "the unmasking and critiquing of the patriarchy behind purportedly engendered law and theory, or, put differently, the uncovering of what we might call 'patriarchal jurisprudence' from under the protective covering of jurisprudence."[172] The objective is to "show that jurisprudence and legal doctrine protect and define men, not women."[173] Other feminists have sought to reveal how prevailing conceptions of law have established

---

168. Minow, *supra* note 5, at 48. This is the important new variation of the difference approach associated with the scholarship of Minow. This form of Feminist critique attempts to understand law as the "power of naming."

169. *See generally* C. MACKINNON, *supra* note 5.

170. *See, e.g.*, Matsuda, *supra* note 117 (arguing that abstraction in Rawl's A THEORY OF JUSTICE fails to take account of women's experiences).

171. Bartlett, *supra* note 118, at 1563.

172. West, *supra* note 2, at 60.

173. *Id.* Robin West attempts to show how mainstream and critical legal jurisprudence have adopted a view of human behavior which characterizes the experience of men, but not women. West, *supra* note 2. She argues that male jurisprudence has adopted a view of human nature which develops its insight from a "separation thesis" which views individual human beings as separate and apart from each other. *Id.* at 5. West claims that the experiences of women, however, are best understood in terms of what she calls the "connection thesis"; the idea that women experience "connection" with others as a result of the experience of pregnancy and the socialization process. *Id.* at 14. Because the dominant forms of jurisprudence are founded upon a separation thesis, West claims that all current versions of jurisprudence fail to respond to the experience of women and thus cannot be defended on universal or fairness grounds. Her general thesis is based on "the global and critical claim that by virtue of their shared embrace of the separation thesis, all of our modern legal theory - by which I mean 'liberal legalism' and 'critical legal theory' collectively - is essentially and irretrievably masculine." *Id.* at 2.

patriarchal power by failing to take into account differences in gender.[174] Closely related to this is a second objective, to show how women and their values have been subordinated to a male-dominated society and system of law.

Feminist scholars also offer different perspectives on adjudication and the theory of judging. Certain feminists, even the most radical, argue that a new feminist jurisprudence requires the recognition of a nonliberal concept of rights—a concept which can provide effective remedies for the specific harms experienced by women.[175] This perspective would build upon the traditional notion of adjudication by having judges do what they are thought to do best—interpret and define rights and remedies. Other feminist thinkers have argued that the type of feminist analysis necessary to protect women's interests requires a "rich, contextual thinking" denied by traditional notions of rights analysis.[176] The more critical feminist argues that rights analysis, even when done from the female perspective, is "politically debilitating," and simply too indeterminate to bring about the type of objectives sought by women activists.[177]

These different perspectives of jurisprudence project competing conceptions about the nature of legal scholarship. In developing a critique of law based upon the experiences of women, feminist thinkers, like some CLS thinkers, claim that social phenomena can best be understood in terms of the contextual experiences of certain societal groups. Phenomenological rather than empirical proof is offered as an explanation for social phenomena. The speculative *and* subjective nature of such "proof" runs counter to the dominant claims of objectivity and neutrality permeating the "proof" of mainstream legal scholarship today. There is thus a different understanding of what counts as "academic modes of proof" in the scholarship of feminist thinkers.[178]

Feminist scholarship, like some of that of CLS, is also unique in that it is openly committed to a transformative project. Instead of seeking to describe reality or to disagree with the way other legal scholars see reality, feminist scholarship seeks to *change* reality by transforming the way legal academics understand reality.[179] In developing a feminist perspective to law and jurisprudence, feminist scholars question the dominant practices and methods used by traditional scholars for reading and understanding law. Feminists argue that meaning and interpretation must be understood against a background of interpretative assumptions that employ the male as the reference point. These scholars argue that mainstream views reflect the norms,

---

174. Minow, *supra* note 5, at 65.

175. For example, MacKinnon has argued that liberalism applied to women is not feminism. "If the sexes are equally different but not equally socially powerful, 'differences' in the liberal sense are irrelevant to the politics of our situation, which is one of inequality." C. MACKINNON, *supra* note 5, at 237. Thus, MacKinnon sees radical feminism as the only type of feminism. "Radical feminism, as I understand it, is against gender hierarchy. Since such a critique *does* address the situation of women as I understand it, I term it simply feminism." *Id.* Other Feminists seek to advance feminist objectives by advocating various law-reform strategies. *See, e.g.*, Schneider, *supra* note 117.

176. *See, e.g.*, Finley, *Choice*, *supra* note 117, at 941–43.

177. *See, e.g.*, Olsen, *supra* note 121.

178. West, *supra* note 2, at 21.

179. C. MACKINNON, *supra* note 5, at 44.

categorical assumptions, and evidentiary criteria of a particular perspective. Feminist writers seek to change this perspective by unmasking its ideological biases.

## III. The Intellectual Bond Between Law and Economics, CLS, and Feminist Legal Thought

There have been some who have claimed that the new movements in jurisprudence share a great deal in common, despite their differences. Martha Minow has recently observed that behind each of these trends in legal scholarship "is a brooding doubt about whether law deserves a privileged place in resolving conflict and ordering society."[180] In her view, "[e]ach of the different movements search outside of law to address the question of law's legitimacy."[181] Similar views have recently been expressed by a leading member of the law and economics movement[182] and by well-known liberal legal scholars.[183]

If law and economics, CLS, and feminism differ in so many fundamental respects, then why do some argue that they share a common ground? A possible point of intersection is that each of the new movements appears to be a distinctively *dissident* movement revolting against the mainstream. There is in fact a deep source of unity grounded in admittedly different political commitments that nevertheless unites these movements as oppositional academic movements in the legal academy.

---

180. Minow, *supra* note 2, at 89.

181. *Id.* at 90–91. Minow argues that the group of scholars within each movement has been "preoccupied with the apparent loss of certainty and determinability within legal reasoning and legal decisionmaking." *Id.* at 91. Minow concludes that the debate generated by law and economics and critical legal studies has raised serious questions concerning "the legitimacy of law within a culture that suspects politics and believes in science or science-like methods for securing truth." *Id.* at 90. She speculates that these new theoretical trends in legal scholarship may be hopeful new developments in that they "offer new ways to discuss real issues in social and political life without adding responsibility for them to a system of thought removed from human choice." *Id.* at 100.

182. In a recent essay commemorating the one hundredth anniversary of the *Harvard Law Review*, Judge Richard A. Posner, the leading spokesperson for the law and economics movement, argued that "[t]he supports for the faith in law's autonomy as a discipline have been kicked away in the last quarter century," partly as a result of "a boom in disciplines that are complementary to law, particularly economics and philosophy." Posner, *supra* note 2, at 766, 768. Posner claims that the recent progress of interdisciplinary approaches in "illuminating law" has "undermine[d] the lawyer's (especially the academic lawyer's) faith in the autonomy of his discipline." *Id.* at 769. As Judge Posner explained: "A purely verbal, purely lawyer's scholarship, in which the categories of analysis are the same as, or very close to, those used by the judges or legislators whose work is being analyzed—a scholarship moreover in which political consensus is assumed and the insights of other disciplines ignored—does not fit comfortably into today's scholarly *Zeitgeist*." *Id.* at 773.

183. Cass R. Sunstein, a liberal legal scholar, makes a similar claim by suggesting that the emergence of feminist legal theory has "throw[n] into question practices and conceptual structures that had previously been accepted or even invisible, and eventually [may] produce . . . substantial change . . . in legal rules." Sunstein, *supra* note 2, at 826. Sunstein notes that the feminist movement in law, like the other intellectual and political movements of the past, challenges "practices that had for a long period been taken as natural and inviolate, sometimes even as based on biological differences" by revealing how these practices are "socially created and subject to criticism and change." *Id.* Sunstein contends that the feminist movement in law "is the most powerful contemporary development" in legal thought, rivaling movements such as the abolitionist movement of the 1850s, the New Deal, or even the civil rights movement of the 1950s and 1960s. *Id.* at 826.

Owen M. Fiss echoes a somewhat similar theme, albeit for different purposes. In a recent lecture delivered at Cornell Law School, Fiss argued that "[b]oth law and economics and critical legal studies are united in their rejection of the notion of law as public ideal." Fiss, *supra* note 2, at 2. In his view, "[b]oth movements can be understood as a reaction to a jurisprudence, confidently embraced by the bar in the sixties, that sees adjudication as the process for interpreting and nurturing a public morality." *Id.* Unlike Minow, Sunstein, and Judge Posner, Fiss believes that at least two of these new movements in jurisprudence, CLS and L/E, are unhealthy in that they "distort the purposes of law and threaten its very existence." *Id.* at 1.

But what accounts for the fact that there are now three separate groups of scholars raising objections to traditional forms of jurisprudence?

It may be significant that both law and economics and CLS scholars have claimed, somewhat ironically, that their movements are rooted in the same intellectual tradition—the tradition of American legal realism.[184] Feminist legal scholars have also recognized the contribution of the legal realists to their methods and perspectives.[185] While it would be a mistake to equate the new jurisprudential movements with American realism, an understanding of the different forms of realist critique can be helpful for explaining the common ground shared by these new movements in law. There are a number of distinctive features of law and economics, CLS, and feminist legal thought that exhibit the forms of critique found in the work of the realists.

### A. *Legal Realist Thought*

Legal realism, dominant during the 1920s and 1930s, attempted to transform and undermine the assumptions of American jurisprudence.[186] The body of work which gave rise to the American legal realist movement is, without doubt, marked by a committed "engagement in struggle."[187] The realist movement was itself comprised of conflicting impulses and alternative strands of oppositional thought.[188]

As members of an oppositional movement, legal realists revolted against forms of so-called "mechanical jurisprudence," namely *formalism* and *conceptualism*,

184. *See, e.g.*, Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229 (1981); Kitch, *The Intellectual Foundations of "Law and Economics,"* 33 J. LEGAL EDUC. 184 (1983); Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC'Y PUB. TCHRS. L. 20, 21 (1980); Tushnet, *supra* note 75, at 505; Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669 (1982) [hereinafter *'Round and 'Round*]; Note, *Legal Theory and Legal Education*, 79 YALE L.J. 1153 (1970) [hereinafter *Legal Theory*]. *See also* R. UNGER; *supra* note 35; Boyle, *supra* note 82, at 746–56; Mensch, *supra* note 3; Peller, *supra* note 52, at 1220–59. For a critical review of the relation between CLS and the legal realist movement, see White, *The Inevitability of Critical Legal Studies*, 6 STAN. L. REV. 649 (1984). *See also* Minda, *Movements*, *supra* note 20.

The work of the legal realists which has served as the bedrock of American realist thought includes: F. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931); F. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935) [hereinafter *Transcendental*]; M. Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933); M. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927); Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918); Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943).

For general background sources, see G. GILMORE, THE AGES OF AMERICAN LAW (1977); G. GILMORE, THE DEATH OF CONTRACT (1974); Kennedy, *Toward Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850–1940*, 3 RES. L. & SOC. 3 (1980)[hereinafter *Toward*]; Mensch, *supra* note 3, at 26–29; Peller, *supra* note 52; Purcell, *The Rise of Legal Realism*, in THE CRISIS OF DEMOCRATIC THEORY (1973); Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979); Singer, *supra* note 3; Yablon, *Law and Metaphysics*, 96 YALE L.J. 613 (1987); D. Kennedy, Classical Legal Thought (unpublished manuscript on file with The Ohio State Law Journal).

185. Scales, *supra* note 16, at 1400.

186. Legal realism has been described as a "broad and dynamic attempt during the twenties and thirties to alter significantly the assumptions of American Jurisprudence." Purcell, *supra* note 184, at 118. Gary Peller argues that "it is apparent that the realists felt an immediacy and urgency to their work, a belief that they were part of a larger transformation extending across disciplines, a historic undermining of the dominant ideology." Peller, *supra* note 52, at 1220. Singer has illustrated how the legal realists "sought to undermine the public/private distinction that had been carefully constructed by the classical (legal) thinkers." Singer, *supra* note 3, at 477.

187. Peller, *supra* note 52, at 1220.

188. Legal realism emerged from such early nineteenth century traditions as pragmatism, instrumentalism, and progressivism. *See* M. WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM (1957).

which prevailed and dominated the judicial imagination during the so-called *formalist* era of American legal thought.[189] The legal realist movement was also a reaction against the liberty of contract era of constitutional law—a time when the Supreme Court routinely invalidated federal and state social welfare legislation.[190] The realists claimed that the Supreme Court's liberty of contract cases were decided by methods of legal analysis that concealed or deflected attention away from the social consequences of judicial decisionmaking.[191] Legal realism was much more than just a crude belief in the subjectivity of judicial decisionmaking. It was a "many-layered attack on formalism: on *empirical ignorance*, *doctrinal abstraction*, and *oppressive social values*."[192] There were, in fact, different critical strands of legal realist thought which generated different attitudes and perspectives about legal formalism.[193] These different strands of realist thought could support liberal, conservative, or radical efforts to reconstruct American law.[194]

One strand of legal realist thought was reflected in the scholarship of Felix Cohen who emphasized a "deconstructive approach"[195] to legal criticism: an approach that focused on the indeterminacy and the circularity of legal reasoning as a basis for "debunking" liberty of contract discourse. Legal realists like Cohen taught that legal scholars should be skeptical about claims of legal objectivity; that many of the key categories of legal doctrine were incoherent, and that a paradigm of "applying the law" through the formal logic of legal syllogisms was insufficient as a model or legal theory. As Cohen put it, "the question of whether the action of the

---

189. *See* D. Kennedy, *supra* note 184. For example, the legal realists argued that it was "formalistic" to assume that there was such a thing as a coherent "concept of freedom of contract" or "free market" independent of normative questions of policy and morality. *See also* Singer, *supra* note 3, at 468–503.

