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Legal Theory and Legal Education, 1920-2000

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The overall trajectory of American legal theory during the twentieth century was as follows. At the outset, a formalist faith gripped the judiciary and the law schools. Resistance to that vision among judges, lawyers, and law teachers gradually increased, ultimately finding full expression in the legal realist movement of the 1920s and 1930s. The realist wave ebbed in the 1940s, but left behind a host of new questions concerning the nature and scope of judicial discretion, the role of "policy" in lawmaking and legal interpretation, the appropriate relationship between public and private power, which branches of government should be entrusted with which legal issues, and, most broadly, the meaning and feasibility of "the rule of law." After World War II, a new orthodoxy emerged, offering answers to those questions that seemed convincing to most legal scholars and lawmakers. Beginning in the 1960s, that new faith – dubbed by its successors, "process theory" – in turn came under attack, not from a single direction but from many angles simultaneously. The attackers, marching under the banners of "law and economics," "law and society," "Kantian liberalism," "republicanism," "critical legal studies," and "feminist legal theory," offered radically different visions of the nature and purposes of law. Each group attracted many adherents, but none swept the field. The net result is that, in the early twenty-first century, legal discourse in the United States consists of a cacophonous combination of issues and arguments originally developed by rival movements, some now defunct and others still with us.

Many aspects of the history of legal education during the twentieth century – for example, the periodic efforts to reshape law school curriculum and pedagogy and the steady increase in the importance of interdisciplinary teaching and scholarship – are best understood as outgrowths or expressions of the struggles among the competing groups of theorists. Other aspects of legal education – most importantly, the changing size and shape of the bottleneck through which students must pass to gain entry to the bar – were shaped instead by the complex relationship in American culture between exclusionary impulses (xenophobia, racism, anti-Semitism, and sexism) and inclusionary, egalitarian impulses. The net result is that the bench, bar, student bodies, and law faculties of today are by no means demographic "mirrors of America," but they are substantially more diverse than their counterparts a century ago.

In this chapter, I trace the development of these two aspects of twentieth-century American law – legal theory and legal education – identifying, when appropriate, connections between them.

I. Theory

The Rise of Realism

"Formalism," "mechanical jurisprudence," "classical legal thought" – these are among the labels that were attached, after the fact, to the collection of attitudes and methods that dominated American legal thought and practice between roughly the 1870s and the 1930s. In the view of its critics (our primary concern here), this outlook had two related dimensions. First, it was a distinctive style of judicial reasoning. When confronted with difficult cases, judges during this period were much less likely than their predecessors during the antebellum period to seek outcomes that would advance public policy (for example, by creating incentives for economic development) or foster equity (for example, by obliging parties to abide only by commitments they had voluntarily made) and much more likely to look for guidance to precedent (decisions rendered previously by other courts in analogous cases). When directly relevant precedents were unavailable, judges commonly would seek to extract from loosely related prior decisions general principles (the more general the better) from which answers to the problems before them might be deduced. Policy considerations, if addressed at all, would be invoked only at the highest level of abstraction – when selecting the "first principles" that formed the top of a chain of deductive reasoning.

Some historians have contended that this dimension of the classical outlook was causally connected to the second: a tendency to resolve cases in socially or politically conservative ways. Between the Civil War and World War I, state and federal courts invented several new legal remedies (such as the labor injunction) and new common law rules (such as the doctrine of tortious interference with contractual relations) that strengthened the hands of employers in struggles with their employees, narrowly construed legislative efforts (such as the Sherman Act) to limit concentrations of economic power, and interpreted the Due Process Clause of the Federal Constitution in ways that shielded corporate property rights and employers' "freedom of contract" against legislative encroachment.

To be sure, even during the heyday of classicism, there were countercurrents. Some lawyers and judges persisted in openly seeking to resolve hard cases in ways that advanced and reconciled considerations of policy and justice. Businesses did not always prevail in legal contests against workers or consumers. And a small group of legal scholars – some proclaiming adherence to what they called "sociological jurisprudence" – denounced the classical reasoning style on both philosophic and political grounds.

