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THE DEATH OF THE LAW?

Owen M. Fiss †

The 1970s were an exciting and unusual time for legal education in America. The period was marked by the emergence of two jurisprudential movements which filled classrooms and law reviews with a remarkable spirit and energy. Today everyone is talking about theory. The purpose of my lecture, however, will not be to celebrate these developments, but rather to criticize them. I want to look at these two jurisprudential movements in some detail, and try to explain to you, if I can, why and how these movements endanger the proudest and noblest ambitions of the law. My claim is that though the jurisprudential movements of the seventies have electrified the academy, they also distort the purposes of law and threaten its very existence.

In making this charge, it will come as no surprise to you that one of the movements I am referring to is critical legal studies. I have spoken of this movement on other occasions, and it has become the subject of articles in a wide variety of popular journals.¹ Critical legal studies is deeply entrenched in two of the most prestigious law schools in the country, Harvard and Stanford, and the institutional turmoil at Harvard has largely been attributed to it. (Everyone seems to thrive on gossip about Harvard's misfortune.) This movement has also provoked an unnerving and widely publicized response by Paul Carrington, the Dean of Duke, who argued that the members of the critical legal studies movement have no place in the modern law school.²

These days everyone seems to be down on critical legal studies, and because I share the egalitarianism that inspires much of the movement, I am a little sorry about that. I will not, however, draw

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† Alexander M. Bickel Professor of Public Law, Yale University. This essay is based on the Robert S. Stevens Lecture delivered at Cornell Law School on April 9, 1986. I am especially grateful to Anthony Kronman and the seminars we taught together, including the one that gave shape to many of these ideas and from which I borrowed the title of this lecture and essay.

¹ Menand, *Radicalism for Yuppies*, NEW REPUBLIC, Mar. 17, 1986, at 20; Frug, *Henry James, Lee Marvin and the Law*, N.Y. TIMES, Feb. 16, 1986, § 7 (Book Review), at 1, col. 1; Lacayo, *Critical Legal Times at Harvard*, TIME, Nov. 18, 1985, at 87; Trillin, *A Reporter at Large: Harvard Law*, NEW YORKER, Mar. 26, 1984, at 53.

² Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984). For exchanges of correspondence addressing Dean Carrington's article, see "Of Law and the River," and of *Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985).

back from my critique, but instead try to broaden it. I will try to place critical legal studies in a larger cultural and intellectual framework and try to link it with the other jurisprudential movement that arose contemporaneously with it, law and economics. The success of that movement is not of the kind that generates articles for popular journals, but it is important to bear in mind that it arose roughly at the same time as critical legal studies and today is even more firmly entrenched within the legal academy. Now there is hardly a major law school that does not have a full-time economist on its faculty; Yale has two, and five or six lawyers who have had considerable training in economics and who self-consciously define themselves as practitioners of law and economics. Much to my embarrassment (I have no taste for Carrington's purge), the critical legal studies movement is virtually unrepresented on the Yale faculty. Several of the leading practitioners of law and economics—Richard Posner, Frank Easterbrook, Ralph Winter, and Robert Bork—have recently been appointed to the federal bench, thereby achieving a measure of power that lies far, far beyond the reach of any critical legal studies scholar.

The 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. The politics of the two movements also tend to be different. Law and economics is a movement of the right, while critical legal studies is one of the left. Despite these differences, however, and others that I will try to elaborate, what strikes me as even more significant is how much they share. Both 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. Both law and economics and critical legal studies are united in their rejection of the notion of law as public ideal. One school proclaims "law is efficient," the other that "law is politics." But neither is willing to take law on its own terms, and to accept adjudication as an institutional arrangement in which public officials seek to elaborate and protect the values that we hold in common.