190. *See* Peller, *supra* note 52, at 1193. As Gary Peller has explained: "This era is associated with the well-known decisions in *Coppage v. Kansas*, 236 U.S. 1 (1915) (where the Supreme Court struck down a Kansas statute forbidding employers to make nonunion affiliation a condition of employment), and in *Lochner v. New York*, 198 U.S. 45 (1905) (where the Court struck down a New York statute limiting the workday of bakers to ten hours)." *Id.* at 1193–94. *See also* Singer, *supra* note 3.

191. Legal educators commonly invoke the legal realists as a group to signify some truism about legal decisionmaking, for example, the proposition that a "legal decision depends less on precedent than on what the judge ate for breakfast." Singer, *supra* note 3, at 465.

192. Note, *Legal Theory*, *supra* note 184, at 1159.

193. Gary Peller, a critical legal studies scholar, recently demonstrated how one might come to understand the critique of legal realism in two different ways. *See* Peller, *supra* note 52, at 1219–59. For a similar discussion of the different "traces" of legal realist thought, see Boyle, *supra* note 82, at 691–705, 746–56.

194. Bruce Ackerman has argued that the realist movement was a conservative movement in that it offered American lawyers a "face-saving way to keep on talking in the traditional manner despite the political crises this lawyerly tradition had helped provoke." B. ACKERMAN, *supra* note 3, at 41. Ackerman's reading of the work of realists focuses only on the constructive strand, realism as science. There is, however, a way to read realists as establishing a much more radical project. *See* Peller, *The Politics of Reconstruction*, 98 HARV. L. REV. 863, 866 (1985).

195. Felix Cohen's article, *Transcendental*, *supra* note 184, for example, is a classic illustration of the work of a legal realist as "critic." Felix Cohen demonstrated in his article how legal principles, such as *corporations*, *trade-marks*, or *property rights*, were flawed by contradiction and circularity of reasoning. Cohen's effort was to deconstruct the legal concepts and arguments of the dominant discourse of the law in order to reveal how the legal abstractions were indeterminate and incoherent. *See also* Peller, *supra* note 52, at 1227. Peller reveals how the "deconstructive" strand of legal realism can be found in the work of other legal realists including Holmes and Robert Hale. *Id.* at 1230–40.

The deconstructive method seeks to reveal how legal rules and principles are indeterminate. *Deconstruction* was a method utilized by the legal realist to critique formalism. *Deconstruction* is also one of the main themes of critical legal studies. *See* Tushnet, *Introduction, Perspectives on Critical Legal Studies*, 52 GEO. WASH. L. REV. 239 (1984). *See also* Peller, *Reason and the Mob: The Politics of Representation*, 2 TUKKEN 28 (1987) [hereinafter *Reason*]; *see infra* notes 208–18 and accompanying text.

courts is justifiable calls for an answer in nonlegal terms. To justify or criticize legal rules in purely legal terms is always to argue in a vicious circle."[196]

The realists also argued that law must be studied as "it works in practice by making use of the social sciences" to establish what Karl Llewellyn called a new "Realistic Jurisprudence."[197] In this second understanding, realism became associated with a "post-formalist" method of law study and practice which was itself influenced by the belief in the empiricism of the scientific method and in the pragmatism of "skilled craftsmanship." Karl Llewellyn's empirical approach, for example, focused on human behavior as the basis for understanding what "officials do about disputes."[198] Jerome Frank took Llewellyn's approach one step further in arguing his case for a psychoanalytic understanding of the judicial method.[199] Other realists defended the social engineering of the New Deal by articulating a coherent conception of the public interest and then developing legal policies to advance that interest.[200] These efforts ultimately led to the reconstruction of new public interest law dedicated to public values and a theoretical practice established by the melding of the older formalism's craftsmanship skills with new policy instrumentalism.

The scholarship associated with the legal realists thus provides at least two powerful examples of how one might critique a system of thought and practice oppositional forms of legal scholarship.[201] A subsequent generation of legal scholars could thus claim the realists as inspirational heroes for demonstrating that law could not be divorced from politics, and that the logical methods of legal analysis could never justify legal decisions without reference to nonlegal considerations. At the very same time, a different group of legal scholars could celebrate the work of the legal realists for demonstrating how one might apply scientific methods and technocratic craftsmanship to legal study.[202]

---

196. F. Cohen, *Transcendental*, *supra* note 184, at 810. *See also* Peller, *supra* note 52, at 1229.

197. The idea of "Realistic Jurisprudence" comes from Llewellyn's famous article, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) [hereinafter *Realistic*]. Llewellyn argued that "Realistic Jurisprudence" would require judges to look beyond abstract legal verbalism and instead focus on behavioral factors—"the area of contact, of interaction, between official regulatory behavior and the behavior of those affecting or affected by official regulatory behavior." *Id.* at 464. The idea of "Realistic Jurisprudence" made the social sciences, including economics, relevant for law study. As Llewellyn put it: "When one approaches the law, not with the idea of formulating its rules into a system, but with an eye to discovering how much it does or can effect . . . economic theory offers in many respects amazing light." Purcell, *supra* note 184, at 86 (quoting from Llewellyn, *The Effect of Legal Institutions Upon Economics*, 15 AM. ECON. REV. 682 (1925).

198. Llewellyn, *Realistic*, *supra* note 197, at 431. *See also* Purcell, *supra* note 184, at 82 ("Llewellyn's empirical approach concentrated on behavior as the proper subject of study for the legal scholar."); Note, *Legal Theory*, *supra* note 184, at 1169.

199. J. FRANK, LAW AND THE MODERN MIND 140–41 (1949). *See also* Purcell, *supra* note 184, at 82–83.

200. Note, *'Round and 'Round*, *supra* note 184, at 1674. An example of such an effort can be found in Lassell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203 (1943).

201. What united the "deconstructive" and the "realistic jurisprudence" strands of legal realism thought was a common opposition to the jurisprudence of formalism which came to characterize the liberty of contract discourse of the 1930s Supreme Court. The strand of critical realism associated with the work of the "radical" realists pursued a pure form of relentless critique of the argumentative structure of the liberty of contract cases in order to show how judges were essentially unrestrained in legal decisionmaking. The other strand of critical realism, "realism as science," sought to ground the radical critique of the deconstructive approach in the determinant theories of the social sciences. Both strands were united in their rejection of the political vision of a jurisprudence which viewed adjudication as a mechanical process of logical manipulations of legal abstractions.

202. This strand of the realist critique has now associated itself with the "law and . . ." movements, including law

B. *The Realist Heritage*

These two different ways of understanding the work of the legal realists may help explain why law and economics, critical legal studies, and even feminist legal scholars might "claim" legal realism as a source of their intellectual inspiration. Critical legal scholars can argue that they are "heirs" to "*realism as critique*;" law and economic scholars can claim that they are the "heirs" of "*realism as science*."[203] Feminist legal scholars can acknowledge their indebtedness "to the Realists for their convincing demonstration that the law could not be described, as the positivists had hoped, as a scientific enterprise, devoid of moral or political content."[204] All three movements can be seen as post-realist oppositional movements rebelling against mainstream legal thought in much the same way that the legal realist rebelled against the formalism of the liberty of contract era in constitutional law.[205]

Like the legal realists of the 1920s and 1930s, practitioners of each movement have raised fundamental questions about the way mainstream legal scholars have come to understand law and adjudication. Law and economics builds upon the idea

---

and economics, law and society, and others. The law and society movement, for example, is a movement which has concerned itself with studying law and legal institutions "from the outside" by applying empirical methods to analyze and criticize legal phenomena. Unlike law and economics, law and society practitioners have adopted the empirical perspective of the social scientist for advancing progressive causes, and to this extent, the movement has alliances with CLS. But "[s]ince many of the law and society scholars saw themselves as objective observers of law, not law reformers, these normative implications did not receive sustained attention in their work." Minow, *supra* note 2, at 93 n.32. According to one of the leading proponents of the law and society movement, David Trubek, "[law and society] differs from most feminist legal theory and from critical legal studies in its commitment to empirical research and its close connection with the social sciences; and from law and economics in the pluralism of its use of various social scientific and humanistic discourses." *Letter from David Trubek*, Newsletter of the Conference on Critical Legal Studies, July 1988, at 14. An academic journal, LAW AND SOCIETY REVIEW, is devoted to law and society scholarship.

203. Peller, *supra* note 52, at 1226–59. Boyle sets out a somewhat similar description of different "traces" of legal realist thought. Boyle, *supra* note 82. He argues that at least three different traces or themes of critical thought can be discovered in the work of the realists, structured by the binary opposition between what he calls the "structuralist" and "subjectivist" strands of critique. *Id.* at 740. Boyle's thesis is "simply that these two strands represent a good way of 'getting at' . . . the most important philosophical issues and some of the most important existential experiences with which social theory and political action have to deal." *Id.* at 740–41.

This does not mean that law and economics, CLS, or feminist scholars believe their work to be merely a continuation of the American realist tradition. It would be a serious misinterpretation of these movements to equate them with realism. There are, in fact, a number of distinctive features of the new jurisprudential movements which are quite different from the work of the realists. *See infra* notes 205–19 and accompanying text. *See also* M. KELMAN, *supra* note 66, at 12–14 (describing how CLS differs from the realist project); Scales, *supra* note 16, at 1400 (describing how realists "did not press their critique deeply enough.").

204. Scales, *supra* note 16, at 1400. The legal realist movement was essentially a movement of elite white male scholars. As a faction, these scholars are just as much subject to the feminist critiques as any other male-dominated movement—including law and economics, critical legal studies, or mainstream legal thought. Of course, the realists were writing at a time when few, if any, voices (female or male) even realized the lack of a feminist perspective in law. However, at least one realist apparently understood that there might be a problem. In responding to Theodore Roosevelt's "sneer" at the legal profession as "especially fitted for the weaker sex," Jerome Frank wrote:

> I think that the young Roosevelt was right in his conclusion, wrong in his attitude. For I believe that the judicial process is one of the best means worked out by human society for the adjustment of many of its difficulties. I believe also that flexibility, tact, and the understanding of people, are more important in the practice of the 'law' than what has usually (but erroneously) been considered legal logic—the rigorous application of fixed legal principles. To what do these beliefs add up? To the conclusion that it is the so-called "feminine" attitudes, rather than the so-called "masculine," that are essential in the task of administering justice.

J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 386 (1949).

205. These new movements are post-realist movements because they build upon the critiques of legal realism in order to criticize the legitimacy and coherence of the prevailing conception of law and adjudication within the legal profession. Hence, while right-wing law and economics and left-wing critical legal studies represent different ideological camps, they are united in their opposition to some of the central premises of mainstream legal thought.

of "realism as science" in its effort to reconstruct a new determinate theory of legal analysis developed from the "science" of economics.[206] Critical legal studies and feminist legal theory have developed the strand of legal realist thought which pursued a deconstructive approach to legal criticism. This approach questions the idea that law consists of a coherent body of principles and policies that informs and rationalizes fundamentally shared values.[207] Each movement can be seen to be practicing merely a different form of legal criticism—forms of critique which draw upon the legacy of *legal realism*—in opposing mainstream legal thought.

Like the realist movement, each of the new movements has also promoted nonlegal methodologies for gaining insight into the nature of law and adjudication.[208] Using these nonlegal techniques, the new critics question whether traditional forms of legal analysis and "principled decisionmaking" can give determinate and consistent expression and meaning to modern liberal virtues.[209] Members of each movement assert that the judicial process, as it works in practice, is far too inconsistent, unstable, and biased to support the claims of liberal scholars who advocate it as a principled, consistent process.[210] Each movement, in its own way, rejects the liberal notion that judges can rely upon an autonomous legal methodology for choosing between hotly contested positions involving politics, economics, and gender.[211] Hence, while each movement offers fundamentally different ways of

---

206. *See supra* note 54.

207. *Id.*

208. Each movement argues the necessity for turning to new methods in resolving the critical issues of the day. *See* Minow, *supra* note 2. Both law and economics and critical legal studies reject the view widely held by lawyers and judges that legal problems can be analyzed and studied "autonomously" by objective methods of legal reasoning and analysis.

209. By modern liberal virtues I am referring to the values of the liberal jurisprudence which some legal scholars have identified with the Warren Court era—namely the presupposition that legal process and legal reasoning can be a vehicle for expressing and preserving fundamental shared values. *See, e.g.*, Fiss, *supra* note 2. Of course, not all members of the new jurisprudential movement would embrace the values of the Warren Court. The Chicago School of economic analysis, for example, appears to be hostile to the liberal virtues of the Warren Court.

210. *See, e.g.*, Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981) (CLS scholar arguing that liberal theories of constitutional scholarship are essentially incoherent and indeterminate); Easterbrook, *Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 8-9 (1984) (law and economics scholar arguing that the traditional methods of the judicial process are unprincipled and inconsistent, but that constitutional interpretation has become increasingly principled as judges have adopted the law and economics approach).