Three of these early critics were to prove especially influential. In his judicial opinions, books, and articles, Justice Oliver Wendell Holmes, Jr. attacked his contemporaries for failing to recognize that "[t]he life of the law has not been logic; it has been experience," for purporting to derive the answers to "concrete cases" from a few "general propositions," and for reading "Mr. Herbert Spencer's Social Statics" into the Fourteenth Amendment. He urged them instead to accept "the right of the

majority to embody their opinions into law" and to replace muddled natural law theories with a harshly positivist perspective: "The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law." In his early writings, Roscoe Pound similarly denounced the "mechanical" mode of reasoning on which the Supreme Court had come to depend and contemporary jurisprudence's infatuation with outmoded images of the "self-reliant man." Law, he insisted, must be brought into alignment with modern "social, economic and philosophical thinking" – and, specifically, must acknowledge that justice entails not merely "fair play between individuals," but "fair play between social classes." Finally, Yale Law School's Wesley Hohfeld, in a dense but brilliant pair of articles, fought the aggregative tendencies of classicism, arguing that any legal doctrine can and should be broken down into logically independent combinations of elemental entitlements, each of which could only be justified through an examination of its "purpose" and its "effect."

In the 1920s and early 1930s, a group of young scholars, most of them affiliated with Yale, Columbia, or Johns Hopkins Universities, drew on Holmes's, Pound's, and Hohfeld's arguments to create the methodological movement that came to be known as legal realism. Two impulses, in addition to the usual desire of each generation to explode the conventions of the preceding one, help explain the force and shape of realism. First, powerful national political movements – initially Progressivism, later the New Deal – stimulated and guided the younger scholars in crafting alternatives to the conservatism of classicism. Second, recent innovations in several other academic fields helped discredit the classical mode of reasoning. Pragmatism in philosophy, non-Euclidean geometry, theories of relativity in physics, and the rising disciplines of anthropology and psychology all called into question the value of axioms and theorems, induction and deduction, and formal rules as ways of resolving controversies and organizing social life.

From these materials, the realists fashioned two clusters of arguments – the first descriptive, the second normative. The foundation of the former was Holmes's insistence that the objective of legal analysis was to predict "what the courts will do in fact." If that is the end, the realists argued, then the "traditional legal rules and concepts" that figured so prominently in classical opinions and scholarship were largely useless. In part, their irrelevance was a function of their internal inconsistency. For almost every common law precedent, canon of statutory interpretation, and legal principle, there existed an equal and opposite precedent, canon, or principle. Even an adept logician could not derive from such contradictory propositions determinate answers to concrete questions. John Dewey and a few other realists argued that the problem ran deeper still: the analytical tools that classical writers purported to employ to reason deductively from premises to outcomes or analogically from one case or issue to another were far shakier than they realized.

In short, doctrine and logic play much smaller roles in determining how courts decide cases than is usually supposed. To the question of what then does explain judicial decisions, the realists offered various answers. Some pointed to

judges' "hunches." In Joseph Hutchinson's words, "[t]he vital motivating impulse for decision is an intuitive sense of what is right or wrong in a particular case." Others, like Jerome Frank, emphasized judges' idiosyncratic personalities. Still others, like Felix Cohen, while agreeing that judges' "prejudices" were crucial, saw them as more systematic, more likely to be shaped by the worldview of the social class from which most judges were drawn, and thus more predictable.

These views, in turn, prompted the realists to regard judicial opinions with skepticism, even condescension. The ostensible function of opinions was of course to explain how courts reached their determinations and thus, among other things, to provide guidance to judges and litigants confronting similar controversies in the future. However, their real function, the realists claimed, was to "rationalize" and "legitimate" the courts' rulings, concealing from the public at large and indeed from the judges' themselves the considerations, often unsavory, that truly underlay them.

