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Systems of Belief in Modern American Law: A View From Century's End

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Keywords

Modern Law, Liberalism, Economics, legal positivist, legal discourse

ARTICLES

SYSTEMS OF BELIEF IN MODERN AMERICAN LAW: A VIEW FROM CENTURY'S END*

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** Professor of Law, *University of Iowa College of Law*, A.B., *Princeton University*, 1967; J.D., *Yale University*, 1972; gerald-wetlaufer@uiowa.edu. On this unusually broad project, I owe thanks to a lifetime of teachings, students, colleagues, adversaries, and friends. These include the lawyers with whom I long practiced law in Washington, DC; the economists with whom I was privileged to work at that time; the students in the dozen or more courses in which I have taught all or part of this material; Barry Matsumoto, Huston Diehl, Martha Chamallas, Mike Green, Jeff Powell, Karen Engle, Lea VanderVelde, Bill Buss, Ken Kress, Randy Bezanson, and the participants in faculty workshops at the College of Law and the Project on the Rhetoric of Inquiry at the *University of Iowa* for their comments and suggestions on various versions of this Article; and Arthur Bonfield, Steve Burton, Herb Hovenkamp, Duncan Kennedy, Richard Posner, Jeremy Waldron, Ernest Weinrib and, a long time ago, Alexander Bickel for all they have taught me, in various ways, about their understandings of law. All errors, including those of reduction and omission, are entirely mine.

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INTRODUCTION

We who study and practice law in America are engaged in an extended series of conversations and arguments about the law, and those conversations and arguments are less easily understood, less easily learned, less productive, less conclusive, and sometimes less civil than we might think it reasonable to expect.

Those who are beginning their study of the law assume, quite reasonably, that there is a set of operating rules that govern this conversation. But they do not know those operating rules and, what is worse, they cannot make them out. Making matters worse, their teachers evidently believe that those rules are simple and self-evident, and that they either need not, cannot, or ought not be explained. When explanations are offered, perhaps in a course on legal reasoning, they may prove far less useful than our students might have hoped.

Those who have been around the law for an extended period of time may describe the condition of legal discourse in different terms, but many of us still find it unsatisfactory. We hear a great many arguments in which it seems that people ought to be convincing one another but, in fact, are not. We see arguments that fail to persuade, disagreements that never end, and, all too often, partisans who neither understand nor respect their adversary's positions. It is sometimes as if there were so many ships passing in the night. On any given ship, there might be conversations in which issues are joined and problems are solved, but as between those ships there is barely any communication worthy of the name.

My purpose in this Article is to address these problems, first by examining the structure of legal discourse and then by assessing the nature of our differences. In this modest way, I hope to increase the intelligibility of our continuing conversation and to shed some light on the problems of argumentative inconclusiveness, mutual unintelligibility, and, where it exists, mutual disrespect. I also hope to ease the burden on those who are beginning their study of law, to

expand the prospects for mutual understanding, to enhance regard for our differences and for the great and unanswered questions on which we are divided, and to enlarge the prospect of our actually joining issue on those great questions.

I will describe the structure of legal discourse in terms of three distinct and, as I would invite my readers to visualize it, horizontal levels of discourse and disagreement. The upper-most of these three horizontal levels of discourse contains all our discussions and disagreements about rules, doctrine, and particular legal outcomes. This is the level at which most of the work, and most of the teaching, of law is done. It is also the level at which we find most of what is unsatisfactory about legal discourse. The middle level is comprised of the commitments we associate with various and conflicting “theories of law.” I will describe our disagreements at this level in terms of six discrete systems of belief, and I will suggest that it is those disagreements that account for most of the dysfunctionality of the arguments and explanations that go on solely at the level of rules, doctrine, and policy.

Each of these second-level systems of belief rests in turn upon certain basic assumptions, beliefs, and commitments. These assumptions, beliefs, and commitments are, in some important sense, prior to theory, and it is these that comprise the third and most basic of our three levels of legal discourse. And, of course, our disagreements at this third level do much to explain the intractability of our differences at the (middle) level of legal theories and at the (upper) level of rules, doctrine, and particular outcome.

Legal discourse can neither be understood nor learned as something governed by a single and unified operating system. Thus there is no such single thing as “legal reasoning.” Rather, legal discourse is far more usefully seen as governed by six different operating systems, each associated with one of the systems of belief found at the second horizontal level of legal discourse—the level of legal theory. Each of these second-level systems of belief corresponds to a distinct community, each is governed by its own set of rules, and each is in important ways inconsistent and incompatible with the others. Thus, the problem we face is that of learning these six basic and competing *systems* of legal discourse, together with the commitments and the moves and countermoves with which they are associated. In the order in which I address them, the six communities and operating systems are:

- (1) *Turn-of-the-century formalism* of the kind associated with Christopher Columbus Langdell and his Harvard Law School

associates and with the constitutional jurisprudence of the *Lochner* court;

(2) The *legal realism* that had its first flowering in the 1920s and 1930s, that is associated with the revolt against formalist jurisprudence, and that exercises a broad and continuing influence upon American law;

(3) The *legal process* school that arose in the early 1950s as a reaction against certain of the more skeptical (proponents of legal process would say nihilistic) aspects of legal realism, and that has a continuing influence on our understanding of judicial review, as well as constitutional and administrative law;

(4) The *law and economics* school that first came to prominence within the antitrust community in the 1960s and that, ever since, has been steadily expanding its domain;

(5) The *legal positivist/analytic tradition*, by which I mean the continuous intellectual tradition that connects the work of John Austin to that of H.L.A. Hart and Ronald Dworkin; and

(6) *Contemporary critical theory*, which includes critical legal studies, feminist legal theory, and critical race theory.

With only the rarest exceptions, all six of these systems operate within what can fairly be called the master paradigm of legal liberalism. Despite that point of common ground, there is an enormous difference between the nature and quality of the generally workable arguments that go on *within* any of these six communities and the largely dysfunctional arguments that go on *between* the members of one community and the members of another. These communities are the ships that are passing one another in the dark night of legal discourse.

If many of our differences at the upper level of rules, doctrine, and policy may best be understood in terms of underlying differences at the middle level of legal theory and systems of belief, it is equally true that our differences at the level of legal theory are best understood by reference to a third, and still more basic, level of differences. This third level contains differences in assumptions, beliefs, and commitments that are, in important ways, prior to theory. Among them are differences with respect to

(1) *assessments of the fairness and legitimacy of the existing order*, including the power, pervasiveness, and persistence of illegitimate structures of domination based on class, race, gender, or sexual preference;

(2) *prime values and projects*, as with the commitments of the formalists to stability and their understanding of economic liberty, of the legal realists to statutory reform and

their understanding of the public interest, and of contemporary critical theorists to their understandings of democracy and equality;

(3) *centers of activity and attention*, as with the focus of formalism and positivism on private law, of legal realism on statutory reform, and of the legal process school on judicial review;

(4) *understandings of human nature*, including among other things, the thickness of the tissue of civility and the place of reason in human nature;

(5) *the nature and consequences of language*, including among other things the possibility of stable meaning and the problem of indeterminacy;

(6) *the nature of knowledge and of reason*, including the possibility of non-problematic foundations, of neutrality and of objectivity;

(7) *the relative autonomy of law and its relationship to other academic disciplines*, where we find legal realism affiliating with the full range of social sciences, law and economics with just one of those social sciences, the positivist/analytic tradition with British analytic philosophy, and contemporary critical theory with continental philosophy;

(8) *interpretive strategies and forms of argument*, as with the penchant of the legal process school for interpretations based on “institutional competence” and “neutral principles,” of law and economics for those based on the maximization of aggregate wealth, and of the positivist/analytic tradition for those based on “principles not policies,” “coherence” and “immanent rationality”;

(9) *the possibility of the rule of law*, of governments of law not men, and of the separation of law from politics; and

(10) *the consequences of critique*, either of the possibility of reason, the possibility of the rule of law, or the fairness and legitimacy of the existing order.

It is from these most basic differences that flow our diverse theoretical commitments, our divergent operating procedures, and our most intractable disagreements—both at the level of legal theory and at the level of doctrine and rules.

Each of the six second-level systems of belief is, as shall be shown, distinguished by a distinctive set of underlying assumptions and beliefs, prime values and projects, centers of attention, intellectual affiliations, and styles of interpretation and argument. Each of these six bodies of theory also has its particular strengths and weaknesses.

Thus certain problems may be more easily “solved” within one theoretical system than within others. Conversely, each of these systems of belief has certain questions to which it has great difficulty yielding satisfactory answers. The legal process school has, for example, a comparative advantage over its competitors in generating a satisfactory “theory of judicial review,” yet it has great difficulty persuading others of the “neutrality” of its principles. Similarly, and despite its manifold strengths, legal realism has a famously hard time generating what the positivist/analytic would regard as a satisfactory “theory of adjudication.” More generally, there is one weakness that is common to all six operating systems. That weakness is this: however satisfactory may be the conduct of business *within* each system, the arguments that one system’s proponents offer for the superiority of their system over its competitors often beg the question and are almost always unpersuasive to those who are already committed to the competing theory.

These six communities may also be distinguished from one another in terms of their cultural location, historical occasion, and historical adversaries. Our understanding of legal realism, for instance, cannot be complete without an appreciation of its adversarial relationship with turn-of-the-century formalism and with formalism’s constitutional jurisprudence. Neither can one appreciate the legal process school without reference to its historical occasion. Nor can the legal positivist/analytic tradition be fully understood without an appreciation of what is entailed in its relationship with the British academic elite and, for instance, the fact that British jurisprudence has developed largely without the stimulus provided, in America, by judicial review and legal realism. Finally, it is also useful, and sometimes necessary, to locate the six communities of belief in relationship to a number of important historical markers, including *Lochner v. New York*¹ and its progeny, the New Deal, World War II and the Holocaust, *Brown v. Board of Education*,² the civil rights movement, and the disruptions of the 1960s.

The test of this project is the degree to which it contributes to the intelligibility of legal discourse. I believe these six operating systems can be described in fairly simple terms and that, once described, they are easily mastered. I also believe that the most intractable of our differences can be readily understood, if not resolved, by reference to these six communities of belief and to their differing assumptions,

1. 198 U.S. 45 (1905).
2. 347 U.S. 483 (1954).

beliefs, and commitments.

I do not wish to suggest that everyone either does or ought to fit neatly into one or another of these six systems of belief. Some writers fit none of them, some—and this is especially true of the practitioners—work sometimes in one and sometimes in another, while others even make a virtue of our being “incompletely theorized.”³ But the great bulk of the conversation comprising twentieth-century American law may fairly be said to fit somewhere within one or another of these six perspectives. For example, arguments from “the presumed neutrality of process-based solutions,” or from “institutional competence,” “neutral principles” or “purposive interpretation” can always be understood by reference to the beliefs and assumptions of the legal process school. Arguments from “free riders” and other “market imperfections” will always and only operate by reference to the rules of law and economics. And arguments from “coherence,” or “integrity,” or “immanent rationality” must generally be understood in light of the teachings of the legal positivist/analytic tradition. Similarly, arguments for law’s indeterminacy always will invoke and carry forward the traditions of legal realism and contemporary critical theory, just as proofs of law’s legitimacy will always invoke and advance the work of this kind that has been done in, among other places, the legal process school and the legal positivist/analytic tradition. Thus what I will call the “great divide” between the Grand Alliance of the Faithful and the League of Skeptics (see the introduction to Section II below) seems likely to be a stable and persistent feature of American law. Moreover, each of these systems of belief has the virtue of making sense, at least on its own terms; each can be learned; and, once they are mastered, the intelligibility of legal discourse is greatly enhanced.

There are at least two groups who may have little or no appreciation for a project of this kind. One includes those who believe they are simply “doing law” in a way that is free from theory, philosophy, or ideology. In response, I can only say that it seems perfectly clear to me (though I can only offer this as an hypothesis) that one cannot work or teach at the level of rules, doctrine, and policies in a way that is free from the kinds of assumptions, beliefs, and commitments that I have described as comprising the second and third levels of legal discourse. Many can and do, of course, proceed without any self-consciousness concerning their assumptions,

3. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

beliefs, and commitments. But the absence of self-consciousness does not, so far as I can tell, represent a condition of being free of—or having transcended—the business of having, and of working from, specifiable assumptions, beliefs, and commitments.

Similarly unsympathetic to this project are those who believe that their particular system of beliefs is the one true perspective upon the law. For this group, all one really needs to do is distinguish between those who have gotten it right (them) and those who have gotten it wrong (others). But even those who hold this view must also acknowledge that a great many others see things differently and are impervious to their persuasions. In the end, I expect even this group to share my interest in the matters here under consideration, if only to gain a better and more usable grasp of other people's misunderstandings.

Despite my own commitments in these matters, I have tried to describe these various and competing systems of belief in a way that would seem both recognizable and sympathetic to the people who work within them. Where I fail in this attempt at sympathetic description, I offer my apologies. But in any event, I share with Karl Llewellyn the belief that “to classify is to disturb,”⁴ especially in matters of this kind. I know from my days as an advocate that there is nothing more persuasive than a seemingly “neutral” statement of the facts. Knowing full well that there are other ways this story could be told, I offer this not as the uncontestable truth but as *my ordering* and as the result of my efforts to make sense of these matters. I hope it may prove interesting, useful, and provocative of further discussion.

Section I of this Article discusses the six “second-level” systems of belief—the theoretical perspectives or, if you like, the “operating systems” that have dominated the last century of American law. Section II takes up the nature of our differences as they exist at the level of assumptions, beliefs, and commitments “prior to theory.” If our differences at this level inform our disagreements at the level of legal theory, our differences at both of these levels inform our disagreements at the level of rules, doctrine, and policy.

I. THE RANGE OF THEORETICAL PERSPECTIVES

The six theoretical perspectives I will describe are, as I have indicated, turn of the century formalism (subsection B below), legal realism (subsection C below), the legal process school (subsection D

4. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 453 (1930).

below), law and economics (subsection E), the legal positivist/analytic tradition (subsection F), and contemporary critical theory (subsection G). I begin, however, with a consideration of the master paradigm within which, with only the rarest exception, all six of these perspectives conduct their affairs. That master paradigm, of course, is legal liberalism.

A. Liberalism: The Master Paradigm

At least as a general matter, all six of our “second-level” theoretical perspectives share a commitment to a form of “liberalism” that constitutes this master paradigm—the larger system of belief within which the others all arise. The liberalism I have in mind is not the twentieth-century political ideology that favors a level of state intervention into the market somewhere between the lower levels favored by political conservatives and the higher level favored by social democrats. It is, instead, the older and broader movement that might be called classical liberalism, a set of beliefs that includes both the “liberalism” and the “conservatism” found in the politics of twentieth-century America.

Specifically, I refer to the beliefs that: (1) the social universe is comprised of individuals who are essentially independent and autonomous of one another and who should be understood to pre-exist society and the state; (2) those individuals are by their nature, and ought to be, free and, indeed, their liberty and autonomy may be the first principles from which we ought to work; (3) among the most basic rights, freedoms, and liberties that those individuals may hold is the right of property and, within a particular realm, the right to choose freely; and (4) the proper role of the state is to protect the rights of these individuals and to provide a mechanism for the mediation of their conflicting desires. This liberalism brings with it a series of particular commitments. These commitments are, first, to the discourse of rights; second, to a particular version of the rule of law, which includes the separation of law from politics; and third, to the idea that there is a public sphere and a private sphere, and that the state may act legitimately within the public sphere but not within the private sphere.⁵

This understanding of liberalism is related to, but broader than, the nineteenth-century English liberalism that was incorporated into

5. See, e.g., JOHN LOCKE, TWO TREATISES OF GOVERNMENT (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); THE DECLARATION OF INDEPENDENCE (U.S. 1776); JOHN STUART MILL, ON LIBERTY (1849); JOHN RAWLS, A THEORY OF JUSTICE (1971); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982).

classical and then neo-classical economics, and that we associate with a particularly demanding form of laissez-faire ideology. In the same way, it is related to but broader than twentieth-century versions of strict laissez-faire ideologies that we associate with Friedrich A. von Hayek, Ludwig von Mises and the Chicago School of Law and Economics. As a result, we who are liberals in the broader sense may regard certain “stronger” versions of liberalism as problematic and contestable. But that assumption of contestability does not mean that we ourselves do not embrace a “weak” version of liberalism as natural and non-contestable. This weak version is, in fact, the sea in which we swim. And with only a very small number of exceptions, all of which are within the perspective I am calling contemporary critical theory, all of the work I discuss in this Article is done within the master paradigm of liberalism.

B. *Turn-of-the-Century Formalism*

The legal theoretical paradigm, if we may tentatively call it that, which prevailed in late nineteenth and early twentieth-century America is often described as “formalist”⁶ and is strongly associated with two separate centers of activity. One was Harvard Law School under the leadership of Dean Christopher Columbus Langdell.⁷

6. Primary material reflecting the work of this community is cited in the subsequent notes. Secondary accounts include, e.g., Robert Stevens, *Two Cheers for 1870: The American Law School*, in PERSPECTIVES IN AMERICAN HISTORY 405 (Donald Fleming & Bernard Bailyn eds., 1971); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought, 1850-1940*, in CURRENT RESEARCH IN THE SOCIOLOGY OF LAW (1980); Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (G. Geison ed., 1983); Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY, 9-31 (1992); WILLIAM P. LAPIANA, LOGIC AND EXPERIENCE: THE ORIGIN OF MODERN AMERICAN LEGAL EDUCATION (1994); Robert W. Gordon, *The Case for (and Against) Harvard*, 93 MICH. L. REV. 1231 (1995). Historically, the formalist community was initially identified and named by their younger adversaries, the legal realists, often in polemics directed against the formalists. See, e.g., JEROME N. FRANK, LAW AND THE MODERN MIND 48-56 (1935); GRANT GILMORE, THE AGES OF AMERICAN LAW (1977).

7. Langdell's publications include, e.g., CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS (Little Brown & Co. 1999) (1871); CHRISTOPHER C. LANGDELL, DISCOVERY UNDER THE JUDICATURE ACTS, 1873, 1875 (1898); Christopher C. Langdell, *Patent Rights and Copyrights*, 12 HARV. L. REV. 553 (1899); Christopher C. Langdell, *The Status of Our New Territories*, 12 HARV. L. REV. 365 (1899); Christopher C. Langdell, *Classification of Rights and Wrongs*, 13 HARV. L. REV. 537, 659 (1900); Christopher C. Langdell, *Mutual Promises as a Consideration for Each Other*, 14 HARV. L. REV. 496 (1901); Christopher C. Langdell, *The Northern Securities Case and the Sherman Anti-trust Act*, 16 HARV. L. REV. 539 (1903); Christopher C. Langdell, *Northern Securities Case Under a New Aspect*, 17 HARV. L. REV. 41 (1903); Christopher C. Langdell, *Dominant Opinions In England During the Nineteenth Century as to Legislation as Illustrated by English Legislating, or the*

There, the formalist project was embodied in the work of Dean Langdell and a cadre of men who, for the most part, had been his students and then his colleagues at Harvard. They included James Barr Ames,⁸ Joseph Beale,⁹ and Samuel Williston.¹⁰ The other center of formalist activity was the politically conservative wing of the U.S. Supreme Court, comprised of Justices Rufus Peckham, Joseph McKenna, Willis Van Devanter, George Sutherland, Pierce Butler, and James McReynolds.¹¹

Absence of it, During that Period, 19 HARV. L. REV. 151 (1906); Christopher C. Langdell, *Equitable Conversion*, 18 HARV. L. REV. 1, 83, 245 (1904-05).

8. Ames' writings include, e.g., James Barr Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1899); James Barr Ames, *The Vocation of a Law Professor*, 48 AM. L. REG. 129 (1900); James Barr Ames, *Professor Langdell: His Services to Legal Education*, 20 HARV. L. REV. 12 (1906); James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908); James Barr Ames, *The Origin and Uses of Trusts*, 21 HARV. L. REV. 261 (1908); James Barr Ames, *Undisclosed Principal: His Rights and Liabilities*, 18 YALE L.J. 443 (1909).

9. Beale's major publications include, e.g., 1-3 JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS (1935); JOSEPH BEALE, TREATISE ON CONFLICT OF LAWS, OR, PRIVATE INTERNATIONAL LAW (1916); JOSEPH BEALE, A SHORTER SELECTION OF CASES ON THE CONFLICT OF LAWS (1941). He served as a reporter for the *Restatement of the Law of Conflict of Laws* in 1925 and 1939. He also published a number of treatises on the measure of damages (1891), a treatise on the law of partnership (1893), criminal pleading and practice (1896), foreign corporations and the taxation of corporations both foreign and domestic (1904), innkeepers and hotels (1906), railroad rate regulation (1907, 1915); published casebooks on criminal law (1894 et seq.), the measure of damages (1895 et seq.), the law of torts (1900 et seq.), public service companies (1902), carriers and other bailment and quasi-bailment services (1909), criminal law (1894), municipal corporations (1911), legal liability (1915), federal taxation (1915 et seq.), and taxation (1922 et seq.); and assembled an extensive bibliography of early English cases.

10. Williston's major publications include, e.g., SAMUEL WILLISTON, A SELECTION OF CASES ON THE LAW OF SALES OF PERSONAL PROPERTY (3d ed. 1919) (1894); SAMUEL WILLISTON, SELECTED CASES AND STATUTES ON THE LAW OF BANKRUPTCY (2d ed. 1915) (1906); SAMUEL WILLISTON, THE LAW GOVERNING SALES OF GOODS AT COMMON LAW AND UNDER THE UNIFORM SALES ACT (2d ed. 1909); SAMUEL WILLISTON, LECTURES ON COMMERCIAL LAW AND THE LAW OF NEGOTIABLE INSTRUMENTS (1913); SAMUEL WILLISTON, A TREATISE ON THE LAW OF CONTRACTS (3d ed. 1961 & Supp. 1979) (1920); SAMUEL WILLISTON, LIFE AND LAW: AN AUTOBIOGRAPHY (1940). Samuel Williston was also the Reporter to the *Restatement of Contracts*, including tentative drafts (1925 et seq.).

11. Rufus Wheeler Peckham, Jr., served on the Court from 1896 to 1909; Joseph McKenna, from 1898 to 1925; Willis Van Devanter, from 1911 to 1937; George Sutherland, from 1922 to 1938; and Pierce Butler, from 1923 to 1939. Those of this group who were then on the Court all voted the formalist position with the majority in *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897) (asserting that "liberty" includes freedom of contract); *Lochner v. New York*, 198 U.S. 45 (1905) (same); *Coppage v. Kansas*, 236 U.S. 1 (1915) (same, re employment contract); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (same, re anti-union provision in employment contract); *Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co.*, 276 U.S. 518 (1927) (defending *Swift v. Tyson*, which rests on assumptions concerning the law that are consistent with those of the formalists); *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) (invoking the conceptual distinction between "direct" and "indirect" in reading Commerce Clause); *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587 (1936) (asserting that "liberty" includes freedom of contract).

The formalists clearly believed that the law was comprised of principles—including definitions, concepts, and doctrines—broad in their generality, few in their number, and clear enough to permit answers to the questions of law to be more or less directly deduced.¹² The formalists also believed that the law generally is, and should be, unresponsive to particular factual contexts and circumstances. They wrote as if such principles had an existence of their own, quite apart from what judges or legislators might actually have said or done,¹³ and that these principles were valid on grounds that were indifferent to what we have come to see as either the needs of society or the purposes that law might serve. Although such principles might develop and evolve over time, they did not do so in accordance with society's changing needs.¹⁴ Neither were they influenced by custom

The same judges then took the formalist position in dissenting from *Nebbia v. New York*, 291 U.S. 502 (1934), which recognized that liberty to conduct business has its limits and may be subject to regulation; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (dissent asserting that "liberty" includes freedom of contract and asserting unconstitutionality of state statute establishing minimum wage for women); *NLRB v. Jones & Laughlin*, 301 U.S. 1 (1937) (dissent defended *Carter Coal*, 298 U.S. 238 (1936) and its conceptual distinction between "direct" and "indirect"); and *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) (dissent defending *Swift v. Tyson*, 41 U.S.1 (1842) and its formalist assumptions concerning the law).

12. See Christopher C. Langdell, *Preface to the First Edition of A SELECTION OF CASES ON THE LAW OF CONTRACTS* vi (Little Brown & Co. 1999) (1871) [hereinafter Langdell, *Preface* (1871)] (recognizing distinct doctrines of law and science).

The number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable in their number.

Id.; see also Samuel Williston, *The Work of Teachers of Law Affecting Its Development, in SOME MODERN TENDENCIES IN THE LAW* (1929) at 120 [hereinafter Williston, *Teachers of Law* (1929)] (citing Langdell's preface as the best statement of method, restating its commitments); James Barr Ames, *The Vocation of a Law Professor*, 48 AM. L. REG. 129, 145 (1900) (arguing that the legal academic's job is to search for "original generalization, illuminating and simplifying the law").

13. See, e.g., Langdell, *Preface* (1871), *supra* note 12, at vi; 1-3 JOSEPH BEALE, *Preface, to A TREATISE ON THE CONFLICT OF LAWS*, at xiii-xiv.