211. While L/E, CLS, and the feminist legal theories challenge established liberal notions of mainstream legal scholars, not all members of these movements oppose Liberalism as a political philosophy. Liberal feminists, of course, support liberalism. Northern CRITS who defend the rights theory also support aspects of liberalism. Strands of the law and economics movement, especially the *liberal* school, can be understood to be working to defend the mainstream scholars' vision of the liberal state by offering a new technocratic method for realizing the virtues of liberalism. Even the conservative L/E scholars of the *Chicago* School could be seen to advance arguments which offer justifications for the existing institutional practices of the modern liberal state as well as the doctrinal legal categories which justify the current distribution of wealth and income in America. *See* M. KELMAN, *supra* note 66, at 115.

Perhaps the willingness of L/E scholars to defend existing institutional practices of the modern liberal state may explain why mainstream liberal scholars are more tolerant of law and economics. For example, Fiss has observed that "[t]he practitioners of law and economics tend to be better behaved; their mission more nearly accords with the traditions of the academy than does that of critical legal studies scholars." Fiss, *supra* note 2, at 2. While Fiss is critical of the Chicago School of law and economics, he finds the liberal branch of L/E associated with some of his colleagues working in the *New Haven* School to be on the right track and more faithful to the role of law as public ideal. *Id.* at 7.

Hence, while law and economics scholars are tolerated because they fit the traditional mold, CRITS are ridiculed because they are thought to be nontraditional in their beliefs and life styles. In fairness to Fiss, it should be noted that he has since recanted his views of critical legal studies scholars at a speech at the Jurisprudence Section meeting of the American Association of Law Schools in New Orleans, on January 5, 1989. Fiss now accepts the CLS movement as a

looking at the world—different ideologies, politics, metaphors, and narrative structures—all three movements appear to share a commonality in rejecting the hegemony of traditional understandings of law and adjudication.

### C. *What is New About the Movements of the 1980s*

The jurisprudential movements of the 1980s offer *new* forms of legal criticism that go beyond the criticism of the legal realists, establishing *systematic* or *totalistic* critiques and analyses of the structure of American law.[212] The legal realists were mainly concerned with critiquing individual cases and particular methods of legal reasoning. Law and economics, critical legal studies, and feminist legal scholars offer more than just new ways to critique cases or analyze law. Each of the new movements have attempted to develop a new theoretical approach for analyzing American law "across the board." Law and economics scholars show how various legal subjects can be approached from the context of a unified approach based upon the logic of economic rationality. Critical legal scholars seek to demonstrate how the system of law as a discourse of power reinforces and legitimates social domination. Feminist legal scholars practice a totalistic critique in their demonstration of how American law supports and defends gender-based hierarchies of power and privilege.

Although law and economics is a diverse movement, all members are united under a common theoretical perspective which assumes that human beings are rational creatures that behave in ways tending to maximize their self-interest. This movement is quite broad, however, with fundamental disagreement among various "schools" of law and economics helping to advance different normative objectives. Chicago School practitioners argue that *efficiency* should be the prevailing norm, while other practitioners either remain agnostic or advance other philosophical values. Despite basic differences about objectives and methodologies, all members of this movement share an understanding of law and adjudication which is structured by the belief that law is, or at least should be, rational.

The critical legal studies movement is also a diverse movement structured by a common perspective about law and adjudication. CLS advances a world view based on the presumed "irrationality" of law as revealed by the indeterminacy of law's various doctrines and the behavior of law's actors. Some CLS scholars argue that law *and* human behavior are too irrational and unpredictable to be the subject of a coherent and determinist theoretical explanation. Others argue that law is quite predictable when understood in light of its underlying biases, assumptions, and ideological tilt. In advancing various *indeterminacy* theses, CRITS seek to reveal

---

worthy scholarly movement, and that some of its practitioners, especially Frank I. Michelman and Peter Gabel, offer useful critical perspectives. Certainly, law and economics scholars have not suffered the degree of scorn that some traditional legal scholars have exhibited toward practitioners of CLS and the feminist legal movement. *See, e.g.*, Frug, *McCarthyism*, *supra* note 15. For example, no one has suggested that practitioners of law and economics should leave the legal academy because they believe in a different legal vision or fail to share a particular creed. Nor have law and economics scholars experienced the type of academic freedom problems that CLS and feminist legal scholars have apparently encountered. *See* Kuttner, *Free Ideas at Harvard Law School Aren't So Free*, Boston Globe, May 18, 1987, at 19, col. 1. *See also* Bernstein, *Profs Say Dalton Was Treated Unfairly*, Harvard Crimson, May 13, 1987.

212. *See* Boyle, *supra* note 82, at 706; Note, *'Round and 'Round*, *supra* note 184, at 1686–89.

how law serves to justify domination and privilege through an abstract discourse which claims neutrality in process and outcome. Unlike law and economics scholars, CRITS argue that law and its processes fail to account for the difference between self and others. In developing a new critical phenomenological discourse, CRITS seek to show how the sphere conversed by law includes politics.

Feminist legal theory is also a diverse movement united by a common perspective for understanding law and adjudication. Feminist legal scholars resist male-constructed perspectives in order to pursue alternative, suppressed perspectives, and in order to open up new ways for understanding legal issues.[213] Like the CLS scholar, most feminist critics reject the idea of a universal and abstract methodology in favor of a contextual, experiential perspective. Feminist legal scholars also seek to reveal how traditional legal discourse serves to dominate, oppress, and devalue the experiences of women. In seeking to claim jurisprudence for feminists, these scholars have worked to show how forms of masculine jurisprudence, including the radical version of CLS, reproduce and reinforce a perspective based upon gender hierarchy. In contrast to the message of CLS, feminist legal scholars seek to reveal the sexual politics of law and to discover ways for understanding legal issues from the perspective of women.

Law and economics, critical legal studies, and feminist legal scholars thus transcend the critique of legal realism by highlighting the inability of mainstream legal scholars to appreciate the economic, political and gender context of law and adjudication. In developing a new systematic understanding of the economic analysis of law, law and economics scholars claim to offer a much more sophisticated basis for establishing a new "rational" approach to legal analysis. The new developments in law and economics represent significant advances compared to "social science" scholarship of the legal realists. In this way, law and economics may offer a new "constructive" understanding of the legal process school.[214] As Mark Kelman has observed, law and economics may represent "the best worked out, most consummated liberal legal ideology" of the sort that modern liberal legal scholars have sought to defend and that CLS scholars have tried to understand and critique.[215] From this perspective, one can see the L/E movement as "an academic school which has advocated, normatively, a certain general vision of state function as well as particular implementing practices *and* a movement that purports to present a general descriptive theory of existing legal practice."[216]

Critical legal studies and feminist legal scholars have also gone beyond the legal realists in developing new forms of legal criticism. Critical legal theorists have

---

213. *See, e.g.*, Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 821–22 (1989) (arguing for a nongendered form of feminism which would "follow through domesticity's insights into the gender structure of American capitalism to their logical conclusion.").

214. *See, e.g.*, Cooter & Ulen, *supra* note 13 (developing an argument in favor of comparative negligence which complements Rawlsian notions of justice); Rose-Ackerman, *supra* note 13, at 354 (developing a progressive L/E approach to administrative law which is intended to complement the process-oriented theory of John Ely).

215. M. Kelman, The Law and Economics Movement: Normative Social Theory 183 (unpublished manuscript on file with The Ohio State Law Journal).

216. *Id.* at 184.

"pushed beyond realism" in developing a deeper understanding of "law as politics."[217] While the radical strand of legal realist thought demonstrated how judges employed "class bias and bad logic" in legal decisionmaking, CLS theorists attempt to reveal how the belief that "law is rational" or the myth of "neutral law" is betrayed by a "set of contradictions that beset the liberal view of the state."[218] Feminist legal critics have, in turn, argued that law must be understood in terms of the gender bias which underlies the way traditional legal scholars perceive the world. In rejecting claims of neutral law, CLS and feminist scholars appear to be united in their disagreement with law and economics scholars, who argue that the inconsistencies of traditional legal methods can be rendered determinant by the so-called "scientific" methods of economics.[219]

CLS and feminist legal scholars have also raised new theoretical questions about the nature of truth and meaning as well as concepts of rationality and the limits of scientific reasoning. In pushing the realists' deconstructive approach to new limits, CLS and feminist practitioners have developed a theoretical critique which "transcends" law in its attempt to demonstrate the "politics of reason."[220] Both CLS and feminist legal scholars have argued that the realization of the liberal ideal of "a government of law, and not *men*" requires a controversial metaphysics [221]disguised as the patriarchal structures of "gender and political hierarchies."[222]

CLS and feminist legal scholars have questioned the manner in which traditional legal discourse is constructed (including the claims of legal rationality made by L/E scholars) to distinguish legal discourse from other ways of thinking and communicating about the social world.[223] The deconstruction strategies of postmodern CRITS attempt to show how "the purported distinction between rational legal argumentation and irrational emotional appeal is incoherent."[224] The objective of such work is to reveal how claims of rationality exclude other ways of understanding the world, other knowledge, and other ways of being.[225] The goal of such analysis appears to support the feminist objective: demonstrating the underlying openness of the legal system for experimenting with new ways to respond to the interests and experiences of women.[226] In rejecting the cynical resignation of legal scholars, who accept the

---

217. *See* Boyle, *supra* note 82, at 706.

218. *Id.*

219. Indeed, there is now a growing body of critical legal scholarship which critiques law and economics scholarship. *See, e.g.*, Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Kelman, *supra* note 88; Kelman, *supra* note 52; Kennedy, *Distributive and Paternalist Moves in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982) [hereinafter *Distributive*]; Kennedy, *supra* note 29; Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980). These critiques of the law and economics scholarship advance the general form of CLS critique of mainstream scholarship. Thus, CLS scholars argue there is simply no politically neutral, coherent way to discuss whether a legal decision is efficient and wealth maximizing, or whether benefits outweigh costs. For a summary of the specific critiques, see M. Kelman, *supra* note 215, at 184.

220. Boyle, *supra* note 82, at 707.

221. *Id.* at 705.

222. *See* C. MACKINNON, *supra* note 5.

223. Peller, *supra* note 52, at 1154.

224. *Id.* at 1155.

225. "The point is that the attempt to exclude other discourses from the legal world because they are 'merely' myths, poems, or opinions is mistaken. Legal reasoning itself depends on metaphor and myths of origin." *Id.* at 1156.

226. *But see supra* note 122.

inevitability of the *status quo*, CLS and feminist practitioners communicate a Utopian vision about law—that there are "grounds for hope" because "things could be otherwise."[227] Law and economics scholars could be seen to advance a similar message in claiming that legal choices are available to improve the economic well-being of society.

Each of these new movements thus expresses different disillusionment about the traditional forms of legal scholarship. L/E scholars argue that traditional methods of legal scholarship are woefully inadequate because they lack "scientific" rigor. L/E scholars look beyond the legal texts to develop a new determinant theory of rights based upon the quasi-science of economics. CLS scholars, on the other hand, seek to show how traditional forms of legal scholarship can be subjected to political criticism based upon an understanding of the relationship between knowledge and politics. CLS scholars thus look beyond law to examine politics. Modern feminists question the claims of traditional legal scholars who defend judicial virtues on the basis of a universal, gender-neutral process. These scholars assert a new form of feminist criticism which looks *into* law *and* politics from the perspective of women in order to discover the influence of gender. In their own distinctive ways, each of these movements questions the legitimacy of forms of legal analysis which have become divorced from an economic, political, and social context. To understand the unity between the three movements, it is necessary to now describe briefly the mainstream position that they seek to transform.

## IV. Mainstream Legal Thought

If legal realism inspired a new generation of legal critics, it also challenged and transferred mainstream thought. A new generation of legal scholars reacted to the challenge posed by the realists and constructed new theories of law and adjudication that accepted the public interest or social engineering strand of legal realism but rejected the extreme claims of the deconstructionists.[228] While recollections of the

227. "And that is finally what may be the most infuriating and subversive message of the CRITS—not at all their supposed 'nihilism,' but their insistence, to those who have come to equate maturity and realism with a cynical resignation, that there are grounds for hope." Gordon, *supra* note 15, at 86.

228. The deconstructive strand of legal realism was dismissed by modern doctrinal scholars as "nihilistic," "morally relativistic," and "nominalist." Peller, *supra* note 52, at 1222 (citing L. Fuller, The Law In Quest of Itself (2d ed. 1940)); Cohen, *Justice Holmes and the Nature of Law*, 31 Colum. L. Rev. 352, 357–58 (1931); Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. Pa. L. Rev. 833 (1931); Fuller, *American Legal Realism*, 82 U. Pa. L. Rev. 429 (1934); Harris, *Idealism Emergent in Jurisprudence*, 10 Tul. L. Rev. 169 (1936); Kantorowicz, *Some Rationalism About Realism*, 43 Yale L.J. 1240 (1934); *cf.* Mechem, *The Jurisprudence of Despair*, 21 Iowa L. Rev. 669, 672 (1936); Miltner, *Law and Morals*, 10 Notre Dame L. Rev. 1, 8 (1934); Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697 (1931); Pound, *The Future of Law*, 47 Yale L.J. 1, 2 (1937).