Unfortunately, the realists' normative arguments – their reflections on what Karl Llewellyn referred to as "ought-questions" – were less coherent and trenchant. They did, however, develop a few major themes that, reconfigured, were to play substantial roles in subsequent schools of American legal thought. The first may be described as "particularism." In various contexts, realists argued, general categories should be broken down into smaller units. For example, following Pound, they argued that scholars should be more interested in "real" or "working" rules (descriptions of how courts were actually resolving disputes) than in "paper" or "black letter" rules (the norms they ostensibly invoked in justifying their decisions). Adherence to that guideline, the realists contended, would likely reveal that judges (especially trial judges) were far more sensitive to the peculiarities of the fact patterns they confronted than is usually supposed. The net result: an accurate map of the landscape of the law, useful in guiding clients, would consist of more – and more specific – norms than could be found in the standard treatises. When crafting new rules, a lawmaker (whether a judge or a legislator) should likewise avoid the temptation to engage in excessive generalization. Social and commercial relations vary radically along several axes. Assuming that it was worthwhile to attempt to formulate norms that covered more than the facts of the case at hand (a matter on which the realists disagreed), such norms should reach no further than the set of similar controversies. So, for example, a rule governing the foreclosure of farm mortgages might make some sense, but probably not a rule governing foreclosure of all mortgages, and certainly not a rule that purported to specify remedies for breaches of contracts of all sorts.

The second theme may be described as "purposive adjudication." Wise interpretation of a legal rule, they argued, required looking behind the language of the norm in question to the social policy that it was designed to advance. That conviction prompted them, when promulgating legal rules (such as the Uniform Commercial Code) to make their purposes explicit. In Llewellyn's words, "the rightest and most beautiful type of legal rule, is the singing rule with purpose and with reason clear."

The realists' commitment to purposive adjudication raised a further, more difficult question: how does a lawmaker (legislator or judge) go about selecting the policies that should be advanced in a particular context? Their responses were disappointing. One, Felix Cohen, made a valiant effort to construct and defend a comprehensive utilitarian theory as a beacon for lawmakers. Most of Cohen's comrades were less ambitious, contenting themselves with an insistence on the wide variety of policies – from the creation of incentives for productive activity, to fostering social cooperation and "team play," to increasing the efficiency of the "legal machinery," to equalization of "men's … access to desired things," to providing "a right portion of favor, of unearned aid or indulgence to those who need it" – that ought to be considered by lawmakers. But when such goals conflict, how is one to choose among them? By looking to custom, some realists suggested. Immanent in extant social practices (such as the conduct of the better sort of merchant) were standards that could and should be employed by lawmakers when selecting and enforcing norms binding on everyone. Not much of an answer.

The Legacy of Realism

By the end of the 1930s, legal realism as a coherent movement had died. In part, its demise can be attributed to increasing hostility, both from other legal scholars and from the public at large, to the views expressed by its adherents. Opponents of the New Deal resented the realists' vigorous sponsorship or defense of Roosevelt's policies. And a growing group of critics argued that the realists' positivism and tendencies toward ethical relativism had helped weaken the nation's intellectual defenses against the rising tide of Fascism in Europe. In the face of these criticisms, some realists publicly disavowed positions they had taken during the 1920s. The diminution of the scholarly output of others was probably caused as much by the lack of fresh ideas as it was by self-doubt or regret.

But the legacy of realism was powerful and durable. The Humpty-Dumpty of classicism had been irremediably broken. New conceptions of the nature and function of law and the proper responsibilities of the various participants in the legal system had to be devised.

Three implications of the realists' arguments made the task especially difficult and urgent. First, their insistence on the ubiquity of judicial lawmaking, the large zone of discretion that courts inevitably have when resolving cases, called into question the central principle of democratic theory: the proposition that the people themselves choose (either directly or through elected representatives) the laws by which they are governed. Second, the same theme, combined with the realists' emphasis on the roles played by "hunches" and "prejudices" in judges' deliberations, intensified many Americans' long-standing doubts concerning the legitimacy of judicial review – the courts' practice (nowhere authorized by the federal or state constitutions) of striking down legislation they deem inconsistent with constitutional provisions. Third, several aspects of the realists' vision of the way the legal system

did and should operate were difficult to reconcile with the central Anglo-American ideal of the rule of law – in brief, the conviction that the state may legitimately impose its will on persons only through the promulgation (by lawmakers who do not know the identities of those affected) and enforcement (by judges who are free from bias and immune to pressure) of general, clear, well-publicized rules that are capable of being obeyed.