14. See Langdell, *Preface* (1871), *supra* note 12, at vii (asserting that in the law of contracts, a small number of important cases have contributed to the "growth, development, or establishment of . . . its essential doctrines"); James Barr Ames, *The Vocation of a Law Professor*, 48 AM. L. REG. 129, 140 (1900) (describing the legal academic's historical investigations into the genesis and development of legal doctrine); James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 99 (1908) (explaining legal history as the evolution of legal rules to include equitable principles and ethical concerns); Williston, *Teachers of Law* (1929), *supra* note 12 (asserting Langdell's disinterest in social desirability; Ames' interest in desirability as expressed in his understanding of justice and business convenience; and Williston's view of stability and simplicity as presumptively controlling aspects of social desirability, public interest and good consequences); see also James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97, 110 (1908) ("The law is utilitarian. It exists for the realization of the

and practice nor by what people might “feel” to be “just.” Yet when the formalists’ procedures seemed to fail, and the conceptually-indicated result was simply intolerable, they were quite willing to solve the problem through the invention of “legal fictions.”¹⁵ These men believed that, in doing law as they did, they were engaged in a “science” of “facts,”¹⁶ and that, notwithstanding the conceptual nature of the relevant “facts,” their work and their results had nothing to do with theories or philosophies of law. Thus Joseph Beale could argue, in 1935, that:

They reckon falsely who think of the author as an exponent of a school of legal philosophy. Philosopher he is none; nor need he apologize for this fact in a book written for lawyers. One deals in facts only. One studies decisions, which are facts of our law, and the inferences from these, which after forty years of study and teaching seem to be necessary.¹⁷

At the same time, formalists were deeply concerned to establish the law’s place within the university and their claim of “science” was routinely put to that purpose.¹⁸

The academic formalists were strongly predisposed in favor of “private” common law (the court-made law of, e.g., property, contracts, and tort) and against public and statutory law. If they had a “science,” it was a science of the common law. Their commitment

reasonable needs of the community. In context, this statement *does not* express a general commitment to consequences and the changing needs of society.”); James Barr Ames, *The Vocation of a Law Professor*, 48 AM. L. REG. 129 (1900) (asserting that law should promote “the legitimate needs and purposes of men,” which refers to their private purposes and not to such public purposes as might be expressed through law); Williston, *Teachers of Law* (1929), *supra* note 12 (claiming that stability and simplicity are vital to the public interest and as properly controlling until offsetting disadvantages are clearly greater).

15. *See, e.g.*, *Hess v. Pawloski*, 274 U.S. 352 (1927) (sustaining jurisdiction on the basis of “consent” implied from use of roads); *see also* LON L. FULLER, *LEGAL FICTIONS* (1967) (reprinting three articles originally published in the *Illinois Law Review* in 1930 and 1931).

16. *See* Christopher C. Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 123 (1887) (“Law is a science . . . and all the available materials are contained in printed books.”); James Barr Ames, *The Vocation of a Law Professor*, 48 AM. L. REG. 129, 130 (1900) (reflecting on the “steadily growing conviction, in this country, that law is a science, and as such can best be taught by the law faculty of a university”); Williston, *Teachers of Law* (1929), *supra* note 12, at 113, 122-23 (explaining the “scientific” study of law); 1 JOSEPH H. BEALE, *Preface to A TREATISE ON THE CONFLICT OF LAWS*, xiii-xiv (1935) (stressing that “one deals in facts only”).

17. JOSEPH H. BEALE, *Preface to A TREATISE ON CONFLICT OF LAWS*, at xiii-xiv (1935) (claiming they are not theorists or philosophers but lawyers, theory has little to say to practitioners); Williston, *Teachers of Law* (1929), *supra* note 12, at 119, 128 (asserting that law teachers of his generation are pragmatists, see law as a practical profession, and are distrustful of theory, philosophy, and speculative reasoning).

18. *See* Christopher C. Langdell, *Harvard Celebration Speeches*, 3 LAW Q. REV. 123, 124 (1887) (arguing that law deserves a place in the university because it is a science and because it is best learned not from practice but from books).

to private common law co-existed, perhaps inevitably, with a commitment to the rights of private property, the freedom and sanctity of contract, the priority of private over public interests, and a resistance to legislative reform. For their part, the formalists on the Supreme Court appear to have *begun* with their commitments to laissez-faire, to the rights of property owners, and, at least occasionally, to the interests of the industries they had served while in private practice. It is from this starting point that they proceed to their views on substantive due process, the contract clause, the unconstitutionality of progressive legislation, and the formalist judicial practices that supported their various commitments.

Formalism is exemplified in Dean Langdell's handling of the consideration in unilateral contracts (the flagpole case)¹⁹ and bilateral contracts (the mailbox rule),²⁰ and in his certainty that an "irrevocable" offer is a "legal impossibility";²¹ in Beale's support for the idea of a general common law as expressed in *Swift v. Tyson*²² and in his certainty that the concept of domicile must be unitary;²³ and in Samuel Williston's reliance upon the "syllogistic marshalling of traditional concepts," his failure to acknowledge cases granting reimbursement for expenditures made in detrimental reliance, and

19. See CHRISTOPHER C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 1-4 (1880) (indicating that performance implies acceptance of an offer); see also Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 15 (1983) (indicating that Langdell's formalist construction of the unilateral contract is demonstrated by his view that an offer was revocable until the performance was fully completed). Therefore, as in the flagpole case, A could offer B one hundred dollars if he will climb to the top of a flagpole, wait until B nears the top, and yell "I revoke," and in Langdell's doctrine, A would owe B nothing.

20. See CHRISTOPHER C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS 12-21 (1880) (asserting it to be in the nature of the concept of "consideration" that one is bound as soon as an acceptance letter is mailed); see also Thomas C. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1 (1983).

21. See CHRISTOPHER C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACT 240-41 (1880) (explaining that the offer is an element of the contract and that the wills of the contracting parties must concur at the moment of making); see also ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 11 (1982) (commenting generally that certain facets of the law are characterized as "instrumentalistic and pragmatic").

22. 41 U.S. (16 Pet.) 1, 18 (1842). The decision was written by Justice Story and long precedes what I would count as the beginning of turn-of-the-century formalism. Story's opinion appears to reflect formalist commitments, but may do so only superficially. Thus he writes that state judicial decisions "are, at most, only evidence of what laws are; and are not of themselves law." *Id.* Story may never have understood the law to be "transcendental" or a "brooding omnipresence." See LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 118 n.19 (1978). But those who in the early twentieth century defended *Swift* against Justice Holmes in *Black & White Taxicab* (1922) and against Justice Brandeis in *Erie* (1937) almost surely did so as an expression of their formalist commitments.

23. See JOSEPH BEALE, A TREATISE ON THE CONFLICT OF LAWS 92-94 (1935) (asserting that domicile had, over 150 years, become a unitary concept).

his inattention to the purposes the law might serve.²⁴ Among the members on the Court, formalism was manifest in their elaboration and defense of *Pennoyer v. Neff*,²⁵ in their opposition to the reversal of *Swift v. Tyson* in *Erie v. Tompkins*,²⁶ and in the positions they took in the debates over substantive due process²⁷ and the Commerce Clause.²⁸ Formalism's lasting contributions are the great treatises written by Professor Williston and his colleagues, including the "string cites" found in the footnotes for which they were justly famous, and the Restatements of Law²⁹ and the Uniform Law

24. See Lon L. Fuller, *Williston on Contracts*, 18 N.C. L. REV. 1, 9-10 (1939) (discussing Williston's approach to contracts and discussing Williston's disregard of "social interests" and "policy" in his approach to contracts).

25. 95 U.S. 714 (1877). The Court's formalist elaboration of *Pennoyer* includes its decisions in *Harris v. Balk*, 198 U.S. 215 (1905), which based jurisdiction on the fictitious claim that a debt "is present" wherever a debtor's debtor is found and *Hess v. Pawloski*, 274 U.S. 352, 355-56 (1927), which refers to decisions in *Pennoyer*, which held that notice sent outside of a state to a nonresident would not establish jurisdiction in the instant case on a fictitious "implied consent." This regime, together with all its epicycles, was finally abandoned in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).

26. 41 U.S. (16 Pet.) 1, 18 (1842). *Swift* rests on the assumption that there exists some arguably transcendental "general federal law" that the federal courts, sitting in diversity cases, could apply in place of the common law of the states. The formalists on the Court defended *Swift* in *Black & White Taxicab and Transfer Co. v. Brown & Yellow Taxicab and Transfer Co.*, 276 U.S. 518 (1922) and then dissented from the Court's abandonment of *Swift* in *Erie v. Tompkins*, 304 U.S. 64 (1938), in which Justices Butler and McReynolds dissented.

27. In the early twentieth century, numerous Supreme Court decisions held that the Fifth and Fourteenth Amendments' protections of "life, liberty or property" unproblematically included the politically conservative laissez-faire concepts of marketplace "liberty" and "freedom of contract." See, e.g., *Allgeyer v. Louisiana*, 165 U.S. 578 (1897) (finding "liberty" includes freedom of contract); *Lochner v. New York*, 198 U.S. 45 (1905) (invalidating maximum hours law); *Coppage v. Kansas*, 236 U.S. 1 (1915) (invalidating law forbidding employment contracts that prohibit membership in a union, or "yellow dog" contracts); *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923) (invalidating law setting minimum wages for children). This conceptualist doctrine was challenged in Charles Warren, *The New "Liberty" under the Fourteenth Amendment*, 39 HARV. L. REV. 431, 433 (1926), and was then abandoned by the Court in *Nebbia v. New York*, 291 U.S. 502 (1934), which upheld legislation designed to control the price of milk, and in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in which the Court upheld minimum wage laws for women.

28. Compare *Carter v. Carter Coal Co.*, 298 U.S. 238, 308 (1936) (arguing from the conceptualist distinction between "direct" and "indirect"), with *NLRB v. Jones & Laughlin Steel*, 301 U.S. 1, 29 (1937) (rejecting that conceptualist distinction).

29. See GRANT GILMORE, *THE DEATH OF CONTRACT* 58-59, 67-68, 100-01 (1974) (describing the Restatements as collections of fundamental principles of common law); Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 YALE L.J. 1037 (1961) (discussing the distinguished membership of the American Law Institute and its attempt, through the Restatements, to mold common law into statutory form); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 872-73 (1977) (describing the Restatements project as Langdellian); William D. Lewis, *History of the American Law Institute and the First Restatement of the Law: "How We Did It,"* in *RESTATEMENT IN THE COURTS* 3 (1945); *Report of the Commission on the Estimation of a Permanent Organization for the Improvement of the Law Proposing an American Law Institute*, 1 A.L.I. PROC. 1 (1923).

initiatives.³⁰

C. Legal Realism

American legal realism is an intellectual movement that flowered in the 1920s and 1930s, and that has given lasting shape to the way Americans think about the law.³¹ The movement was anticipated and in certain ways begun by Oliver Wendell Holmes,³² Roscoe Pound,³³ and Benjamin Cardozo.³⁴ Later practitioners included Karl Llewellyn,³⁵ Felix Cohen,³⁶ Jerome Frank,³⁷ William O. Douglas,³⁸ John

30. See WALTER P. ARMSTRONG, JR., A CENTURY OF SERVICE: A CENTENNIAL HISTORY OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1991) (providing a history of the efforts to modify the different legal traditions of the 50 states and discussing Williston's contributions to the Uniform Law initiatives, including the authorship of the Uniform Sales Act, Uniform Warehouse Receipts Act, Uniform Bills of Lading Act, and Uniform Stock Transfer Act).

31. Primary material reflecting the work of this community is cited in the subsequent notes. Secondary treatments include, e.g., WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968); Edward A. Purcell, *American Jurisprudence Between the Wars: Legal Realism and the Crisis of Democratic Theory*, 75 AM. HIST. REV. 424 (1969); WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT (1973); GRANT GILMORE, THE AGES OF AMERICAN LAW (1977); LAURA KALMAN, LEGAL REALISM AT YALE: 1927-1960 (1986); Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 466 (1988); JOHN H. SCHLEGEL, AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE (1995); NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995); Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 GEO. L.J. 2215 (1996). For a discussion linking legal realism with pragmatism, instrumentalism, progressivism, see MORTON WHITE, SOCIAL THOUGHT IN AMERICA (1947).

32. Holmes' major publications include, e.g., OLIVER W. HOLMES, THE COMMON LAW (1881); Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Oliver W. Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899). For secondary material regarding Holmes, see Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Neil Duxbury, *The Birth of Legal Realism and the Myth of Justice Holmes*, 20 ANGLO-AM. L. REV. 81 (1992).

33. Pound's writings include, e.g., Roscoe Pound, *Do We Need a Philosophy of Law?*, 5 COLUM. L. REV. 339 (1905); Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 THE GREEN BAG 607 (1907); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 25 HARV. L. REV. 489 (1912); Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 802, 940 (1923); Roscoe Pound, *The Call for A Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931) (discussing realist jurisprudence and its validity as a movement); Roscoe Pound, *The Progress of the Law: Analytical Jurisprudence, 1914-1927*, 41 HARV. L. REV. 174-99 (1928) (discussing two distinct theories on jurisprudence since 1914—analytical positivist and philosophical sociological).

34. Cardozo's major publications include, e.g., BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS (1921); BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW (1924); BENJAMIN N. CARDOZO, PARADOXES OF LEGAL SCIENCE (1928).

35. Llewellyn's major works include, e.g., Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930); KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930); Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931); Karl Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704 (1931); Karl Llewellyn, *On What Is Wrong With So-Called Legal Education*, 35 COLUM. L. REV. 653

Dewey,³⁹ Underhill Moore,⁴⁰ and others.⁴¹ Historically, legal realism

(1935); Karl Llewellyn, *On Warranty of Quality and Society*, 37 COLUM. L. REV. 341 (1937); Karl Llewellyn, *The Rule of Law in Our Case-Law of Contract*, 47 YALE L.J. 1243 (1938); Karl Llewellyn, *On Reading and Using the Newer Jurisprudence*, 40 COLUM. L. REV. 581 (1940); KARL LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941); Karl Llewellyn, *On the Good, the True, and Beautiful, in Law*, 9 U. CHI. L. REV. 224 (1942). For a collection of his essays, see KARL LLEWELLYN, *THE COMMON LAW TRADITION* (1960); KARL LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962). For his treatises and casebooks, see KARL LLEWELLYN, *CASES AND MATERIALS ON THE LAW OF SALES* (1930); KARL LLEWELLYN, *COMMERCIAL TRANSACTIONS* (1946). Lastly, for a biography, see WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973).

36. Cohen's publications include, e.g., Felix S. Cohen, *The Ethical Basis of Legal Criticism*, 41 YALE L.J. 201 (1931); FELIX S. COHEN, *ETHICAL SYSTEMS AND LEGAL IDEALS: AN ESSAY ON THE FOUNDATIONS OF LEGAL CRITICISM* (1933); Felix S. Cohen, *Modern Ethics and the Law*, 4 BROOK. L. REV. 33 (1934); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); Felix S. Cohen, *The Problems of a Functional Jurisprudence*, 1 MOD. L. REV. 5 (1937); Felix S. Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950). For a collection of previously published essays by Felix Cohen, see *THE LEGAL CONSCIENCE: SELECTED PAPERS OF FELIX S. COHEN* (Lucy Cohen ed., 1960).

37. Frank's writings include, e.g., JEROME FRANK, *LAW AND THE MODERN MIND* (1930); Jerome Frank, *Are Judges Human?*, 80 U. PA. L. REV. 17 (1931); Jerome Frank, *Review of The Bramble Bush by Karl Llewellyn*, 40 YALE L.J. 1123 (1931); Jerome Frank, *What Courts Do In Fact*, 26 ILL. L. REV. 645 (1932); William O. Douglas & Jerome Frank, *Landlord Claims in Reorganizations*, 42 YALE L.J. 1003 (1933); Jerome Frank, *Why Not a Clinical Lawyer School?*, 81 U. PA. L. REV. 907 (1933); JEROME FRANK, *COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE* (1949). For a discussion of Frank's legacy, see ROBERT JEROME GLENNON, *THE ICONOCLAST AS REFORMER: JEROME FRANK'S IMPACT ON AMERICAN LAW* (1985); Neil Duxbury, *Jerome Frank and the Legacy of Legal Realism*, 18 J.L. SOC'Y 175 (1991).

38. Douglas' publications include, e.g., William O. Douglas & Carol M. Shanks, *Insulation from Liability through Subsidiary Corporations*, 39 YALE L.J. 193-218 (1929); William O. Douglas & J. Howard Marshall, *A Factual Study of Bankruptcy Administration and Some Suggestions*, 32 COLUM. L. REV. 25 (1932); William O. Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329 (1932); William O. Douglas, *Wage Earner Bankruptcies—State vs. Federal Control*, 42 YALE L.J. 591 (1933); William O. Douglas & Jerome Frank, *Landlords' Claim in Reorganizations*, 42 YALE L.J. 1003 (1933); William O. Douglas, *Protecting the Investor*, 23 YALE REVIEW 521-33 (1934); *DEMOCRACY AND FINANCE: ADDRESSES AND PUBLIC STATEMENTS OF WILLIAM O. DOUGLAS* (James Allen ed., 1940); WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS* (1974); WILLIAM O. DOUGLAS, *THE COURT YEARS, 1939-1975* (1980).

39. Dewey's legal writings include, e.g., John Dewey, *Nature and Reason in Law*, 25 INT'L J. ETHICS 25 (1914); John Dewey, *Force, Violence, and Law*, 5 THE NEW REPUBLIC 295 (1916); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1925); JOHN DEWEY, *THE QUEST FOR CERTAINTY* (1929); JOHN DEWEY, *MY PHILOSOPHY OF LAW* 71, 76 (1941).

40. Moore's major writings include, e.g., Underhill Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923); Underhill Moore & T. Hope, *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703 (1929); Underhill Moore & G. Sussman, *The Lawyer's Law*, 41 YALE L.J. 566 (1932); Underhill Moore & G. Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts*, 40 YALE L.J. 381, 555, 752, 928, 1055, 1219 (1931); Underhill Moore, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1943). For a discussion of Moore's influence, see John Henry Schlegel, *American Legal Realism and Empirical Social Science: The Singular Case of Underhill Moore*, 29 BUFF. L. REV. 195 (1980).

41. See W.W. Cook, *Scientific Method and the Law*, 13 A.B.A. 303 (1927); THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935); THURMAN ARNOLD, *THE FOLKLORE OF*

may be understood as a part of the political opposition to the static and politically conservative jurisprudence of turn-of-the-century formalism, as a part of the early twentieth-century “revolt against formalism” that manifested itself in a wide range of disciplines,⁴² as incorporating into the law the insights and instincts of American philosophical pragmatism,⁴³ and as an attempt to bring to bear on the law a wide range of social sciences including, among other disciplines, sociology and psychoanalysis. Its lineal descendants include contemporary proponents of “law and social science,” “law and economics,” and “critical legal theory.”

Legal realism is characterized by various forms of skepticism about the rule of law as it was understood from what had become the orthodox perspective and by a commitment to the demystification of the law in general and of the work of the courts in particular. These include skepticism about reasoning, especially “legal reasoning”;⁴⁴ skepticism about concepts and conceptual thinking;⁴⁵ claims

CAPITALISM (1937); Max Radin, *Legal Realism*, 31 COLUM. L. REV. 824 (1931); Hessel E. Yntema, *The Rational Basis of Legal Science*, 31 COLUM. L. REV. 925 (1931); Hessel E. Yntema, *Legal Science and Reform*, 34 COLUM. L. REV. 207 (1934); Hessel E. Yntema, *Jurisprudence on Parade*, 39 MICH. L. REV. 1154 (1941); GLENDON SCHUBERT, JUDICIAL DECISION-MAKING (1963); GLENDON SCHUBERT, JUDICIAL BEHAVIOR: A READER IN THEORY AND RESEARCH (1964); GLENDON SCHUBERT, THE JUDICIAL MIND REVISITED: PSYCHOMETRIC ANALYSIS OF SUPREME COURT IDEOLOGY (1974); *see also* Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Myers McDougal, *Fuller v. the American Legal Realists: An Intervention*, 50 YALE L.J. 828 (1940).

42. *See* MORTON WHITE, SOCIAL THOUGHT IN AMERICA: THE REVOLT AGAINST FORMALISM 11-31 (1947); ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 33 (1982) (noting that pragmatists were antiformalistic).

43. *See* Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609 (1908); John Dewey, *Logical Method and the Law*, 10 CORNELL L.Q. 17 (1925); JOHN DEWEY, MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS 71, 77 (1941); *see also* EDWARD A. PURCELL, THE CRISIS OF DEMOCRATIC THEORY (1973); DAVID WIGDOR, ROSCOE POUND 185 (1974); GRANT GILMORE, THE AGES OF AMERICAN LAW (1977); ROBERT S. SUMMERS, INSTRUMENTALISM AND AMERICAN LEGAL THEORY 30-33 (1982); JAMES KLOPPENBERG, UNCERTAIN VICTORY: SOCIAL DEMOCRACY AND PROGRESSIVISM IN EUROPEAN AND AMERICAN THOUGHT, 1870-1920 (1986); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 956-58 (1987); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); ROBERT B. WESTBROOK, JOHN DEWEY AND AMERICAN DEMOCRACY (1991); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960, 200 (1992).

44. *See* BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 167-77 (1921) (asserting the relevance of the subconscious judicial mind); John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1925); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928); Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929); JEROME FRANK, LAW AND THE MODERN MIND 108-09 (1930); KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1930); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955 (1955).

45. *See* John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 23 (1925) (“[M]en do not begin thinking with premises.”); JEROME FRANK, LAW AND THE

concerning the indeterminacy of legal texts⁴⁶ and the indeterminacy of judicial facts;⁴⁷ a critique of the public-private distinction;⁴⁸ a critique of the consent-coercion distinction as found in the law of contract;⁴⁹ and a critique of the supposed determinacy of the legislative histories.⁵⁰ Together, these skepticisms contribute to sustained critiques both of claims concerning the separation of law from politics⁵¹ and of claims for that strong version of the rule of law in which we are said to be governed not by men but by laws.⁵²

Legal realism is also characterized by a number of affirmative commitments, all of which can be understood in one way or another as commitments “to the facts.” These include a desire to separate “is” from “ought”;⁵³ to distinguish “real rules” from “paper rules”;⁵⁴ to attend not to what the courts are saying but to what they are doing;⁵⁵ and to understand the law in a way that will permit us to predict what

MODERN MIND 108-11 (1930) (arguing that judges work backwards from their conclusions); KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY & PRACTICE, 56, 58 (1962) (explaining the theory of rationalization).

46. See Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935); KARL N. LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY 66-69 (1951); KARL N. LLEWELLYN, *A Selection of Available Impeccable Precedent Techniques, in THE COMMON LAW TRADITION: DECIDING APPEALS* 77-91 (1960).

47. See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 3-4, 168-69 (1949); see also WILFRID E. RUMBLE, JR., AMERICAN LEGAL REALISM: SKEPTICISM, REFORM, AND THE JUDICIAL PROCESS (1968) (defining fact skepticism).

48. See, e.g., Morris Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 11 (1928) (discussing the distinction between sovereignty, a public law concept and property, a private law concept); Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 585-92 (1933) (indicating that enforceability of a contract by the government gives contract law a public element); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); see also Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988).

49. See, e.g., Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Walter Wheeler Cook, *Privileges of Labor Unions in the Struggle for Life*, 27 YALE L.J. 779 (1918); Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Morris Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 569 (1933); Robert Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); see also Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 482-87 (1988).

50. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930).

51. See FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT OF THE UNITED STATES FROM 1790 TO 1955 (1955).

52. See KARL LLEWELLYN, THE BRAMBLE BUSH: ON OUR LAW AND ITS STUDY (1951); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928). But see Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decisions*, 14 CORNELL L.Q. 274 (1929); JEROME FRANK, LAW AND THE MODERN MIND 6 (1930); FRED RODELL, NINE MEN: A POLITICAL HISTORY OF THE SUPREME COURT FROM 1790 TO 1955, at 6-7 (1955).

53. Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 439-43.

54. See *id.* at 439.

55. See *id.*

courts will do.⁵⁶ Legal realists' commitment to the facts also include the beliefs that particular facts may be more important to the outcome of a litigated case than the general rule the court pronounces;⁵⁷ that the justification for laws is to be found in the (factual) consequences they produce;⁵⁸ and that the law is an institution that should evolve in ways that are responsive to the changing (factual) needs of the society it serves.⁵⁹

The legal realists may also be understood in terms of certain systematic "credulities." These pertained to the possibilities of empiricism,⁶⁰ and to various forms of expertise associated with those social sciences;⁶¹ to the idea that there is an ascertainable public interest;⁶² to the possibility of "balancing" interests;⁶³ and to the

56. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897); Underhill Moore & Gilbert Sussman, *The Lawyer's Law*, 41 YALE L.J. 566 (1932); Lee Loevinger, *Jurimetrics: The Next Step Forward*, 33 MINN. L. REV. 455 (1949).

57. See GRANT GILMORE, *THE DEATH OF CONTRACT* 64 (1974); GRANT GILMORE, *THE AGES OF AMERICAN LAW* 80 (1977).

58. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 468-69 (1897); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence (Pt. 3)*, 25 HARV. L. REV. 489, 510-16 (1912); Walter Wheeler Cook, *Scientific Method and the Law*, 303 A.B.A. J. 303, 308 (1927); Karl N. Llewellyn, *Some Realism About Realism: Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1223, 1236, 1237 (1931); Felix Cohen, *The Problems of a Functional Jurisprudence*, 1 MODERN L. REV. 5, 18-24, 25 (1937); John Dewey, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 71, 84 (Julius Rosenthal Foundation ed., 1941).

59. See OLIVER W. HOLMES, *THE COMMON LAW* 5 (1881) (asserting that law evolves in accordance with the felt necessities of the time).

60. See JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (1995); ALAN HUNT, *THE SOCIOLOGICAL MOVEMENT IN LAW* (1978); HUNTINGTON CAIRNS, *LAW AND THE SOCIAL SCIENCES* (1935) (observing the connection between sociology and the law, and how realists such as Holmes used sociological methods such as statistics in analyzing the law).

61. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 167-77 (1921) (discussing the discovery of the subconscious judicial mind); JEROME N. FRANK, *LAW AND THE MODERN MIND* (1930) (psychoanalysis); THURMAN ARNOLD, *THE SYMBOLS OF GOVERNMENT* (1935) (economics); THURMAN ARNOLD, *THE FOLKLORE OF CAPITALISM* (1937) (economics); KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY* (1941) (providing an example of anthropological studies); HAROLD LASSWELL, *POWER AND PERSONALITY* 94-107 (1948) (psychoanalysis); HAROLD LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* (1930) (psychoanalysis).

62. See Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, at 461-64 (1930).

63. See BENJAMIN CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112 (1921) (noting that comparative importance or value of social interests are considered in shaping the law); Roscoe Pound, *The Theory of Social Interests* (1921), published as *A Survey of Social Interests*, 57 HARV. L. REV. 1, 39 (1943) (recognizing the law's attempt to harmonize and balance competing interests); Harlan Fiske Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 10 (1936) (noting that "resourcefulness and insight with which judges and lawyers weigh competing demands of social advantage . . . in determining whether precedents shall be extended or restricted, chiefly give the measure of the vitality of the common law system and its capacity for growth"). See generally T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 948-72 (1987) (providing a history of balancing interests in the law).

general project of statutory reform.⁶⁴ And finally, the legal realists may be understood in terms of their commitments to progressive legislation, to the work of the New Deal, and to the removal of the judicial and constitutional impediments to those political projects.