The objection and fear was that the radical skepticism of the legal realist might lead legal scholarship to a "dead end." There was an emerging new confidence at this time in the scientific method and the ability of "man" to solve social problems through rational techniques. The era of ideology struggle seemed to be at an end; a new era of "reasoned elaboration" seemed possible. By the end of the 1930s many of the best known realists eventually embarked on a new effort to "reconstruct" an objective theory of law by turning to the social sciences and pragmatic social engineering. The concerns of intellectual discovery and social improvement led a number of the realists to look to the social sciences for guidance in developing a new public interest law. Others gave up teaching and practicing law and joined the New Deal effort established by the F.D.R. administration. Ultimately, the rise of fascism in Europe and World War II made it difficult, if not impossible, for legal academics to sustain the realists' assault on the legitimacy of American law.

misadventures of Justice McReynolds and the 1930s Supreme Court remained "vivid" in the minds of legal scholars, there was a renewed sense of optimism within the 1950s and 1960s generation of legal scholars that an alternative jurisprudence could be found to "answer" the questions posed by the radical challenge of legal realism.

### A. *Process Theorists*

A new pluralism in legal methodology has now been established with the "uneasy marriage"[229] of the formalist and realist traditions. During the 1950s, a new paradigm in legal analysis, known as the "*Legal Process*" school, emerged promising legal objectivity of "reasoned elaboration" that combined principle and policy in an effort to recreate the idea of neutral decisionmaking.[230] A major tenet of this school was to provide an objective "process" determined by legitimate procedures and proper institutions for resolving subjective questions of "public policy."[231] The hope was that judicially conceived notions of self-restraint and the duty to render a "reasoned decision" would establish constraints on the freedom of a judge in deciding issues of subjective value. The realist critique of "subjectivity" in decisionmaking would thus be avoided by a new understanding of "legal reasoning" and the process of adjudication.[232]

---

229. *See* Note, *'Round and 'Round, supra* note 184, at 1669.

230. This post-realist movement is commonly associated with the scholarship of Henry Hart, Jr. and Albert Sacks. *See* H. HART & A. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tent. ed. 1958). Parker, *The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223 (1981); Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REF. 561 (1988). *See also* G. WHITE, THE AMERICAN JUDICIAL TRADITION: PROFILES OF LEADING AMERICAN JUDGES 230–96 (1976); Wellman, *Dworkin and the Legal Process Tradition: The Legacy of Hart and Sacks*, 29 ARIZ. L. REV. 413 (1987). Hart and Sacks articulated the new pluralism of legal process by suggesting that it was possible to identify a legal method of "reasoned elaboration" for resolving controversial issues of public policy in a determinant manner. The idea of "reasoned elaboration" assumed that decisionmakers could discover determinant legal solutions in a way that would give effect to fundamentally shared values. "In short, principles and policies of law comprise [in the view of the Legal Process school] a background . . . a substratum of values which inform and rationalize the rules and standards of the law." *Id.* at 420. Hence, the idea of reasoned elaboration signifies "a sense of craft within which the judiciary could elaborate principles and policies contained within precedent and legislation to reach a reasoned, if not analytically determined, result in particular cases." Peller, *supra*, at 595. The basic tenets of this school were premised upon the view that the legal community could develop a coherent theory of the shared social values embodied within the law. *See* Mensch, *supra* note 3.

231. The underlying theory of legal process focused on questions of institutional competence, reasoned elaboration, and democratic government. *See, e.g.*, Greenwalt, *The Enduring Significance of Neutral Principles*, 78 COLUM. L. REV. 982, 982–83 (1978); Singer, *supra* note 3.

232. Thus, H.L.A. Hart argued that there were characteristically judicial virtues that potentially constrained judges in legal decisionmaking. *See* H.L.A. HART, THE CONCEPT OF LAW (1961). These constraining virtues were described in terms of "values" such as "impartiality" and "neutrality" in surveying the alternatives, "fair consideration" for the interest of all who will be affected, and "judicial rationality" that some acceptable general principle be deployed as a reasoned basis for decision. Professor Herbert Wechsler, in turn, argued that judicial authority rests on "principle neutrality" or "reasoned principle." *See* Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959), *reprinted in* H. WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 3 (1961). *See also* Greenwalt, *supra* note 231; H. HART & A. SACKS, *supra* note 230. The thrust of their argument was that judges should be constrained from interjecting too much ideology into decisionmaking at the expense of consistency and principled reasoning. The underlying idea was that judges were supposed to decide "like cases alike" and to base decisions on reasons that have general application. While judges may be required to make difficult choices between conflicting values, they should make those choices fairly and impartially, and apply neutral principles. In response to the question of the legal realists who questioned the ability of judges to render neutral decisions, Professor Wechsler stated: "The answer. . . inheres primarily in that . . . [judges] are—or are obliged to be—entirely principled. A principled decision . . . is one that rests on reasons

A fundamental source of difficulty posed by the idea of an objective legal process is that the theory failed to specify a principled *method* for determining the bounds of discretion afforded judges in choosing between different techniques of interpretation.[233] Even if one were to accept the existence of "reasoned elaboration," "neutral principles," or "objective interpretation," judges would still need to know how to choose between any number of possible meanings ascertainable from different interpretations and defensible on rational and other grounds. Even more perplexing is the possibility that process theory might fail to support morally correct results in particular cases. The problem is that process theorists failed to establish that there is a necessary analytical link between their theory of law and social justice. The reality of inequality and oppression in America during the 1950s and 1960s was largely irrelevant to those who believed that law should be defined exclusively in terms of *rational* modes of decisionmaking.[234]

Indeed, while the process orientation of these theorists shifted attention away from substantive values to "the process by which legal institutions operate," the Warren Court era in constitutional adjudication and the events of the 1960s refocused scholars once again on substantive principles and outcomes. The normative justification for cases like *Brown v. Board of Education*[235] made the position of legal process scholars untenable. It was difficult to square decisions like *Brown* with the process-oriented perspective which uncritically assumed that American law was the product of a free and democratic process.[236] The racial segregation at issue in *Brown*

---

with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Wechsler, *supra*, at 27.

233. This has been the source of the current debate in constitutional law about whether the Supreme Court should give effect to the original meaning of the framers in interpreting the Constitution. The debate involves a host of interpretative theories about constitutional adjudication such as "originalism," "textualism," and "intentionalism." *See* Lyons, *Constitutional Interpretation and Original Meaning*, 4 SOC. PHIL. & POL'Y 75 (1986).

234. *See* Peller, *supra* note 230, at 620 ("Despite its progressive and sophisticated tone, the process rhetoric was the language through which socially comfortable and intellectually sophisticated white Northeasterners translated their own social assumptions into language that was culturally acceptable in their environment because it did not bear the obvious baggage of bigotry." In eschewing ideological preferences, for example, judges in the Legal Process School were supposed to preserve the integrity of the legal system by preventing individual biases and preferences from influencing the resolution of disputes. The belief in the "characteristically judicial virtues" of rationality, neutrality, and respect for the institution fails, however, to instruct judges on the proper course of action when they are faced with subtle choices between different modes of interpretation in adjudication. Even the most careful of legal process scholars would now seem to agree that it would be difficult to "evaluate the consistency of judge from case to case, and difficult even for the judge who aims for consistency to be sure that he was not being swayed by non-relevant factors in particular cases." Greenwalt, *supra* note 231, at 982–83. Indeed, it is now recognized that "occasional compromises" of legal process virtues must be made and judicial decisions might have to be "sacrificed" for other social goals in making choices about different legal interpretations. *Id.*

The now classic illustration of this approach can be found in the liberal jurisprudence of the Warren era in civil rights. Indeed, it was the Warren Court activism in civil rights culminating in such celebrated decisions as Shelley v. Kramer, 334 U.S. 1 (1948), and Brown v. Board of Educ., 347 U.S. 483 (1954), which presented serious challenge to the dominant ideology of the Legal Process School. The Warren Court decisions on race were particularly troublesome because, while they seemed to be obvious victories for "truth and right," they were under sharp attack by well respected legal scholars such as Herbert Wechsler, Alexander Bickel, and Philip Kurland. Greenwalt, *supra* note 231. A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); P. KURLAND, POLITICS, THE CONSTITUTION AND THE WARREN COURT (1970). *See* Wechsler, *supra* note 232. These scholars launched "widesweeping indictments of the Warren Court's performance, claiming that the Court had constitutionally enshrined its own egalitarian sentiments without adequate justification." Greenwalt, *supra* note 231, at 982–83.

235. 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1955).

236. Peller, *supra* note 230, at 610.

was, after all, the product of a pervasive system of state-supported institutionalized racism which itself called into question the legitimacy of an objective process. Hence, the liberal jurisprudence of Earl Warren called into question the validity of process theory.

B. *Law as Interpretation and the New Rights Theorists*

Mainstream legal theorists today seek to avoid the moral bankruptcy of process theory by advancing new theories of adjudication that claim legitimacy by appealing to democratic values and process. These theorists appear to accept the idea that law is indeterminate but argue that adjudication can be more or less objective, constrained, and rational. They postulate that judges operate and are restrained by established rules, customs, and conventions of legal culture. These rules and customs are what Owen Fiss calls the "disciplinary rules" found in the "interpretative community" of judges, or what Ronald Dworkin calls the judge's "interpretative attitude."[237] These "disciplinary rules" or "interpretative attitudes" establish the basis for believing in the possibility of an objective interpretation for "filtering" and discovering community values.

By advancing the idea of "law as interpretation," these scholars have adopted the understanding that adjudication *is* interpretation and that judges can make rational choices about sharply contested issues by identifying shared or community values through an objective interpretative process. For example, Fiss has claimed that "[ad]judication is interpretation: Adjudication is the process by which a judge comes to understand and express the meaning of an authoritative legal text and the values embodied in that text."[238] Ronald Dworkin has advanced a similar claim in arguing that "we can improve our understanding of law by comparing legal interpretation with interpretation in . . . literature."[239] Modern liberal scholars thus share an ideological commitment that objective methods of interpretation can be identified as giving effect to the community of values which epitomize the Warren Court era.[240]

Modern liberal theorists such as John Rawls,[241] Ronald Dworkin,[242] John Ely,[243] and Bruce Ackerman[244] have in turn attempted to construct new interpretative theories of rights and judicial process, by elaborating upon ideas of community

237. R. DWORKIN, *supra* note 3. Fiss, *supra* note 3.

238. Fiss, *supra* note 3, at 739.

239. Dworkin, *How Law is Like Literature*, in A MATTER OF PRINCIPLE 146 (1982). *But see* West, *Adjudication is Not Interpretation: Some Reservations About the Law-As-Literature Movement*, 54 TENN. L. REV. 203 (1987).

240. The field is divided, however. While some scholars believe that interpretation can be grounded in objectivity and shared values, other scholars working in the law as interpretation school argue that legal interpreters are "for all intents and purposes, free" to construct their own interpretations of legal texts and discover their own values. *See, e.g.*, Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982). *See also* S. FISH, IS THERE A TEXT IN THIS CLASS? (1980).

241. J. RAWLS, *supra* note 3. Nonliberal versions of the new rights theory have also been offered. *See, e.g.*, R. NOZICK, ANARCHY, STATE AND UTOPIA (1974).

242. *See, e.g.*, R. DWORKIN, *supra* note 3.

243. *See, e.g.*, J. ELY, *supra* note 3.

244. *See, e.g.*, B. ACKERMAN, *supra* note 3; B. ACKERMAN, SOCIAL JUSTICE IN THE LIBERAL STATE (1980).

norms, "shared values," and fair procedures that responsible individuals would consent to within a structure of rational consent. The goal of such scholarship is to create a new theory of rights or process based upon normative legal argument.[245] First, the objective of much of new rights discourse is to specify fair decisionmaking standards for "filtering community values."[246] Some rights theorists hypothesize how community values would emerge from an objective and authoritatively defined "choice situation."[247] The process-oriented approach to rights theory thus imagines the existence of a neutral medium for discovering shared values.[248] Rights theorists also rely upon a framework of interpretation which combines descriptive and normative arguments for objectively prescribing fundamentally shared values.[249] In short, legal principles help prescribe the relevant process and range of normative argument for resolving substantive issues.

An alternative paradigm born out of the legal process tradition thus seems possible to some legal scholars—one that is more traditional in its understanding of the legal realist's project. This alternative paradigm arises from the view of traditional legal scholars who have accepted the skeptical, functional approach of the realists but who have rejected the political and ideological ramifications of realist critique.[250] This alternative paradigm adopted the legal realists' view that law must look outward for legal justifications, but rejected the radical implications of the realists' assault on the objectivity of law.[251] Proponents of this view proclaim that the application of genuine public values shared within the community can settle public policy issues through either strong adherence to the "legal process" virtues of reasoned judgment and rational technique[252] or by adherence to the liberal ideals of universalism and impartiality.[253]

---

245. Singer, *supra* note 3, at 508.

246. *Id.* at 510.

247. *Id.*

248. The most famous version of this is J. RAWLS, A THEORY OF JUSTICE (1971). *See also* J. ELY, *supra* note 3 (developing a process-oriented approach for constitutional review of substantive rights).

249. *See, e.g.*, R. DWORKIN, *supra* note 3. As Singer explains the work product of these scholars:

> This second framework for rights theory combines descriptive and normative theory. Dworkin asks judges to determine what the consensual practices and beliefs of our community are, and to identify principles that "fit" both with precedent and community values. But they are also to examine those community norms critically, with an eye toward generating principles that can be normatively and rationally "justified" from the standpoint of "substantive political morality."

Singer, *supra* note 3, at 570.

250. For example, it is not uncommon to hear traditional legal scholars reject the legal realist project as "a naive attempt to do empirical social science" and yet at the same time proclaim that "we are all realists now." *See* Schlegel, *supra* note 184, at 459–60.