I

Law and economics has a descriptive dimension and as such might be understood as a continuation of the social scientific tradition in the law that began with Roscoe Pound and the realists. It seeks a patterned description of the case law. The most prominent hypothesis generated by such an inquiry asserts that the law is efficient, or more particularly, that in defining or shaping rights, judges have tended to create rules that maximize the total satisfaction of

preferences. Richard Posner's career was made by going through one body of decisions after another—torts, contracts, property, etc.—in an effort to show how each and every one might be understood in such instrumental terms.³ For Posner, the law was by and large efficient.

The efficiency hypothesis always seemed weak. The evidence marshalled has not been wholly convincing;⁴ the exceptions seemed almost as important as what purported to be the generalization, and although a story might be told as to how a particular rule (e.g., the fellow servant rule) served efficiency,⁵ it also seems possible to tell a similar story about the opposite rule. Even more important, no explanation was ever given for how the law might work in the wondrous way that Posner hypothesized.⁶ Why would the law always, or generally, produce the efficient result? An explanatory mechanism was needed to render the hypothesis plausible (and thus to compensate for the shoddy empirical work). It was also needed to give the hypothesis some predictive power and to thus fulfill the highest scientific aspirations of this school. Posner and his colleagues claimed not only that the law *was* efficient, but that it *will be*.

On one occasion, at a workshop at Yale in the late seventies, Posner was pressed on this point. He was asked how a body of decisions might be understood as an instrument for maximizing the total satisfaction of preferences when the judges responsible for those decisions were not trained in economics, did not justify their decisions in those terms, and did not give much evidence that they even thought about such matters. In fact, it appeared that the judges thought about everything else but maximization. Posner responded by describing the work of a colleague who sought to explain the behavior of rats in terms of maximizing their satisfaction. What was critical, Posner insisted, was that the rats behaved “as if” the maximization of their satisfaction was their objective and it was not important for the validity of such an explanation that the rats actually thought about maximization, economics, or for that matter anything else.

The analogy seemed to many far-fetched, if not downright insulting, but the general theoretical point Posner made was well taken. “As if” explanations might have predictive validity and do

³ R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972). A second edition was published in 1977 and a third edition in 1986.

⁴ On close inspection, the “law is efficient” hypothesis does not even hold up in the one area in which it seems plausible. See M. TREBILCOCK, *THE COMMON LAW OF RESTRAINT OF TRADE: A LEGAL AND ECONOMIC ANALYSIS* (1986).

⁵ Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

⁶ Priest, *The New Scientism in Legal Scholarship: A Comment on Clark and Posner*, 90 YALE L.J. 1284, 1291-92 (1981).

not require self-awareness or any kind of consciousness. It is possible to say that judges are acting "as if" they were trying to maximize the satisfaction of preferences, even though it could be assumed that they never thought in those terms. "As if" explanations do require, however, the identification of some dynamic (e.g., a structure of incentives) that would explain the behavior in question and render the empirical hypothesis plausible, or even credible. In the case of the rats there was the cheese; for judges there was no explanation why they might behave "as if" they were maximizing the total satisfaction of preferences. No reason was given why we should disbelieve the justification the judges offered for their behavior.

Subsequently, Posner turned away from an "as if" explanation, and toward what might be termed a "sensible objectives" one: According to this theory, devising rules for maximizing the satisfaction of preferences is the only "sensible" (or "rational") thing for judges to do. Posner postulated two types of rules—those that maximize and those that redistribute—and then further assumed that courts cannot effectively redistribute and legislatures can. Under these circumstances, the only "sensible" thing for a court to do is to promulgate rules that maximize the total satisfaction of preferences and are in that sense efficient. As Posner put it, "Courts can do very little to affect the distribution of wealth in a society, so it may be sensible for them to concentrate on what they can do, which is to establish rules that maximize the size of the economic pie, and let the problem of slicing it up be handled by the legislature with its much greater taxing and spending powers."⁷ This sentence comes from an article written after Posner became a judge, and as such has some special biographical value. In an earlier paper, he advanced a similar theory to explain the behavior of litigants. They are likely to fight for efficient rules in the courts, Posner claimed, because that is the only sensible thing for them to do: "By doing so they increase the wealth of the society; they will get a share of that increased wealth; and there is no alternative norm that would yield a larger share."⁸