D. *The Legal Process School*

The “legal process school”⁶⁵ dominated the American legal academy for perhaps twenty-five years beginning around 1950. It was the work of a generation that came of age under the influence of Hitler, fascism, Pearl Harbor, Dachau, Hiroshima, the exhaustion of the western European democracies, the eastern European “revolutions,” and the simultaneous threats of communism abroad and McCarthyism at home—and under the influence of the distinctly 1950s belief that ours was a society that had moved, or certainly could move, “beyond ideology.”⁶⁶ The legal process school was affected strongly by the thought, temperament, and mentorship of Felix

64. See generally, e.g., WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN* (1974); PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982).

65. Primary material reflecting the work of this community is cited in the subsequent notes. Secondary treatments include, e.g., G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973); Joseph William Singer, *Legal Realism Now*, 70 CAL. L. REV. 465, 505-07 (1988); MORTON HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960*, at 247-68 (1992); Neil Duxbury, *Faith in Reason: The Process Tradition in American Jurisprudence*, 15 CARDOZO L. REV. 601, 602 (1993); William N. Eskridge, Jr. & Philip P. Frickey, *An Historical and Critical Introduction to The Legal Process*, in HENRY M. HART & ALBERT M. SACKS, *THE LEGAL PROCESS* (tent. ed. 1958) (William N. Eskridge & Phillip P. Frickey eds., 1994) [hereinafter HART & SACKS, *THE LEGAL PROCESS* (1958)].

A number of critiques of this approach, chiefly by proponents of legal realism and contemporary critical theory have been written. See Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960); Louis Pollak, *Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler*, 108 U. PA. L. REV. 1, 5 (1959); Duncan Kennedy, *Utopian Rationalism in American Legal Thought* (June 1970, a student paper written at Yale Law School for Harry Wellington) (on file with author); J. Skelly Wright, *Professor Bickel, The Scholarly Tradition, and the Supreme Court*, 84 HARV. L. REV. 769, 772 (1971); Arthur S. Miller & Ronald F. Howell, *The Myth of Neutrality in Constitutional Adjudication*, 27 U. CHI. L. REV. 661, 664 (1960); Mark Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307-08 (1979); Paul Brest, *The Substance of Process*, 42 OHIO ST. L.J. 131 (1981); Laurence Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063 (1980); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1152, 1182-87 (1985); Gary Peller, *Neutral Principles in the 1950s*, 21 U. MICH. J.L. REF. 561, 565 (1988); Kimberle Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683 (1998).

66. See DANIEL BELL, *THE END OF IDEOLOGY: ON THE EXHAUSTION OF POLITICAL IDEAS IN THE FIFTIES* (1960); SEYMOUR MARTIN LIPSET, *POLITICAL MAN: THE SOCIAL BASES OF POLITICS* 406, 408 (Anchor Books ed., 1963) (1960); Seymour Martin Lipset, *A Concept and Its History: The End of Ideology*, in CONSENSUS AND CONFLICT: ESSAYS IN POLITICAL SOCIOLOGY 81 (1985).

Frankfurter,⁶⁷ by the political writings of Walter Lippman,⁶⁸ and, near the mid-point of its development, by Learned Hand's reservations about the legitimacy of judicial review.⁶⁹ Early members of the legal process school included Henry M. Hart,⁷⁰ Albert Sacks,⁷¹ Herbert Wechsler,⁷² Alexander Bickel,⁷³ Gerald Gunther,⁷⁴ Harry Wellington,⁷⁵

67. Frankfurter's writings include, e.g., *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927); THE CASE OF SACCO AND VANZETTI (1927); FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT (1927); FELIX FRANKFURTER & NATHAN GREENE, LABOR INJUNCTION (1930); FELIX FRANKFURTER, THE PUBLIC AND ITS GOVERNMENT (1930); CASES AND OTHER AUTHORITIES ON FEDERAL JURISDICTION AND PROCEDURE (Felix Frankfurter & Wilber G. Katz eds., 1931); FELIX FRANKFURTER & J. FORRESTER DAVISON, CASES AND MATERIALS ON ADMINISTRATIVE LAW (2d ed. 1935); MR. JUSTICE BRANDEIS (Felix Frankfurter ed., 1932). See also MELVIN I. UROFSKY, FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES (1991).

Frankfurter's academic writings represent only a part—and perhaps a small part—of the contributions he made to this movement. Other contributions include his teaching, his mentoring (especially of his clerks), and the opinions he wrote while serving on the Supreme Court. See *infra* note 79.

68. See WALTER LIPPMAN, INQUIRING INTO THE PRINCIPLES OF THE GOOD SOCIETY (1937); WALTER LIPPMAN, THE PUBLIC PHILOSOPHY (1955); see also RONALD STEEL, WALTER LIPPMAN AND THE AMERICAN CENTURY (1980).

69. See LEARNED HAND, THE BILL OF RIGHTS (1960) (Holmes' lectures at Harvard Law School, delivered on Feb. 4, 5, and 6, 1958).

70. Hart's writings include, e.g., Henry M. Hart, *Holmes' Positivism—An Addendum*, 64 HARV. L. REV. 929 (1951); Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959); HENRY M. HART, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (1953) (later editions with Herbert Wechsler); HART & SACKS, THE LEGAL PROCESS (1958), *supra* note 65.

71. Sack's writings include Albert Sacks, *Foreword to The Supreme Court, 1953 Term*, 68 HARV. L. REV. 96 (1954); HART & SACKS, THE LEGAL PROCESS (1958), *supra* note 65.

72. Wechsler's publications include, e.g., Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); HENRY M. HART & HERBERT WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM (Paul M. Bator et al. eds., 3d ed. 1998); HERBERT WECHSLER, PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW (1961); HERBERT WECHSLER, THE COURTS AND THE CONSTITUTION (1965); HERBERT WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES (1970). For a discussion regarding Wechsler, see Norman Silber & Geoffrey Miller, *Toward "Neutral Principles" in the Law: Selections from the Oral History of Herbert Wechsler*, 93 COLUM. L. REV. 854 (1993).

73. Bickel's writings include, e.g., Alexander M. Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Alexander M. Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS (2d ed. 1962) [hereinafter BICKEL, LEAST DANGEROUS BRANCH (1962)]; ALEXANDER M. BICKEL, THE MORALITY OF CONSENT (1975); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1978).

74. Gunther's works include, e.g., Gerald Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW (various editions from 1965 to 1997); GERALD GUNTHER, CASES AND MATERIALS ON INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW (4th ed. 1986); Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate*, 36 STAN. L. REV. 895 (1984); GERALD GUNTHER, LEARNED HAND: THE MAN AND THE JUDGE (1994).

75. Wellington's writings include, e.g., Harry Wellington & Alexander M. Bickel, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1

Philip Kurland,⁷⁶ and a handful of others,⁷⁷ as well as, some years later, Antonin Scalia.⁷⁸ All members of the original group were closely associated with Felix Frankfurter or Henry Hart, Harvard Law School, and the Harvard Law Review.⁷⁹ The lasting contribution of

(1957); HARRY H. WELLINGTON & HAROLD SHEPHERD, *CONTRACTS AND CONTRACT REMEDIES: CASES AND MATERIALS* (4th ed. 1957); HARRY H. WELLINGTON, *LABOR AND THE LEGAL PROCESS* (1968); HARRY H. WELLINGTON & CLYDE SUMMERS, *CASES AND MATERIALS ON LABOR LAW* (1968); HARRY H. WELLINGTON & RALPH K. WINTER, JR., *THE UNIONS AND THE CITIES* (1972); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221 (1973); Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486 (1982); HARRY H. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* (1990).

76. Kurland's publications include, e.g., Philip Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 165 (1964); Philip Kurland, *Earl Warren, the "Warren Court," and the Warren Court Myths*, 67 MICH. L. REV. 353 (1968); Philip Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19 (1969); Philip Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 682 (1970); PHILIP KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION (1971); Philip Kurland & Dennis J. Hutchinson, *The Business of the Supreme Court, O.T. 1982*, 50 U. CHI. L. REV. 628 (1983); Philip Kurland, *The Rise and Fall of the "Doctrine" of Separation of Powers*, 85 MICH. L. REV. 592 (1986); Philip Kurland, *Judicial Review Revisited: "Original Intent" and "The Common Will,"* 55 U. CINN. L. REV. 733 (1987).

77. See, e.g., Louis Jaffe, *Foreword to the Supreme Court, 1950 Term*, 65 HARV. L. REV. 107 (1951); Erwin Griswold, *The Supreme Court, 1959—Foreword: Of Time and Attitudes, Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960); Philip Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); OWEN FISS, *THE CIVIL RIGHTS INJUNCTION* (1978); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Archibald Cox, *Congress v. The Supreme Court*, 33 MERCER L. REV. 707 (1982); Paul Carrington, *"Substance" and "Procedure" in the Rules Enabling Act*, 1989 DUKE L.J. 281 (1989).

An account of the legal process school would be incomplete without mention of Lon L. Fuller, who taught at Harvard from 1939 until 1970. Fuller might best be understood as being affiliated, simultaneously, with the legal process school and with the legal positivist/analytic tradition. See, e.g., Lon L. Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); LON L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940) (espousing purposive interpretation); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949) (espousing purposive interpretation); Lon L. Fuller, *American Legal Philosophy at Mid-Century*, 6 J. LEG. ED. 457 (1954) (discussing purposive doctrine); see also ROBERT S. SUMMERS, LON L. FULLER (1984).

78. Justice Scalia's academic writings include, e.g., Antonin Scalia, *Rulemaking as Politics*, 34 ADMIN. L. REV. v (1982); Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983); Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511; ANTONIN SCALIA, *A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW* (1997). Justice Scalia has, of course, made a further contribution in the form of his published opinions.

79. Felix Frankfurter served on the faculty of the Harvard Law School from 1913 until he was appointed to fill Justice Brandeis' seat on the Supreme Court in 1939, a post he held until 1962. There is then a core group of seven that includes Hart, Sacks, Wechsler, Bickel, Gunther, Wellington, and Kurland. Five of these seven (Hart, Sacks, Bickel, Wellington and Kurland) graduated from the Harvard Law School and served on the *Harvard Law Review* (Hart, Sacks, and Kurland as

the legal process school, and the area of its greatest interest, involved the theorizing of judicial review⁸⁰ and numerous related developments in constitutional⁸¹ and administrative law,⁸² as well as

Presidents) and either served as a junior co-author with Frankfurter before he was appointed to the Court (Hart) or clerked for him after his appointment (Sacks, Bickel, Wellington, and Kurland). A sixth (Gunther) graduated from the Harvard Law School, served on the *Law Review*, but did not clerk for Frankfurter. Only the seventh (Wechsler) neither went to Harvard, served on the *Law Review*, nor clerked for Frankfurter; he did, however, discover his commitments to "legal process" while serving as a visiting member of the Harvard faculty. It is not until the mid-sixties, when legal process was less of a movement than simply a style of thought, that John Hart Ely finally broke the mold. He did not attend Harvard, did not serve on the *Harvard Law Review*, did not clerk for Frankfurter, and did not teach at Harvard. Rather, he graduated from Yale—where he studied under Bickel and Wellington.

80. Much of the literature of the legal process school may be read as a series of responses to Learned Hand's attack on the legitimacy of judicial review, presented as the Holmes Lectures at the Harvard Law School on February 4-6, 1958, and published as *LEARNED HAND, THE BILL OF RIGHTS 1-30* (1960). See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); Alexander M. Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73. Their defense of judicial review was more expansive than that suggested by Hand and, before him, by James B. Thayer in *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). It was, at the same time, highly critical of what it saw as the excessive judicial activism of the Warren Court.

81. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952); Alexander M. Bickel & Harry W. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 353 (1959); Erwin N. Griswold, *The Supreme Court, 1959—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81 (1960); Alexander M. Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73; Gerald Gunther, *The Subtle Vices of the "Passive Virtues": A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964); Philip Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government,"* 78 HARV. L. REV. 143, 165 (1964); Philip Kurland, *Earl Warren, the "Warren Court," and the Warren Court Myths*, 67 MICH. L. REV. 353 (1968); Philip Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19 (1969); Philip Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629 (1970); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971); PHILIP B. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* (1971); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* (1978); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989); HARRY W. WELLINGTON, *INTERPRETING THE CONSTITUTION: THE SUPREME COURT AND THE PROCESS OF ADJUDICATION* (1990); MELVIN I. UROFSKY, *FELIX FRANKFURTER: JUDICIAL RESTRAINT AND INDIVIDUAL LIBERTIES* (1991); see also GERALD GUNTHER, *CASES AND MATERIALS ON CONSTITUTIONAL LAW* (numerous editions).

82. See FELIX FRANKFURTER & JAMES FORRESTER DAVISON, *CASES AND MATERIALS ON ADMINISTRATIVE LAW* (1932); Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927); JAMES M. LANDIS, *THE ADMINISTRATIVE PROCESS* (1938); LOUIS L. JAFFE & NATHANIEL L. NATHANSON, *ADMINISTRATIVE LAW: CASES AND MATERIALS* (1953); JAMES M. LANDIS, *REPORT ON THE REGULATORY AGENCIES TO THE PRESIDENT-ELECT* (1960); Louis L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319 (1964); Philip Elman, *Rulemaking Procedures in the FTC's Enforcement of the Merger Law*, 78 HARV. L. REV. 385 (1964); ARTHUR E. BONFIELD, *STATE ADMINISTRATIVE*

statutory interpretation.⁸³

This school of thought reflects both a powerful reaction against the deeper skepticisms of legal realism and a deep concern for the life—literally the survival—of our institutions.⁸⁴ Witnesses and participants in America's mid-century battles first with fascism and then with communism, members of this group hold a distinctive belief in the fragility of democratic institutions and what I would call the thinness of the tissue of civility.⁸⁵ Accordingly, they exhibit an urgent faith in

RULE-MAKING (1986).

83. See, e.g., notes 93 as to plain meaning, 102 as to purposive interpretation, and 103 as to legislative intent.

84. See BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73, at 73-84 (condemning "neo-realists" like Thurman Arnold for their "nihilism," their "self-validating cynicism," and their lack of respect for the deliberative process); Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1962); see also G. Edward White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

85. Sir Howard Beale recounts Felix Frankfurter's response, in 1962, to the passage in Robert Bolt's *A Man for All Seasons* in which Bolt's Thomas More declares

And when the last law was down, and the Devil turned on you – where would you hide, Roper, the laws all being flat? (*He leaves him*) This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down – and you're just the man to do it – d'you really think you could stand upright in the winds that would blow then? (*Quietly*) Yes, I'd give the Devil the benefit of law, for my own safety's sake.

According to Beale, "At the end of this passage the Justice could not contain himself. 'That's the point,' he kept whispering to us in the dark, 'that's it, that's it!' *A Man for All Seasons*, in FELIX FRANKFURTER: A TRIBUTE (Wallace Mendelson ed., 1964). Although I claim no special expertise on the subject of Thomas More, my reading of his *Utopia* (1516) suggests to me that his faith in humanity, in humanity's capacity for reason, was so great as to suggest he might not be among those who have thought the "tissue of civility" to be thin. Frankfurter, as well as those who followed him, also made a more specific point concerning the fragility of the courts' authority. See *Baker v. Carr*, 369 U.S. 186 (1962) (Frankfurter, J., dissenting).

Several years after Frankfurter's death, and during the period of unrest associated with the Vietnam War, Philip Kurland began his book on Frankfurter by lamenting that "In these times of domestic and foreign turbulence, 'law and order' is a phrase taken to mean police oppression and 'reason' is considered merely a device for the protection of 'the establishment'" and by quoting W.B. Yeats to the effect that "[m]ere anarchy is loosed upon the world" and "the centre cannot hold." PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION 1 (1971). Kurland, himself an important member of this community, ends the book with assertion that the United States, in 1971, faced a crisis comparable to "the war against Hitler" and that the authors of that crisis, by whom he presumably means the students in the streets, have "glorified unreason," *id.* at 223 (quoting C.P. Snow), and "brought our entire civilization to imminent peril of destruction," *id.* at 224-25 (quoting Learned Hand's assessment of the crisis represented by the war against Hitler). And he quotes John Pym to the effect that:

The Law is that which puts a difference betwixt Good and Evil, betwixt Just and Unjust; if you take away the Law, all things will fall into Confusion; every Man will become a Law to himself, which in the depraved condition of Human Nature, must needs produce great enormities; Lust will become a Law, and Envy will become a Law, Covetous and Ambition will become Laws. . . . Today's "Levellers," [continues Kurland,] would not understand this teaching . . . any more than they find Frankfurter's teachings acceptable.

reason, objectivity, deliberation, the possibility of consensus, and the strong version of the rule of law.⁸⁶ These—especially the rule of law—are, in the view of this community, the qualities that separate democracies from their totalitarian enemies and the faith by which our civility will be assured.⁸⁷ Under the historical circumstances, these concerns and predispositions seem both reasonable and warranted.

In their commitment to the strong version of the rule of law, the legal process school envisions a society governed by laws not men, in which judicial decisions do not depend on the personal or political preferences of judges, and in which law is clearly separate from politics.⁸⁸ Insofar as this vision can be sustained, the ideal of the

Id. at 224; *see also* WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* 11 (1955) (asserting that “our great traditions of civility” are at risk; distrust of “the mob”); BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 27 (asserting the inherent instability of democracy and the fragility of the rule of law).

86. Members of the legal process school are distinguished by their faith in the possibilities of reason, neutrality, objectivity, and neutral principles, in the belief that courts can act without reference to their personal or political preferences, and in the belief that courts actually act in accordance with those ideals. Thus, Henry Hart declares that “the tradition of Anglo-American law” is “thrilling” and that the Supreme Court is “predestined . . . to be a voice of reason, charged with . . . discerning afresh and of articulating and developing impersonal and durable principles. . . .” Henry M. Hart, Jr., *Foreword: The Time Chart of the Justices*, 73 *HARV. L. REV.* 84, 99 (1959). To similar effect, Alexander Bickel confidently asserts that “the life of the law is reason,” that “reasoned deliberation” actually works, and that Hart is right and the “nihilists” are wrong. *See* BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73; PHILIP B. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* 1-4 (1971).

87. *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947) (Frankfurter, J.) (“Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised.”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 393 (1952) (Frankfurter, J., concurring) (“It is absurd to see a dictator in a representative product of the sturdy democratic traditions of the Mississippi Valley. The accretion of dangerous power does not come in a day. It does come, however slowly, from the generative force of unchecked disregard of the restrictions that fence in even the most disinterested assertion of authority.”); *Cooper v. Aaron*, 358 U.S. 1, 21 (1958) (Frankfurter, J.) (“[L]awlessness if not checked is the precursor to anarchy.”); *see also* HART & SACKS, *THE LEGAL PROCESS* 4 (tent. ed. 1958, 1994) (asserting that the alternative to respect for the rule of law is “disintegrating resort to violence”); Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 *HARV. L. REV.* 630, 657-61, 672 (1958) (Nazi totalitarianism); Philip Kurland, *Egalitarianism and the Warren Court*, 68 *MICH. L. REV.* 629 (1970) (likening the Warren Court to Orwellian fascism).

88. *See Terminiello v. Chicago*, 337 U.S. 1, 11 (1940) (Frankfurter, J.) (asserting that the Court must not “sit like a kadi under a tree dispensing justice according to considerations of individual expediency”); *West Virginia Bd. of Educ. v. Barnette*, 319 U.S. 624, 646-47 (1943) (Frankfurter, J., dissenting) (asserting, in a school flag-salute case, that “as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. . . . As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard”); *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 266-67 (1957) (Frankfurter, J.) (arguing that the Court’s judgment must be based on “something much deeper and more justifiable than personal preference”

separation of powers is vindicated and one can be a staunch majoritarian,⁸⁹ admit to the counter-majoritarian difficulty with judicial review,⁹⁰ and still defend the legitimacy of a restrained form of judicial review.⁹¹ In addition, insofar as this vision of the rule of law is actually achieved, we need not fear for the future of the Court's authority.

In seeking to realize the strong version of the rule of law, the legal process school developed and promoted numerous strategies intended to maximize the legitimacy of judicial decision-making. Foremost among these is the idea of basing decisions upon "neutral principles,"⁹² including those derived from the plain meaning of a

and in that sense, so far as possible, "impersonal"); BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73 (arguing that principled decision-making and maturation of collective judgment actually happen on courts); *see also supra* note 78 (noting Justice Scalia's expressed commitments to "plain meaning" and "a law of rules," and his distrust of judicial balancing and of reliance on legislative history).

89. *See* BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 27 ("democracies . . . live by the idea . . . that the majority has the ultimate power to displace the decision-makers and to reject any part of their policy"); JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Although Professor Bickel was ultimately a majoritarian, he was a fearful majoritarian whose real faith was in the governing elite. Thus, on the pages just cited, he states his assumption "that the people themselves, by direct action at the ballot box, are surely incapable of sustaining a working system of general values specifically applied" he describes direct democracy as "the fallacy of the misplaced mystic, or the way of those who would use the forms of democracy to undemocratic ends; and he explains that "[d]emocratic government under law . . . carries the elements of explosion, [though] it doesn't contain a critical mass of them." *See* BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 27. Bickel's regard for hierarchy may be expressed by his pronouncement that "many a little man may rightly claim to be a better citizen than the expert or the genius. *See id.* at 28; *see also* PHILIP B. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* 1, 224 (1971) (explaining Frankfurter's commitment to the idea of an "elite" and Kurland's own disregard for the "Levellers" of his day); WALTER LIPPMANN, *THE PUBLIC PHILOSOPHY* (1955) (expressing distrust of plebiscites and of the "mob").

90. *See* *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 649-52 (Frankfurter, J., dissenting) ("[E]ven the narrow judicial authority to nullify legislation has been viewed with a jealous eye" because "it serves to prevent the full play of the democratic process."); BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 16-23.

91. Even Learned Hand, in *The Bill of Rights* (1958), approved a strictly limited version of judicial review that bears a close relationship to the "clear mistake" doctrine propounded by James Bradley Thayer in *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893). Frankfurter, Hart, Wechsler, Bickel, and Wellington are, while strict, less so than Hand and Thayer. *See* BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73; PHILIP B. KURLAND, *MR. JUSTICE FRANKFURTER AND THE CONSTITUTION* (1971).

92. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 353 (1959); BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 49-65, 73-84; Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971). A commitment to "principles" is one of the points of overlap between the legal process school and what I shall describe as the legal positivist/analytic tradition. *See* Ronald Dworkin, *Hard Cases*, in *TAKING RIGHTS SERIOUSLY* 81, 82 (1977) (arguing that courts should rely on principles not policies); William N. Eskridge & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HART & SACKS, *THE*

text,⁹³ from the “hard facts” of constitutional design and institutional competence,⁹⁴ from the presumed neutrality of procedural or process-based solutions,⁹⁵ or from the presence or absence of a shared

LEGAL PROCESS (1958), *supra* note 65, at cxvii (asserting that Dworkin “followed” and “accepted” the position of Hart, Sacks, Wechsler, and Bickel on this matter). Whatever the similarity, there are also important differences between Dworkin’s handling of “principles” and the legal process school’s understanding of “neutral principles.” At the very least, Dworkin shows no sign of embracing the legal process school’s procedures for identifying the supposed “neutrality” of their principles.

93. See, e.g., *Brogan v. United States*, 522 U.S. 398 (1998) (Scalia, J.); *Chisom v. Edwards*, 501 U.S. 380, 404 (1991) (Scalia, J., dissenting); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 452 (1987) (Scalia, J., concurring); *Mesa Verde Constr. Co. v. District Council of Laborers*, 861 F.2d 1124, 1146 (9th Cir. 1988) (“When courts interpret a statute, they search for its true meaning—and there can never be more than one true meaning.”) (Kozinski, J., dissenting), *cert. denied*, 498 U.S. 878 (1990); Frederick Schauer, *Statutory Construction and the Coordinating Function of Plain Meaning*, 1990 SUP. CT. REV. 231. *But see* BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73 (criticizing the idea of plain meaning).

94. See generally HART & SACKS, THE LEGAL PROCESS (1958), *supra* note 65, at 102-82. Clear examples include arguments by which the proper role of the judiciary are derived from the courts’ place in our constitutional architecture and from the relative competencies of various branches of government. See *id.* at 102-12; Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 99 (1959) (explaining that the Supreme Court appears “predestined” by, among other things, “the hard facts of its position in the structure of American institutions, to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles. . . .”); BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73 (deriving a theory of constitutional adjudication from the tripartite structure of our government and from the relative competencies of the three branches); Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978) (originally written and circulated within this community in 1957) (arguing that courts should avoid “polycentric” tasks on grounds of competence).

Felix Frankfurter clearly anticipated these arguments in *United States v. United Mine Workers*. See 330 U.S. 258, 308 (1947) (Frankfurter, J.) (asserting that judges are “set apart” and well-positioned “to be depositories of law”); see also *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 651-52 (1943) (Frankfurter, J., dissenting) (“If the function of this Court is to be essentially no different from that of a legislature, if the considerations governing constitutional construction are to be substantially those that underlie legislation, then . . . judges should not have life tenure and they should be made directly responsible to the electorate.”); *Texas v. Florida*, 306 U.S. 398, 428 (1939) (Frankfurter, J.) (arguing from “[t]he limitations of litigation—its episodic character, its necessarily restricted scope of inquiry, its confined regard for considerations of policy, its dependence on the contingencies of a particular record, and other circumscribing factors” to argue against the Court’s assuming jurisdiction in an interpleader action involving a controversy among four states).

Similar arguments have been made within the domain of administrative law where, for instance, Frankfurter and Landis supported the role of administrative agencies through arguments from institutional competence. See Felix Frankfurter, *The Task of Administrative Law*, 75 U. PA. L. REV. 614 (1927); JAMES M. LANDIS, THE ADMINISTRATIVE PROCESS (1938); Louis L. Jaffe, *James Landis and the Administrative Process*, 78 HARV. L. REV. 319 (1964).