251. These scholars defend the view that it is possible to develop a coherent theory of law and adjudication for resolving uncertainties posed by controversial legal questions involving conflicts in values. In short, these legal scholars advanced the idea that legal decisionmakers can discover and implement a reliable method for informing and rationalizing the rules of law. *See also* Minow, *supra* note 2, at 93.

252. *See, e.g.*, J. RAWLS, *supra* note 3.

253. *See, e.g.*, Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1566–71 (1988) (arguing for a new liberal republican philosophy of law).

### C. *How Each Movement Critiques the Mainstream*

Modern day law and economics, CLS, and feminist legal scholars offer different modes of legal criticism challenging the views of mainstream legal scholars. Law and economics scholars argue that the dominant methodology of the legal process school is inadequate because it lacks scientific rigor and a persuasive theory for developing a consistent theory of decisions. These scholars argue that "[h]opes for a better society do not justify unreflective treatment of the tradeoffs we must make in a world of scarcity."[254]

Some law and economics scholars take issue with liberal scholars who argue that objective decisionmaking standards can be inferred from an interpretative community or from some enduring theory of legal rights.[255] Other L/E scholars accept the liberal vision of shared values, but offer a more determinant methodology for realizing the liberal vision. These scholars argue that judicial decisionmaking has and will become increasingly consistent as the judiciary adopts the law and economics perspective. In place of process values of "harmony," "stability," and "shared-values," law and economics scholars argue that in the "real world," what count are the "facts of life"—"scarcity," "choice," and "self-interested conduct."[256]

Adherents of the CLS movements argue that the legal scholars' current plea for reaffirmation of the "virtues" and "morality" of the legal process serves only as protection for the professional status of a particular conception of the judicial process that has dominated the profession since the 1950s.[257] CLS scholars argue that mainstream scholars can defend their claims of rational, determinant law only by establishing a theory of law that projects false and misleading visions about the nature of law in American society.[258] CRITS argue that legal interpreters are always free to choose between a host of possible techniques, outcomes, and values. In place of the process virtues of stability and shared values or liberal ideals of universalism and

---

254. Easterbrook, *Method, Result, and Authority: A Reply*, 98 HARV. L. REV. 622, 629 (1985) (arguing that the Supreme Court's constitutional decisions have become increasingly coherent as the Court has adopted the L/E perspective). Judge Easterbrook's view of statutory interpretation reflects a public choice theory which views legislation as the product of political bargains. *See* Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust As A Window*, 61 N.Y.U. L. REV. 554, 560 (1986). Moreover, unlike liberal constitutional scholars who advance noneconomic goals such as fairness and justice, Easterbrook can see no public purpose other than efficiency for statutory interpretation. *See id.*

255. *See, e.g.*, Posner, *supra* note 2.

256. *See, e.g.*, Easterbrook, *supra* note 254 (arguing that "scarcity," "choice," and "self-interested conduct" are "the facts of life" which judges must sometimes respond to in legal decisionmaking); Rose-Ackerman, *supra* note 13, at 341 ("Economics tries to reveal the costs in time, money, and energy of all of life's enterprises; it refuses to permit dreamers to ignore scarcity.") *See also* Peller, *The Politics of Reconstruction*, 98 HARV. L. REV. 863, 864 (1985) (describing how "liberal reformist legal thinkers" are challenged by "law-and-economics" adherents' claim to scientific rigor and hardheaded realism about 'the way things are' ").

257. *See, e.g.*, Peller, *supra* note 230 (describing the ideology of mainstream legal scholars of the 1950s and how that ideology came to dominate the thinking of a generation of post-war scholars). *See also* Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981) (describing the various "responsive modes" of traditional legal scholarship in *denying* "the historical and cultural contingency of law.").

258. *See, e.g.*, Hutchinson & Monahan, *supra* note 3, at 207 ("[T]he difference between critical and mainstream legal thought is that, although the latter rejects formalism, it persists in the view that *some* viable distinction can be drawn between legal reasoning and vulgar political debate"). *See also* Mensch, *supra* note 3, at 29–37; Schlegel, *Introduction*, 28 BUFFALO L. REV. 203 (1979).

impartiality, these scholars argue that law and adjudication are the product of "conflict," "struggle," and "politics."

Feminist legal scholars assert yet another set of related claims. Feminists argue that modern legal scholars seek to justify a perspective of law shared by men but not by women. They assert that traditional legal scholars can claim consistency and fairness only by relying upon a conception of law and adjudication which excludes the perspectives of others who are at the margins of power. Feminist scholars advance the perspective of women's experiences and the values such a perspective represents. In place of the process values of "universality" and "objectivity," these scholars argue that law must be contextual, particular, and obedient to human values of love, commitment, and care.

All three movements thus challenge the pragmatic and antitheoretical stance of traditional doctrinal scholars, who argue that questions of public policy can be settled by an autonomous and universal "legal process."[259] Law and economics scholars argue that modern liberal scholars have internalized a "political" view of "law as an autonomous discipline"—a view which assumes that law is "a subject properly entrusted to persons trained in law and in nothing else."[260] L/E followers assert that this way of thinking is "old-fashioned, passé, tired";[261] that it ignores the insights of other disciplines; and that it assumes a political consensus can be reached for deciding upon an official method for legal decisionmaking.[262] L/E scholars argue that it is "wrong" to assume legal problems can be "informed by one set of premises and one method of argument."[263] L/E scholars thus look beyond law to develop new determinant theories for establishing law's legitimacy.

CLS scholars, in turn, challenge the notion that legal texts contain neutral meanings which can be "correctly" discovered by "authoritative" legal interpretive methods.[264] They argue that the claims made by modern liberal scholars defending

---

259. *See, e.g.*, C. MACKINNON, *supra* note 5; R. UNGER, *supra* note 35; Easterbrook, *supra* note 210; M. OLSEN, *supra* note 33; Posner, *supra* note 2; Scales, *supra* note 16; Tushnet, *supra* note 75.

260. Posner, *supra* note 2, at 762. In reacting to Judge Posner's essay, Erwin N. Griswold wrote:

> [Judge Richard A. Posner's] essay is thoughtful and penetrating, but it does take me by surprise. It has never occurred to me that the law is an "autonomous discipline," and I do not think that that was the lore of the Harvard Law School when Judge Posner was a student or at any other time in the twentieth century. It always seemed to me—and I was taught—that the law sought light from any source, and that contributions from other fields were welcome and relevant.

Griswold, *Essays Commemorating the One Hundredth Anniversary of the Harvard Law Review: Introduction*, 100 HARV. L. REV. 728, 729-30 (1987).

While it may be true, as former Dean Griswold argues, that modern legal scholars look to sources "outside the law" for insight about their subject, modern legal scholars nevertheless make assertions about the meaning and application of those insights in the context of an autonomous legal methodology.

261. Posner, *supra* note 2, at 773.

262. *Id.*

263. Easterbrook, *supra* note 210, at 4.

264. Borrowing from the field of *literary postmodern criticism*, critical theorists have challenged the notion that legal texts contain meanings which can be "correctly" discovered by utilizing "authoritative" interpretative methods. *See e.g.*, Frug, *supra* note 115; Kennedy, *Turn*, *supra* note 115. *See also* Minda, *supra* note 115, at 487 n.34. By deconstructing legal texts into equally plausible counter-meanings, these educators have sought to illustrate how a community of legal interpreters has performed an ideological function by creating legal meanings which fail to perceive honest differences and alternative ways of being. Their goal is to empower the reader so that she can evaluate the inescapably ideological character of legal thought. For a general introduction to deconstruction as a new postmodern critical attitude toward interpretation, see Peller, *Reason*, *supra* note 195.

modern liberal methods are simply too inconsistent and incoherent to support such a conception of law. CLS scholars argue that the class of law interpreters is too elitist and privileged to be relied upon as a representative of the values and interests of those within the larger society.[265] Both CLS and feminist scholars argue that the traditional methods of legal reasoning ignore the significance of *contingency and difference.*

Feminist scholars build upon the CLS critique by rejecting the notion that law can be studied as an autonomous system, abstracted from the reality of class, race, and gender differences. These scholars use the experiences of women to show how allegedly neutral abstractions of mainstream legal analysis privilege the male perspective. Feminist scholars argue that claims of objective and universal law mask discriminatory content and application under male-constructed norms of jurisprudence.

Feminist critics, like the critics of L/E and CLS, look beyond law to ascertain how the traditional understanding of adjudication reflects a cultural perspective which fails to respect the realities of women in the world. Like L/E critics, feminist legal scholars argue for a view of law that evaluates the effectiveness of legal rules by judging their instrumental capacity in promoting the well-being of individuals. Hence, while Chicago School L/E scholars argue that efficiency or wealth maximization should be the general welfare standard, feminist legal scholars argue that a broader definition of substantive equality should be the standard.[266] Feminist legal scholars, like CLS scholars, argue that law must be approached from a multidisciplinary perspective focusing on political culture and the social basis of politics.

Members of each of the new movements in jurisprudence also exhibit various degrees of antipathy toward the rights theories of mainstream legal scholars. Chicago School law and economics scholars claim that the assignment of legal rights is theoretically irrelevant in cases without transaction costs.[267] Where transaction costs block bargaining, these L/E scholars treat rights as if they were mere "price signals" for allocating scarce resources to their most efficient uses. L/E scholars who are associated with other schools of law and economics have adopted behavioral assumptions which analyze legal rules as incentives which influence how individuals respond to rules.[268] The new generation of L/E scholars, like the founders of the Chicago School, no longer give primary significance to the traditional legal scholars' concept of rights and their correlative duties.

The analytical move of L/E scholars thus allows a shift from rights to policy; these scholars argue that economics equips lawyers with a new understanding of how to make legal policy analysis much more rigorous and scientific. Rather than deducing meanings from abstract legal concepts like freedom of contract and

---

265. *See, e.g.*, Brest, *supra* note 8, at 771.

266. A feminist critique of law and economics might seek to show how the principle of wealth maximization serves to entrench sexism and patriarchal structures by solidifying the position of the status quo. If wealth is maximized in a society structured by the values of patriarchy, then disadvantages resulting from gender differences would probably be worsened. The hand of the dominant class would be strengthened at the expense of the weaker class.

267. As Singer has noted: "[t]he rights theorists have attempted to modernize and revitalize social contract theory; the law and economics scholars sought leave to do the same for utilitarian theory." Singer, *supra* note 3, at 513.

268. *See, e.g.*, Kornhauser, *supra* note 45; R. COOTER & R. ULEN, *supra* note 25.

property, L/E scholars approach legal analysis by drawing assumptions and making predictions from "models" of economic behavior.[269] Their goal is to redefine legal rights by unifying law and the social sciences thereby erecting a new structure for instrumentally approaching law.[270]

CLS scholars also reject the conception of rights advanced by mainstream legal thinkers. Some CRITS reject the modern rights theorists' belief in a rational basis for making normative judgments. Such an appeal is seen as founded upon an unrealistic belief that noncontroversial criteria can be found to support the judgments that all reasonable persons in society would accept. Most CLS scholars point to the existence of doctrinal inconsistencies and indeterminacy as examples of the controversial nature of the normative judgments made by traditional scholars.[271] A minority faction within CLS argues that the liberal conception of rights can be transcended and re-established by redefining rights to correspond to the needs of disadvantaged social groups. Finally, while substantial disagreement exists, some critical thinkers have claimed that the trouble with rights is that they reinforce a profoundly self-destructive and alienated form of human consciousness.[272]

Feminist legal critics challenge the rights theories of traditional legal scholars by demonstrating how those theories fail to respond to the social, economic, and political harms of women. A central point to the feminist critique of rights is that abstract formulations of rights actually conceal gender-biased hierarchies and coercive systems of relationships.[273] Some feminists argue that the rights discourse of modern scholars "has an unofficial, underground, subterranean potentiality, only occasionally recognized, but nevertheless always *there*."[274] According to this view, rights discourse must be used carefully to advance feminist interests or to remedy their harms.[275] Other feminist thinkers argue that the concept of rights must be transformed to take into account the differences of others. Minow argues, for example, that "[i]nstead of trying continually to fit people into categories, and to enforce or deny rights on that basis, we can and do make decisions by immersing in particulars to renew commitments to a fair world."[276] While feminist legal scholars

---

269. Singer, *supra* note 3, at 514. "[E]fficiency theorists reject the idea that one can deduce the inherent meaning of legal entitlements from abstract concepts." *Id.* at 515.

270. *Id.*

271. Some CLS practitioners claim that abstract concepts of rights cannot be rendered determinant by either theory or social context. As Mark Tushnet has claimed, "[s]pecifying a particular right is thus either an act of political rhetoric or a commitment to social transformation." Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1380 (1984).

272. *See* Gabel, *The Phenomenology of Rights—Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 207 (1984). *But see* Williams, *Alchemical Notes: Reconstructed Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L.L. REV. 401 (1987) (arguing that rights can empower the disadvantaged).

273. *See, e.g.*, MacKinnon, *An Agenda for Theory*, *reprinted in* FEMINIST THEORY: A CRITIQUE OF IDEOLOGY 1 (1982). "To say that the personal is political means that gender as a division of power is discoverable and verifiable through women's intimate experience of sexual objectification, which is definitive of and synonymous with women's lives as gender female. Thus, to feminism, the personal is epistemologically the political, and its epistemology is its politics." *Id.* at 535 (footnote omitted).