In short, the realists left their successors a formidable challenge: how to reshape or recharacterize the legal system in a way that, without relying on the discredited bromides of classicism, offered Americans reassurance that they lived in a democracy, that the exercise of judicial review was legitimate, and that the rule of law was attainable.

Legal Process

The first group to take up the task eventually came to be known as the "legal process" school. Its leading figures were Lon Fuller, Henry Hart, Albert Sacks, Erwin Griswold, Paul Freund, and Louis Jaffe at Harvard; Alexander Bickel and Harry Wellington at Yale; and Herbert Wechsler at Columbia. They surely did not agree on all things, but they shared many convictions and, more important, a sensibility – centered on the values of moderation, craft, and "sound judgment" – that would set the dominant tone of American legal theory until the middle of the 1960s.

In some respects, the legal process theorists merely reasserted (in more measured form) ideas first developed by the realists. For example, they were quick to acknowledge that there were multiple "right answers" to many of the controversies that were presented to modern courts – that the law, in short, was not determinate. The process theorists also agreed with the realists about both the importance of purposive adjudication and the multiplicity of values advanced by the typical legal norm. So, for example, Lon Fuller, in perhaps his most famous article, contended that underlying the requirement that, to be enforceable, a contract must rest on "bargained-for consideration" were several distinct social values: the need to "caution" private parties when they are about to make legally binding promises, providing judges subsequently obliged to interpret those promises with good evidence of what had been intended, and "channeling" the parties into choosing efficient and informative forms. Underlying the system of contract law as a whole were still other, more general values: respecting "private autonomy," protecting persons' reasonable reliance on promises made by others, and preventing unjust enrichment. In all cases involving the consideration doctrine, Fuller argued, judges must attend to these various purposes. In easy cases, they would all point in the same direction, and the judges would likely not even be aware of their salience; in hard cases, the purposes would conflict, and the judges would be obliged consciously to weigh and balance them. But to every case they were germane. Only one aspect of Fuller's analysis departed from the methodology developed by Llewellyn and Cohen: his insistence (of which he made much during his subsequent career) that the policies

underlying the rules must be considered part of the law, not as external considerations that judges invoked only when the law "gave out."

In other respects, however, process theory deviated sharply from realism. Most importantly, while the realists' emphasis on the role of discretion and policymaking in adjudication tended to blur distinctions among the kinds of reasoning employed by the three branches of government, the process theorists were adamant that the separate branches had very different jobs and should do them in very different ways. Specifically, decisions whose resolution depended either on the expression of "preferences" or on political compromises could and should be addressed either by a legislature or by the public at large through "a count of noses at the ballot box." Decisions (such as the appointment of judges, the setting of tariff policy, or the detailed regulation of industries) with respect to which context-specific exercises of "expertise" were more important than consistency or predictability were best handled by the executive branch or by administrative agencies. Last but not least, problems "which are soluble by methods of reason" were properly allocated to the judiciary. So long as the branch to which an issue had been correctly assigned had resolved it in a procedurally proper manner, the process theorists argued, the other branches should ordinarily defer to its judgment.

The notion that the special responsibility of judges was to resolve disputes through "reason" – or "reasoned elaboration" – was the centerpiece of process theory. It encompassed at least three, related guidelines. First, "reasoned" deliberation was "dispassionate." Process theorists agreed with Felix Frankfurter that a judge must assume a posture of "intellectual disinterestedness in the analysis of the factors involved in the issues that call for decision. This in turn requires rigorous self-scrutiny to discover, with a view to curbing, every influence that may deflect from such disinterestedness." Second, when possible (typically at the appellate level), judges should consult with their colleagues before coming to conclusions. Such collegial consultation would reveal which of each judge's inclinations were idiosyncratic (and thus should be rejected) and generally would facilitate "the maturing of collective thought." Finally, judges must in their opinions explain their reasoning thoroughly, both to provide effective guidance to future litigants and to enable constructive criticism of their decisions.