95. Members of this community exhibit a strong interest in the correct design of institutions as inherently good, as important to the smooth working of government, as a factor contributing to the legitimacy and stability of the law in general and of our various particular institutions, and as a corollary to the principle of institutional settlement. See HART & SACKS, THE LEGAL PROCESS (1958), *supra* note 65, at 6 (asserting that the “second corollary” to the “principle of institutional settlement” is

social consensus.⁹⁶ These strategies also include reliance upon the “passive virtues” by which courts might avoid the resolution of issues on which reason and deliberation have not yet produced the necessary consensus.⁹⁷ Courts ought not impose substantive solutions

the duty to attend “to the constant improvement of all of [our] procedures”); William N. Eskridge & Philip P. Frickey, *An Historical and Critical Introduction to the Legal Process*, in HART & SACKS, *THE LEGAL PROCESS* (1958), *supra* note 65, at xciv-xcvi. Many of them seem also to have shared Professor Hart’s view that “the first recourse of law, in dealing with intractable questions, is to seek not final answers but an agreeable procedure for getting acceptable answers” at least in part because “[p]eople are bound to disagree . . . about the substance of the answers.” Henry M. Hart, “Note on Some Essentials of a Working Theory of Law” (ca 1950), Hart Papers, Box 17, Folder 1 (on file with the Harvard University Law Library).

The strong connection between the legal process school and administrative law surely reflects these commitments. *See, e.g.*, *supra* note 82. So does their attention to issues regarding the separation of powers and to procedural due process, both of which offer procedural answers to substantive questions. *See, e.g.*, *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593-614 (1952) (Frankfurter, J., concurring) (separation of powers); *Silver v. New York Stock Exchange*, 373 U.S. 341, 363 (1963) (imposing a procedural solution upon a substantive antitrust question).

96. *See* BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 18; Harry Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221, 284 (1973); *see also* *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 149 (1951) (Frankfurter, J., concurring) (arguing that the Court must do all it can not to become “entangled in political controversies, especially those that touch the passions of the day”); *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 267 (1957) (Frankfurter, J., concurring) (asserting that Court’s judgment “must rest on fundamental presuppositions rooted in history to which widespread acceptance may fairly be attributed”); *Baker v. Carr*, 369 U.S. 186 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. . . . [Accordingly, the Court must not] inject itself into the clash of political forces.”). *But see* JOHN HART ELY, *DEMOCRACY AND DISTRUST* 63-69 (1980) (discussing the view that “constitutional law must now be understood as expressly contemporary norms”).

97. *See* BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 111-98 (urging the Court to avoid the merits of constitutional cases, through such devices as the denial of certiorari or the dismissal of appeals, or through doctrines of standing, ripeness, mootness, desuetude, political questions, when no usable principle is then at hand); Alexander M. Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 *HARV. L. REV.* 40, 40 (1961) (discussing the means by which the Court has limited its judicial review). The Courts’ avoidance of the resolution of issues would permit a new issue to “simmer” through the accumulation of incidents and the maturation of opinion. *See* BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 176. Or it would permit solution by non-judicial processes. *See id.* at 177. Alternatively, abstention would promote the development of usable principles through a “colloquy with the political institutions.” *See id.* at 179. Lastly, judicial review can “sap the quality of the political process.” *See id.* at 155. *But see* Gerald Gunther, *The Subtle Vices of the “Passive Virtues:” A Comment on Principles and Expediency of Judicial Review*, 64 *COLUM. L. REV.* 1, 1, (1964) (criticizing Bickel’s strategy of abstention by courts as unprincipled).

Professor Bickel’s argument concerning the passive virtues is a fairly straightforward extension of two arguments that Justice Frankfurter had long been making concerning the numerous rules by which, in his view, the Court ought to avoid constitutional questions whenever possible and concerning the prudential importance of the Court’s steering clear of the political thicket. *See* *United States v. Lovett*, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring) (arguing that because

for which there is no general social consensus, both because such impositions are illegitimate and because they may undermine people's faith in the courts and in the rule of law. The legal process school's commitment to neutral principles strongly predisposes it to applications of the "gored ox test" to hypothetical extensions of an argumentative position.⁹⁸ Members of this community will criticize

"the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible," the Court has "developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision"⁹⁸ (quoting *Ashwander v. T.V.A.*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring)); *Poe v. Ullman*, 367 U.S. 497, 501-09 (1961) (Frankfurter, J.) (noting that the Court has developed its own series of rules where it avoids passing judgment on significant constitutional questions); *Baker v. Carr*, 369 U.S. 186, 267 (Frankfurter, J., dissenting) (arguing that the Court must avoid political questions).

98. "[A] neutral principle is a rule of action that will be authoritatively enforced without adjustment or concession and without let-up. *If it sometimes hurts, nothing is better proof of its validity.*" BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 59 (emphasis added). As I have studied this form of argument in countless lunchtable arguments between legal process advocates ("LP") and their skeptical adversaries ("SA"), I have found that it takes two forms, one defensive and the other offensive. In its defensive form, LP offers an argument that is nominally based on a principle but that could, in theory, reflect nothing more than his own personal preferences. He then seeks to demonstrate that his argument is based on principle (and is therefore powerful) and not on personal preference (and therefore weak) by asserting that there exists some possible state of affairs in which his own personal preferences would be disserved by the principle in question and by asserting that under those (absent) conditions he would willingly accept that disservice to his preferences. Therefore, at least to his satisfaction, he has shown that his argument is founded not on personal preference but instead on neutral principles. Accordingly, he should win.

The offensive use of the "gored ox test" involves LP's application of this test to his adversary SA's arguments. Here, LP hypothesizes some situation in which the principle SA has asserted would be strongly inconsistent with what LP knows to be SA's personal or political preferences; by eliciting SA's admission that he might not be inclined to apply that principle in that hypothetical case; and then making some gesture by which victory is claimed. It usually involves a kind of turning-of-the-tables on free speech, hate speech, the politics of racial identity, Nazis in Skokie, etc. LP takes the claim of victory to be warranted because, at least to his own satisfaction, he has either exposed SA's position as hypocritical (in which event SA's argument would carry no weight) or he has shown that SA's argument is not one of principle (which would be powerful) but one of personal preference (which would not). If this is a form of argument, it is also closely related to a form of classroom colloquy that many of my colleagues would unselfconsciously assume is simply how one teaches law. It is also, I think, a staple of oral argument before the Supreme Court.

Many who are not members of the legal process community find this form of argument far less compelling than do those who are, and proponents of contemporary critical theory are likely to be totally unpersuaded. From their perspective, all legal principles are ineradicably unstable, and none can be neutral. *See, e.g.*, Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1713 (1976) (criticizing the notion that rules and standards can be applied in isolation from the substantive issue to which they purport to respond); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209 (1979) (discussing altruism versus individualism); Gerald Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277, 1277 (1984) (discussing why

judicial activism;⁹⁹ judicial discretion, unconfined judicial balancing, and slippery slopes;¹⁰⁰ unreasoned per curiam decisions;¹⁰¹ and all other such “unprincipled” resolutions. Also among their rhetorical

attempts by bureaucratic theorists to defend corporations and administrative law fail to overcome problems of managerial domination and personal alienation that exists in every hierarchical organization); Joseph Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 477-82 (1988) (discussing the private/public distinction and the consent versus coercion debate). Accordingly, “we act and act and act on one direction, but then reach the sticking point. . . . We make commitments, and pursue them. The moment of abandonment is no more rational than that of the beginning, and equally a moment of terror.” Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1775 (1976).

99. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (criticizing *Terry v. Adams*, 345 U.S. 461 (1953), *Shelley v. Kraemer*, 334 U.S. 1 (1948), and *Brown v. Board of Educ.*, 347 U.S. 294 (1955), as unprincipled); BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73, at 51-59 (criticizing *Shelton v. Tucker*, 364 U.S. 479 (1960), as unprincipled); Philip Kurland, *The Supreme Court, 1963 Term—Foreword: Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*, 78 HARV. L. REV. 143, 162-67 (1964); Philip Kurland, *Earl Warren, the “Warren Court,” and the Warren Court Myths*, 67 MICH. L. REV. 353 (1968); Philip Kurland, *Toward a Political Supreme Court*, 37 U. CHI. L. REV. 19 (1969); ALEXANDER M. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); Philip Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629, 682 (1970) (likening the Warren Court to Orwellian fascism); Robert Bork, *Neutral Principles and Some First Amendment Problems* 47 IND. L.J. 1 (1971) (criticizing *Griswold v. Connecticut*, 381 U.S. 479 (1965), as unprincipled); see also *Burns v. Ohio*, 360 U.S. 252, 260 (1959) (Frankfurter, J., dissenting) (asserting that the Court must not “[stray] off the clear path of its jurisdiction to reach a desired result”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 594 (1952) (Frankfurter, J., concurring) (“Rigorous adherence to the narrow scope of the judicial function is especially demanded in controversies that arouse appeals to the Constitution.”); *Baker v. Carr*, 369 U.S. 186, 267 (1962) (Frankfurter, J., dissenting) (“The Court’s authority—possessed of neither the purse nor the sword—ultimately rests on sustained public confidence in its moral sanction. Such feeling must be nourished by the Court’s complete detachment, in fact and in appearance, from political entanglements and by abstention from injecting itself into the clash of political forces in political settlements . . .”).

100. The touchstone on this subject is Justice Frankfurter’s declaration, in *Terminiello v. Chicago*, 337 U.S. 1 (1949), that the Court must not “sit like a kadi under a tree dispensing justice according to considerations of individual expediency.” See *id.* at 11; see also *Sweezy v. New Hampshire*, 354 U.S. 234, 255, 266-67 (1957) (Frankfurter, J.) (asserting that courts must make “impersonal judgments . . . founded on something much deeper and more justifiable than personal preferences”); BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73, at 55 and *passim* (arguing that “the inviting garden of . . . ‘judicial impressionism’ is forbidden territory” and, more generally, adjudication based on neutral principles is clearly understood to be good precisely in virtue of its elimination of judicial discretion); Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1176 (1989) (discussing the distinction between rules and personal discretion in a judicial system); cf. *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 626 (1990) (Scalia, J.) (condemning the proposal to assess transient jurisdiction question under a “totality of the circumstances” test on grounds that such an approach “does not establish a rule of law at all”).

101. See Louis L. Jaffe, *The Supreme Court, 1950 Term—Forward*, 65 HARV. L. REV. 107, 108-09, 112-13 (1951); Albert M. Sacks, *The Supreme Court, 1953 Term—Forward*, 68 HARV. L. REV. 96, 103 (1954); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1, 3, 5-6, 35 (1957); BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73.

tools is what might seem the unlikely conjunction of a commitment to the practice of “purposive interpretation”¹⁰² and a steadfast opposition to arguments based upon the “motives,” perhaps especially the bad motives, of a legislature.¹⁰³ Finally in this vein, they generally embrace “the principle of institutional settlement,” which is a kind of moral obligation to respect the law and to work within the system.¹⁰⁴

This group is marked by its passionate commitment to the strong version of the rule of law; its faith in the possibilities of reason, neutrality, and objectivity,¹⁰⁵ and its almost unshakeable confidence

102. See BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 61-63; HART & SACKS, *THE LEGAL PROCESS* (1958), *supra* note 65, at 102-07; see also Lon L. Fuller, *The Case of Speluncean Explorers*, 62 HARV. L. REV. 616, 616, 624 (1949) (“Foster, J.” arguing for a legal treatment of self-defense “cannot be reconciled with the words of the statute, but only with its purpose”).

103. BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 208-10; Edwards v. Aguillard, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting).

104. Hart and Sacks write that:

The alternative to disintegrating resort to violence is the establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgement that decisions which are the duly arrived at as a result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed. . . . [E]ach system whatever it may be, provides the indispensable framework for living within the society in question. Short of a violent reconstitution of the system, it provides the means, and *the only means*, by which the problems of *that* society can be resolved.

HART & SACKS, *THE LEGAL PROCESS* (1958), *supra* note 65, at 5. I trust my reader to imagine how this message was received, in the late 1960s, by students who were then engaged in direct action on matters related to civil rights and the Vietnam War. As one of those students, I recognize this as the voice of our disapproving seniors, although at least in my case it had its counterpart in the internalized voice urging me, supposedly on tactical grounds, to “work within the system.” See *Cooper v. Aaron*, 358 U.S. 1, 24, 26 (1958) (Frankfurter, J., concurring) (arguing that one may criticize and seek to change the law, but until it is changed one must obey).

105. Henry M. Hart provides a classical statement of this faith when he announces that the Supreme Court “is predestined . . . not only by the thrilling tradition of Anglo-American law but also by the hard fact of its position in the structure of American institutions to be a voice of reason, charged with the creative function of discerning afresh and of articulating and developing impersonal and durable principles of constitutional law” Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84, 89 (1959); see also Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 353 (1959) (offering an argument that rests on faith in the possibility of neutral principles); BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 27, 82-84 (quoting, celebrating, and defending Hart’s statement about the “thrilling tradition,” that reason works, and that “the life of the law is reason”).

Justice Frankfurter’s faith in reason and confidence that, within the judiciary, reason really works, is easily illustrated. See *Ex parte Peru*, 318 U.S. 578, 603 (1943) (Frankfurter, J., dissenting) where Frankfurter writes:

[T]he judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in Conference. Without adequate

that through correct institutional design and the process of collective deliberation, sometimes led by the Supreme Court,¹⁰⁶ we can find and agree upon the right answers to even the hardest questions of public policy and law,¹⁰⁷ even on such difficult matters as race. This group is also distinguished by its concern for the fragility of democratic institutions and for the authority of the Court; its commitment to civility; and its opposition to the skepticism—they would call it “nihilism”—of the legal realists. Such skepticism is, to them, empirically unwarranted. Further, such talk is both dangerous and destructive insofar as it may undermine the public’s faith in reason and the rule of law and, if judges take it to heart, be an evil and self-fulfilling prophecy.¹⁰⁸

study there cannot be adequate reflection; without adequate reflection there cannot be adequate discussion; without adequate discussion there cannot be that mature and fruitful interchange of minds which is indispensable to wise decisions and luminous opinions.

Id. at 603; *United States v. United Mine Workers*, 330 U.S. 258, 308 (1947) (Frankfurter, J., concurring) (“Law alone saves a society from being rent by internecine strife or ruled by mere brute power however disguised” and judges, “set apart . . . by their disciplined training and character and by withdrawal from the usual temptations of private interest may reasonably be expected to be ‘as free, impartial, and independent as the lot of humanity will admit’”); *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 593 (1952) (Frankfurter, J., concurring) (“A constitutional democracy like ours . . . is more dependent than any other form of government on knowledge and wisdom and self-discipline for the achievement of its aims. For our democracy implies the reign of reason on the most extensive scale.”); *Cooper v. Aaron*, 358 U.S. 1, 21 (1958) (Frankfurter, J.) (“[L]awlessness if not checked is the precursor to anarchy.”).

106. Professor Bickel’s entire project concerning “the passive virtues” rests on the assumption that the Court, if it does its job right, can move the nation in the direction of a national consensus on difficult issues. See Alexander Bickel, *The Supreme Court, 1960 Term—Forward: The Passive Virtues*, 75 HARV. L. REV. 40 (1961); BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73, at 23-28. This is, for instance, clearly what he sees as having happened on the question of racial segregation, and it is, in his view, what could have happened but did not with respect to the death penalty. See Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193, 208 (1952) (asserting that Justices are teachers in a “vital national seminar”); Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (discussing the process by which the Court decides cases, and discussing the relationship between this process and the substantive outcome of cases).

107. See Henry M. Hart, *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (asserting the maturing of collective thought); Erwin Griswold, *The Supreme Court, 1959—Foreword: Of Time and Attitudes—Professor Hart and Judge Arnold*, 74 HARV. L. REV. 81, 85, 94 (1960); Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959); BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73, at 23-29, 80-84, 111-98, 200-08, 235-43, 244-54 (asserting that “the maturing of collective thought” actually happens and that “reason” works and explaining the role of the Court and of principled decision-making in leading opinion toward eventual consensus); see also WALTER LIPPMAN, *THE PUBLIC PHILOSOPHY* 40 (1955) (asserting that “the public interest may be presumed to be what man would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently.”).

108. See BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73, at 108.

While most of these men view themselves as political liberals, their time, place, and emotional and intellectual commitments all cast them as the defenders of existing institutions during the disturbances of the 1960s. At the time of the violence at Kent State, they stood on the inside of the barricades—and it is my experience that one cannot overstate the importance of this passionate standoff in the lives of these people. Across those barricades were the forces of darkness: those who spoke against the possibility of neutrality, objectivity, reason, and the rule of law; those who spoke against the settled expertise of the Cold War generation and who shouted down speakers; those who broke the laws, sometimes committed violence, and paid no heed to the principle of institutional settlement; those who rejected the claim that the existing order was fair and legitimate; and those who violated the fundamental rules of civility.¹⁰⁹ The dis-ease of the legal process school, both with these events and with certain of the skepticisms associated with legal realism, reflect, at least in part, their deeply felt belief that their adversaries were undermining the people's faith in reason and the rule of law, which faith was essential to the preservation of our fragile institutions; that those adversaries promoted cynicism; and that to promote cynicism was to put democracy at risk.¹¹⁰ If, as these "nihilists" saw it, reason were inherently infused with politics and power, then the strong version of the rule of law must fail, and the separation of law from politics is impossible. To the members of this community, such a result would be wholly intolerable.

E. *Law and Economics*

"Law and economics" is among the most important contemporary American perspectives on the law. Whole bodies of law are now exclusively within its domain, including antitrust,¹¹¹ economic

109. See, e.g., discussion *supra* note 85 (concerning Kurland's discussion of these matters in PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION (1971)).

110. BICKEL, LEAST DANGEROUS BRANCH (1962), *supra* note 73, 81-84 (attacking "neo-realists" and "nihilists," in the person of Thurman Arnold, for their "cynicism" and for "propagating a self-validating picture of reality"); Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL ED. 222 (1984) ("A lawyer who succumbs to legal nihilism faces a far greater danger than mere professional incompetence. He must contemplate the dreadful reality of government by cunning and a society in which only right is might. Such a fright can sustain belief in many that law is at least possible and must matter."); Owen Fiss, *The Death of Law?*, 72 CORNELL L. REV. 1 (1986).

111. See Richard A. Posner, *The Social Costs of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975); RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE (1976); ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF

regulation,¹¹² and major portions of corporate law.¹¹³ In a great many other areas of the law, including property,¹¹⁴ contract,¹¹⁵ torts,¹¹⁶ and environmental law,¹¹⁷ law and economics is a serious and important

(1978); HERBERT H. HOVENKAMP, FEDERAL ANTITRUST POLICY THE LAW OF COMPETITION AND ITS PRACTICE (1994).

112. See ALFRED E. KAHN, THE ECONOMICS OF REGULATION: PRINCIPLES AND INSTITUTIONS (1970); A.K. Klevorick, *The "Optimal" Fair Rate of Return*, 2 BELL J. ECON. & MGMT. SCI. 122 (1971); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL ECON. & MGMT. SCI. 3 (1971); Richard A. Posner, *Theories of Economic Regulation*, 5 BELL J. ECON. & MGMT. SCI. 335 (1974); STEPHEN BREYER, REGULATION AND ITS REFORM (1982).

113. See RICHARD A. POSNER & KENNETH E. SCOTT, ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION (1980); Dennis W. Carlton & Daniel R. Fischel, *The Regulation of Insider Trading*, 35 STAN. L. REV. 857 (1983); David D. Haddock, Jonathan R. Macey & Fred S. McChesney, *Property Rights in Assets and Resistance to Tender Offers*, 73 VA. L. REV. 701 (1987); FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW (1991); Douglas G. Baird, *Fraudulent Conveyances, Agency Costs, and Leveraged Buyouts*, 20 J. LEGAL STUD. 1 (1991).

114. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960); Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); ECONOMIC FOUNDATIONS OF PROPERTY LAW (Bruce A. Ackerman ed., 1975); Louis De Alessi, *The Economics of Property Rights: A Review of the Evidence*, 2 J. RES. L. & ECON. 1 (1980); ROBERT C. ELICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991).

115. See Charles J. Goetz & Robert E. Scott, *Liquidated Damages, Penalties and the Just Compensation Principle: Some Notes on an Enforcement Model and a Theory of Efficient Breach*, 77 COLUM. L. REV. 554 (1977); Oliver E. Williamson, *Transaction-Cost Economics: The Governance of Contractual Relations*, 22 J.L. & ECON. 233 (1979); A. Mitchell Polinsky, *Risk Sharing Through Breach of Contract Remedies*, 12 J. LEGAL STUD. 427 (1983); Thomas S. Ulen, *The Efficiency of Specific Performance: Toward a Unified Theory of Contract Remedies*, 83 MICH. L. REV. 341 (1984); Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989). See generally THE ECONOMICS OF CONTRACT LAW (Anthony T. Kronman & Richard A. Posner eds., 1979).

116. See GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 14-15 (1970); WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); Alan O. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563 (1988).

117. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (discussing social costs of firms' actions that harm the environment); Harold Demsetz, *The Exchange and Enforcement of Property Rights*, 7 J.L. & ECON. 11 (1964) (discussing costs imposed on traders and owners by exchange of goods and maintenance of control over use of goods); ORRIS C. HERFINDAHL & ALLEN V. KNEESE, QUALITY OF THE ENVIRONMENT: AN ECONOMIC APPROACH TO SOME PROBLEMS IN USING LAND, WATER AND AIR (1965) (applying economic reasoning to problem of natural resource deterioration); Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243 (1968) (discussing inherent problems of policy of laissez-faire in reproduction); BRUCE A. ACKERMAN ET AL., THE UNCERTAIN SEARCH FOR ENVIRONMENTAL QUALITY 1-6 (1974) (discussing contributions of nature, science, economics, politics, law and philosophy to formulation of public policy); ECONOMICS OF THE ENVIRONMENT: SELECTED READINGS (Robert Dorfman & Nancy S. Dorfman eds., 2d ed. 1977) (providing a collection of essays addressing economic concerns that measures taken to protect environment are efficient); TOM TEITENBERG, ENVIRONMENTAL AND NATURAL RESOURCES ECONOMICS (2d ed. 1988); A. MYRICK FREEMAN, III, THE

contender for dominance. It has even laid an intelligible, if not necessarily persuasive, claim to providing a general theory, perhaps *the* general theory, of law.¹¹⁸

Practitioners of law and economics include Robert Bork,¹¹⁹ Richard Posner,¹²⁰ Frank Easterbrook¹²¹ and Guido Calabresi,¹²² all of whom had distinguished academic careers before being appointed to the U.S. Court of Appeals, as well as countless others.¹²³ The work that

MEASUREMENT OF ENVIRONMENTAL AND RESOURCE VALUES: THEORY AND METHODS (1993) (providing overview of principle methods of resource valuation).

118. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (5th ed. 1998) (published in five editions beginning in 1972) [hereinafter POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998)].

119. Bork's writings on law and economics include, e.g., Robert H. Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Robert H. Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division: Part I*, 74 YALE L.J. 775 (1965); Robert H. Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division: Part II*, 75 YALE L.J. 775 (1965); Robert H. Bork, *Resale Price Maintenance and Consumer Welfare*, 77 YALE L.J. 950 (1968); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978).

120. Posner's contributions to law and economics, see for example RICHARD A. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979); Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979); RICHARD A. POSNER & ANTHONY T. KRONMAN, *THE ECONOMICS OF CONTRACT LAW* (1979); RICHARD A. POSNER & KENNETH E. SCOTT, *ECONOMICS OF CORPORATION LAW AND SECURITIES REGULATION* (1980); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987); RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990); RICHARD A. POSNER, *SEX AND REASON* (1992); POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118.

121. Easterbrook's writings include, e.g., Frank Easterbrook, *Is There a Ratchet in Antitrust?*, 69 TEX. L. REV. 705 (1982); Frank Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1 (1984); Frank Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696 (1986); FRANK EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991).

122. Calabresi's writings on law and economics include GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); Guido Calabresi, *Optimal Deterrence and Accidents*, 84 YALE L.J. 656 (1975); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

123. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); HENRY G. MANNE, *INSIDER TRADING AND THE STOCK MARKET* (1966); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970); Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUPREME CT. REV. 41; OLIVER E. WILLIAMSON, *MARKETS AND HIERARCHIES* (1975); GARY S. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* (1976); ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978); STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* (1983); Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* (1988); FRANK H. EASTERBROOK & DANIEL R. FISCHER, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* (1991); HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* (1994); POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998),

this group has done in developing and extending this paradigm has been some of the most original, provocative, and successful work done anywhere within the law during the last two generations. Though this movement can trace its origins to Beccaria¹²⁴ and Bentham,¹²⁵ it is a lineal descendant of legal realism¹²⁶ and is, as a practical matter, a twentieth-century American invention.

It is customary to divide this theoretical perspective into two rival factions. One is the "Chicago school of law and economics."¹²⁷ It arose out of the seminars that the economist Aaron Director taught at the University of Chicago law school; it is affiliated with, but not identical to, Milton Friedman's "Chicago school of economics"; its proponents include Judges Bork, Posner, and Easterbrook; and it is conservative in its politics and, some would say, reductionist in its economics. The other camp, I will call them the "Not-Chicago school of law and economics," includes, among others, Judge Calabresi, Oliver Williamson,¹²⁸ Herbert Hovenkamp,¹²⁹ Eleanor Fox,¹³⁰ and Susan Rose-Ackerman.¹³¹ The Not-Chicago school tends to be more

supra note 118.

124. See CESARE BONESANA BECCARIA, ON CRIMES AND PUNISHMENTS (1764) (discussing crime and punishment in terms of their social utility).

125. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, in THE COLLECTED WORKS OF JEREMY BENTHAM (J.H. Burns & H.L.A. Hart eds., 1970) (1789) (applying principles of utility to the legal system).

126. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 44-46 (1995).

127. See Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979) (explaining the foundations of the Chicago School of antitrust); Edmund W. Kitch, *The Fire of Truth: A Remembrance of Law and Economics at Chicago, 1932-1970*, 26 J.L. & ECON. 163 (1983) (recounting the intellectual history of the Chicago School of law and economics). See generally Edmund W. Kitch, *Chicago School of Law and Economics*, in THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS (Peter Newman ed., 1987).

128. See, e.g., OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES, ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION (1975); OLIVER E. WILLIAMSON, ECONOMIC ORGANIZATION: FIRMS, MARKETS AND POLICY CONTROL (1986); Oliver E. Williamson, *Transaction Cost Economics Meets Posnerian Law and Economics*, 149 J. INSTITUTIONAL & THEORETICAL ECON. 99 (1993).