Each and every step in this argument is contestable—the division of judge-made rules into two (and only two) types, the allocations of competencies among various institutions, the assumption that we all do what is "sensible," etc. In one of the great understatement of his long and distinguished career, Posner said of his own effort to provide the requisite explanatory mechanism, "some

⁷ Posner, *Wealth Maximization and Judicial Decision-Making*, 4 INT'L REV. L. & ECON. 131, 132 (1984).

⁸ Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 505 (1980).

of the links in the chain are obscure.”⁹ For our purposes, however, what must be stressed is that a “sensible objectives” theory would never suffice for a thoroughgoing positivist, especially an economist. Scientific theories are not built out of claims about what is the “sensible” or “rational” thing for someone to do, but instead require an identification or description of those observable features of the environment that systematically lead people to behave the way they do (regardless of what they say about their beliefs or anything else). That Posner and his colleagues never provided.

The theory of “sensible objectives” fails to supply the explanatory mechanism needed to give the “law is efficient” hypothesis predictive validity, or even descriptive credibility. In that sense, it takes us no further than did Posner’s talk about rats and “as if” explanations. The theory of “sensible objectives” does, however, advance our understanding of the law and economics movement in general, for it makes abundantly clear that the efficiency hypothesis rests largely on a normative assumption—that is the way a judge *should* decide cases. Such a normative assumption cannot, of course, save an enterprise that purports to be descriptive and predictive—the pretense of scientism must be abandoned—but this assumption can stand on its own and, in fact, has given rise to what might be regarded as a second branch of the law and economics movement, a normative one, which in fact has turned out to be the predominant one.

The aim of this second, or normative, branch of law and economics is not to describe or explain how decisions were in fact made or predict how they will be made, but rather to guide them. It depicts the normative concepts employed by judges—for example, equality or reasonableness—as a hopeless jumble of intuitions and offers an intellectual structure to order those intuitions and give them content. That structure is the market. According to this branch of law and economics, the normative concepts of the law should be construed and applied in such a way as to make the judicial power an instrument for perfecting the market.

The normative branch of law and economics ultimately rests on the relativization of all values. All values are reduced to preferences and all preferences are assumed to have an equal claim for satisfaction. The struggle between the neighbors in the typical nuisance case (to take an example that is at once central to the economic analysis of the law and most congenial to it) is not a conflict between peace and recreation, understood as public values that have to be harmonized and ordered, but rather a conflict between those who

⁹ *Id.*

prefer to use the land for recreation and those who prefer peace and quiet. There is no way, moreover, of judging one preference as more worthy than the other, any more than there is a way of judging the preference for one flavor of ice cream better than another. Any choice between the two would be "arbitrary," or to use the jargon of this school, merely a matter of "distribution" (which means that the choice does not depend on any universally acceptable criterion, but rather amounts to favoring the interests of one group over another).

Having thus reduced all values to preferences, and having established that a choice between preferences would be arbitrary, it then follows that social institutions can have one purpose and only one purpose and that is to maximize the total satisfaction of preferences. In the ordinary situation, bargaining and exchange are presumably the best means for achieving that end. Individuals know best what their preferences are and how much they are worth, and thus they should be free to bargain with one another to obtain the means (or conditions) of satisfying them. Cash for ice cream. The exchange will take place only when the positions of both parties will be improved. In this way, free exchanges among individuals keep us moving toward the goal of maximizing the satisfaction of preferences.