The last and most controversial of the propositions associated with process theory was first developed by Herbert Wechsler – although it was subsequently adopted and applied by Archibald Cox and others. It came into play only in the special context of judicial review. When a judge was called on to determine whether a statute was consistent with a constitution, Wechsler argued, the set of considerations he or she might legitimately consider was narrower than the set appropriate in other sorts of controversies. Specifically, the judge could only rely on "reasons … that in their generality and their neutrality transcend any immediate result that is involved." The concept of "neutrality" was crucial but slippery. To Wechsler, it did not mean that the "value" in question must not affect different groups differently. It meant, rather, that the "value and its measure must be

determined by a general analysis that gives no weight to accidents of application, finding a scope that is acceptable whatever interest, group, or person may assert the claim." What made this seemingly innocuous norm so notorious is that, in the 1959 article in which he first developed it, Wechsler argued that it could not be reconciled with the Supreme Court's decision in *Brown v. Board of Education*, which had held that the maintenance of racially segregated public schools violated the Equal Protection Clause of the Federal Constitution. Not all process theorists followed Wechsler on this issue, but some did. And this particular implication of their arguments did not bode well for the hegemony of process theory when, in the 1960s, controversies over race, voting, and sexuality increasingly assumed center stage in American politics and law.

Law and Economics

During the 1940s and 1950s, economists began with some frequency to address issues close to the hearts of legal scholars. In perhaps the most influential of those forays, Arthur Pigou argued that situations of the sort that dominate the law of torts – that is, when one party behaves in a fashion that causes an injury to another party – could and should be managed by selecting rules that forced the actors to "internalize" all of the costs of their behavior, including the losses sustained by the victims. How? Various devices might be employed, but the most straightforward would be to make the actors liable for all of the victims' injuries.

In 1960, the economist Ronald Coase published an article offering an alternative way of analyzing the same class of controversies. In "The Problem of Social Cost," Coase developed four related arguments. First, the aspiration of the legal system in cases of the sort considered by Pigou should not be merely to force actors to internalize the "social costs" associated with their activities but, more broadly, "to maximize the value of production" – taking into account the welfare and conduct of all affected parties. So, for example, a rule making each actor liable for the injuries associated with his conduct might not be socially optimal if the victims could more cheaply alter their own behavior in ways that would avoid the harms. Second, in considering possible solutions to such problems, it was important not to treat the active party as the sole "cause" of the resultant injuries – and thus presumptively the proper bearer of financial responsibility. Typically, both parties "are responsible and both should be forced to include the loss … as a cost in deciding whether to continue the activity which gives rise to" the injury. Third, in all such cases, if "there were no costs involved in carrying out market transactions," "the decision of the courts concerning liability for damage would be without effect on the allocation of resources," because the parties themselves would enter into agreements that would compel the party who could avoid the damage most cheaply to do so. (This third argument is what George Stigler subsequently dubbed, the "Coase theorem.") Fourth and finally, in the overwhelming majority of cases in which transaction costs did prevent such efficiency-enhancing private arrangements, the

choice of legal rule would affect the allocation of resources. In such cases, wise lawmakers should consider the relative costs of a wide variety of rules and dispute-resolution mechanisms, selecting the combination with the lowest total costs.

This cluster of arguments proved inspirational, launching a thousand scholarly ships. The largest group pursued the fourth of Coase's lines. What set of legal rules, they asked, would foster the most efficient allocation of resources in particular contexts, assuming that transaction costs would prevent the achievement of optimal solutions in such settings through free bargaining? To some doctrinal fields – contracts, torts, property, and antitrust, for example – such an inquiry seemed obviously pertinent. But the same methodology was soon applied to many fields with respect to which cost minimization might have seemed less germane – criminal law, family law, civil procedure, and constitutional law, among others. Legions of lawyer-economists set off on quests of this sort, but one, Richard Posner, towered above the others. In tens of books and hundreds of articles, he brought his particular version of the wealth-maximization criterion to bear on virtually every field of both public and private law.

Another group of scholars focused on Coase's observation that, even when the absence of transaction costs made the choice of legal rule irrelevant from the standpoint of economic efficiency, that choice would affect the relative wealth of the affected parties. In the second-most influential article within the law-and-economics genre, Guido Calabresi and Douglas Melamed treated such "distributional considerations" as equal in importance to efficiency considerations when deciding not just which party to a given transaction or controversy should be given the legal entitlement but also whether a "property rule," "liability rule," or "inalienability rule" should be selected as the right mechanism for protecting that entitlement. Taking this recommendation to heart, several economists and legal scholars argued for years whether the non-waivable implied warranty of habitability that now governs residential leaseholds in most American jurisdictions did or did not improve the lot of the poor tenants it was ostensibly designed to serve. Other fields to which this approach has been extensively applied include tax and employment law.