129. See, e.g., Herbert Hovenkamp, *Distributive Justice and the Antitrust Laws*, 51 GEO. WASH. L. REV. 1 (1982); Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645 (1983); HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW (1985); Herbert Hovenkamp, *The Political Economy of Substantive Due Process*, 40 STAN. L. REV. (1988); Herbert Hovenkamp, *The Antitrust Movement and the Rise of Industrial Organization*, 68 TEX. L. REV. 105 (1989); Herbert Hovenkamp, *The First Great Law and Economics Movement*, 42 STAN. L. REV. 993 (1990); HERBERT HOVENKAMP, ENTERPRISE AND AMERICAN LAW, 1836-1937 (1991); HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE (1994).

130. See, e.g., Eleanor M. Fox, *Consumer Beware Chicago*, 84 MICH. L. REV. 1714 (1986); Eleanor M. Fox, *The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window*, 61 N.Y.U. L. REV. 554 (1986); Eleanor M. Fox, *The Battle for the Soul of Antitrust*, 75 CAL. L. REV. 917 (1987).

131. See, e.g., Susan Rose-Ackerman, *Inalienability and the Theory of Property Rights*, 85 COLUM. L. REV. 931 (1985); Susan Rose-Ackerman, *Progressive Law and Economics—*

progressive in its politics and less reductionist in its economics than its Chicago school counterparts. Apart from this division between the Chicago and the Not-Chicago schools, analysts have also divided the domain of law and economics between the “normative” and the “positive” (or descriptive) use of economics,¹³² and between the “politically conservative” and the “politically liberal” use of economic analysis.¹³³

For my money (as some might say), it is far more useful to distinguish between a “strong” and a “weak” version of law and economics. According to the strong version, justice is, and only is, the maximization of aggregate wealth and the promotion of allocative efficiency.¹³⁴ This is a form of utilitarianism marked by its commitment not to the maximization of aggregate *utility* or *happiness* but to the maximization of aggregate *wealth*.¹³⁵ Aggregate wealth and

and the New Administrative Law, 98 YALE L.J. 341 (1988); Susan Rose-Ackerman, *Defending the State: A Skeptical Look at “Regulatory Reform” in the Eighties*, 61 U. COLO. L. REV. 517 (1990).

132. See POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 26-29.

133. See *id.*; Alex M. Johnson, *An Appeal for the “Liberal” Use of Law and Economics*, 67 TEX. L. REV. 659 (1989) (stating that law and economics is apolitical, equally useful to liberals as to conservatives); POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 29-30 (rejecting the claim that law and economics “manifests a conservative political bias”).

134. See RICHARD A. POSNER, *ANTITRUST LAW* (1976) (elaborating the theory that justice, at least in antitrust law, is wealth maximization); RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* (1981) (elaborating the theory that justice is wealth maximization); POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, *passim* (elaborating the theory that justice is the maximization of wealth); see also Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 647 n.17, 670 (1983) (arguing that the common law is best understood as having pursued the maximization of aggregate wealth).

135. See ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* (1978) (defending efficiency on the grounds that it provides the greatest good for the greatest number); see also Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103 (1979) (acknowledging “philosophical hostility to utilitarianism” and claims to have solved its problems through shift from maximization of utility to maximization of wealth).

In response to utilitarianism’s unpopularity, Posner has progressively distanced himself from Bentham’s movement. His progress can be marked from (1) *ECONOMIC ANALYSIS OF LAW* 357 (1st ed. 1972) in which “utilitarianism . . . is another name for economic theory,” to (2) *ECONOMIC ANALYSIS OF LAW* 20 (2d ed. 1977) in which “utilitarianism” is “the philosophical basis of economics” but is different enough that wealth-maximization is “quite untouched by any debate over the philosophical merits of utilitarianism,” to (3) *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986) in which all references to the possibility that his “law and economics” approach may be the same as or based upon utilitarianism have disappeared and utilitarianism has simply become one of those systems of belief that economic analysis is different from and better than. Such reasons as Judge Posner has offered for this dissociation boil down to the claim that Kaldor-Hicks wealth maximization can be trusted, in ways that utilitarianism cannot, to generate answers to our problems and never to provide comfort to those who may want to redistribute wealth. See *id.*

allocative efficiency are, in turn, understood to be those things that are naturally maximized by a freely operating perfect market.¹³⁶ Then, if this is the meaning of justice, the purposes of law are: (1) to maximize the market's domain;¹³⁷ (2) to facilitate the market's operation through, for instance, the minimization of transaction costs;¹³⁸ (3) to correct the market's imperfections, whether they involve externalities, public goods, free riders, or certain forms of rent-seeking;¹³⁹ and (4) where for instance there can be no market, as in the case of accidents, to do what the market would have done.¹⁴⁰ Beyond these four purposes, there is an affirmative, efficiency-based

136. This proposition is given the status of an economic fact. See POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 11-12; ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* 6, 585-88 (2d ed. 1992). Once this is taken to be the case, aggregate wealth is neither the total sum of a society's money, as explained in Posner's *Economic Analysis*, *see supra* note 118, nor the sum of the market value of all its assets. At this stage, I know of no better definition of aggregate wealth than this: that sum of those values that is maximized by a freely operating perfect market. As a technical matter, this definition is not circular. But it does suggest that, once we embraced as our objective the maximization of aggregate wealth, neither our preference for freely operating perfect market nor our distrust of state interference in the market require any further explanation.

137. Posner urges us to maximize the market's domain when he argues that (1) everything, or at least everything of value, should be held as private property or, at the very least, managed as if it were private property; (2) everything should be transferable in voluntary and priced transactions; and (3) there should be strong incentives through the law of crimes and intentional torts to deter behavior that unnecessarily evades the market in favor of coerced transactions. See POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 36, 43-54, 61-72, 126, 224-29, 237-42.

138. See *id.* at 101-08 (contract law); *id.* at 122-26 (minimization of transaction costs and optimization of administrative costs through prohibition of fraud).

139. See STEPHEN BREYER, *REGULATION AND ITS REFORM* (1982) (discussing and criticizing rationales for regulation); POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 166 (arguing that the regulation of divorce is warranted because parents will not otherwise "fully internalize the cost to the . . . third party . . . children"); *id.* at 180 (asserting that tort law may be justified by reference to externalities); *id.* at 301-05 (monopoly as a market imperfection); *id.* at 377-81 (public utility regulation justified by natural monopoly condition); *id.* at 508-11 (using state action to alleviate poverty is warranted only because "affluent altruists" who are willing and able to do something about it face "a free-rider problem"); *id.* at 523 (taxes warranted because of free rider problems associated with public goods). See generally GEORGE J. STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* (1975); George J. Stigler, *The Theory of Economic Regulation*, 2 *BELL J. ECON. & MGMT. SCI.* 3 (1971).

140. See Ronald H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960). Coase argues that, at least where transaction costs are very low, the market will efficiently allocate rights and entitlements, and the law need not be concerned with their allocation. Thus, Posner explains that where "the cost of voluntary transactions is low, common law doctrines create incentives for people to channel their transactions through the market." POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 277. It is only when "the cost of allocating resources by voluntary transactions is prohibitively high, making the market an infeasible method of allocating resources," that the common law must step in and "price[] behavior in such a way as to mimic the market." *Id.* Among the circumstances in which transaction costs are high, at least for Posner, are those he describes as "bilateral monopolies." See *id.* at 274.

case against state action or legal intervention. Indeed, according to the Coase Theorem, except where transaction costs are relatively high, the law need not and ought not be concerned with the setting of rights and entitlements.¹⁴¹ Then when those costs are high, the law ought to allocate rights and entitlements so as to maximize aggregate wealth, which is, of course, what the market itself would have done in the absence of those transaction costs. Further in the same vein, proponents of the strong version of law and economics believe that the law need not be concerned with the mere transfer of wealth, except when such transfers have an adverse effect on allocative efficiency and aggregate wealth.¹⁴² Thus monopoly is a problem not because the taking—or, more neutrally, the transfer—of monopoly profits may be wrong in the way that theft is wrong, but because the monopolist will raise prices and restrict output. Insofar as these price and output levels differ from what would have been set by a freely operating perfect market, “too little” of the monopolist’s product is produced, resources are in that way “misallocated,” and aggregate wealth is reduced.¹⁴³

141. See Ronald H. Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960).

142. Under Judge Posner’s view, efficiency is a matter of aggregate wealth, and simple transfers of wealth from one person to another have no effect on aggregate wealth. Such a transfer “would not diminish the stock of resources. It would diminish my purchasing power, but it would increase the recipient’s by the same amount. Put differently, it would be a private cost but not a social one. A social cost diminishes the wealth of society; a private cost merely rearranges that wealth.” POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 7. Because involuntary wealth transfers from one person to another do not, in and of themselves, diminish aggregate wealth, they are, without more, a matter to which the law ought be indifferent.

Efforts to secure involuntary wealth transfers are not subject to condemnation because they transfer wealth from the perpetrator to the victim. Rather, they are subject to condemnation when and only when they give rise to social costs. See *id.* at 126 (arguing that extortion is a bad idea not because one person is enriched at another’s expense but because it “channel[s] resources into the making of threats and into efforts to protect against them”); *id.* at 226 (arguing that theft is bad not because of the injury inflicted on the victim but because of social costs entailed when owners are induced to “spend heavily on protection” and thieves, “on thwarting the owners’ protective efforts”); *id.* at 237-42 (same regarding crime generally); *id.* at 301-05 (arguing that monopoly is bad not because one person is enriched at another’s expense but because of “social costs” including “deadweight loss” and socially wasteful efforts to secure monopoly power); see also ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 110-12 (1978) (expressing and defending indifference to injuries to consumers arising from the transfer of monopoly profits and to the harm that one competitor might inflict upon another).

143. ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 100-01 (1978) (explaining that the monopolist will charge a higher price and produce “fewer widgets” than would have been produced if the industry were competitive). This “restriction of output . . . creates a misallocation of resources and thereby makes society poorer. The evil of monopoly . . . is not higher prices or smaller production (though these are its concomitants) but misallocated resources, or allocation inefficiency.” *Id.* Bork also acknowledges that “[t]hose who continue to buy after a

The strong version of law and economics is a theory of justice and law in which rights exist, and ought to exist, only insofar as they contribute to the maximization of aggregate wealth, and in which a person's value and moral worth exist in and only in the degree to which that person is willing and able to pay.¹⁴⁴ Accordingly, it is a theory of justice and law that embodies, reflects, and reproduces the existing distribution of wealth. Proponents of the strong version may also believe that economics explains everything¹⁴⁵ and that, because allocative efficiency is our objective and markets are self-correcting, private economic power is not nearly so serious a problem as is government interference in the market.¹⁴⁶ They are likely to believe that state action must either promote allocative efficiency or

monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners" *Id.* But he is absolutely clear that such "income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity" because "the shift in income distribution does not lessen total wealth." *See id.*; *see also* RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 8-11 (arguing that the taking of monopoly profits is itself objectionable and in so doing, they take a position more consonant with the weak version of law and economics than with the strong); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65, 72-74 (1982); Gerald B. Wetlaufer, *Reconstructing the Sherman Act: Law, Economics, and the Ethic of Industry and Restraint* (unpublished manuscript, on file with author).

144. Judge Posner formally defines "value" as "human satisfaction as measured by aggregate consumer willingness to pay for goods and services" which is "a function . . . the distribution of income wealth." RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 10 (2d ed. 1977). Moreover, in a system in which justice is the maximization of aggregate wealth, and aggregate wealth is understood to be that which is maximized through voluntary market transactions, a person's worth is measured by their ability to pay. It is in this sense that scarce medical resources ought to be allocated to the rich person who wants cosmetic surgery but not to the poor child at the point of death "because value is measured by willingness to pay . . ." *See id.* It is in this sense that the problem with poverty is not the suffering of poor people, who are presumably neither willing nor able to pay to do something about it. Rather, "the major cost of poverty is the dis-utility it imposes on affluent altruists." *Id.* at 464; *see also* RICHARD A. POSNER, THE ECONOMICS OF JUSTICE 67-68 (1981).

145. The economic model:

is a comprehensive one that is applicable to all human behavior, be it behavior involving money prices or imputed shadow prices, repeated or infrequent decisions, large or minor decision, emotional or mechanical ends, rich or poor persons, men or women, adults or children, brilliant or stupid persons, patients or therapists, businessmen or politicians, teachers or students.

GARY S. BECKER, THE ECONOMIC APPROACH TO HUMAN BEHAVIOR 8 (1976). *See also* Gary S. Becker, Elizabeth M. Landes & Robert T. Michael, *An Economic Analysis of Marital Stability*, 85 J. POL. ECON. 1141 (1977); POSNER, ECONOMIC ANALYSIS (5th ed. 1998), *supra* 118, at 155-56 (explaining the institution of the family in terms of "economies of scale" and its facilitation of "the division of labor, yielding gains from specialization"); *id.* at 158 ("The pleasure we get from our children's presence is the result of 'consuming' the intangible 'services' that they render us.").

146. *See* Harold Demsetz, *Two Systems of Belief About Monopoly*, in INDUSTRIAL CONCENTRATION: THE NEW LEARNING 164-65 (Harvey J. Goldschmid et al. eds., 1974).

redistribute wealth,¹⁴⁷ and that all such redistribution is presumed to diminish aggregate wealth,¹⁴⁸ to result from the self-interested (rent-seeking) behavior of those who are its beneficiaries,¹⁴⁹ and to be illegitimate¹⁵⁰ and either ineffective or counterproductive.¹⁵¹ And they may well hold the views that a society's practices and institutions will persist only insofar as they are efficient¹⁵² and that the common law, properly understood, has always been about the maximization of aggregate wealth.¹⁵³

For its part, the weak version of law and economics is distinct from the strong primarily in its rejection of the notion that justice is, and only is, the maximization of aggregate wealth. With it, the weak version rejects the idea that value and moral worth are, and only are, a matter of peoples' ability and willingness to pay. It also rejects the

147. See POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 175, 572-78; ARTHUR M. OKUN, *EQUALITY AND EFFICIENCY, THE BIG TRADEOFF* (1975); ROBERT S. PINDYCK & DANIEL L. RUBINFELD, *MICROECONOMICS* 6, 585-88 (2d ed. 1992); A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 7-10, 119-30 (2d ed. 1989).

148. See POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 7, 302-03 (asserting that the argument is not that redistribution, as such, causes a diminution in aggregate wealth, but rather, it is understood, standing alone, to have no such effect); see also ROBERT H. BORK, *THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF* 110-12 (1978) (expressing indifference to transfer of monopoly profits); *id.* at 72-89 (expressing indifference to harm that one competitor might do another); HERBERT HOVENKAMP, *ECONOMICS AND FEDERAL ANTITRUST LAW* 48 (1985) (explaining that economic measures of efficiency are "indifferent to how resources are distributed in society").

Instead, the argument is that redistribution causes a diminution in aggregate wealth by virtue of its administrative costs, incentive and substitution effects, and rent-seeking. See POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 220-24 (no-fault accident compensation); *id.* at 500-04 (redistribution is costly); *id.* at 511-14 (in-kind benefits including legal services for the poor); *id.* at 514-18 (housing codes); *id.* at 525-29 (excise taxes); *id.* at 544-48 (progressive taxation).

149. See POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 175 (laws against bigamy); *id.* at 572-75 (legislation generally); see also DENNIS C. MUELLER, *PUBLIC CHOICE II*, at 229-44 (1989); R.D. Tollison, *Rent Seeking: A Survey*, 35 *KYKLOS* 575-602 (1982); TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (J.M. Buchanan et al. eds., 1990).

150. See POSNER, *ECONOMIC ANALYSIS* (4th ed. 1992), *supra* note 118, at 503 ("Involuntary [state-sponsored] redistribution is a coerced transfer not justified by high market-transaction costs; it is, in efficiency terms, a form of theft.")

151. See POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 361-63 (arguing that minimum wage laws are counterproductive); *id.* at 514-18 (same regarding housing codes); see also Edgar O. Olsen, *An Econometric Analysis of Rent Control*, 80 *J. POL. ECON.* 1081 (1972) (same regarding rent control); MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* 180-81 (1962) (same regarding minimum wage laws); see also ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991).

152. See POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118, at 155 ("The persistence of the family as a social institution suggests . . . that the institution must have important economizing properties.")

153. See *id.* at 29-268 and especially at 251-68; Herbert Hovenkamp, *The Economics of Legal History*, 67 *MINN. L. REV.* 645, 647-70 (1983).

ideas that the only legitimate purpose of law and other forms of state action is expanding, facilitating, fixing, and mimicking the market; that state action is inherently a problem; that institutions persist only if they are efficient; and that the purpose of the common law is, and always has been, the maximization of aggregate wealth. Proponents of the weak version are likely to believe that people have rights over and above those that may be warranted by efficiency.¹⁵⁴ They are also likely to believe that the law may properly serve social needs or interests other than efficiency and the vindication of rights,¹⁵⁵ or that it may properly prohibit bad conduct.¹⁵⁶ Finally, despite their reservations about certain “applications” of economics to law, proponents of the weak version will find numerous ways in which economic analysis may be useful in understanding or applying the law.¹⁵⁷ While these applications would not distinguish for us between what is right and what is wrong, they might tell us whether or not there exists some legally significant economic predicate (e.g., monopoly power or lessening of competition); help us to identify the most cost-effective way of accomplishing some goal, whether it be minimizing criminal behavior, regulating natural monopolies, or protecting the environment; or permit us to assess the economic consequences, including for instance the economic injury, arising from some conduct or act.

F. *The Legal Positivist/Analytic Tradition*

The legal positivist/analytic tradition is less a single school of thought than a continuous intellectual tradition that probably begins with Thomas Hobbes¹⁵⁸ and that includes Jeremy Bentham,¹⁵⁹ John

154. See Herbert Hovenkamp, *The Economics of Legal History*, 67 MINN. L. REV. 645, 691-97 (1983); Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1097-98 (1972).

155. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1097-98 (1972); Robert Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051 (1979).

156. See Louis B. Schwartz, “Justice” and Other Non-Economic Goals of Antitrust, 127 U. PA. L. REV. 1076 (1979) (asserting that congressional history demonstrates that Congress did not intend for economic gains to be the sole factor in resolving antitrust controversies); Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged*, 34 HASTINGS L.J. 65 (1982) (arguing that Congress passed antitrust laws to further distributive rather than efficient economic objectives by preventing unfair transfers of wealth from consumers to firms with market power); Gerald B. Wetlaufer, *Reconstructing the Sherman Act: Law, Economics and the Ethic of Industry and Restraint* (unpublished manuscript on file with author).

157. See TOM TEITENBERG, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS (1984).

158. See THOMAS HOBBS, LEVIATHAN (1651).

159. See JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT: THE LIMITS OF

Austin,¹⁶⁰ H.L.A. Hart,¹⁶¹ Ronald Dworkin,¹⁶² Joseph Raz,¹⁶³ Ernest Weinrib,¹⁶⁴ Jeremy Waldron,¹⁶⁵ and others.¹⁶⁶ The tradition is largely

JURISPRUDENCE DETERMINED (1832).

160. Austin's work includes, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble, Jr. ed., Cambridge University Press 1995) (1832); JOHN AUSTIN, *LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW* (1863). For a number of other workers about Austin, see W.L. MORISON, JOHN AUSTIN (1982); WILFRID E. RUMBLE, *THE THOUGHT OF JOHN AUSTIN* (1985).

161. Hart's publications include, e.g., H.L.A. Hart, *Philosophy of Law and Jurisprudence in Britain* (1942-52), 2 AM. J. COMP. L. 355-64 (1953); H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 LAW Q. REV. 37-60 (1954); H.L.A. Hart, *Analytical Jurisprudence in Mid-Twentieth Century: A Reply to Professor Bodenheimer*, 105 U. PA. L. REV. 953 (1957); H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958); H.L.A. Hart, *Legal and Moral Obligation*, in *ESSAYS IN MORAL PHILOSOPHY* (A.I. Melden ed., 1958); H.L.A. HART & A.M. HONORE, *CAUSATION IN THE LAW* (1959); H.L.A. HART, *THE CONCEPT OF LAW* (1961); H.L.A. HART, *PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW* (1968); H.L.A. Hart, *American Jurisprudence Through English Eyes: The Nightmare and the Noble Dream*, 11 GA. L. REV. 969 (1977); H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* (1983). For more information on Hart, see NEIL MACCORMICK, H.L.A. HART (1981).

162. Dworkin's writings include, e.g., RONALD A. DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); Ronald A. Dworkin, *'Natural' Law Revisited*, 34 U. FLA. L. REV. 165-88 (1982); RONALD A. DWORKIN, *A MATTER OF PRINCIPLE* (1985); RONALD A. DWORKIN, *LAW'S EMPIRE* (1986); RONALD A. DWORKIN, *LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM* (1993); RONALD A. DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996).

163. Raz's publications include, e.g., JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* (1970); LAW, MORALITY, AND SOCIETY: *ESSAYS IN HONOUR OF H.L.A. HART* (P.M.S. Hacker & Joseph Raz eds., 1977); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (1978); Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. LEGAL STUD. 123 (1984); Joseph Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1 (1984); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986).

164. Weinrib's writings include, e.g., Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 COLUM. L. REV. 472 (1987); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988); Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 486 (1989); Ernest J. Weinrib, *Aristotle's Forms of Justice*, 2 RATIO JURIS 211 (1989); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992).

165. Waldron's major publications include, e.g., JEREMY WALDRON, *THEORIES OF RIGHTS* (1984); JEREMY WALDRON, *NONSENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN* (1987); JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* (1988); JEREMY WALDRON, *LIBERAL RIGHTS* (1993); Jeremy Waldron, *Kant's Legal Positivism*, 109 HARV. L. REV. 1535 (1996); JEREMY WALDRON, *THE DIGNITY OF LEGISLATION* (1999); JEREMY WALDRON, *LAW AND DISAGREEMENT* (1999).

166. See, e.g., ALBERT KOCOUREK, *JURAL RELATIONS* (1927); A.L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 YALE L.J. 161 (1930); GLANVILLE L. WILLIAMS, *CRIMINAL LAW: THE GENERAL PART* (1953); Robert S. Summers, *The New Analytic Jurists*, 41 N.Y.U. L. REV. 861 (1966) [hereinafter Summers, *New Analytic Jurists* (1966)]; ROLF SARTORIOUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* (1975); NEIL MACCORMICK, *LEGAL REASONING AND LEGAL THEORY* (1978); JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* (1984 et seq.); GERALD J. POSTEMA, *BENTHAM AND THE COMMON LAW TRADITION* (1986); Ken Kress, *Legal Indeterminacy*, 77 CAL. L. REV. 283 (1989); STEPHEN J. BURTON, *JUDGING IN GOOD FAITH* (1992); R. KENT GREENAWALT, *LAW AND OBJECTIVITY* (1992); MICHAEL MOORE, *PLACING BLAME: A THEORY OF CRIMINAL LAW* (1997). For secondary treatments, see Joel Feinberg, *Analytic Jurisprudence*, in *THE ENCYCLOPEDIA OF PHILOSOPHY* (1967); and Albert

British, or at least Anglocentric. As such, it is distinguished by its associations with the universities at Oxford and Cambridge, and with the last three centuries of British political theory¹⁶⁷—including its commitments to positivism,¹⁶⁸ utilitarianism,¹⁶⁹ and classical liberalism.¹⁷⁰ It is similarly distinguished by its strong connections with twentieth-century British philosophy, a discipline that includes the analytic philosophy of Bertrand Russell, G.E. Moore, Gilbert Ryle, and J.L. Austin and that, in Britain, has often been taken to be both the “master discipline” and the crown jewel of the academy.¹⁷¹ Finally, it is marked as an essentially British intellectual tradition by its resistance to the claims of legal realism¹⁷² and its open hostility to

Kocourek, *The Century of Analytic Jurisprudence Since John Austin*, in *LAW, A CENTURY OF PROGRESS* (A. Reppy ed., 1937).

167. If we accept the main line of British political theory to include, among many others, Thomas Hobbes, John Locke, Jeremy Bentham, James and John Stuart Mill, and John Rawls, we then have a tradition that is inseparable from the positivist/analytic tradition in law. Hobbes and Bentham were themselves the most prominent early legal positivists. John Austin's primary intellectual relationships were with Bentham and the Mills, and, among his predecessors, with Hobbes and Locke. See, e.g., JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1832); MORRISON, JOHN AUSTIN 34-60 (1982) (discussing John Austin's relationship with Bentham and James and John Mill); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977) (stating ruling theory is composed of positivism and utilitarianism which is derived from philosophy of Jeremy Bentham); H.L.A. HART, *THE CONCEPT OF LAW* (1961) (referring to intellectual similarities between John Austin and Jeremy Bentham and John and James Mill); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963).

168. See THOMAS HOBBS, *LEVIATHAN* (1651); JOHN AUSTIN, *LECTURES ON JURISPRUDENCE, OR THE PHILOSOPHY OF POSITIVE LAW* (1863); H.L.A. HART, *THE CONCEPT OF LAW* (1961); H.L.A. Hart, *Positivism*, in *THE ENCYCLOPEDIA OF PHILOSOPHY* (1967).

169. See Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* (1789), in *THE COLLECTED WORKS OF JEREMY BENTHAM*, (J.H. Burns & H.L.A. Hart eds., 1970). JAMES MILL, *FRAGMENT ON MACKINTOSH* (1835); JOHN STUART MILL, *UTILITARIANISM* (1863); John Stuart Mill, *Speech Before the House of Commons, 1868*, in *HANSARD'S PARLIAMENTARY DEBATES* (3d series, 1868); JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Wilfrid E. Rumble, Jr. ed., Cambridge University Press 1995) (1832).

170. See H.L.A. Hart, *Immorality and Treason*, 62 *THE LISTENER* 162-63 (1959); H.L.A. HART, *LAW, LIBERTY AND MORALITY* (1963); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977); RONALD DWORKIN, *MATTER OF PRINCIPAL* (1985); JOHN RAWLS, *POLITICAL LIBERALISM* (1993); JEREMY WALDRON, *LIBERAL RIGHTS* (1993).