With the ordinary commercial transaction, say between a retailer and a customer, the contribution of market exchanges to the satisfaction of preferences seems clear and obvious. What the new law and economics movement did, under the leadership of Ronald Coase,¹⁰ was to perceive a role for market exchange even in non-commercial contexts, such as nuisance cases. The desires of the parties could not be fully satisfied because there was a conflict, or to introduce some more jargon, a "costly interaction" between the two, but an exchange might maximize the total value realizable; either the sports club could buy out the adjoining homeowner (which would leave both parties better off—one with the game, and the other with money) or the bargain could work the other way if the monetary value to the homeowner of remaining was greater than the cost of moving for the sports club.

Under this account, law appears to have two purposes. One is to provide the conditions necessary for effective bargaining (demarkating property rights, assuring bargains are enforced, preventing fraud, etc.). The law is an indispensable backdrop for the market. A second mission for the law arises only when bargaining breaks down or is not possible, as when there are too many people involved. In such a case, often described as one in which there are "transaction

¹⁰ Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1 (1960).

costs," the law takes a more active role, serving as a supplement rather than a backdrop for the market. It corrects for market failure. The purpose of law or adjudication in particular is to remove the obstacles to exchange and, if that is not possible, to replicate the market outcome. The just result is one that either brings the parties together for exchange or gives them approximately what they would have received if they had been able to bargain.

For some theorists, mostly in Chicago, the role of law as an institution that supplements and thus perfects the market in this second way is minor, for they assume that market failure (because of, say, high transaction costs) is the exception and sporadic. Law and economics merely becomes the handmaiden of *laissez faire*, though perhaps with a special twist. Law is not only unnecessary, but, as emphasized by Demsetz¹¹ and the others who have pursued Coase's essential insight, it is also redundant: No matter how the case is decided, as long as bargaining remains possible, an exchange between the parties after judgment will maximize the satisfaction of preferences and move us closer to the efficient allocation of resources. In contrast to the Chicago school, there are some practitioners of law and economics (originally based in New Haven) who contemplate a larger role for the state and for adjudication. They see market failure almost everywhere. They acknowledge the power of the market paradigm, in which all values are relativized and the maximum satisfaction of preferences is the end of all social institutions, yet they insist that the need for supplementary institutions is all pervasive. Through the most ingenious of arguments they are able to embrace both the market and the activist state.

The New Haven school is, in my judgment, closer to the truth than the Chicago one, especially if the focus shifts from nuisance cases to the great public law cases of our day. The "transaction costs" in the typical desegregation case are staggering, to engage in something of an understatement. It seems to me, however, that the problem is deeper and that all practitioners of law and economics—whether they be in New Haven or Chicago—are on the wrong track. The issue is not quantity but quality: It is not that a larger role for law must be assumed, but rather that its role should be understood in qualitatively different terms. The 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. The duty of the judge is not to serve the market, but to determine whether it should prevail.

This account of law reflects actual practices, how we think and

¹¹ Demsetz, *When Does the Rule of Liability Matter?*, 1 J. LEGAL STUD. 13 (1972).

talk about the law. It also reflects the judiciary's self-understanding. 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. But recall, at this juncture the claim of law and economics is normative, not descriptive: As a statement of what the purpose of the law should be, the efficiency principle is not defeated by the simple (and well-taken) objection that it contradicts actual social practices or self-understanding of judges by depicting the law in crudely instrumental terms (as a means of satisfying preferences). The normative claim of law and economics can be defeated only by challenging its first premise, namely, the one that relativizes all values, and it will come as no surprise that I am happy to do that too. I do not believe all values are reducible to preferences and that all have an equal claim to satisfaction. Values are values.