274. West, *supra* note 2, at 52.

275. "As a consequence, [the Rule of Law] can be used and occasionally is used to ameliorate the sorrow we feel as a consequence of our alienation, as well as to protect the autonomy we value against the very real threat of annihilation." *Id.*

276. Minow, *supra* note 5, at 91.

advance different views on how to "feminize" rights, as a group they believe that prevailing "masculine" theories of rights must be resisted.

Thus, members of each movement reject a number of the central premises of mainstream legal theory, including the assumption that judges *or* legislators can discover shared values;[277] the idea that a political consensus on fundamental issues exists;[278] the belief that American society consists of a harmonious, conflict-free citizenry who share profound values; and the idea that law and legal reasoning can be the basis for establishing a universal, autonomous system of thought.[279] Practitioners of each movement argue for a new "realism" that reflects the deep conflict and tension present in a world comprised of sharp political and economic differences—a world where scarcity, privilege, sexism, and disadvantage are ubiquitous.

## V. How Some Legal Scholars Have Reacted to the New Movements

The new movements have provoked a response from a number of distinguished legal scholars. Some have called into question the new critics' professional and ethical commitment to law and the legal profession.[280] Others have argued that the new critics are practicing dangerous forms of criticism.[281] Still others have questioned whether the new movements will make communication and discourse within the profession impossible.[282] The response of these scholars establishes examples for understanding the mainstream position that the new movements are now criticizing. The response of mainstreamers to the competition of the new critics also suggests that the resolution of paradigm conflicts will not be resolved by theoretical proofs, but will instead depend upon the force of conviction and pleas for commitment to preserve the status quo.

### A. *The Plea for Commitment to the "Rule of Law"*

Perhaps the most notorious reaction to one of the movements, CLS, was Paul Carrington's metaphoric essay, *Of Law and the River*,[283] which sparked a heated controversy among the pages of the *Journal of Legal Education*.[284] Carrington argued that law teachers who "embrace nihilism and its lesson that who decides is everything, and principle nothing but cosmetic [have] an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy."[285] The essay

---

277. *See, e.g.*, Posner, *supra* note 2, at 773.
278. *Id. See also* Freeman, *supra* note 184, at 1233–34.
279. *See, e.g.*, Mensch, *supra* note 3, at 30.
280. *See, e.g.*, Carrington, *supra* note 7.
281. *See, e.g.*, Fiss, *supra* note 2. Still others have argued that some of the new movements are simply "wrong." *See* Hegland, *supra* note 81 (criticizing the deconstructive stategy of CLS).
282. *See, e.g.*, B. Ackerman, *supra* note 3, at 42.
283. Carrington, *supra* note 7.
284. *See* Martin, *supra* note 7.
285. Carrington, *supra* note 7, at 227.

provoked bitter controversy because it was generally understood as a broadside attack on the critical legal studies movement.[286]

Carrington subsequently stated that it was not his intent to question the professional ethics of all persons "having sympathy or connection with CLS" but "to comment instead on Legal Nihilism."[287] Additionally, Carrington has made clear his "oppos[ition] to Red Hunts and loyalty oaths."[288] A number of legal scholars, including a few who are identified with the mainstream position which CLS criticizes, nevertheless strongly objected to the overall position Carrington advanced. Guido Calabresi of Yale University Law School retorted that "if in all honesty what the scholar sees seems false, then the scholar must declare it to be false even if that opens him or her up to the charge of nihilism."[289] Owen M. Fiss, rejecting Carrington's suggestion of a purge of the so-called nihilist, argued that "[w]e cannot shut off an avenue of inquiry, for fear that it would render the professional training [in law school] pointless. . . . [I]t is of the essence of academic freedom to allow all sides to speak."[290]

However, while most legal scholars have found the idea of a purge distasteful, there remains a lingering concern within the legal academy over whether the new trends in legal theory represent healthy developments for law and legal scholarship. Dean Carrington's essay may thus articulate what other legal scholars have been unwilling to say—that some forms of legal criticism, especially the form represented by CLS, are threatening to the profession because they undermine the commitment that lawyers owe to the "Rule of Law."[291] So, while most legal academics would probably agree that "nihilists" should not be excommunicated from the academy, there is far from a consensus on whether "nihilistic" scholarship satisfies academic tenure requirements for retention, or whether "nihilistic" candidates for appointment represent hot prospects for upgrading the institution's scholarly status. In performing their gatekeeping function, mainstreamers appear to demand that new members to the profession demonstrate their scholarly commitment to mainstream perspectives on law and adjudication. The assertion of professional "standards" may thus become a subterranean basis for mainstreamers to defend their *particular* conception of law and adjudication.[292] Members of the new movements risk ultimate exclusion in advancing

---

286. *See, e.g., Robert W. Gordon to Paul D. Carrington*, 35 J. LEGAL EDUC. 1 (1985); *Paul Brest to Phillip E. Johnson*, 35 J. LEGAL EDUC. 16 (1985).

287. *Paul D. Carrington to Robert W. Gordon*, 35 J. LEGAL EDUC. 9, 10 (1985).

288. *Id.*

289. *Guido Calabresi to Paul D. Carrington*, 35 J. LEGAL EDUC. 23 (1985). "I also cannot say—because I know few of them well, and do not know them all—that all members of the CLS are honest in their nihilism as Leff and Gilmore were. But if they are—and the burden must be on those who claim they are not to show it—then they are as worthy of being teachers of law as those of us who do not, in all honesty, share their vision." *Id.* at 24.

290. *Owen M. Fiss to Paul D. Carrington*, 35 J. LEGAL EDUC. 24 (1985). "Every law school should confront the question whether law exists, and it is of the essence of academic freedom to allow all sides to speak, even those who would answer that question in the negative and thus recommend that our doors be closed and resources be used for other purposes." *Id.*

291. *See, e.g.*, Hegland, *supra* note 81 (While Hegland states that he does not "share Carrington's position," *id.* at n. 46, he nevertheless argues that commitment to the "Rule of Law" has professionally important value.).

292. The plea to obey "the law" may represent a "strategy utilized to shift the debate within the profession about the content of law and legal education over to a debate about the necessity of protecting law and its institutions from non-believers." Minda, *supra* note 15, at 721. What may be at stake in the debate provoked by Dean Carrington's essay

scholarly projects which mainstreamers find to be objectionable. In some cases, mere association with the new movements has resulted in a decline in civility and trust of one's colleagues. In other cases, membership has resulted in academic isolation and exclusion. The danger, of course, is that a new group of scholars may be effectively suppressed from advancing alternative professional conceptions of law and adjudication crucial to the scholarly and pedagogical mission of the nation's law schools.

### B. *The Plea for Shared Values and Public Morality*

Perhaps the most eloquent and thoughtful spokesperson and defender of the mainstream position of liberal legal scholars has been Owen M. Fiss. Fiss has offered honest criticism of the new movements without embracing the tainted position now attributable to Carrington. Fiss has also been extremely forthright in explaining his strongly held convictions about law and adjudication. In his Stevens lecture at Cornell University School of Law, Fiss presented the most forceful argument and defense of the conception of law that has come to represent the position of liberal scholars—the idea that law and adjudication express a public morality and an objective process for discovering law's legitimacy.

In his lecture, ominously entitled *The Death of the Law?*,[293] Fiss argued that law and economics and CLS "were dangerous jurisprudential movements" because practitioners of those movements "distort the process of law and threaten its very existence."[294] Fiss criticized the strand of L/E associated with the Chicago School because its arguments and methodology depend upon what Fiss deems "contestable assumptions" about law and adjudication.[295] Fiss claimed that the new economic analysis of law "fails to supply the explanatory mechanism needed to give [the movements' claims] predictive validity, or even descriptive credibility."[296] He argued that the "normative" claims of the hardliners within this movement rest upon a "crude instrumentalism" that would lead to the "relativization of all values."[297] Fiss thus asserted that the law and economics movement fails to reflect the way the judiciary understands its own role—"judges do not see themselves as instruments of efficiency, but rather as engaged in a process of trying to understand and protect the values embodied in the law."[298]

---

is whether a particular conception of professionalism should be allowed to displace other conceptions for no reason other than some *felt necessity* about the faith in the need to protect the "Rule of Law" from non-believers. *See also* Minda, *The Politics of Professing Law*, 31 ST. LOUIS U.L.J. 61 (1986).

293. *See* Fiss, *supra* note 2.

294. *Id.* at 1.

295. *Id.* at 4.

296. *Id.* at 5.

297. *Id.*

298. *Id.* at 8. Fiss acknowledges, however, that "some practitioners of Law and Economics (originally based in New Haven)" offer a more acceptable view of law and adjudication—a view which shifts its focus from private law subjects to "the great public law cases of our day." *Id.* at 7. He thus defends the liberal school of law and economics because he finds that the scholars of this school better understand the "larger role for law . . . in qualitatively different terms." *Id.* According to Fiss, "[t]he role of the law is neither to perfect nor to replicate the market, but rather to make those judgments that the adherents of law and economics claim are only 'arbitrary,' i.e., a mere matter of distribution." *Id.*

Ironically, it may be the hardliners of the Chicago School that provide Fiss with his strongest source of support.

As for CLS, Fiss argued that such practitioners critique without a vision of what might replace that which is destroyed— a form of critique Fiss finds "politically unappealing and politically irresponsible."[299] Fiss argued that the indeterminacy claims that CRITS assert about law are suspect because the assertions have not been empirically established or defended.[300] Fiss argued that the "law is politics" creed of CLS is threatening to both law and morality because there is no way of confining the "law is politics" criticism.[301] Fiss claimed that the CLS movement has generated a new and dangerous form of *nihilism* which threatens the ability of law to sustain or generate a public morality.[302]

In defense of a liberal, yet more traditional, form of jurisprudence, Fiss invokes the great struggles of the civil rights movement and the liberal values associated with the Warren Court era as examples of the public morality and concept of law that he favors. Thus, Fiss claims that "[t]he proponents of law and economics would have us believe that the typical nuisance case, or for that matter, a case like *Brown v. Board of Education*,[303] is simply a conflict over preferences, and that it arises because the preference of all parties cannot be fully satisfied."[304] As for CLS, Fiss argues that the nihilism of CLS is dangerous because it undermines the law's belief in the fundamental values fostered by cases like *Brown*.[305] Like other modern liberal scholars, Fiss posits the notion that an objective interpretative process can establish a necessary balkline for defending a conception of public morality symbolized by Chief Justice Earl Warren.[306]

While Fiss acknowledges that feminism is a "new cause" which he sees as having "achieved (at least in New Haven) the momentum that once belonged to the civil rights movement,"[307] he warns feminists that they may also fall prey to the dangers that have befallen the CLS and the L/E movements. Hence, Fiss argues that the "bears of the (feminist) cause" must "cease to view gender issues as a matter of individual or group interests, and recognize the claim to sexual equality as an expression of the ideals and values we hold in common."[308] Fiss thus admonishes

---

These L/E scholars offer objective methods for making legal choices that avoid the necessity of making arbitrary subjective choices in decisionmaking. *See* Posner, *supra* note 2. *See also* Singer, *supra* note 3, at 55 n.106, *citing* Kennedy, *Distributive*, *supra* note 219, at 621. Not unlike the claims of liberal scholars, L/E scholars of the Chicago School argue that their particular method and perspective should be privileged over all other methods and perspectives because their theory allegedly avoids the necessity of taking sides on sharply contested values. Liberal L/E scholars are much more tentative and less certain about the possibility of realizing consistent and determinant decisions. Where L/E scholars differ is in their rejection of the liberal notion that "principles of law could be inferred from judicial opinions." Posner, *supra* note 2, at 762. Thus, Fiss' criticism of the hardliners of the Chicago School may have been substantially wide of mark—methodologically, those scholars may be his strongest allies.

299. *See* Fiss, *supra* note 2, at 10.

300. *Id.* at 12.

301. *Id.* at 13.

302. *Id.* at 15.

303. 347 U.S. 483 (1954), *supplemented by* 349 U.S. 294 (1955).

304. Fiss, *supra* note 2, at 8.

305. *Id.* at 11.

306. *See, e.g.*, R. Dworkin, *supra* note 3, at 29–30 (using Justice Warren's decision in *Brown* as an example of the public morality which can be defended under an interpretation of the Constitution).

307. Fiss, *supra* note 2, at 15.

308. *Id.*

feminist thinkers to commit their movement to a view of law which embraces the fundamental ideals of liberalism.

While Fiss has since recanted much of his criticism of the CLS movement in an unpublished speech,[309] he has remained staunchly committed to his overall jurisprudential position, a position which the new critics, including CLS, criticize. Indeed, much of Fiss' views about the law must be understood in terms of his firmly felt convictions about the Warren Court era.[310] The missing ingredient in Fiss' defense of a liberal, more traditional jurisprudence is the affirmative justification for believing that *his* particular professional conception of law and adjudication is in fact superior to the ones he criticizes because it will serve to protect the jurisprudential values he associates with the Warren Court. It is one thing for Fiss to advocate a position on the basis of conviction; it is a different matter altogether for Fiss to establish the validity and truth of his convictions, no matter how strongly felt.[311]

The conviction that an objective legal process can guarantee and preserve the values of civil rights, equality, or an entire constitutional era is, of course, something which at least some members of the new jurisprudential movements debate and ultimately reject. It is not just the new critics who have come to question the conviction of those who believe that a particular form of jurisprudence can preserve the fundamental values of the Warren Court. Indeed, a growing number of court observers are quite pessimistic and skeptical about the lessons to be drawn from the Warren Court era.[312] As Derrick Bell has observed, "[j]ubilant predictions of victory in the struggle against racism based on a favorable court decision or helpful statute

---

309. *See supra* note 211.