A third group of scholars set out to refine the simplistic conception of people as rational utility-maximizers on which Coase's original arguments – and, in particular, his famous third claim – appeared to rest. Once one introduces more realistic assumptions concerning people's abilities first to discern their own desires and interests and then to determine how best to achieve them, these scholars asked, How is the selection of either efficient or distributionally fair rules affected? Their answers varied widely.

One of the factors that contributed to the enormous popularity of economic analyses of these various sorts is that they enabled their practitioners to avoid the ethical pluralism that had characterized both of the preceding two major schools of American legal theory. The realists had insisted and the process theorists had acknowledged that a diverse array of policies were relevant to every legal rule or

issue. As noted above, the process theorists had argued that a wise, mature judge or other decision maker could derive from those competing considerations sensible, if not necessarily determinate answers to particular questions. But, in the 1960s, more and more participants in legal culture came to doubt that the "balancing" method commended by the process theorists had any bite at all. To some of those skeptics, economic analysis offered clarity and rigor. For Posner and his followers, the ideal of allocative efficiency offered a single beacon, the conscientious pursuit of which would make possible the socially beneficial reorganization of the entire legal system. For other economists, like Calabresi and Melamed, who were equally concerned with distributional considerations, the normative field was more complex, but nowhere near as chaotic as the sets of values associated with realism or process theory.

At the outset of the law-and-economics movement, its political valence was unclear. Although some aspects of "The Problem of Social Cost" were distinctly conservative in tone – for example, Coase's sweeping declaration that "economists, and policymakers generally, have tended to over-estimate the advantages which come from governmental regulation" – other passages expressed skepticism that unregulated private markets would foster economic efficiency. And whether exploration of the distributional consequences of legal rules will lead to liberal or conservative recommendations depends, of course, on the distributional criterion one is seeking to advance. Nevertheless, over time, economic analysis within legal scholarship came increasingly to be associated with the political Right. In part, this association was due to the notoriety and influence of a cluster of scholars centered at the University of Chicago who did indeed think that governmental intervention in private markets almost always wrought more harm than good. In part, it also resulted from most economists' insistence on the superiority of their perspective and their skepticism about the insights that could be derived from any other methodology. Whatever the cause, by the late 1970s, economists dominated the conservative end of the political spectrum at most American law schools, and their increasingly confident assaults on scholars to their left contributed heavily to bitter battles over curricula and faculty appointments.

Law and Society

The economists were not the only group of legal scholars disappointed by process theory who sought inspiration and guidance from some other academic discipline. Some turned to sociology, others to philosophy, still others to history.

The path to sociology was already reasonably well marked. Around the turn of the century, Max Weber had written provocatively about connections between law and social activity. Holmes, in "The Path of the Law," had famously predicted that "the statistics guy" would be "the man of the future." And some of the legal realists had undertaken extensive (albeit not always fruitful) empirical studies of "the law in action." In the early 1960s, a rapidly growing group of scholars, many of them

professors at the University of Wisconsin Law School, built on these foundations a full-blown movement they dubbed "law and society."

Among the pioneers was Stewart Macaulay. In his most famous article, "Non-Contractual Relations in Business: A Preliminary Study," Macaulay broke sharply with the kind of legal scholarship in general and contracts scholarship in particular exemplified by Fuller's article on "Consideration and Form." A contract, he argued, is best understood as a social institution, not a legal form: "a contract, as I use the term here, involves two distinct elements: (a) rational planning of the transaction with careful provision for as many future contingencies as can be foreseen, and (b) the existence or use of actual or potential legal sanctions to induce performance of the exchange or to compensate for non-performance." Drawing on extensive empirical work concerning business practices in Wisconsin, Macaulay contended that business enterprises employ contracts, so defined, under circumstances and for reasons quite different from those presumed by traditional legal scholars. For example, often a firm enters into a contract more to clarify its own internal structure – say, to improve communication between production and marketing divisions – than to organize its relationship with the other party. The breach of a contract typically leads to renegotiation of the parties' relationship. Lawsuits to enforce bargains are rare and are typically motivated more by the thirst for revenge than by the hope of recovering damages or securing specific performance. In general, Macaulay found, contracts are less important than ongoing relationships among enterprises in organizing business and distributing their fruits.