171. Hart's training was not in law at all, but rather in philosophy. His methodological debt to J.L. Austin could hardly be greater. Marshall Cohen writes that:

If, as Hart thinks, the main task of jurisprudence is the analysis of legal concepts, he has the special advantage of being not only a lawyer but also a philosopher in command of the methods of conceptual and linguistic analysis developed by Gottlob Frege and Ludwig Wittgenstein, G.E. Moore, and Hart's Oxford colleague, J.L. Austin.

Marshall Cohen, *H.L.A. Hart*, in *THE ENCYCLOPEDIA OF PHILOSOPHY* (1967).

172. See, e.g., Lon L. Fuller, *The Case of the Speluncean Explorer*, 62 *HARV. L. REV.* 616 (1949); H.L.A. HART, *THE CONCEPT OF LAW* 124-47 (1961); Summers, *New Analytic Jurists* (1966), *supra* note 166; STEPHEN J. BURTON, *INTRODUCTION TO LAW AND LEGAL*

late-twentieth-century critical theory and to the sources of that critical theory in continental philosophy.¹⁷³

The heirs to this tradition have a distinctive understanding of law as a discipline and, more specifically, the boundaries and affiliations that are appropriate to the discipline of law. For this group, the discipline of law is defined narrowly so as to be distinctly separated from, for instance, the study of sociology, psychology, economics, virtually all forms of empiricism, and even attention to what judges actually do.¹⁷⁴ At the same time, through its close affiliation with British philosophy, this school of legal theory gets its commitments to analysis and clarification through the meaning of words,¹⁷⁵ to its particular form of “conceptual” analysis,¹⁷⁶ to “coherence,”¹⁷⁷ “integrity,”¹⁷⁸ “fit,”¹⁷⁹ “immanent rationality”¹⁸⁰ and “intrinsic ordering,”¹⁸¹ and to the view that language is largely determinate.¹⁸²

REASONING (1995).

173. Their hostility to contemporary critical theory in law is entirely consistent with their views on legal realism. See STEPHEN J. BURTON, JUDGING IN GOOD FAITH 135-63 (1992). Their view of critical theory in general and of contemporary continental philosophy is suggested by the fact that Dennis Patterson, in *Law and Truth*, can argue for what he calls a “postmodern jurisprudence” solely with reference to the writings of Anglophone philosophers. See DENNIS PATTERSON, LAW AND TRUTH (1996).

174. See H.L.A. HART, THE CONCEPT OF LAW (1961); Summers, *New Analytic Jurists* (1966), *supra* 166.

175. See H.L.A. HART, THE CONCEPT OF LAW (1961). In his Preface to *The Concept of Law*, Hart explains that his book is “essay in analytical jurisprudence” and that it is thus concerned with “the clarification of the general framework of legal thought” and, more particularly, with “the meanings of words.” In defense of this focus, he asserts that:

Many important distinctions, which are not immediately obvious, between types of social situation or relationships may best be brought to light by an examination of the standard uses of the relevant expressions In this field of study it is particularly true that we may use, as Professor J.L. Austin said, “a sharpened awareness of words to sharpen our perception of the phenomena.”

Id. at vii. Indeed, Hart’s training was as an ordinary language philosopher and Professor Austin was his colleague. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); Summers, *New Analytic Jurists* (1966), *supra* note 166.

176. Summers, *New Analytic Jurists* (1966), *supra* note 166 (stating that conceptual analysis has been a primary focus of old and new analytical jurists); H.L.A. HART, THE CONCEPT OF LAW (1961); JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM (1968); RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

177. See ROLF SARTORIUS, INDIVIDUAL CONDUCT AND SOCIAL NORMS 196-97 (1975); ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE 37-48 (1990).

178. See RONALD DWORKIN, LAW’S EMPIRE 176-224 (1986).

179. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 283-84 (1977); RONALD DWORKIN, LAW’S EMPIRE 176-224 (1986).

180. See generally Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

181. See generally Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 486 (1989).

182. See H.L.A. HART, THE CONCEPT OF LAW (1961).

Also through that affiliation, they acquire their distinctively Aristotelian commitments to corrective and distributive justice¹⁸³ and to “practical reason,”¹⁸⁴ to the appropriateness of reasoning about some thing (e.g., human beings, tort law) from that which is either essential or distinctive to that thing,¹⁸⁵ and to the idea that things like tort law might have yearnings or aspirations toward particular ideals.¹⁸⁶ Members of this community are inclined toward the beliefs that moral knowledge is available, that such knowledge is unrelated to our religious traditions, and that it is to be found instead in the last two hundred years of British philosophy and political theory and in those other texts (e.g., Aristotle and occasionally Kant) that have been accepted into the canon of modern British philosophy.¹⁸⁷ This, in turn, is the source of their persistent flirtation with what is called “moral realism.”¹⁸⁸

Many of the modern heirs to this tradition seem predisposed, at least to this outsider and at least as a relative matter, to see existing hierarchies as both steep and legitimate, whether those hierarchies be social, cultural, intellectual, or judicial.¹⁸⁹ They sometimes exhibit what, to an outsider, seems to be an unexplained confidence in the wisdom, sufficiency, and superiority of the institutions, traditions, and

183. See Ernest Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37 (1983); Ernest Weinrib, *Liberty, Community, and Corrective Justice*, 1 CANADIAN J.L. & JURISPRUDENCE 3 (1988); Ernest Weinrib, *Aristotle's Forms of Justice*, 2 RATIO JURIS 211 (1989); Ernest Weinrib, *The Special Morality of Tort Law*, 34 MCGILL L.J. 403 (1989); Ernest Weinrib, *Corrective Justice*, 77 IOWA L. REV. (1992). In various ways, each of these is an elaboration of Aristotle's *Nicomachean Ethics*.

184. See JOSEPH RAZ, PRACTICAL REASONS AND NORMS (1975); PRACTICAL REASONING (J. Raz ed., 1978); Stephen J. Burton, *Law as Practical Reason*, 62 S. CAL. L. REV. 747 (1989); STEPHEN J. BURTON, JUDGING IN GOOD FAITH (1992); see also BERNARD WILLIAMS, ETHICS AND THE LIMITS OF PHILOSOPHY (1982).

185. See H.L.A. HART, THE CONCEPT OF LAW (1961); Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 486 (1989). This is, it should be noted, a distinctly Aristotelian form of definition.

186. See Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 486 (1989).

187. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

188. See Michael Moore, *Moral Realism*, 1982 WISC. L. REV. 1061; Michael Moore, *Moral Realism Revisited*, 90 MICH. L. REV. 2424 (1992); Brian Bix, *Michael Moore's Realist Approach to Law*, 140 U. PA. L. REV. 1293-1331 (1992).

189. This assertion is warranted, if at all, by the confidence of this group that judges actually do what they say they do, see HART, THE CONCEPT OF LAW and Summers, *The New Analytic Jurists* (1966), *supra* note 166; and that those trained in British philosophy really do make better judgments than those who have not been so trained, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977); by their faith in the rule of law and, accordingly, in the legitimacy of the existing order; by the commitment to aristocracies that may come with their Aristotelianism, and by what I will assert is the general faith of those educated within the upper reaches of British society that—at least by American standards—existing hierarchies are fair and legitimate. I do not mean to suggest that writers like Dworkin, Raz, and Waldron may not, even quite regularly, take positions that are politically progressive.

philosophy of Anglo-America and in the idea that the day-to-day behavior of judges is in actual fact guided by the law, and not personal preference, in exactly the way the judges say it is.¹⁹⁰ They often make and accept arguments from the presumed propriety of existing arrangements¹⁹¹ and from the felt legitimacy of the system and the felt duty to obey the law.¹⁹² They are inclined to see their own work as the whole of jurisprudence and to dismiss those outside their community for having “gotten it wrong,” by which they usually refer to some supposed linguistic, conceptual, or philosophical error.¹⁹³ Having said all that, their faith in the rule of law, however great, expresses a commitment to liberal legalism that is distinguishable only in degree from the commitment to liberal legalism that almost all of us share.

G. Contemporary Critical Theory

Finally, we come to a legal perspective, or a set of legal perspectives, that I shall call “contemporary critical theory.”¹⁹⁴ Contemporary critical theory includes critical legal studies, feminist legal theory, and critical race theory. It includes the work of Duncan Kennedy,¹⁹⁵ Mark Tushnet,¹⁹⁶ Robert Gordon,¹⁹⁷ Alan Freeman,¹⁹⁸ Betty

190. See H.L.A. HART, *THE CONCEPT OF LAW* 124-47 (1961); Summers, *New Analytic Jurists* (1966), *supra* note 166.

191. See H.L.A. HART, *THE CONCEPT OF LAW* 134, *passim* (1961) (on the internal perspective); Summers, *New Analytic Jurists* (1966), *supra* note 166.

192. See H.L.A. HART, *THE CONCEPT OF LAW* 134, *passim* (1961) (on the internal perspective).

193. See Summers, *New Analytic Jurists* (1966), *supra* note 166; see also STEPHEN J. BURTON, *JUDGING IN GOOD FAITH* xi (1992) (on “get[ting] it straight”); *id.* at 123 (on Judge Posner’s “philosophical mistake”); *id.* at 157 (stating that radical critique of law “rests on two . . . errors”).

194. Primary material reflecting the work of this community is cited in subsequent notes. Secondary treatments include, e.g., Gordon, *New Developments in Legal Theory, in THE POLITICS OF LAW* (David Kairys ed., 1982) [hereinafter Gordon, *New Developments* (1982)]; Note, *‘Round and ‘Round the Bramble Bush: From Legal Realism to Critical Legal Studies*, 95 HARV. L. REV. 1666 (1982); John Henry Schlegel, *Toward an Intimate, Opinionated and Affectionate History of Critical Legal Studies*, 36 STAN. L. REV. 391 (1983); ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991). For polemics against these forms of theory, see Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984); Owen Fiss, *The Death of Law?*, 72 CORNELL L. REV. 1 (1986); DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON: THE RADICAL ASSAULT ON TRUTH IN AMERICAN LAW* (1997).

195. Kennedy’s academic writings include, e.g., Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 209 (1979); Duncan Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought, 1850-1940*, in *CURRENT RESEARCH IN THE SOCIOLOGY OF LAW* (J. Spitzer ed., 1980); Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563 (1982); Duncan Kennedy, *Legal Education As Training for Hierarchy*, in *THE*

Mensch,¹⁹⁹ Karl Klare,²⁰⁰ and Peter Gabel,²⁰¹ of Martha Minow,²⁰²

POLITICS OF LAW: A PROGRESSIVE CRITIQUE 40-61 (D. Kairys ed., 1982); Duncan Kennedy & Peter Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; DUNCAN KENNEDY, SEXY DRESSING ETC. (1993); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE (1997).

196. Tushnet's academic writing includes, e.g., Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); MARK TUSHNET, THE AMERICAN LAW OF SLAVERY 1810-1860 (1981); Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205 (1981); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Mark Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 MICH. L. REV. 1502 (1985); MARK TUSHNET, THE NAACP'S LEGAL STRATEGY AGAINST SEGREGATED EDUCATION, 1925-1950 (1987); MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ACCOUNT OF AMERICAN CONSTITUTIONAL LAW (1988); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515 (1991).

197. Gordon's writings include, e.g., Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Robert W. Gordon, *Holmes' Common Law as Legal and Social Science*, 10 HOFSTRA L. REV. 719-46 (1982); Gordon, *New Developments* (1982), *supra* note 194; Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920*, in PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70 (G. Geison ed., 1983); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Robert W. Gordon, *Letter from Robert W. Gordon to Paul D. Carrington*, reprinted in *'Of Law and the River,' and of Nihilism and Academic Freedom*, 35 J. LEGAL EDUC. 1 (1985); Robert W. Gordon, *Law and Ideology*, 3 TIKKUN 14 (1987); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); Robert W. Gordon, *Law and Disorder*, 64 IND. L.J. 803 (1989); Robert W. Gordon, *The Case for (and against) Harvard*, 93 MICH. L. REV. 1231 (1995).

198. Freeman's major publications include Alan David Freeman, *Legitimizing Racial Discrimination through Anti-discrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Alan David Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880 (1981); Alan David Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988).

199. Mensch's work includes, e.g., Elizabeth Mensch, *Freedom of Contract as Ideology*, 33 STAN. L. REV. 753 (1981); Elizabeth Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635 (1982); Alan David Freeman & Elizabeth Mensch, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987).

200. Klare's major publications include, e.g., Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978); Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981); Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982); Karl E. Klare, *Legal Theory and Democratic Reconstruction: Reflections of 1989*, 25 U.B.C. L. REV. 69 (1991).

201. Gabel's academic writings include, e.g., Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984); Peter Gabel & Duncan Kennedy, *Roll over Beethoven*, 36 STAN. L. REV. 1 (1984); Peter Gabel & Paul Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. REV. L. & SOC. CHANGE 369 (1983); Peter Gabel, *Reification in Legal Reasoning*, 3 RES. IN L. & SOC. 25 (1980).

202. Minow's major publications include, e.g., Martha Minow, *Forming Underneath Everything That Grows: Toward a History of Family Law*, 1985 WIS. L. REV. 819; Martha Minow, *The Supreme Court 1986 Term: Justice Engendered*, 101 HARV. L. REV. 10 (1987); Martha Minow, *Interpreting Rights: An Essay for Robert Cover*, 96 YALE L.J. 1860 (1987);

Catharine MacKinnon,²⁰³ and Robin West;²⁰⁴ of Derek Bell,²⁰⁵ Kimberle Crenshaw,²⁰⁶ Pat Williams,²⁰⁷ and Richard Delgado,²⁰⁸ among a great

Martha Minow, *Many Silent Worlds*, 9 W. NEW ENG. L. REV. 197 (1987); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47 (1988); Martha Minow, *Pluralisms*, 21 CONN. L. REV. 965 (1989); Martha Minow, *Beyond Universality*, 1989 U. CHI. LEGAL F. 59; MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION AND AMERICAN LAW (1990); Martha Minow, *Repossession: Of History, Poverty, and Dissent*, 91 MICH. L. REV. 1204 (1993); Martha Minow, *Surviving Victim Talk*, 40 UCLA L. REV. 1411 (1993); Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647 (1996).

203. MacKinnon's major publications include, e.g., CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED (1987)]; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); Catharine A. MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281 (1991); CATHARINE A. MACKINNON, ONLY WORDS (1993).

204. West's major publications include, e.g., Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Robin West, *Economic Man and Literary Woman: One Contrast*, 39 MERCER L. REV. 867 (1988); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988); Robin West, *Law, Literature, and the Celebration of Authority*, 83 NW. U. L. REV. 977 (1989); Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59; Robin West, *Taking Freedom Seriously*, 104 HARV. L. REV. 43 (1990); Robin West, *Relativism, Objectivity, and Law*, 99 YALE L.J. 1473 (1990); Robin West, *Murdering the Spirit: Racism, Rights, and Commerce*, 90 MICH. L. REV. 1771 (1992); Robin West, *Sex, Reason, and a Taste for the Absurd*, 81 GEO. L.J. 2413 (1993); Robin West, *The Constitution of Reasons*, 92 MICH. L. REV. 1409 (1994).

205. Bell's works include, e.g., DEREK BELL, SHADES OF BROWN (1980); DEREK BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE (1987); DEREK BELL, RACE, RACISM, AND AMERICAN LAW (3d ed. 1992); DEREK BELL, FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM (1992); DEREK BELL, CONFRONTING AUTHORITY: REFLECTIONS OF AN ARDENT PROTESTOR (1994); DEREK BELL, CONSTITUTIONAL CONFLICTS (1997); DEREK BELL, GOSPEL CHOIRS: PSALMS OF SURVIVAL FOR AN ALIEN LAND CALLED HOME (1996).

206. Crenshaw's major writings include, e.g., Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory, and Antiracist Policies*, 1989 U. CHI. LEGAL F. 139 (1989); Kimberle Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 STAN. L. REV. 1241 (1991); Kimberle Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1991); *Foreword—Toward a Race-Conscious Pedagogy in Legal Education*, 4 S. CAL. REV. L. & WOMEN'S STUD. 33 (1994); Kimberle Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683 (1998).

207. Williams's academic writings include, e.g., Patricia J. Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerprinting as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127 (1987); Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989); PATRICIA J. WILLIAMS, THE ALCHEMY OF RACE AND RIGHTS (1991) [hereinafter WILLIAMS, ALCHEMY (1991)]; Patricia J. Williams, *Women of Color at the Center: Reordering Western Civ.*, 43 STAN. L. REV. 1437 (1991); Patricia J. Williams, *Spare Parts, Family Values, Old Children, Cheap*, 28 NEW ENG. L. REV. 913 (1994).

208. See, e.g., RICHARD DELGADO & JEAN STEFANIC, FAILED REVOLUTIONS: SOCIAL REFORM AND THE LIMITS OF LEGAL IMAGINATION (1994); RICHARD DELGADO, THE PRICE WE PAY: THE CASE AGAINST RACIST SPEECH, HATE PROPAGANDA, AND PORNOGRAPHY (1995); RICHARD DELGADO, CRITICAL RACE THEORY: THE CUTTING EDGE (1995); RICHARD DELGADO, RODRIGO CHRONICLES: CONVERSATIONS ABOUT AMERICA AND RACE (1995); RICHARD DELGADO, THE COMING RACE WAR? AND OTHER APOCALYPTIC TALES

many others.²⁰⁹

OF AMERICA AFTER AFFIRMATIVE ACTION AND WELFARE (1996).

209. See, e.g., ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975); C. Edwin Baker, *The Ideology of the Economic Analysis of Law*, 5 J. PHIL. & PUB. AFF. 3 (1975); MORTON HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Katherine Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed., 1982); Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379; Sylvia A. Law, *Women, Work, Welfare, and the Preservation of Patriarchy*, 131 U. PA. L. REV. 1249 (1983); Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); John Henry Schlegel, *Notes Toward an Intimate, Opinionated and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391 (1983); William Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Thomas C. Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984); James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 687 (1985); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Mary J. Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065 (1985); David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987); Charles R. Lawrence, III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO MANGABERIA UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1988); Gregory S. Alexander, *Takings, Narratives, and Power*, 88 COLUM. L. REV. 1752 (1988); Guyora Binder, *On Critical Legal Studies as Guerilla Warfare*, 76 GEO. L.J. 1 (1987); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988); Martha Fineman, *Dominant Discourse, Professional Language, and Legal Change in Child Custody Decisionmaking*, 101 HARV. L. REV. 727 (1988); Carrie 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); Thomas Ross, *The Richmond Narratives*, 68 TEX. L. REV. 381 (1989); Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989).

See also, e.g., Patricia Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY WOMEN'S L.J. 191 (1990); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV. 581 (1990); Gerald B. Wetlauffer, *Rhetoric and Its Denial in Legal Discourse*, 76 VA. L. REV. 1545 (1990); Steven L. Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CAL. L. REV. 1411 (1990); DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW (1991); DANGEROUS SUPPLEMENTS: RESISTANCE AND RENEWAL IN JURISPRUDENCE (Peter Fitzpatrick ed., 1991); Neil Gotanda, *A Critique of "Our Constitution is Color-Blind"*, 44 STAN. L. REV. 1 (1991); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413 (1991); Gerald Torres, *Critical Race Theory: The Decline of the Universalist Ideal and the Hope of Plural Justice: Some Observations and Questions of an Emerging Phenomenon*, 75 MINN. L. REV. 993 (1991); Joseph William Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991); Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991); Karen Engle, *Female Subjects of Public International Law: Human Rights and the Exotic Other Female*, 26 NEW ENG. L. REV. 1509 (1992); Deborah L. Rhode, *Feminism and the State*, 107 HARV. L. REV. 1181 (1994); GARY MINDA, POSTMODERN LEGAL MOVEMENTS (1995); Carol Sanger, *Girls and the Getaway: Cars, Culture, and the Predicament of Gendered Space*, 144 U. PA. L. REV. 705 (1995); Robin D. Barnes, *Black America and School Choice: Charting a New Course*, 106 YALE L.J. 2375 (1997); Karen Engle, *The Persistence of Neutrality: The Failure of the*

This community may be defined by its commitments both to expansive understandings of equality and democracy, and to freedom from illegitimate structures of domination. Its members also share four fundamental beliefs. First, law is politics.²¹⁰ Second, emphatic claims for “the rule of law” are seriously mistaken, and indeed they may simply be more-or-less transparent apologetics for those who benefit from the way things are.²¹¹ Third, the existing order, by which I mean the current distribution of power and wealth, is fundamentally unfair and illegitimate, at least with respect to certain groups.²¹² Fourth, the existing distribution of resources is held in place by illegitimate structures of domination—based on race, gender, or class—that are powerful, pervasive, and persistent.²¹³

Religious Accommodation Provision to Redeem Title VII, 76 TEX. L. REV. 317 (1997); Rudolph J.R. Peritz, *History as Explanation: Annals of American Political Economy*, 22 L. & SOC. INQ. 231 (1997); Pierre Schlag, *Law and Phrenology*, 110 HARV. L. REV. 877 (1997); Kimberle Crenshaw & Gary Peller, *The Contradictions of Mainstream Constitutional Theory*, 45 UCLA L. REV. 1683 (1998); PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* (1998).

210. See *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed., 1982); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 997-98 (1985); MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203 (law is an expression of male domination).

211. See Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* (D. Kairys ed., 1982); MARK TUSHNET, *RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 63 (1988); David Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 247 (1984); Joseph Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203 (criticizing objectivity as a specifically male stance); WILLIAMS, *ALCHEMY* (1991), *supra* note 207 (arguing that claims of neutrality are unwarranted).

212. See MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203, at 169, 202 (law is unfair to women); WILLIAMS, *ALCHEMY* (1991), *supra* note 207; DERRICK A. BELL, JR., *FACES AT THE BOTTOM OF THE WELL: THE PERMANENCE OF RACISM* (1992) (racism is inescapable); Derrick A. Bell, Jr., *Racial Realism*, 24 CORNELL L. REV. 363 (1992) (racial equality is unattainable); DERRICK A. BELL, JR., *RACE, RACISM, AND AMERICAN LAW* (3d ed. 1992).

213. See MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203; Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1991); WILLIAMS, *ALCHEMY* (1991), *supra* note 207. It is important to note that many within this community understand the mechanisms of power and of domination and submission in a way that is infinitely closer to Gramsci, de Beauvoir and Foucault's understandings of these matters than, say, to Locke's. Catharine MacKinnon, for instance, offers feminism as a theory of power and of the coherence, rationality, and pervasiveness of unjust domination. But she also sees power and domination as largely extra-legal constructs, domination, and submission as reciprocal relations, and sexuality as whatever is constructed as erotic as well as a principle mechanism for the objectification, control and domination of women. See MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203; see also Gordon, *New Developments* (1982), *supra* note 197; Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 940 (1985) (arguing that “the totality [of nineteenth-century classical economics and law] functioned ideologically: it operated as a legitimator of oppression”); Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991) (noting the relationship between power and knowledge), *reprinted in* KENNEDY, *SEXY DRESSING, ETC.* (1993); ANTONIO GRAMSCI,

Although these four beliefs are shared by all members of this community, it must be said that these beliefs are not absolute. Thus, few will argue that the “law is absolutely and in all respects indistinguishable from what we generally recognize as politics.” Instead, the members of this community share a *relatively strong belief* in the idea that law is politics. In other words, they believe that law is politics in a way that, although not absolute, is consistently and markedly stronger than the corresponding views of their adversaries within the larger legal community.

If a relatively strong belief in these four matters is a condition of membership in the contemporary critical theory community, most—but not all—members of that community also hold an underlying commitment to what I shall call the “social constructionist” position.²¹⁴ This is the view that much of what we know and believe is not inherent in the world but is, instead, “socially constructed.” Thus, most who operate within this perspective hold a (relatively) constructionist understanding of the nature and consequences of language, as well as the associated critiques of reason, neutrality, and objectivity. Under this view, things (?) are cast into language in ways that allow discovery in the world and that cause us to take them for granted and see them as “natural” and “given.”²¹⁵ They find such “reification” (literally “thing-ification”) in our understandings of rights, property, individual identity, and gender. Many will also speak about the social construction, and thus the contingency of society, liberalism, individualism, the rule of law—and even of the self. Further, they will speak about the relation of “perspective” to “knowledge”²¹⁶ and the relation of “knowledge” to “power.”²¹⁷ Here

SELECTIONS FROM THE PRISON NOTEBOOKS (Quinton Hoare et al. trans., 1971); SIMONE DE BEAUVOIR, *THE SECOND SEX* (H.M. Parshley trans., Bantam Books 1961) (1949); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION* 92-102 (Robert Hurley trans., 1978); MICHEL FOUCAULT, *POWER/KNOWLEDGE* 78-133 (Colin Gordon trans., 1980).

214. See Gordon, *New Developments* (1982), *supra* note 197 (asserting the social constructionist position but also that certain “there’s” are really “there”); MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203 (asserting that domination is socially constructed); CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1985) (on false consciousness, law, and de-reification).

215. See Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203, at 171-77 (asserting the constitutive effects of pornography); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); see also Karl Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930).

216. See Susan Estrich, *Rape*, 95 YALE L.J. 1086 (1986) (critiquing claims of objectivity, asserting that knowledge of facts relevant to the law is perspectival); MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203, at 50 (critiquing

again, however, when we speak of a commitment to the social constructionist position, we are speaking of a commitment that although not absolute, is still *relatively* strong. Few, if any, proponents of critical legal theory hold the absolute view that “there is no there there” or that supposedly factual statements may not sometimes be proven wrong. None would linguistically “reconstruct” a “wall” as a “door” and then attempt to walk through that “door.” Nevertheless, real differences on the matter of “social construction,” even if they are only differences in degree, are some of the clearest demarcations between the proponents and the opponents of critical theory.

Proponents of contemporary critical theory can also be understood in terms of their distinctive projects, all of which express their core commitments and their central beliefs. Much of this work seeks to demonstrate the constructedness and the contingency of our settled understandings, including our understandings about the law. Thus, Robert Gordon suggests a “struggle” against “conventional beliefs” by using “the ordinary rational tools of intellectual inquiry to expose belief-structures that claim that things as they are must necessarily be as they are.” The point of this “critical exercise,” he explains, “is to unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as (we believe) it really is: people acting, imagining, rationalizing, justifying.”²¹⁸ Sometimes this is done by showing that “the belief-structures that rule our lives are not found in nature but are historically contingent.”²¹⁹ Sometimes it is done through

objectivity as a stance); CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989); MARTHA MINOW, MAKING ALL THE DIFFERENCE (1990); WILLIAMS, ALCHEMY (1991), *supra* note 207; *see also* ALAN D. SCHRIFT, NIETZSCHE AND THE QUESTION OF INTERPRETATION: BETWEEN HERMENEUTICS AND DECONSTRUCTION 124-56 (1990); FRIEDRICH NIETZSCHE, A GENEALOGY OF MORALS (William A. Haussman trans., 1897).