310. For nearly a decade Fiss has been warning of the dangers of new jurisprudential trends which depart from the style of jurisprudence characterized by the Warren Court era in constitutional law. Fiss asserts that during the Warren Court era of the 1960s, judges sought to provide "structural reform" by giving "meaning to our public values." Fiss, *Foreword, supra* note 8, at 2. According to Fiss, Earl Warren symbolizes the "great judge"—"someone whom the specter of authority both disciplines and liberates, someone who can transcend the conflict." Fiss, *supra* note 3, at 758. The public values which "great judges" give effect (values such as equality, liberty, and due process) are thought to have a "true and important meaning" such that judges can discover and make them meaningful. Fiss, *Foreword, supra* note 8, at 17. "The task of a judge, then, should be seen as giving meaning to our public values and adjudication as the process through which that meaning is revealed or elaborated." *Id.* at 14. Fiss admits that he is "a romantic and an innocent." *Owen M. Fiss to Paul D. Carrington, supra* note 290. It is becoming increasingly difficult, however, to sustain the conviction and romanticism of the Warren Court when the Burger and Rehnquist Courts have established examples of what a Supreme Court is like. *See* Froomkin, *Climbing the Most Dangerous Branch, Legisprudence and the New Legal Process*, 66 TEX. L. REV. 1071, 1093 (1988).

311. Fiss acknowledges that his assumptions are "open to a factual challenge, as any empirical claim must be." Fiss, *supra* note 2, at 203. Hence, his theory of jurisprudence is subject to the same challenge he raises against CLS and L/E. Fiss asks for the proof that "our legal culture is sufficiently developed and textured so as to yield a body of disciplining rules that constrains judges and provides the (rational) standards for evaluating their work." *Id.* at 11. If the claims of L/E and CLS are empirically weak, as Fiss suggests, then why does Fiss perceive these movements to be so dangerous? A movement founded on empirically weak claims would hardly present a danger to traditional dogma *unless* the profession uncritically accepts the unverified claims as truth. In fact, if either L/E or CLS is dangerous because the profession may readily accept unfounded assertions about law and adjudication, then might not Fiss be seen as advancing an equally dangerous position? If, however, the real danger presented by L/E or CLS discourse is that it is transforming the content and meaning of justice, then the true source of objection is politics, not empirical impression. *See* F. Michelman, Bringing The Law To Life: A Plea For Disenchantment (unpublished manuscript on file with The Ohio State Law Journal) (arguing that "law is—that is ought to be, and ought to be understood to be politics").

312. *See, e.g.*, D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987). *See also* Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988); Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L.L. REV. 295 (1988).

have always proved premature."[313] Anti-discrimination law has accommodated conservative as well as liberal views of race and equality; there is no guarantee that a particular form of jurisprudence fosters a particular moral vision.[314] The new critics can thus argue that there is no evidence, in theory or practice, to support the conviction that an objective legal process will ever *overcome* racism, sexism, and economic disadvantage. The new critics can also offer alternative conceptions of law that promise to preserve the very values which Fiss and other liberal scholars try to defend.

Hence, law and economics scholars argue that there is an economic justification for supporting cases like *Brown*, and for rejecting the principle of separate but equal.[315] "Segregation reduces the opportunities for valuable associations between races and these associations would be especially valuable to the blacks because of the dominant position of the whites in the society."[316] These scholars thus advance an economic principle to support *Brown*: "Because blacks are an economic minority, the costs to them of the whites' prejudice are proportionately much greater than the costs to the whites."[317]

Law and economics scholars contend that so long as efficiency and self-interested rationality embody important social norms, economics will be necessary to "clarify value conflicts and to point the way toward reaching given social ends by the most efficient path."[318] Even in cases involving public morality, economic scholars offer a calculus which they claim can be useful for analyzing the costs of competing moral choices.[319] Some argue that even if other noneconomic values are at stake, "a judge may feel obligated to achieve legal objectives without wasting resources."[320] Thus, "[t]he fact that legal officials are expected to pursue consistent ends by efficient means implies (in their view) that there is broad scope for legal theory based upon economic analysis."[321] Certainly, law and economics scholarship cannot be found inappropriate merely because it provides a new cautionary basis for making legal choices under scarcity.

CLS scholars raise yet another set of arguments questioning the existence of so-called "objective interpretive methods" which liberal scholars such as Fiss claim are essential for preserving a liberal public morality. Instead of evaluating whether the social impact of their efforts maximizes the objectives of some objective program, CRITS argue that legal academics must become actively involved in actually

---

313. Bell, *Foreword*, 61 OR. L. REV. 151 (1982). According to Bell, "[t]he modern civil rights movement and its ringing imperative, 'We Shall Overcome,' must be seen as part of the American racial fantasy." Bell, *Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 10 (1985).

314. *See* Crenshaw, *supra* note 312 (demonstrating how antidiscrimination law represents "an ongoing ideological struggle in which occasional winners harness the moral, coercive, consensual power of law." *Id.* at 1335.).

315. *See, e.g.*, R. POSNER, *supra* note 18, at 617–19.

316. *Id.* at 617.

317. *Id.* at 619.

318. *Id.* at 23.

319. *Id.* at 238. L/E scholars argue that such moral principles as "honesty, truthfulness, frugality, trustworthiness (as by keeping promises), consideration for others, charity, neighborliness, hard work, and avoidance of negligence and of coercion" have "economic value." *Id.*

320. R. COOTER & T. ULEN, *supra* note 25, at 12.

321. *Id.*

transforming the social and legal structures which deny real democratic decisionmaking and justice. CRITS claim that theory cannot be separated from practice and that a theoretical commitment to the equalitarian values of the *Brown* decision requires political awareness of the relation between knowledge and politics. If CLS arguments, raising fundamental questions about coherent interpretations of shared values have any validity, then the legal process generation of liberal scholars must face what these claims mean for their liberal vision of public morality under law.[322]

Finally, Fiss must face the claims of feminists who assert that the legal profession has entrenched male domination and power by failing to view gender issues from the particular perspective of women.[323] Feminist legal scholars argue that mainstream legal thought advances and entrenches the ideals and values shared by men, not women, under claims of universal law. Feminists, at least radical feminists, seek to make law respect the fundamental differences between men and women by emphasizing the value of difference, *not* shared values.

CLS and feminist scholars argue that there is a *dialectical* relationship between law and values: that dreams and visions for a better world are *shaped* and *limited* by the traditional legal discourse that denies the existence of difference as a social and political force. Feminists argue that men seeing males and females as abstractions, are kept within a legal philosophy proclaiming the necessity for domination and power rather than the true reality of the "other" person. CLS scholars argue that elite powerholders represent themselves as the group which claims to have the authority under the "Rule of Law" to block or dominate alternative experiences and understandings necessary for critical reflection and action. Both feminist and CLS scholars ask: How can we expect to have shared experiences or understandings if only one particular perspective is given the power and authority to define meaning?

Responding to the reactions of modern liberal scholars, the new critics challenge the view that a public morality can be consistently and intelligently developed through an objective interpretative legal process, uninfluenced by the particular perspective of the law interpreter. The new critics challenge the assumption that judges can discover shared values in a society where vast disparities of wealth and power exist between social and economic classes. Some critics emphasize the cost of making choices between alternative courses of action and the efficiency of choosing one action over another. Some argue that a conception of public morality can be defended, but only by utilizing different, more determinant methods. Others question the belief that a community of law interpreters can be trusted with the absolute

322. *See* Peller, *supra* note 230. In order to judge the superiority of Fiss' theory of law and adjudication, one would need to know who counts in determining shared values for the "larger role of law" he foresees for the profession. Do we count the perspective and values of all groups in society or only those values and perspectives of judges, lawyers, law professors, and other legal elites? If we count only the values of some sub-group within society, upon what basis can we claim that law is based on a shared-value perspective? More generally, why should the perspectives of a legal elite be authoritative over the perspectives of those at the margins of power? It is in the face of such questions, questions which are inherent in the critique advanced by CLS, that Fiss' theory must ultimately respond to and resolve.

323. *See, e.g.*, C. MacKinnon, *supra* note 5, at 137; West, *supra* note 2, at 58–68.

authority to define public morality under law.[324] Still others wonder whether the very idea of shared values, in denying the value of difference, is itself a dangerous idea for those at the margins of power. Instead of offering pleas for shared values, these scholars make pleas for disenchantment with the values that now dominate the legal imagination.[325]

In this important sense, Fiss is right to wonder if the new movements may signify the death of the law as *his* generation has come to know it. What is unclear is whether the death of an understanding of law which has dominated the legal imagination of Fiss' generation is cause for celebration or concern. What is clear is that the new movements in jurisprudence have successfully posed a serious challenge to a concept of law which has dominated legal analysis for nearly three decades.

### C. *The Pleas for New Comprehensive or Comprehensible Discourses*

Of course, the threat posed by the new academic movements has provoked heated debate and controversy. Academic discussions about law have reached a new level of heightened hyperbole as a result of the new forms of critical discourse. It seems apparent that the legal academics are "more openly politicized and more polarized than ever before."[326] For some, the new developments in legal theory have resulted in a "pseudocritical posturing" at the legal academy which has erupted into a "shouting match pairing outrageous and self-congratulatory Chicagoan against obscure and critical Ungero-Marxist."[327] In reacting to the possibilities of sheer incomprehensibility of different discourses, some legal scholars have called for the creation of a new "constructive" or "comprehensible" discourse.

The plea for a comprehensive discourse has been raised by mainstream legal scholars who complain that they are being incapacitated by "barriers of language and intellectual style" erected by the new critics.[328] Martha Minow, for example, argues that the new interdisciplinary movements in law are making it increasingly difficult for members of the profession to speak together or to speak to members of other disciplines.[329] Minow calls for a new "*comprehensible discourse*" which would allow legal academics to engage in a public debate about their differences in methodology and outlook.

---

324. Hence, some new critics argue that when Fiss claims that "the judge . . . speaks with authority of the Pope," or when Dworkin asserts that "the courts are the capitals of law's empire, and the judges are its princes," the images of absolute authority are neither "accidental nor hyperbolic flourish." J. Baken, Retreat to the Elite 4 (unpublished manuscript). *See also* Singer, *supra* note 3. Singer argues that Fiss seeks to defend the idea that there is only one way to think about questions of morality. Fiss' "rationalist approach says: Either you take my view—normative statements are answers to problems that are solved by applying a 'universally accepted criterion' such as rational consensus or reasoned elaboration of precedent—or you have rejected morality and reason altogether." *Id.* at 543.

325. *See* F. Michelman, *supra* note 311.

326. Peller, *The Politics of Reconstruction*, 98 HARV. L. REV. 863 (1985).

327. B. ACKERMAN, *supra* note 3, at 44.

328. *See, e.g.*, Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413, 416 n.6 (1984) (commenting on "CLS theories and vocabulary"). *See also* Ulen, *supra* note 24, at 206 (arguing that "practitioners of CLS have seemed to be talking only to each other speaking in tongues, as it were, intelligible only to the true believers" (footnote omitted)). The problem of communication has also been raised in reaction to the new form of power-talk associated with the law and economics movement. *See* B. ACKERMAN, *supra* note 3, at 44–45.

329. Minow, *supra* note 2, at 95.

In asserting her "feminist commitment to communication," Minow argues that we need a new discourse which would "relinquish the claim of exclusive truth, and [evince] a willingness to hear competing vantage points, all of which are partial."[330] She asserts that "[r]ather than creating some new distanced categories and methods of legal analysis removed from popular understanding, legal scholars [should] look to local, specific problems that crop up in their experiences" such as "problems grounded in the experiences of particular groups, like women, or like the residents of the Jamaica Plain area in Boston."[331] Minow recommends dialogue, listening, and efforts to make one's own claims comprehensible to others while advocating the recognition of the inevitable partiality of one's own understanding and perspective. The idea is that "legal scholarship should look outward by looking inward to how it has insulated law from communication with nonlawyers, and cut off the sound of legal meaning in people's daily lives."[332]

Other legal academics have made proposals for the creation of a new comprehensive form of legal discourse. Bruce Ackerman, for example, recently argued that the legal profession needs a "common language" that will enable its practitioners to engage in a "main line of conversation in a more Constructive direction."[333] Unlike Minow, Ackerman calls for a new "technocratic" discourse to provide a new source of authority and to stabilize the rhetoric of lawyers. Then, lawyers could "translate their clients' grievances into a language that powerholders will find persuasive."[334] As it turns out, the new "common language" that Ackerman advocates is based at least in part on the language of "law and economics."[335]

These divergent proposals for a new common discourse suggest that the decision to use a particular "descriptive" discourse, such as feminism, the discourse of difference, or the language of law and economics, would be just as controversial and perhaps as polarizing as the current substantive debate now being waged by different discourses. Legal scholars probably could never agree on a common language because whoever is allowed to define the official language for the profession will have the power to entrench particular conceptions of law and adjudication.