To many scholars, the methodology exemplified by Macaulay's article seemed compelling. Detailed, empirically grounded, "bottom-up" studies of how people and enterprises actually use the law offered more insight, they believed, than the "top down" approaches of all other schools of legal theory. Many set about documenting in various contexts the gap between the "law on the books" and "the law in action." Others explored the ways in which legal norms affect the contents of bargains made in their "shadow." Still others studied the relative costs in practice of various forms of dispute resolution (often concluding that mediation and arbitration systems were superior to litigation). Finally, many explored the extent to which the regulatory and social welfare initiatives of the Great Society did (or, more often, did not) achieve their professed ends.

Like economic analysis, sociological analysis of law had no necessary political tilt. However, the large majority of empirical studies of the types just summarized terminated in criticisms of the existing legal order – specifically, in contentions that the law was biased in favor of the rich on one or more of four levels. First, the substantive rules are commonly designed to enhance or protect the interests "of those in positions of wealth and authority." Second, even when unbiased, the rules are commonly interpreted in ways that favor the powerful. Third, the legal profession is organized in ways that favor the "haves" in their struggles with the "have-nots." For example, as Marc Galanter pointed out in a seminal article, the canons of ethics permit the lawyers for "repeat players" (typically businesses) to use

the litigation game strategically – settling or abandoning unpromising cases while vigorously pursuing cases with attractive facts in hopes of securing favorable precedents – but forbid the lawyers for "one-shotters" (typically individuals pressing claims against the repeat players) to do the same. Fourth, the legal system as a whole is organized in a fashion that enables "the haves" to invoke it more shrewdly and effectively than the have-nots. For example, as Galanter pointed out, the complexity and ambiguity of many of its norms and the many opportunities for appeal favor parties with access to sophisticated (expensive) counsel and the financial ability to tolerate long delays in the issuance of judgments.

The result was that while the adherents of the fading legal process school occupied the political center of most law school faculties, and the majority of the law-and-economics scholars stationed themselves on the Right, those associated with the law and society movement usually found themselves on the Left.

Law and Philosophy

In the 1970s and 1980s, significant numbers of legal scholars began to draw on moral and political philosophy to propose modifications of American legal doctrine. They fell into two reasonably distinct subgroups, each looking to a different body of argument then popular in philosophy departments.

The first subgroup was influenced most heavily by the resurgence of interest among English and American philosophers in the work of Immanuel Kant. H.L.A. Hart, writing in 1977, summarized as follows this reorientation of perspective:

> We are currently witnessing, I think, the progress of a transition from a once widely accepted old faith that some form of utilitarianism, if only we could discover the right form, *must* capture the essence of political morality. The new faith is that the truth must lie not with a doctrine that takes the maximisation of aggregate or average general welfare for its goal, but with a doctrine of basic human rights, protecting specific basic liberties and interests of individuals.

Among the philosophers taking this neo-Kantian tack, the most prominent was John Rawls. Of Rawls' many arguments, the most important was his theory of distributive justice. In brief, Rawls argued that inequality in the distribution of "primary goods" is legitimate only if, by increasing incentives for productivity, it leaves the members of the lowest group in the society no worse off than they would have been under conditions of perfect equality.

Among the legal scholars who looked for guidance to Kant and (to a lesser extent) Rawls were Bruce Ackerman, Ronald Dworkin, Charles Fried, David Richards, and, in some of his work, Frank Michelman. They shared a methodology, encapsulated in the slogan: "The right is prior to the good." Less cryptically, they argued that every government has a responsibility to establish and enforce a system of basic rights and liberties, but lacks legitimate authority to encourage or compel adherence to particular ways of living. In a polity organized on those principles,

people would be accorded the respect they are due as autonomous moral agents, permitted and empowered to select and pursue their own goals so long as they did not interfere with the comparable liberties of others.