217. *See* Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939 (1985); MACKINNON, FEMINISM UNMODIFIED (1987), *supra* note 203; Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327 (1991), *reprinted in* SEXY DRESSING, ETC. (1993); WILLIAMS, ALCHEMY (1991), *supra* note 207 (arguing that “standards” are subjective preferences that have been institutionalized); Steven L. Winter, *The “Power” Thing*, 82 VA. L. REV. 721 (1996). The texts that introduced this relationship between knowledge and power include, e.g., MICHEL FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 78-133 (Colin Gordon et al. trans., 1980); MICHEL FOUCAULT, THE HISTORY OF SEXUALITY, VOL. I: AN INTRODUCTION 92-102 (Robert Hurley trans., 1978).

218. Gordon, *New Developments* (1982), *supra* note 194, at 289.

219. *Id.*; *see also* Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978); Duncan Kennedy,

demonstrations of law's indeterminacy.²²⁰ And sometimes it is expressly disruptive and oppositional, taking the form of arguments variously known as critique, debunking, unmasking, unfreezing, trashing and—a term that has both a technical and a colloquial meaning—deconstruction.²²¹

In all of these ways, proponents of contemporary critical theory seek to demonstrate the constructedness and the contingency of those settled understandings that hold in place, or perhaps that simply *are*, the existing order. In all these ways, they seek to unmask the operation of power and politics within legal discourse and to expose the existence and operation of illegitimate structures of domination. This first set of projects includes sustained critiques of the distinction between public and private and between consent and coercion, of our conventional understandings of individual rights including rights in property, of the assumption that the market is

Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought, 1850-1940, in 3 CURRENT RESEARCH IN THE SOCIOLOGY OF LAW (J. Spitzer ed., 1980); Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 452 (1981); Robert W. Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Elizabeth Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635 (1982); Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57 (1984); Mary L. Dudziak, *Desegregation as a Cold War Imperative*, 41 STAN. L. REV. 61 (1988).

220. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 209 (1979); Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law*, 41 MD. L. REV. 563 (1982); Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1 (1984); Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION: FIN DE SIECLE (1997).

221. See Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1887 (1981) (reviewing DERRICK BELL, RACE, RACISM AND AMERICAN LAW (2d ed.)) (unmasking); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) (trashing); Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 STAN. L. REV. 623 (1984) (deconstruction); Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (deconstruction); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 994 (1985) (derefication); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 FLA. ST. U. L. REV. 195 (1987) (unfreezing); MACKINNON, FEMINISM UNMODIFIED (1987), *supra* note 203, at 1-15, 32-45 (setting out her "demystification" of "the substantive misogyny of liberal neutrality" and critiquing constructions of gender difference); DRUCILLA CORNELL, BEYOND ACCOMMODATION: ETHICAL FEMINISM, DECONSTRUCTION, AND THE LAW (1991) (deconstruction); see also JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Spivak trans., 1976); FREDERIC JAMESON, THE POLITICAL UNCONSCIOUS (1980); FRANK LENTRICCHIA, AFTER THE NEW CRITICISM (1980); CHRISTOPHER NORRIS, DECONSTRUCTION: THEORY & PRACTICE (1982).

somehow natural and given, of the meaning of equality, and of the meanings of the Constitution. Members of this community critique our understandings of language, knowledge, racial and gender differences, human nature, and even "the self." And they critique claims made in the name of reason, objectivity, nonproblematic foundations, the possibilities of stable meaning, of legal reasoning, and of the rule of law.²²² Taken together, this is a sustained demonstration that knowledge is perspectival and political, and that law is indeterminate and political. If successful, it is thought to show that many of the claims made on behalf of the existing distribution of power and resources are false, incoherent, inherently contestable, or simply bad faith apologetics.

Other projects pursued by the proponents of contemporary critical theory reflect an affirmative commitment to change, usually in the name of greater equality and democracy, and to empowering the

222. See Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) (equality, antidiscrimination law); Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978) (labor law); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063 (1981); Alan D. Freeman, *Race and Class: The Dilemma of Liberal Reform*, 90 YALE L.J. 1880, 1887 (1981); Gordon, *New Developments* (1982), *supra* note 194 (rights, including rights in property); Morton Horwitz, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982) (public and private); Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982) (public and private); Paul Brest, *State Action and Liberal Theory: A Casenote on Flagg Brothers v. Brooks*, 130 U. PA. L. REV. 1296 (1982) (public and private); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) (rights); Peter Gabel, *Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984) (rights); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 991-1001 (1985); Elizabeth Mensch & Alan D. Freeman, *The Public-Private Distinction in American Law and Life*, 36 BUFF. L. REV. 237 (1987) (public and private); MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203 (arguing the limits and contradictions of abstract equality and liberal neutrality); *id.* at 32-45 (constructing equality not of a question of difference but of domination and subordination, of hierarchy and force, and of the construction of social perception and social reality); *id.* at 44 (constructing sex equality as involving the reasonable treatment of differences is "part of the way male dominance is expressed in law"); *id.* at 86 (critiquing objectivity); Alan D. Freeman, *Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay*, 23 HARV. C.R.-C.L. L. REV. 295 (1988) (critiquing understandings of equality); Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) (critiquing distinctions between public and private, consent and coercion); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989) (critiquing understandings of equality, law of rape, abortion, pornography, discrimination); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803 (1990) (critiquing equality); Joseph W. Singer, *Sovereignty and Property*, 86 NW. U. L. REV. 1 (1991) (critiquing rights, including rights in property); WILLIAMS, *ALCHEMY* (1991), *supra* note 207, *passim*, 106 (critiquing equality; holding simultaneously to the views that our essential selves are threatened by the possibility of domination and that our selves are constructed; and that racial identities are threatened and that they, too, are constructed).

disempowered. This work sometimes involves the advocacy of legal change, change that is often by its nature incremental. It may involve promoting equality and democracy across boundaries of race, gender, or class;²²³ promoting those values in the workplace;²²⁴ promoting diversity or affirmative action;²²⁵ or critiquing First Amendment bars to the regulation of pornography and hate speech.²²⁶ In these and other ways, they demonstrate that the law could, in ways it does not, promote the ideals of equality and democracy.²²⁷ Further, by interrogating the operation of hierarchy and power, by consciousness-raising, and by narrative jurisprudence, members of this community seek to expose the illegitimate structures of domination. By so doing, they attempt to speak for, and sometimes in the voices of, those on the margins and to empower the disempowered.²²⁸

223. See, e.g., Alan David Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978); MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* 203; CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); WILLIAMS, *ALCHEMY* (1991), *supra* note 207.

224. See, e.g., Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives from Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982); MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203 (opposing sexual harassment); Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988); Karl E. Klare, *The Labor-Management Cooperation Debate: A Workplace Democracy Perspective*, 23 HARV. C.R.-C.L. L. REV. 39 (1988); Karl E. Klare, *Legal Theory and Democratic Reconstruction*, 25 U.B.C. L. REV. 69 (1991) (arguing that the market structure should be designed to promote the ideal of equality).

225. Derrick A. Bell, *Bakke, Minority Admissions and the Usual Price of Racial Remedies*, 67 CAL. L. REV. 3 (1979); Richard Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 566-73 (1984); MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203 (asserting that, from the perspective in which differentiation is discrimination, "changing an unequal status quo is discrimination, but allowing it to exist is not"); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; WILLIAMS, *ALCHEMY* (1991), *supra* note 207.

226. See MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203, at 129-30 (arguing that the First Amendment's protection of pornography "promotes freedom for men and enslavement and silence of women"); MARI J. MATSUDA ET AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993) (objecting to free speech for racists and arguing that racial equality is a precondition of free speech).

227. See MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203 (arguing that the law could and should protect women from violence, sexual abuse, sexual harassment, pornography, rape).

228. Consciousness-raising is named and discussed as a strategy in CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83-105 (1989), and is found, in practice, across an enormous range of literature. Interrogations of the workings of power in law school include, e.g., Duncan Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW* (D. Kairys ed., 1982); Gordon, *New Developments* (1982), *supra* note 194, at 290. MacKinnon writes that: "What law school does for you is this: it tells you that to become a lawyer means to forget your feelings, forget your community, most of all, if you are a woman, forget your experience. Become a

If this community is held together by a set of common commitments and a linked set of projects, it also marked by a number of important and visible differences, the resolution of which differences may be largely unnecessary. Thus there have been tensions and conflicts between the practitioners and the theorists and between the liberals and the radicals. Some of the work done within this community is devoted to the possibilities of incremental change, while some is committed, instead, to unmasking incrementalism as a strategy doomed to perpetuate existing structures of domination. Some of its work is committed to the construction and vindication of rights, while other such work is no less committed to demonstrating the incoherence and disutility of rights-discourse. Some of this group's work is done within the domain of legal reasoning, while other such work seeks to prove law's indeterminacy, the inseparability of law from politics, and thus the bankruptcy of legal reasoning. Equality is sometimes pursued through efforts to end discrimination and eliminate formal inequalities in the ways that people are treated, and it is sometimes pursued through a critique of formal equality and through efforts to promote the politics of identity and the rhetoric of diversity. Empowerment is sometimes sought through demands for the accommodation of differences (e.g., of race or gender) and sometimes by proofs that those differences, or our understandings of those differences, are merely a social construction. Finally, and at the highest level of abstraction, most of the work of this community is done within the master paradigm of liberalism, and within the assumption that we live in a political society comprised of rights-bearing individuals, while some of the work of this community is a full-throated critique of liberalism as a set of beliefs that needlessly privileges separateness, individualism, and disregard for others.

I think these are, in the end, primarily differences in emphasis and in the selection of projects and of particular tools that are appropriate to the diverse tasks at hand. They are as likely to be found within the work of a single member of this community as they

maze-bright rat." MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203, at 205.

The related literature of (and counter-literature against) narrative jurisprudence continues to expand. *See, e.g.*, Susan Estrich, *Rape*, 95 *YALE L.J.* 1086 (1986); Patricia J. Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 *MICH. L. REV.* 2128 (1989); Thomas Ross, *The Richmond Narratives*, 68 *TEX. L. REV.* 381 (1989); Richard Delgado, *Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 *MICH. L. REV.* 16 2411 (1989); WILLIAMS, *ALCHEMY* (1991), *supra* note 207; *see also, e.g.*, Regina Austin, *Sapphire Bound!*, 1989 *WIS. L. REV.* 539; Derrick A. Bell, *The Final Report: Harvard's Affirmative Action Allegory*, 87 *MICH. L. REV.* 2382 (1989).

are to be found between different members or sub-communities.²²⁹ I do not take them to be signs of deep division, of inconsistency or even (as some might have it) of hypocrisy, but rather as evidence of this community's consistent commitment to equality, democracy, and freedom from oppression.

II. DIMENSIONS OF DIFFERENCE

The differences between, and among, these theoretical perspectives can be described in a great many different ways. In a certain sense, each perspective entails a complete discursive system and, accordingly, a complete rhetorical universe. Each is characterized by specifiable assumptions and beliefs, and by distinctive forms of analysis and argument. Each is characterized by particular areas of interest, by a set of questions with which it is especially concerned, and by a unique set of intellectual and normative commitments.

My purpose in this section is to sketch the structure of the differing assumptions, beliefs, and commitments that mark and distinguish our six communities. In doing so, I will lay out the basic differences on which issues could be joined and on which argument could be sustained between the proponents of these otherwise incompatible theoretical perspectives. Further, if I am right about the structure of our differences in legal discourse, this effort should, in the degree to which it is successful, shed light on the more particular, doctrinal matters on which we reach divergent conclusions.

229. Robert Gordon, in his early essay titled *New Developments*, discusses many of these themes, including the differences and the barriers between theorists and practitioners. See Gordon, *New Developments* (1982), *supra* note 194. He describes a single community that is simultaneously (1) attracted by the possibility of activist reform lawyering, through which the system may sometimes be compelled to make good on its utopian promises and (2) deeply disenchanted with liberal legalism and driven to understand its illusions and contradictions. See *id.* at 286. Ours is, he suggests, a situation in which "hard-won struggles to achieve new legal rights for the oppressed" may produce "real gains" but may do so in ways that are inherently self-limiting and that ultimately strengthen the illegitimate structures of domination. See *id.*

For her part, Catharine MacKinnon moves easily back and forth between appeals to end such formal inequalities as sexual harassment and the legal subordination of women as women and a devastating critique of the insufficiency and "the substantive misogyny" of liberal neutrality, formal equality and law's supposed objectivity. See MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203. I don't think a generous reader will find any incompatibility between these two forms of work, or between these forms of work and Professor MacKinnon's understandings of power and of law. Nor is Patricia Williams's "devoutly wish[ing] this to be a colorblind society, in which removing the words 'black' and 'white' from our vocabulary would render the world, in a miraculous flash, free of all division" and her continuing real-world commitment to the politics of racial identity. See WILLIAMS, *ALCHEMY* (1991), *supra* note 207, at 83

I will take up ten “dimensions of difference” on which one may sort and distinguish these six communities. In the order of their presentation, they are:

- (1) the fairness and legitimacy of the existing order;
- (2) prime values and projects;
- (3) focus and center of attention;
- (4) human nature and social existence;
- (5) the nature and consequences of language;
- (6) the nature of knowledge and the possibilities of reason and objectivity;
- (7) the relationship between law and other disciplines;
- (8) interpretive strategies and forms of argument;
- (9) the possibility of the rule of law; and
- (10) the consequences of speaking against either of the above.

Ideally, I should like to explain the relationship between these elements, and identify those elements that matter most and those differences from which the other differences might flow. The most I can do, however, is to offer a handful of speculations. Thus one’s sense of the fairness and legitimacy of the existing order (item 1) seems to determine, or at least to motivate and inform, many of one’s judgments on the other nine elements. Similarly, one’s prime values (item 2) may be entailed in one’s assessment of the existing order, and one’s projects (also item 2) may flow more or less directly from that assessment and those prime values. So may the focus of one’s activity and attention (item 3) flow from one’s prime values and projects. In this way, the first three “dimensions of difference” bear a special relationship to one another.

Another such cluster might include our understandings of human nature and social existence (item 4); the nature and consequences of language (item 5); and the nature of knowledge and the possibilities of reason and objectivity (item 6). Within this group, I assume we obtain first a rough understanding of human nature, and that at some point in our development, these three elements begin to develop in tandem with one another. In the course of that development, I imagine we also acquire both our ideas about the other academic disciplines that may bear most importantly upon our understanding of the law (item 7) and our commitments to particular interpretive strategies and forms of argument (item 8).

Next, we come to the possibility of the rule of law (item 9). Our beliefs in this area may flow fairly directly from our assessment of the

fairness and legitimacy of the existing order, including the existing *legal* order (item 1), and from beliefs regarding human nature (item 4), the nature and consequences of language (item 5) and, perhaps most importantly, the nature of knowledge and the possibilities of reason and objectivity (item 6).

Finally, our beliefs concerning the consequences of speaking against the possibilities of reason, objectivity and the rule of law (item 10) are informed by our assessments of the legitimacy of the existing order (item 1), the possibilities of reason and objectivity (item 6), the possibility of the rule of law (item 9), the nature and consequences of language (item 5), all flowing through our choice of projects (item 2). Viewed in this way we can understand, though not simultaneously share, critiques of the rule of law that have been made by, among countless others, Jerome Frank,²³⁰ Duncan Kennedy,²³¹ and Catharine MacKinnon,²³² as well as the critiques of those critiques that have been made by Alexander Bickel,²³³ Paul Carrington,²³⁴ and Owen Fiss.²³⁵ Again, I trust my reader to understand that the relationships I am suggesting among these elements are the barest hypotheses. What seems clear is that there exist relationships among these elements, or dimensions of difference, that are worth trying to understand.

If there are relationships among these various dimensions of difference, there are also, as I have earlier suggested, certain broad patterns that exist among our six communities of belief. At the broadest level, there may be two large camps separated by a Great Divide. In one camp there is the Grand Alliance of the Faithful ("Team Faithful") and, in the other, the League of Skeptics ("Team Skepticism"). In terms of the ten dimensions of difference, we find

230. Jerome N. Frank, *Beale, and Legal Fundamentalism*, in *LAW AND THE MODERN MIND* (1935).

231. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *HARV. L. REV.* 1685 (1976); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFF. L. REV.* 209 (1979); Duncan Kennedy, *Distributive and Paternalistic Motives in Contract and Tort Law*, 41 *MD. L. REV.* 563 (1982); Duncan Kennedy, *Legal Education As Training for Hierarchy*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 40-61 (D. Kairys ed., 1982); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 *J. LEGAL EDUC.* 518 (1986).

232. See MACKINNON, *FEMINISM UNMODIFIED* (1987), *supra* note 203; CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989).

233. See BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 81-82 (attacking "neo-realists" and "nihilists," such as Thurman Arnold, for their "cynicism" and for "propagating a self-validating picture of reality").

234. See Paul D. Carrington, *Of Law and the River*, 34 *J. LEGAL EDUC.* 222, 227 (1984) (arguing that critical legal studies is nihilism and there is no place for nihilism, or for nihilists, in the legal academy).

235. See Owen Fiss, *The Death of Law?*, 72 *CORNELL L. REV.* 1, 1-2 (1986) (arguing that critical legal studies threatens the very existence of the law).

on Team Faithful those who have a relatively *high* degree of faith in the fairness and legitimacy of the existing order (item 1); the possibility that language can hold stable and determinate meaning (item 5); the possibilities of knowledge, reason, and objectivity (item 6); and the possibility they know as “the rule of law” (item 8). In contrast, Team Skeptical holds a relatively *low* degree of faith in each of these matters. As previously suggested, Team Faithful includes most of the proponents of turn-of-the-century formalism, the legal process school, law and economics, and the legal positivist/analytic tradition. It may also include those legal realists whose faith in the social sciences exceeds their skepticism of formalist logic and the rule of law. For its part, Team Skeptical claims the remainder of the legal realists as well as the proponents of contemporary critical theory.

This formulation, however useful, must obviously be taken with a grain of salt. Members of these two large groups certainly do not agree on all matters, even with the members of their own group. Indeed, the members of Team Faithful represent a number of quite different systems of belief and, accordingly, they may not even all speak the same language. Just as there are individuals who do not fit neatly into any one of our communities, there are those who are affiliated, in one way or another, both with Team Faithful and with Team Skeptical. And there are times when this great two-part division takes on the appearance of a continuum, or even of multiple and intersecting continua. But even if these differences are only differences in degree, they are also differences that matter to our understanding of and to our work within the law.

In describing these dimensions of difference, my first purpose is to probe the particular problems that afflict legal discourse—namely the problems of incommensurability, mutual unintelligibility, mutual disrespect, and unjoined argument—and to identify the commitments and characteristics that distinguish the six systems of belief and argument. The second purpose of this section is to identify a series of basic differences on which issue could actually be joined and to locate those differences, crucial to our understandings of the law, in terms of the centuries-old debates of which they are a part.

A. The Fairness and Legitimacy of the Existing Order

This first dimension of difference involves differing beliefs concerning the fairness and legitimacy of the existing order and of the existing distribution of power and resources within our society. For some, this is a matter of differing beliefs concerning the power,

pervasiveness, and persistence of illegitimate structures of domination (sometimes known by the acronym P.P.I.S.D.) based on race, gender, sexual orientation, class, or wealth. Differences in this dimension may also extend to, or to be correlated with, differences in the degree to which the existing legal order is thought to conform to the strong version of the rule of law. They also extend to differences in the degree to which the law's existing procedures—namely the systems of democratic politics and of civil and criminal justice—are seen as fair and evenhanded.

Differing beliefs concerning the fairness and legitimacy of the existing order correspond quite closely to the distinction between Team Faithful and Team Skeptical. The members of Team Faithful see the existing order as generally fair and legitimate, and that team includes most practitioners of turn-of-the-century formalism, the legal process school, law and economics, and the legal positivist/analytic tradition. For their part, the members of Team Skeptical have their doubts. In one degree or another, and across one or more dimensions, Team Skeptical sees the existing distribution of power and resources as relatively unfair and illegitimate. Unlike their Faithful adversaries, they see illegitimate structures of domination and they believe those structures to be powerful, pervasive, and persistence. For purposes of this “dimension of difference,” the members of Team Skeptical include many of the legal realists and all of the practitioners of contemporary critical theory.

B. Prime Values and Projects

Our six schools of thought also differ with regard to what we might call the “prime values” to which they are devoted. Turn-of-the-century formalists cannot be reasonably understood without reference to their commitments to order and stability; to promoting law's claim to academic status through, for instance, their claim that their work is scientific; to conceptual clarity understood in terms of progressive simplification; and to economic freedom. For their part, the legal realists, at least in the first generation, were devoted to the public interest they saw embedded in progressive legislation and the work of the New Deal, to economic justice, and, perhaps to those ends, to demystifying the work of the courts, to exposing the personal and political judgments embedded in existing law, and to a critique of formalist logic. In their turn, the legal process school pursued, above all else, the legitimacy of judicial and other governmental action, the separation of law from politics, respect for the law and for the possibility of neutral and objective

reason, and the correct design of our legal processes. Law and economics is marked by its commitment to allocative efficiency and the maximization of aggregate wealth, to the work of freely operating perfect markets, and to the belief that government action is justified by the absence of a market or by the presence of some market failure (e.g., public goods, externalities, free riders). The legal positivist/analytic tradition often takes, as its prime values, the legitimacy of judicial behavior and existing institutions, conceptual clarification in the manner of ordinary language philosophy, the separation of law from politics, and the separation of law from religious morality. Finally, contemporary critical theory pursues commitments to its expansive understandings of equality, democracy, and economic justice, to the empowerment of the disempowered, to existential freedom, and, perhaps to those ends, to exposing and deconstructing illegitimate structures of domination and loosening regard for order and stability, faith in the possibility of objective reason, and faith in the authority and legitimacy of the law.

A further word is warranted on the subject of what is called “the public interest.” More than any other of our six communities, it is the legal realists who invoked this term, and what they had in mind was a diverse set of consequentialist or instrumental purposes that they saw as unproblematically promoting the good of the entire society. Nonetheless, members of our other communities also believe that the prime values they promote is beneficial, if not essential, to society as a whole. Thus, turn-of-the-century formalists clearly believed that order and stability were to be valued, at least in part, because they promoted the public interest. Proponents of legal process clearly believe that it is in the public interest to promote the rule of law and the legitimacy of judicial action. Practitioners of law and economics generally see aggregate wealth as an important measure, and perhaps the only valid measure, of the public good. And members of the positivist/analytic tradition surely understand their efforts to “get things right” and to maximize the law’s clarity and coherence as promoting the public good, albeit a non-consequentialist understanding of the public good.

C. Centers of Activity and Attention

While the members of our six communities have worked throughout the entire range of the law, each of these communities also has its own distinctive focus, or center of attention, within the law. Such centers of attention may reflect a community’s substantive commitments, as with contemporary critical theory’s commitments to

race, gender, and equality. They may reflect a preoccupation with a particular problem, as in the case of the legal process school's concern with the legitimacy of judicial review. Or they may arise from an affinity between a community's particular methods and particular areas of the law, as with the relationship between law and economics and the law of antitrust and economic regulation.

With that introduction, we might observe that the turn-of-century formalism takes as the center of its attention the concepts comprising private common law (e.g., property, torts, contracts) and the case against reform and regulation, including the constitutional impediments to statutory reform. The realists directed their attention in exactly the opposite direction, namely to "the facts," to statutory reform including economic regulation, and, like the formalists but for opposite purposes, to the constitutional impediments to statutory reform. Next, the legal process school focused on constitutional and administrative law, on theories of judicial review and constitutional adjudication, on the proper role of the courts, and more generally on the design of institutional arrangements and legal processes. Originally, the focus of law and economics was on antitrust and other forms of economic regulation, though that focus has widened to include the entire body of common law and virtually everything else, including the law of crimes, families, and sexual behavior. The legal positivist/analytic tradition privileges the private common law (as did the formalists), as well as the subject of "general jurisprudence," theories of legitimate adjudication, the duty to obey, and the clarification of concepts. Finally, contemporary critical theory takes as its centers of attention the indeterminacy of law, the politics of law and reason, the social construction of hierarchy, illegitimate structures of domination based on class, race and gender, and the law of equality.

D. Human Nature

The next dimension of difference involves differing assumptions, beliefs, and commitments concerning the nature of human beings and the place of reason within that nature. This is not one of those tidy dimensions in which there is a single continuum along which all the proponents of order are at one end and all of the proponents of change, at the other. Indeed we here confront at least five basic distinctions—and thus as many axes or continua—each having its own relationship to our six systems of belief. Despite this complexity, an appreciation of our differences on these matters is absolutely essential to an understanding of contemporary legal discourse.

1. *Individual v. social*

It has for some time been clear that some people assume that we humans are originally and by our first nature individuals, while others believe instead that we are by that first nature members of communities. In modern legal discourse, the formalists and the law and economics school are strongly predisposed to see us as individuals, while the early legal realists and the proponents of contemporary critical theory tend to see us as, by our first nature, members of communities. This difference is reflected in the individualistic understanding of liberty shared by the *Lochner* Court and Robert Bork; in the legal realists' understanding of the public interest; and in contemporary debates over discrimination, color-blindness, and identity politics. While these differences are sometimes clear, it remains true that almost all members of our six communities share at least the weak commitment to individualism that characterizes the master paradigm of legal liberalism.

2. *Pessimism v. optimism*

On the subject of human nature, it has probably always been true that some people are fundamentally optimistic while others are just as fundamentally pessimistic. Somewhat separately, there are optimists and pessimists with respect to the possibility of collective or state action. And some of those who are *pessimistic* about the possibility of collective or state action are profoundly *optimistic* about the power of the market to produce good results out of man's selfish nature. Optimists on the possibility of collective or state action, particularly in the form of legislative reform, include the legal realists and others who supported the New Deal. The formalists, including the *Lochner* Court, were correspondingly pessimistic about the possibility of collective action through legislative reform. Proponents of the strong version of law and economics are pessimistic about the possibility of collective or state action but optimistic about the market. As to human nature itself, the formalists, the legal process school, and the legal positivist/analytic tradition all seem optimistic about the capacities of the elite even if they do not have the same faith in the people at large; while proponents of legal realism and contemporary critical theory profess far more optimism in the people at large than in the governing elites.