The proponents of law and economics would have us believe that the typical nuisance case, or for that matter a case such as *Brown v. Board of Education*,¹² is simply a conflict over preferences, and that it arises because the preferences of all the parties cannot be fully satisfied. They assign the judge the task of trying to devise some scheme for maximizing the satisfaction of these conflicting preferences. It seems to me, however, that the conflict before the court is of a different character altogether—not a conflict arising from a divergence of preferences or tastes, but a conflict between the various ethical commitments implicit in that body of shared understandings known as the law. And from that perspective, the assigned task of the judiciary should not be to devise schemes for maximizing the satisfaction of preferences, but rather to give concrete meaning and expression to the values made authoritative by the law. Judges should order, interpret, and establish a regime of state power for protecting these values.¹³ The right of the judiciary to give meaning to our public values does not rest on the moral expertise of the persons who happen to hold office, but on the processual norms that simultaneously constrain and liberate those who exercise the judicial power—judges are insulated from the political process and are required to engage in a special kind of dialogue over the meaning of those values. This dialogue is arduous and taxing, at times almost beyond the powers of anyone, but it is an essential part of the process through which a morality evolves and retains its public character.

¹² 347 U.S. 483 (1954); 349 U.S. 294 (1955).

¹³ For an elaboration, see Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1 (1979).

II

Like law and economics, the critical legal studies movement starts by emphasizing the openness of the normative concepts used by the judiciary. The purpose here, however, is not affirmative, but negative. Critical legal studies scholars do not try to transcend the uncertainty—they revel in it. Rather than impose an intellectual structure on all the conflicting intuitions embraced within these normative concepts, critical legal studies scholars accept this openness or (to use their favorite term) “indeterminacy” as a given. Consequently, they argue, there can be no standards for constraining judges or for determining whether a decision is correct as a matter of law. To revert to the example of law and economics, there is no basis for saying one use of the land is more reasonable than another; or to move to the public law cases that are much more central to critical legal studies, there is no basis for saying that one judicial interpretation of the equal protection or due process clause is truer than another. The purpose of this exercise is to deny the distinctive claim of law as a form of rationality.¹⁴ Law is not what it seems—objective and capable of yielding “right answers”—but rather simply politics in another guise. Judges speak the way they do because that is the convention of their profession and is needed to maintain their power, but their rhetoric is all a sham.

The realists of the twenties and thirties were also intent on demystifying the law, and insisted that the law’s claim to determinacy and objectivity was a sham, but their critique was aimed at freeing law from the past (in particular, from its commitment to *laissez faire*). Their critique was a prelude to having the law become an effective instrument of good “public policy.” Today there is a strain of feminism that also seeks to unmask the law—to show how the privileged position of men in the legal profession has tended to skew the law, and how neutral sounding concepts or principles have often served as a cloak for patriarchy. They, like the realists, are moved by an affirmative vision—if not liberty, then a true and substantive equality—and they appreciate how the law can be used to further that vision. But that is not critical legal scholarship.¹⁵ Critical legal studies scholars are distinguished (if at all) from feminists and from the legal realists of an earlier generation by the purity of their negativism. When critical legal studies scholars insist that “law

¹⁴ Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). For two general collections of material on critical legal studies, see *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

¹⁵ Indeed, Professor Frug refers to feminism as a “source” of critical legal studies. Frug, *supra* note 1, at 1, col. 2.

is politics," they mean something quite different and more nihilistic than either realists or feminists. Critical legal studies scholars want to unmask the law, but not to make law into an effective instrument of good public policy or equality. The aim of their critique is critique. Critical legal studies scholars realize that any normative structure created to supplant law would be subject to the very same critique they used to attack the law.

A few have tried to go further. They have tried to construct an affirmative program and to explain what law could become once it is unmasked, but in each instance the affirmative program offered is rather empty and unattractive. Indeed, it turns out to be another form of negativism. One such program has been put forth by Duncan Kennedy,¹⁶ generally thought of as the Abbie Hoffman of the movement.¹⁷ Kennedy's program contemplates a particularized form of adjudication, where judges look at the totality of circumstances and simply decide, without the guidance of rules or principles (which, of course, would be vulnerable to the critique), but with a full understanding of their historical position and a willingness to assume full responsibility for their decisions. Another so-called affirmative program has been advanced by Roberto Unger, whose work strikes me as the true inspiration of the movement.¹⁸ He urges us to use the judicial power as an instrument of destabilization—of tearing down whatever structure happens to exist at the time—not as a means of moving us closer to nirvana (which, given the distortions of existing social structures, cannot be specified), but as a way of revealing our capacity to transcend the particular context in which we happen to find ourselves.