Even a language that seeks to valorize difference may abuse the power to cut off alternative conversations that may be necessary for presenting new and contrary perceptions of the world. Martha Minow has recognized this danger in noting that "[i]n critiques of the 'male' point of view and in celebrations of the 'female,' feminists run the risk of treating particular experiences as universal and ignoring differences of racial, class, religious, ethnic, national, and other situated

330. *Id.* at 97.

331. *Id.* at 99.

332. *Id.*

333. B. ACKERMAN, *supra* note 3, at 44–45.

334. *Id.* at 3.

335. *Id.* at 42. Ackerman argues that there are two structures to his new discourse: one for establishing "facts"; the other for establishing "values." *Id.* at 45. The language of law and economics would be used to determine facts, and common discourse of the "people" would be used to determine "values." *Id.* at 29, 79–80. *See also* Peller, *supra* note 326, at 867–68. "Ackerman's strategy for the liberal reformist center is to incorporate conservative law-and-economics discourse into the 'main line of conversation' for the legal description of *facts* yet preserve traditional liberal discourse for the discussion of *values*." *Id.* at 869.

experiences."[336] Of course, the same danger exists with critiques of CLS which come close to asserting that a particular contradiction in legal thought is "fundamental" and hence is the universal basis for critiquing American law. There seems to be a common tendency within the new jurisprudential movements to privilege a particular perspective as "truth" and thereby repeat the mistakes these movements have identified in mainstream legal thought. Indeed, the tendency to privilege some view as the universal view for understanding the world may be a powerful tendency affecting all perspectives.[337]

The call for new comprehensive or comprehensible forms of legal discourse will probably never escape the very conflict it is designed to avoid. The notion of a pure descriptive discourse for communication is itself subject to the fact that social power is always at stake, that change can only come about through struggle and conflict, and that "there is no such metadiscourse that is itself immune to being placed within its particular 'interpretative framework.' "[338] The fact that someone or some group has the power to define the acceptable standards of professional discourse too often remains submerged, unexpressed, and unappreciated. If different languages and perspectives are allowed to coexist and compete, then perhaps other perspectives can be acknowledged and appreciated, or at least tolerated. If there is a single lesson to be gleaned from the new jurisprudential movements of the 1980s, it is that method itself is ideological and political; that there is no escape from the link between law and politics.

## VI. Conclusion

While the methods and approaches of law and economics, critical legal studies, and feminist legal theory are not beyond criticism, neither are they responsible for creating what even mainstream legal scholars have recognized as the "*current malaise*" in mainstream scholarship and legal theory.[339] The competition between the new movements in jurisprudence and the controversy that they have sparked with the old can be understood as part of an ongoing intellectual struggle now being waged by new critical discourses offering new ways for understanding law and new methods for utilizing that understanding. The debate generated by the new "movements" in legal theory has relevance to an older debate involving some of the central questions raised by the *legal realists* concerning the nature of power and meaning and the role of law in American society. This debate also raises new theoretical questions concerning the limits of scientific reasoning, rational investigation, and the relationship between knowledge and power.

---

336. Minow, *supra* note 16, at 47–48. Indeed, Minow acknowledges that the problem of mediating between different discourses and perspectives renders the idea of a universal discourse difficult, if not impossible. *See* Minow, *supra* note 5, at 92–93. *See also* Abrams, *Law's Republicanism*, 97 YALE L.J. 1591, 1600–01 (1988).

337. Minow suggests that this tendency is the product of "our attraction to simplifying categories, our own psychodynamic development, our unconscious attachment to stereotypes, and our participation in a culture in which contests over power include contests over what version of reality prevails." *Id.* at 51.

338. Peller, *supra* note 326, at 880–81.

339. For a discussion of the current "crisis" in legal scholarship and legal theory, see *Contemporary Legal Theory Symposium*, 36 J. LEGAL EDUC. 441 (1986).

The new trends in legal scholarship may be developing because the prevailing visions of the 1950s and 1960s no longer adequately explain or justify the operation and conflict of everyday social life occurring in the marketplace, the workplace, and the family.[340] New sources of images and visions of the world appear necessary when mainstream legal theory becomes divorced from the realities of a world plagued by cultural differences and a multiplicity of societal factions.

The belief in a shared political consensus might have seemed sensible and appropriate in the 1950s when the legal process school was established. Nevertheless, such a belief is "oddly out of touch" with the realities of the judicial activism of the 1960s and the social events following the Vietnam War and Watergate.[341] The law, like society, is now comprised of a wide spectrum of conflicting views which, as Judge Posner has noted, "runs from Marxism, feminism, and left-wing nihilism and anarchism on the left to economic and political libertarianism and Christian fundamentalism on the right."[342] As the debate over abortion rights now vividly illustrates, we no longer live in a legal world of shared values where one legal theory or moral conception can hope to command widespread allegiance.[343]

Perhaps the need for a persuasive explanation of how the world works is responsible for the birth of new trends in legal jurisprudence. In arguing for an

---

340. A number of explanations have been advanced to explain the development of the jurisprudential movement of the 1980s. *See* Minow, *supra* note 2. One "simple explanation" may have to do with the fact that "the job market for Ph.D's has constricted dramatically in the last 15 years." *Id.* at 91. Ph.D.s who could no longer find jobs in the social sciences were forced to retool their skills in law school. Minow suggests that as some of these people joined law faculties, they "brought with them questions and methods of inquiry common in nonlegal disciplines, and subjected law to scrutiny." *Id.* An alternative explanation stems from the fact that there is a "lag-time before the ideas from academic study permeates the rest of society—including law." *Id.* at 91–92. The lag-time is "the time it takes for those ideas to be taught to undergraduates who enter other fields, and this lag-time has been met by efficiency-oriented economics, post-World War II continental philosophy and social theory, and post-modern literary interpretation." *Id.*

Yet another "simple explanation" focuses on the "group biographies" of the scholars who have identified with each movement. Minow notes that the personal experiences of members of each group (especially CLS) were "forged in the political upheavals of the 1960s and 1970s with questions about what then makes law legitimate for resolving disputes and maintaining order." *Id.* at 92. *See also* Gordon, *New Developments in Legal Theory*, in THE POLITICS OF LAW 281, 282–84 (D. Kairys ed. 1982).

There is an even deeper explanation for why these new trends in legal theory are occurring now. Behind each new movement is the legacy of the legal realist movement and its revolt against formalism and conceptualism in legal thought. As Minow has observed, it was the legal realist movement of the 1920s and 1930s that caused the "fissures in the legal edifice troubling contemporary scholars" ever since. Minow, *supra* note 2, at 92. Law and economics, CLS, and feminist legal theory can be understood as the heirs of an earlier oppositional academic movement which has profoundly challenged "law's foundation in knowable truth, objectively determinable rights, and reliably applied precedents." *Id.* at 93. The legal process movement of the 1950s was an attempt to respond to the criticism of the legal realists by substituting "objectivity of process" for "objectivity of doctrine." *See* White, *The Inevitability of Critical Legal Studies*, 36 STAN. L. REV. 649, 663 (1984).

341. *See, e.g.*, White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279, 291–302 (1973); White, *supra* note 340, at 659–60. The myth of a national consensus was "forever shattered" by the Vietnam War and the realities of American society in the years following Vietnam. *See* Binder, *supra* note 10, at 16–18. "The experience of the Vietnam years fundamentally altered [Americans'] conceptions of the state, the national political community, the role of the intellectual, and the process of social change." *Id.* at 16. Of particular significance was the economic stagnation following the war and the black "ghettoization" of American cities. *Id.* at 18. More than anything else, the urban riots of the late sixties ended the idea that Black Americans shared a consensus with the rest of America. "The looting and burning that characterized these riots primarily targeted exploitative white owned businesses. It was, in short, political protest." *Id.* at 20 (footnote omitted).

342. Posner, *supra* note 2, at 766.

343. For a description of the world which has dominated the thinking of mainstream legal scholars, see D. BELL, THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES (1960).

economic approach to legal decisionmaking, law and economics scholars have been successful in advancing the idea that it makes sense for judges to consider the *opportunity cost* of their decisions, that in the real world there is "scarcity," and that legal actors, like people generally, tend to engage in "self-interested conduct." These scholars have also advocated a new economic "metric" for making choices about sharply divided public policies that accept and respond to the modern realities of scarcity, choice, and trade-offs.[344] While some may find the underlying values of law and economics distasteful, disagree with its underlying assumptions, or reject some of its advocates' empirical assertions, it is difficult to ignore the reality of an approach cognizant that in a world of scarcity, trade-offs are inevitable and that "judicial decisions create, transfer, or destroy valuable things and affect people's decisions."[345]

Critical legal and feminist scholars offer yet another message about law and adjudication. These scholars have fueled a deep skepticism about the possibility of authoritative and rational interpretations of legal texts.[346] The arguments of these critics are bound to be unsettling to both traditional liberal and modern law and economics scholars. If CLS and feminist claims about the limits of scientific reasoning and rational discourse are correct, then much of the current thinking about law and adjudication would be placed in jeopardy by a crisis transcending law and questioning the distinction between rationality and politics. What critical legal and feminist scholars have been successful in doing is advancing a "new realism" about the way knowledge and power are reproduced and reinforced by professional discourse and in advancing a better understanding of the choices available for establishing the quality of life we want to live.

The new jurisprudential movements have already made significant contributions which will have lasting consequences for the future development of legal theory and practice. It is, of course, too early to predict the resolution of the current paradigm conflicts. One possibility is that one of the new movements, or perhaps a combination of two or all three, will emerge as the dominant jurisprudential perspective, thereby replacing the prevailing jurisprudential views of mainstream legal scholars. Movements toward partnerships and synthesis seem likely. Critical legal studies and the feminist legal theory movement have already begun to develop a partnership of sorts which may yield a new form of legal criticism built on the strengths of each.[347] It is not inconceivable that a synthesis may also develop between progressive strands of the L/E movement and CLS.[348]

---

344. As one leading law and economic scholar has proclaimed:

> We get nowhere by listing values unless we have both a metric by which to assess the claims the parties make and a legitimate rule of decision. Economic analysis sometimes suggests a metric and a rule of decision; a list of values along with an aspiration to improve life in all its fullness does not.

Easterbrook, *supra* note 254, at 626.

345. *Id.* at 622.

346. Posner, *supra* note 2, at 768.

347. *See supra* notes 121–23 and accompanying text.

348. Indeed, there is now room within both the L/E and CLS movements for a more critical form of law and economics, one which develops a theory of law from a deeper understanding of ideology, or one which develops concepts from the philosophical traditions associated with Hegel or Marx. However, a synthesis may mean dilution of the

Another possibility is that the movements of the 1980s will themselves be absorbed into a new reconstructed jurisprudence developed from prevailing jurisprudential perspectives of mainstreamers. For example, a new breed of legal scholar has recently appeared on the academic scene proclaiming to have developed a new high-tech theory of legal process for approaching public law and statutory interpretation problems.[349] This *New Legal Process* builds on the theories of the older legal process by incorporating elements of public choice theory of law and economics and the critical interpretative methods of CLS into a more realistic understanding of legislation.[350] Other ambitious legal scholars have attempted to develop a new liberal conception of civic virtue as an alternative to the possessive individualism of mainstream Lockean liberalism.[351] It is far from clear whether the *New Legal Process* approach to legislation will establish a reconstructed form of legal process. It is also doubtful that a *new liberalism* developed from universal civic virtues could ever hope to overcome the criticism of the new movements while defending the basic tenets of a universal and politically impartial legal theory. What does seem certain, however, is that the attitudes and perspectives of mainstream legal scholars will be forever affected by the challenge posed by the critics of the new movements.

Whether law and economics, critical legal studies, or feminist legal theory are to be praised, condemned, or replaced by new forms of "discourse" will depend upon how successful these movements are in hastening the death, not of law, but rather of the particular methods legal scholars have traditionally employed in thinking about their subject. The proliferation of new forms of competing discourses, the willingness of some to try new methods, and the expression of discontent and resistance signify neither the end of professional discourse nor law as we have known it—all may simply be symptomatic of change from the old to the new.[352]

---

distinctive nature of the claims now made within each movement. The risk inherent in synthesis is the possible extinction or absorption of the separate character of a particular movement. *See* Minow, *supra* note 2, at 99. Whether the new movements result in revolution, or merely modification of the prevailing legal paradigm, may depend upon the ability of each movement to maintain its distinctively critical edge.

349. *See* Eskridge & Frickey, *Legislation Scholarship and Pedagogy in the Post-Legal Process Era*, 48 PITT. L. REV. 691 (1987) (developing a new theory for reading statutes and understanding legislative lawmaking). *See also* Froomkin, *supra* note 310 (reviewing W. ESKRIDGE & P. FRICKEY, CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY (1988)).

350. The *New Legal Process* approach to legislation is based on the view that "lawmaking is a process of value creation that should be informed by theories of justice and fairness . . . that legislation too often fails to achieve this aspiration and that creative lawmaking by courts and agencies is needed to ensure rationality and justice in law. A final theme is the importance of dialogue or conversation as the means by which innovative lawmaking can be validated in a democratic policy and by which the rule of law can best be defended against charges of unfairness or illegitimacy." Froomkin, *supra* note 310, at 1088 (citing J. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 330–31 (1984)). The term *New Legal Process* was first coined by Weisberg in *The Calabresian Judicial Artist: Statutes and the New Legal Process*, 35 STAN. L. REV. 213, 237–49 (1983).

351. *See* Sunstein, *supra* note 253.

352. *See, e.g.*, T. KUHN, *supra* note 1, at 91.