3. *"Tissue of civility" thin v. thick*

Closely related to the distinction between the pessimists and the optimists is the further distinction between those who believe the

“tissue of civility” to be thin (e.g., legal process) and those others who take that “tissue” to be thick (legal realism, contemporary critical theory). Those to whom the tissue of civility seems thin primarily include the members of the legal process community who came of age in the shadow of the Third Reich, Pearl Harbor, the Holocaust, Hiroshima, and the early years of the Cold War. Not surprisingly, to this group what mattered most was the preservation of order and the rule of law, while nihilism and incivility were among the greatest sins. On the other end of this continuum, those who take the tissue of civility to be thick—indeed perhaps too thick—are the first-generation legal realists and the proponents of contemporary critical theory. To this group, demystifying the rule of law is factually warranted and can do nothing “worse” than opening things up a bit, clearing space for change, and expanding the possibilities of democracy, equality, and ethical responsibility.

These differences were compounded and etched into the soul of American law in the late 1960s and early 1970s. During those years, the legal process community and others of the 1950s generation—those who took the tissue of civility to be thin, and whose prime values included order, civility, and respect for the law—found themselves on the inside of the academic barricades, cast as the defenders of the status quo. Facing them from the other side of those barricades were the early proponents of contemporary critical theory and others of the 1960s generation—all of whom took the tissue of civility to be thick, and whose prime values decidedly did not include order, civility, and respect for the existing order. For those on the inside, their adversaries were widely understood to be the forces of lawlessness and disorder—simple hooligans. And for those on the outside, their adversaries were the co-opted apologists of hierarchy, racism, oppression, and colonial war. Within a very short time, this conflict and these constructions became permanently inscribed in American law.

4. *The place of reason*

As to the place of reason in human nature and human affairs, some—chiefly the members of Team Faithful—either assume that humans always act rationally (law and economics), take reason to be the very essence of human nature (e.g., the Aristotelians of the legal positivist/analytic tradition), or see it as the only road to progress and salvation (legal process). At the same time, others, mostly members of Team Skepticism, see reason as significantly less powerful and less central to man’s life, sometimes as an appealing delusion, and

sometimes as the source of our greatest errors. This second group includes the legal realists, except when they become credulous of the possibilities of social science, and the proponents of contemporary critical theory.

5. *Innate nature v. social construction*

Finally, some see our views about human nature and the structure of society as reflecting “real” facts about our actual and innate nature, while others take those views to be contingent and “socially constructed.” In various ways, this controversy extends to the differences that may exist between men and women, blacks and whites, gays and straights; to matters of personal, sexual, and racial identity; to questions of hierarchy and class; to debates involving nature, nurture, and the genetic sources of human behavior; and to the timeless question of free will.

Our differences concerning human nature are enormously complex and have been the subject of debate for thousands of years. For all this complexity, there are some things that can usefully be said about the relationship between these differences and our six systems of belief. For instance, Team Faithful—formalism, legal process, law and economics, and the positivist/analytic tradition—is distinguished, if not defined, by its high and certain faith in reason. That said, this large group can be further broken down in terms of their particular understandings of rationality. Thus, the strong version of law and economics is irrevocably committed to its assumption of economic rationality; legal process to its understandings of “neutral principles”; and large segments of the legal positivist/analytic tradition may be defined by its Aristotelian understandings of humanity and reason. Team Skeptical—legal realism and contemporary critical theory—is, for its part, distinguished if not defined by its distrust of certain forms of human reason. At the same time, the legal process school tends towards a particular understanding of the place of reason in human affairs, and a fear that the tissue of civility is thin, while the proponents of legal realism and contemporary critical theory evidence a clear belief that the tissue of civility is quite thick.

However complex might be a map of our differences concerning human nature and the place of reason within that nature, those differences are enormously important. They inform our choice of legal theoretical perspectives and, even if they cannot be resolved, these differences can be identified. Once identified, they can and ought to be made the subject of discussion, argument, and counter-

argument. And it seems clear that time would be better spent trying to understand how to engage in arguments about these differences than in simply holding to our different and unargued positions and shouting our disagreements about the diverse and incompatible implications of those different positions.

E. The Nature and Consequences of Language

We come next to the dimension of difference that reflects our differing understandings of both the nature and the consequences of language, including the possibility of stable meaning and the problem of indeterminacy. I know of no intellectual terrain more difficult than this one. This debate has been joined not just by legal scholars but also philosophers,²³⁶ linguists,²³⁷ anthropologists,²³⁸ literary theorists,²³⁹ historians,²⁴⁰ sociologists,²⁴¹ and others.²⁴² And it is a debate that I understand only in the most partial and preliminary way. With that enormous caveat, I find it useful to see our larger community as divided into two large and competing sub-communities. Following the lead of others, I will call them Team Serious and Team Rhetoric.²⁴³ In its shortest form, the distinction between the two is that Team Serious sees language as *potentially transparent* while Team Rhetoric sees it as *constitutive*. Each of these contrary understandings of language then entails an equally contrary understanding of the world and of the law. In terms of the

236. See A.J. AYER, *LANGUAGE, TRUTH, AND LOGIC* (1936); BENJAMIN LEE WHORF, *LANGUAGE, THOUGHT AND REALITY* (J. Carroll ed., 1956); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans., 1958); J.L. AUSTIN, *HOW TO DO THINGS WITH WORDS* (1962); JOHN R. SEARLE, *SPEECH ACTS: AN ESSAY IN THE PHILOSOPHY OF LANGUAGE* (1969).

237. See FREDERICK SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (1983).

238. See CLAUDE LEVI-STRAUSS, *THE SAVAGE MIND* (1962); CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* (1973); CLIFFORD GEERTZ, *LOCAL KNOWLEDGE: ESSAYS IN INTERPRETIVE ANTHROPOLOGY* (1983); *WRITING CULTURE: THE POETICS AND POLITICS OF ETHNOGRAPHY* (J. Clifford & G. Marcus eds., 1986).

239. See Cleanth Brooks, *The Formalist Critic*, 13 *KENYON REV.* 72 (1951); E.D. HIRSCH, JR., *VALIDITY IN INTERPRETATION* (1967); Stanley Fish, *Interpreting the Variorum*, 2 *CRITICAL INQUIRY* 465 (1976); JACQUES DERRIDA, *OF GRAMMATOLOGY* (Gayatri Chakravorty Spivak trans., 1976) (1967).

240. See DOMINICK LACAPRA, *RETHINKING INTELLECTUAL HISTORY: TEXTS, CONTEXTS, LANGUAGE* (1983); HAYDEN WHITE, *THE CONTENT OF THE FORM: NARRATIVE DISCOURSE AND HISTORICAL REPRESENTATION* (1987).

241. See KARL MANNHEIM, *IDEOLOGY AND UTOPIA* (1936); PETER BURGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966).

242. See KENNETH BURKE, *LANGUAGE AS SYMBOLIC ACTION* (1966); MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES* (1970).

243. See Stanley Fish, *Rhetoric*, in *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989) (drawing a distinction between Serious Man and Rhetorical Man, which is in turn drawn from RICHARD LANHAM, *THE MOTIVES OF ELOQUENCE* (1976)).

distinction drawn in the introduction to this section, Team Serious is closely affiliated with the Alliance of the Faithful and Team Rhetoric, with the League of Skeptics.

To say that Team Serious sees language as potentially transparent, and as not constitutive, is to say that for them, there is a world that is unproblematically “out there,” and language provides us with a potentially clear way of transmitting information about that world from one person to another. That world is unaffected by the language that we or others may use to describe it. In its more extreme versions, this view applies to concepts and moral judgments as well as the things of the world. The meaning of a particular text may be unclear, but the possibility of clear and stable meaning self-evidently exists. In the case of a clear text, meaning is determinate and stable and it may be found either through reference to the text itself or, in a pinch, through reference to the intentions of the author. For Team Serious, language itself has no consequences though we, of course, have the capacity either to use it well or to get it wrong.

For its part, Team Rhetoric sees language as constitutive and *not* as potentially transparent. For them, the world and the self are constructed through speaking. In the most extreme version, Team Rhetoric does not hold that our understanding of the world comes to us through speaking and language, but that *the world itself* actually arises in our speaking and in our language. It is from this extreme position that one can intelligibly say that “there is no there there.” Language is the process by which the world, or at least the world as we know it, comes into existence. It is Team Rhetoric that sees things as “socially constructed,” whether those things are either concepts or the world at its most concrete, and whether they are our understanding of justice, law, and doctrine; our understanding of human nature and social institutions; or our understandings of gender and our own personal selves. All members of Team Rhetoric see language, and thus also the law, as inherently unstable and indeterminate.

Although many people hold to relatively moderate positions along the continuum between Team Serious and Team Rhetoric, the differences even between these moderate positions are serious and sometimes intractable. Take, as an example, the word “rhetoric.” To Team Serious, the word is always prefaced by “mere,” express or implied, and it refers to linguistic ornamentation.²⁴⁴ It is difficult for

244. See, e.g., STEPHEN J. BURTON, JUDGING IN GOOD FAITH 20-21, 23 (1992).

them to grasp, and almost impossible for them to take seriously, what their adversaries mean by the inherent and pervasive rhetoricity of language. Similarly, Team Rhetoric has the greatest difficulty in imagining that Team Serious could really mean what they are saying. To one team, the other is a gang of nihilists who cannot mean what they say. To the other, their adversaries are apologists, probably speaking in bad faith by intentionally overstating the possibility of reason and objectivity.

F. The Nature of Knowledge and the Possibilities of Reason and Objectivity

Next after human nature and the nature and consequences of language, we come to differing beliefs concerning the nature and possibility of reason, including differences concerning the possibility of non-problematic foundations, as well as the possibilities of neutrality and objectivity. Here, as elsewhere, we find the Team Faithful arrayed against Team Skeptical. Members of Team Faithful have a relatively high degree of faith in the possibility of reason—or, more specifically, faith in the idea that reason works, that it can get a grip on the truth, that it has (or at least can have) influence over human affairs, and that it is (or at least can be) rational, objective, and politically neutral. In the opposite camp, we find those who are relatively skeptical of the possibility of reason and who believe that the whole business of reasoned argument, of logic and of “policy analysis” is not nearly so conclusive and authoritative as their proponents would have us believe.

Thus there is a great division, or more exactly a continuum, between those who are relatively credulous and those who are relatively skeptical with respect to the possibility of reason. I speak of a continuum and use terms like “relatively” credulous because these are differences not in kind but in degree. Clearly, even the most skeptical among us still has enough faith in the possibility of reason to conduct his business through language, through written texts, and through arguments. But this difference in degree is still a difference that matters, especially in terms of its consequences for our understandings of the neutrality and objectivity of arguments—and for the legitimacy of what we call the rule of law.

Among those who have a high level of faith in the possibilities of neutral and objective reason, some, but not all, will assert that our concepts and categories are real, actual, and natural things. This is the position of the philosophical “realists,” a group named for their belief in the “reality” of such things, and a group that could not be further removed from those we know as “legal realists.” Subject to

certain differences as to where these “realities” are to be found, this is the position both of the Platonists and of the Aristotelians among us.²⁴⁵ Some among Team Faithful, a subset of the philosophical realists, support strong claims for the possibility of reason through the assertion that our moral understandings are understandings of real things—real like the color green is real or some particular table is real. This is the position of the “moral realists.”²⁴⁶ Again, because the risks of confusion are so great, the position of the “moral realists” could not be further from, or in greater opposition to, the position of the “legal realists.”

There is then another and much larger group, including the philosophical realists among a great many others, who support strong claims for the possibility of reason with the belief that, in matters of public and normative discourse, people have access to non-problematic foundations or starting points from which reasoning may satisfactorily proceed. What is most remarkable, though, is the variety, the range, and the utter incompatibility of these supposedly non-problematic starting points. Among them are various and conflicting ideas of the natural rights of individuals to equality, freedom, autonomy, liberty of contract, the sanctity of property, and appropriate levels of food and well-being, as well as the rights of autonomous peoples.²⁴⁷ They also include various forms of natural law, whether based on the texts of our theological traditions or classical antiquity or upon the “internal morality” of law.²⁴⁸ And they include various and conflicting ways of assigning meanings to legal

245. See PLATO, *THE REPUBLIC* (Benjamin Jowett trans., 1941); ARISTOTLE, *METAPHYSICS*, *POSTERIOR ANALYTICS* II 19, *reprinted in* *INTRODUCTION TO ARISTOTLE* (Richard McKeon ed., 1947); see also DAVID ROSS, *PLATO'S THEORY OF IDEAS* (1951).

246. See, e.g., Michael Moore, *Moral Realism*, 1982 *Wis. L. Rev.* 1061; Michael Moore, *Moral Reality Revisited*, 90 *MICH. L. REV.* 2424 (1992).

247. See *DECLARATION OF INDEPENDENCE* (U.S. 1776) (identifying rights to life, liberty and the pursuit of happiness); IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* (1785) (asserting right to autonomy); *UNIVERSAL DECLARATION OF HUMAN RIGHTS*, G.A. Res. 217, U.N. GAOR, 3d Sess., pt. 1, U.N. Doc A/810 (1948) (identifying rights to work, fair pay, health, well-being, social security, etc.); ROBERT NOZICK, *ANARCHY, STATE, AND UTOPIA* (1974) (asserting rights to property and to freedom in its use); RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* (1985) (same).

248. See, e.g., PLATO, *THE REPUBLIC* (Benjamin Jowett trans., 1941); ARISTOTLE, *NICOMACHEAN ETHICS AND POLITICS*, *reprinted in* *INTRODUCTION TO ARISTOTLE* (Richard McKeon ed., 1947); CICERO, *DE RE PUBLICA* (51 B.C.) (G.H. Sabine & S.B. Smith, trans. 1929); AQUINAS, *SUMMA THEOLOGICA* (1265-73); JOHN LOCKE, *ESSAYS ON THE LAW OF NATURE* (1660-64); LON L. FULLER, *THE LAW IN QUEST OF ITSELF* (1940); LON L. FULLER, *THE MORALITY OF LAW* (1964); see also JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* (1980); LLOYD WEINREB, *NATURAL LAW AND JUSTICE* (1987); *NATURAL LAW* (John Finnis ed., 1991).

texts by reference to their plain or literal meaning;²⁴⁹ their plain meaning as supplemented by necessary or appropriate implications;²⁵⁰ their original meaning or intention;²⁵¹ the purposes taken to be inherent in them;²⁵² their meaning in light of the policies and purposes that current decision-makers ought to promote, whatever these might be;²⁵³ neutral principles;²⁵⁴ institutional competence;²⁵⁵ consensus;²⁵⁶ conceptual clarity;²⁵⁷ coherence;²⁵⁸ immanent rationality;²⁵⁹ or some supposedly non-problematic strategy for assigning meaning to cases.

When we move from the faithful to the skeptical end of the continuum, from the group whose adversaries call it credulous to the group whose adversaries call it nihilistic, we find those who see the methods of reasoned argument to be historically contingent, inherently incomplete, less neutral, and less objective than their proponents will let on. Such observers see these methods as inevitably serving the interests of some people while diserving the interests of others, and as having less to do with truth than with power. And they see much that is done in the name of neutral and objective reason as heavily influenced, if not controlled, by post-hoc rationalizations. Those at the skeptical end of the continuum will also assert that our *particular* understandings, concepts, forms of reasoning, and claims of foundation are contingent and socially

249. The views of Justice Scalia and Judge Kozinski are set out in *supra* note 78. It is also customary on this question to cite Justice Roberts who said:

When an act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate the judicial branch of the government has only one duty – to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former.

United States v. Butler, 297 U.S. 1, 62 (1936).

250. See *McCullough v. Maryland*, 17 U.S. (4 Wheat.) 316 (1819) (Marshall, J.); *Wood v. Lucy, Lady Duff-Gordon*, 118 N.E. 214 (N.Y. 1917) (Cardozo, J.).

251. See, e.g., Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

252. See HART & SACKS, *THE LEGAL PROCESS* (1958), *supra* note 65.

253. See, e.g., POSNER, *ECONOMIC ANALYSIS* (5th ed. 1998), *supra* note 118 (assuming that the law's purpose is the maximization of aggregate wealth).

254. See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 353 (1959); ALEXANDER BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73.

255. See *supra* note 95.

256. See *supra* note 97.

257. See, e.g., H.L.A. HART, *THE CONCEPT OF LAW* (1961).

258. See ROLF SARTORIUS, *INDIVIDUAL CONDUCT AND SOCIAL NORMS* 196-97 (1975); RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 283-84 (1977); RONALD DWORKIN, *LAW'S EMPIRE* 176-224 (1986).

259. See Ernest Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 486 (1989); Ernest Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949 (1988).

constructed. Even if they are not simply rationalizations, they still constitute decisions that we or others have made. Further, they are commitments that have important effects on the distribution of power and resources, on our understandings of ourselves and our world, and on our ability to imagine alternative arrangements. Such commitments exercise great power over us, not least because we are continually granting them the status of natural (unconstructed) facts.

Our differences as to the nature and possibility of reason are very great indeed, and those differences account for a great many of the arguments without end. We spend enormous amounts of time on arguments that, because of these differences on the matter of reason, can never be resolved. Again, we might be far better off taking even a small fraction of the time spent on such arguments and trying to sustain a conversation on the nature of our knowledge and the possibilities of reason and objectivity.

G. The Relationship between Law and Other Disciplines

Here we are concerned with differing assumptions and beliefs concerning the relative autonomy of the law and the relationship of the law to other academic disciplines. There is, on this dimension of difference, a wide range of positions with respect to the law's autonomy from, or dependence upon, other intellectual disciplines. A person's views on these matters will be consistent with her understanding of justice and with her beliefs concerning the foundations or starting points from which reasoning may properly proceed. And each of the six theoretical perspective has its unique position, or positions, on this question.

To the Langdellian formalists, law was intellectually free-standing and autonomous. To the legal realists, it is properly, even necessarily, informed by the full range of social scientific disciplines including sociology, anthropology, Freudian and perhaps other forms of psychology, history, politics, and economics. To the legal process school, the law is generally autonomous but is sometimes usefully informed by political science. To the proponents of law and economics, it is properly informed only by the single social science of economics. To those in the legal positivist/analytic tradition, the law is properly informed only by the traditions of British political theory and British philosophy (including, by incorporation, Aristotle). And to the proponents of critical theory, the law is properly informed by the Continental tradition of philosophy, phenomenology, and existential psychology; by distinctly contemporary, usually post-structuralist, forms of anthropology and literary theory; and by the

tradition of American philosophical pragmatism.

In the end, we see a shifting pattern of commitments with respect to the autonomy of law and to inter-disciplinary affiliations. We find law as one of the arenas in which various contests between various philosophical traditions (e.g., the British and the Continental) and between various incompatible disciplines (e.g., neo-classical economics on the one hand and sociology or anthropology on the other) are continuously being played out.

H. Interpretive Strategies and Forms of Argument

As between the six basic perspectives, there are also differences in the nature and form of arguments they make, not just in terms of the objectives for which they argue—their prime values—but in terms of their interpretive and argumentative strategies. We might fairly say, for instance, that turn-of-the-century formalists are far more likely than most others to construct their legal premises on the proper definition of a term or the proper meaning of a concept, and that they stand alone in their readiness to rely upon legal fictions. Legal realists seem predisposed to construct legal premises by reference to the particular factual circumstances of a case, to in-the-world policies and purposes attributed to the authors of textual authority, and to the decision-makers' own understanding of the public interest, often as informed by the social sciences. Members of the legal process school, for their part, are distinguished by their propensity to construct legal premises out of their understandings of neutral principles, institutional competence, and purposive interpretation.

Proponents of law and economics, at least in its stronger versions, are clearly marked by their commitment to the argumentative premise that the justice is the maximization of aggregate wealth and the promotion of allocative efficiency. In this sense, they are like the legal realists except that, for them, the consequence that defines the public interest is and only is the maximization of aggregate wealth. In their turn, members of the positivist/analytic tradition are predisposed to favor legal premises reflecting the right definition of a term or the proper meaning of a concept; an understanding of existing law in light of its presumed coherence or "integrity" or of its "immanent rationality"; or the reading of cases in light of such distinctions as "holding," "dicta," and "*ratio decidendi*." And finally, proponents of contemporary critical theory are predisposed in favor of premises based upon their assertions that language is indeterminate, that law is politics, and that much of what we take to be natural is socially constructed.

So short a catalogue cannot be comprehensive and cannot do justice to the complexities, qualifications, and interrelationships that inhere in this question. But it may be enough to suggest that there exist identifiable affinities between, on the one hand, the six basic systems of belief and, on the other, the interpretive strategies and the forms of argument that may be brought to bear upon the law.

I. The Possibility of the Rule of Law

There is perhaps nothing more central to legal theory than the question of whether it is, as a practical matter, possible to achieve the ideal we know as “the rule of law,” and the possibilities of having a government of laws not men and of separating law from politics. That ideal, of course, is the possibility that we be governed “not by men but by laws.” It is an ideal that is closely associated with whatever measure of legitimacy any particular system might be able to claim.

The range of views on the possibility of the rule of law can be seen as arrayed along the same kind of continuum that we found in connection with the possibility of neutral and objective reason. As in that case, the continuum runs from the Faithful (some call them credulous or cynical apologists) to the Skeptical (some call them nihilists). Indeed there is a sense in which the range of views on the possibility of the rule of law represents a summing of certain of the differences already seen in connection with human nature (item D), the nature and possibility of language (item E), and the possibility of reason (item F). Thus, for instance, those who see people as fundamentally rational beings, who see language as a stable and transparent bearer of meaning, and who have strong faith in the possibility of reason are almost certain to have a high degree of faith in the possibility of the rule of law. Accordingly, they will be predisposed, when others are not, to see the existing order as fair and legitimate. Similarly, those who do *not* see people as fundamentally rational, who do *not* see language as a stable and transparent bearer of meaning, and who are *skeptical* with respect to the possibility of reason are likely to be highly skeptical about the possibility of the rule of law.

J. The Consequences of Speaking Against the Possibilities of Reason, Objectivity, or the Rule of Law

On this question of consequences, one position, taken most commonly by members of the legal process school, is that the tissue of civility is thin and that disorder will engulf us if people become persuaded that the existing system is unfair and illegitimate, or that

the rule of law is a delusion or a sham. For these people, and in at least a small degree they include most members of Team Faithful, the disorder in question will bring with it chaos, inefficiency, and violence.

This, of course, is not how the matter is understood by most members of Team Skeptical. They will begin by arguing that the rule of law is a sham, that the existing order is unfair and illegitimate, and that illegitimate structures of domination are powerful and persistent. But this is not just a matter of what may factually be the case but, more precisely, of the consequences of expressing certain views. Thus, both Professor Bickel and Dean Carrington have seemed not so much to contest the *truth* of what the skeptics were saying as to condemn them for *saying such things* because of the effects that flow from such speech.²⁶⁰ On that question, the members of Team Skeptical are likely to argue, and to believe, that the tissue of civility is not so thin, and the risk of cynicism is not so great, as their adversaries would suggest. And that speaking what for the skeptics is the truth about these matters threatens nothing more serious than an expansion of democracy, equality, or ethical responsibility.

CONCLUSION

The conclusions I draw from all this are decidedly modest. At the beginning of the twenty-first century, American legal discourse is not and cannot be understood as a single, seamless phenomenon. It can, however, be reasonably well understood, and reasonably well learned, in terms of the six theoretical perspectives that I have described. Within each of those perspectives, arguments are carried on in a more or less satisfactory way. Issues are joined, and there is general agreement about what kind of reasons count and what kind of arguments are taken to be valid. At least as a general matter, differences are mutually intelligible, arguments are commensurable, and standards are shared. Within any one of these legal perspectives, there may be strong disagreements, but such disagreements go on within the context of a stronger or at least larger set of agreements and shared dispositions. Conditions are right for trusting that an adversary's arguments are made in good faith, for respect, and for reciprocity.

260. See BICKEL, *LEAST DANGEROUS BRANCH* (1962), *supra* note 73, at 82-84; Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984).

As between our legal theoretical perspectives, the conditions of disagreement are infinitely less satisfactory. There is no general agreement about what reasons count and what kinds of arguments are valid. Standards are not shared, arguments are incommensurable, and, for the most part, issues are not joined. If there is agreement on some point, it is accidental. One side offers an argument that they know to be a winner and what they get in return is a blank stare, a disrespectful dismissal of their argument, and sometimes a charge of bad faith. As between these ships in the night, it is sometimes genuinely the case that the minimal conditions of civility do not exist.

What is to be done? Obviously I am of the view that one step in the right direction is to acknowledge the deep differences within the larger legal community; to give up the illusion that we are a single community, which illusion is the source of so much disappointment; to acknowledge the multiplicity of perspectives and to admit that even our own perspective is both contingent and, what is harder, contestable; and to seek out the origins and the intelligibility of those perspectives which are most alien to us. At the risk of being condemned as some kind of incurable romantic (but who else would have attempted such a project as this?), I am deeply attracted to Martin Buber's suggestion that the place to begin is with a fuller and more sympathetic appreciation of the other's perspective and position.²⁶¹ It would seem to suggest that we might benefit from suspending judgment and simply listening, from first appreciating and then seeking to establish dialogue.

It would be a mistake to understand this as a simple call for civility in discourse or, worse still, for a kind of unrestrained ethical relativism. These things really matter, especially in law, which is a field of such enormous in-the-world importance. And each of us knows, in his heart of hearts, that *he really is right* and *they really are wrong*. What interests me is the possibility that we could join issue and have *real* arguments, and that we could do so not just with people who share our most basic commitments but with those who do not. That we could move towards a domain in which people thought about, and offered reasons in support of, their most important beliefs, including their beliefs that the existing order is or is not fair and legitimate, that judges do or do not do what they say they are doing, that order is or is not more important than democracy, that justice is or is not the maximization of aggregate wealth—and in

261. See MARTIN BUBER, I AND THOU (1937).

which people offered reasons and arguments in support of their wildly disparate beliefs concerning the place of reason in people's lives or the determinacy of legal texts.