Critique without a vision of what might replace that which is destroyed strikes me as politically unappealing and politically irresponsible. Some suggest that these fears are unwarranted, claiming that adjudication has a place in these so-called affirmative programs, and that for the first time it will become "responsible," "intelligible," and "democratic." But this is simply a play on words. I would, of course, have to accept the critique and live with the political consequences of this critique, however unpleasant they might be, if I thought for a moment that the critique was intellectually compelling. But in fact it is not. The freedom of the judge that is posited by critical legal studies and that serves as its central premise simply does not exist. The concepts of the law may be open-ended, in the

¹⁶ Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 646-49 (1982).

¹⁷ Granetz, *Duncan the Doughnut*, NEW REPUBLIC, Mar. 17, 1986, at 22.

¹⁸ Unger, *supra* note 14.

sense that one cannot reach judgment by a simple process of deduction, but that is not what the law or objectivity requires or even aspires to. What is required is that judges be constrained in their judgment, and that they certainly are.

When I read a case like *Brown v. Board of Education*,¹⁹ 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 constitute that profession. There is more to judging than simply confronting the bare words of the fourteenth amendment commanding that “[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws.” The justices start with the amendment’s legislative history and a body of cases that has struggled to make sense out of the commitment of the amendment to racial equality. Guided by years of training and experience, they read earlier cases, and sense which way the law is moving. They consider the role of the state, and the place of public education in particular, in the life of the nation and weigh the evidence developed at trial on the impact of segregative practices. They also know what constitutes a good reason for distinguishing *Plessy*²⁰ or for deciding the case one way or another. In sum, the justices are disciplined in the exercise of their power. They are caught in a network of so-called “disciplining rules” which, like a grammar, define and constitute the practice of judging and are rendered authoritative by the interpretive community of which the justices are part.²¹ These disciplining rules provide the standards for determining whether some decision is right (or wrong) and for justifying it (or for contesting it). They constrain, not determine, judgment. Of course, disagreement can still take place, as it has throughout history. But disagreement—at least within modest proportions—is not destructive of law. Rather, it is generative of it: Disagreement is in fact an essential part of any collaborative moral enterprise within a changing society.

In this account of adjudication I recognize that I am making an empirical assumption about the richness of the legal system in a country such as the United States. I am assuming that our legal culture is sufficiently developed and textured so as to yield a body of disciplining rules that constrains judges and provides the standards for evaluating their work. This assumption is, of course, open to a factual challenge, as any empirical claim must be. Indeed, I ad-

¹⁹ 347 U.S. 483 (1954); 349 U.S. 294 (1955).

²⁰ *Plessy v. Ferguson*, 163 U.S. 537 (1896).

²¹ This account draws on my earlier works, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982) and *Conventionalism*, 58 S. CAL. L. REV. 177 (1985).

vanced this theory a few years ago, and nowadays I wonder whether I am mistaken in making this assumption and whether I am guided more by a duty to see the best in life rather than by a tough assessment of the facts. The proponents of critical legal studies are not, however, prepared to disagree with me on these (mundane) terms. For their claim is not that, as a factual matter, in some particular legal system, or at some historical phase, judges are not constrained by law, but rather that law, by its nature, can never provide the constraint needed to achieve objectivity. Their idea is not that there are no right answers, but rather that there can *never* be a right answer. To support so ambitious and extravagant a claim, most resort to Duncan Kennedy's theory of the "fundamental contradiction"²² (though some, like Frug²³ and Levinson,²⁴ believe—quite falsely—that the key may be found in Derrida, Fish, Miller, and other literary theorists of the deconstructive bent).

According to Kennedy's theory of the "fundamental contradiction," all normative concepts are infected with an unresolvable conflict. They deconstruct into two (or more) antithetical and competing forces, impulses, or desires, such as the desire for others and the fear of others. So infected with contradictions, a normative concept (or any rule, principle, or standard generated out of it) cannot act as a restraint upon the judge, for it always affords the judge a choice. The judge can favor one antipode over the other and nonetheless be said to be (honestly) applying the rule. The "fundamental contradiction" creates a freedom, a choice, and thus renders everything normative indeterminate, that is, unable either to constrain the judge or provide any standards of evaluation. And it creates this freedom almost as a matter of logical necessity. There is nothing contingent, limited, or empirical about the "fundamental contradiction." It is no mere "tension."

There is no proof or even an argument on behalf of the "fundamental contradiction." Its existence is simply asserted by Professor Kennedy in the midst of an exceedingly long analysis of the table of contents of Blackstone's *Commentaries*. I am not even sure whether the existence or validity of the "fundamental contradiction" *can* be proved or demonstrated, given its universal scope. Operating much like a moral axiom, it ultimately rests on an appeal to common experience. In response, one can always appeal to a different under-

²² Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 211 (1979). For his subsequent "thoughts" on the idea, see Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

²³ Frug, *supra* note 1, at 28, col. 1.

²⁴ Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982). For the response, see Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982). See also Weisberg, *Text into Theory: A Literary Approach to the Constitution*, 20 GA. L. REV. — (1986).

standing of that very same experience and assert with equal fervor that the normative structures of the law are not riddled with "fundamental contradictions." I am prepared to do just that. Moreover, I might point out that the stakes are greater than they at first appear. What is at issue as one starts down the road of the "fundamental contradiction" is not simply the law, but morality as well, or for that matter any practice, discipline, or institution that rests upon or otherwise incorporates normative structures. There is no way of confining the "fundamental contradiction" to law. Everything normative must go. There can never be a right answer in morals, just as certainly as there can never be a right answer in law.

Some have claimed to the contrary, and once Professor Michelman—not a member of the movement, but so obviously drawn to it—insisted that while there could never be a right answer in the law, there could be (indeed must be) right answers in morals.²⁵ This view fails to account for the full sweep of the "fundamental contradiction." It also seems to be at odds with common intuitions. Given the institutional apparatus of the law, and the shared understandings that bond and animate the profession, I think it far more likely for there to be right answers in the law than in morals. Of course, morality does not require "the compulsion of a transcendent rule," to use a phrase of Michelman's,²⁶ but neither does law. It requires only constrained judgment. An insistence upon the contrary, and an attempt to depict the law in other terms, as "transcendent," "mechanical," or "unitary," strikes me as a desperate but transparent attempt to restrict the critique of critical legal studies to the law and to render credible a jurisprudence that rests not on any fancy theory about the "fundamental contradiction" or anything else, but on a special strain of utopianism, one that rightly aspires to a true and substantive equality, but fails to accord a proper place for the institutional arrangements needed to bring that ideal into being.

III

Critical legal studies and law and economics differ in many important respects—their politics, the intricacies of their arguments, the definition of their scholarly mission, and of course, their antics. To claim that "law is efficient" is quite different than saying "law is

²⁵ This occurred in the course of a discussion of his article, *Justification (and Justifiability) of Law in a Contradictory World*, in 28 NOMOS: JUSTIFICATION 71 (J. Pennock & J. Chapman eds. 1986).

²⁶ Michelman, *New Ways of Thinking About Law—Miller v. Jackson En Critique*, in CANADIAN INSTITUTE FOR ADVANCED LEGAL STUDIES, THE CAMBRIDGE LECTURES, 1985 (forthcoming 1987).

politics." I believe, however, that these movements have something in common, and that what they share is as important as their differences. I have tried to show that they both start from a rejection of law as an embodiment of a public morality and thus have a common base line. Critical legal studies denies that there is such a morality (or, for that matter, any kind of morality) when it argues that *all* our normative structures embody an unresolvable contradiction. Law and economics strikes at the notion of law as public morality too, but not through the "fundamental contradiction." It does this by relativizing all values and claiming for itself what Bork, in a gesture that trivializes the jurisprudence of the sixties, terms the "Equal Gratification Clause."²⁷ Under law and economics, the idea of a public morality once again becomes untenable because values are transformed into preferences and each preference is assumed to have an equal claim to satisfaction.

From this perspective, it is no surprise that both law and economics and critical legal studies achieved their ascendancy in America within the same period of history. Nor is it surprising that this period was the 1970s—a time of difference and disagreement, in which the emphasis was not on what we shared, our public values and ideals, but on how we differed and what divided us. Although in the 1960s we undertook the Second Reconstruction and tried to build the Great Society, and we were drawn to law as public ideal, in the next decade we took refuge in the politics of selfishness. All normative matters became subjective. The prospect of understanding and nourishing a common morality seemed hopeless.

Locating these two jurisprudential movements within a specific historical context may also help us understand what must be done. Law has been threatened by the disintegration of public values in the larger society, and its future can only be assured by the reversal of those social processes. In order to save the law, we must look beyond the law. We will never be able to respond fully to the negativism of critical legal studies or the crude instrumentalism of law and economics until a regenerative process takes hold, until the broad social processes that fed and nourished those movements are reversed. The analytic arguments wholly internal to the law can take us only so far. There must be something more—a belief in public values and the willingness to act on them.

Where will that belief come from? In speaking of a public morality and the judiciary's responsibility for giving meaning and expression to those values, I am sustained by a historical vision—by remembering the 1960s, and the role that the law played in the

²⁷ Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 10 (1971).

struggle for racial equality. But for a generation born after *Brown*, after Ole Miss, after Birmingham, after Freedom Summer, and maybe even after Selma, this vision does not work. It is not fought but only tolerated as a quaint and even touching remembrance of a time past. True, today a new cause is taking hold, and it seems to have achieved (at least in New Haven) the momentum that once belonged to the civil rights movement. I am referring to the women's movement, which seems to be on the verge of mobilizing an entire generation of law students. It demands a reexamination of existing social arrangements and has unleashed for this enterprise a remarkable energy. But for feminism to become, like the civil rights movement before it, the instrument of social regeneration the law awaits, we—both the bearers of the cause and the community criticized—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.

Beyond that, it is difficult to know how a belief in public values might be regenerated. Such a process of social regeneration depends on events that are beyond our control and that are even hard to imagine. It seems to me, however, that law itself might have an important role to play in this process, for law appears as generative of public values as it is dependent upon them. The Warren Court and the transformative process that it precipitated in American society not only presupposed a belief in the existence of public values but was also responsible for it. *Brown* assumed that the Constitution embodied a commitment to racial equality, and that this value was so real and so important as to warrant moving mountains (almost). It also generated and nurtured a commitment to racial equality that far transcended the law.

An appreciation of law as a generative force of our public life does not make the task we confront any easier. In truth, it compounds the complexity and magnitude of our dilemma, for it suggests that we are caught in a circle: Law is, alas, both agent and object. Yet an understanding of the generative force of law can also make us acutely aware of the dangers posed by law and economics and critical legal studies, and thus strengthen our resolve to resist them. We need public morality to have law, true, but even more, we need law to have a public morality. Of course, law will exist even if the two jurisprudential movements of which I have spoken are victorious, in the limited sense that there will be people who wear black robes and decide cases, but it will be a very different kind of law. For (Judge) Kennedy, adjudication will be entirely particularistic; for Judge Posner it will be wholly instrumental. In neither case will it be capable of sustaining or generating a public morality. It will be

law without inspiration. This will mean the death of the law, as we have known it throughout history, and as we have come to admire it.