From this common methodological platform, however, the members of this group derived radically different recommendations for legal reform. Michelman, for example, relied heavily on Rawls to urge the Supreme Court to increase the stringency of its review of statutes adversely affecting the poor – for example, by striking down legislation that made access to public office dependent on "economic vicissitude" or failed to abide by the principle that "each child must be guaranteed the means of developing his competence, self-knowledge, and tastes for living." Fried, by contrast, argued on Kantian premises that contract law should be refashioned so as to limit liability to situations in which a person has broken a freely made promise – that is, has violated a commitment he has imposed on him- or herself – and denounced the steadily growing roles played in American law by the idea that contractual duties should be created or construed so as to advance "the community's" goals and standards. Dworkin, in one of his many articles and books on public and private law, argued that, in determining the latitude that the state enjoys to regulate pornography, we should be sure to respect persons' "right to moral independence" – their "right not to suffer disadvantage in the distribution of social goods and opportunities … [solely because] their officials or fellow-citizens think that their opinions about the right way to lead their own lives are ignoble and wrong." Fidelity to this principle, he concluded, requires striking down anti-pornography legislation to the extent it is motivated either by the belief that the attitudes about sexuality contained in pornographic materials are "demeaning or bestial" or by the desire to relieve people of their disgust at the knowledge that their neighbors are looking at "dirty pictures" – but does not require invalidation of legislation driven by people's desire "not to encounter genital displays on the way to the grocer" or by a demonstrated link between pornography and crime. Using standard labels, Michelman's argument might be described as progressive, Fried's as conservative, and Dworkin's as liberal. Divergence of this sort made the political cast of Kantian legal theory intriguingly ambiguous.

The members of the second of the two subgroups derived inspiration from Hegel and Aristotle, rather than Kant. They rejected their colleagues' insistence on the priority of the right over the good, arguing instead that, in Michael Sandel's words, "we cannot justify political arrangements without reference to common purposes and ends, and … we cannot conceive our personhood without reference to our role as citizens, and as participants in a common life." Thus freed from the Kantian ban on governmental promotion of substantive visions of the good life, they set about elaborating the social and legal arrangements that would most facilitate human flourishing.

Some examples: Margaret Jane Radin of Stanford and Jeremy Waldron of Berkeley argued in separate essays that the best justification for and guide to the reform of the institution of private property are that it enables people more fully to

realize their selves – for example, by forming identity-stabilizing attachments to physical objects, by cultivating the virtues of prudence and responsibility, by affording them zones of privacy, or by providing them the means of self-fulfilling acts of generosity. Kan Kahan, who would later join the Yale faculty, argued that group-libel laws (statutes that proscribe speech or expressive action designed to foster hatred of particular racial, ethnic, or religious groups) should be deemed compatible with the First Amendment because they protect the "constitutive communities" central to many people's ability to form, modify, and implement rich conceptions of personhood. Finally, Kenneth Karst of UCLA argued that "intimate associations," including marriages and non-marital partnerships, were crucial in cultivating attributes central to self-realization – "caring, commitment, intimacy, self-identification" – and thus that the courts should allow legislatures to interfere with such associations only if they have strong, non-pretextual reasons for doing so.

One variant of this general approach proved by far the most popular. The substantive vision on which it was based was the cluster of ideals now known as classical republicanism: the notions, in brief, that a good life is a virtuous life, that one component of virtue is a willingness to subordinate one's private interests to the welfare of the community as a whole, and that only through active participation in the deliberative politics of a republic is true self-realization possible. In the late 1960s and 1970s, an important group of historians had excavated this belief system, identified its roots in the writings of Aristotle and Machiavelli, and showed the important roles it had played in eighteenth-century British politics, in helping fuel the American Revolution, in shaping the Federal Constitution, and in inspiring various nineteenth-century reform movements. In the 1980s, legal scholars began to take note. Partly because many of the Founders seemed to have been steeped in republicanism, and partly because (at least if purged of its patriarchal, xenophobic, and militaristic dimensions) it offered an alternative to the time-worn ideology of liberalism, it seemed to provide a promising criterion with which to reevaluate a wide variety of doctrines in both public and private law.

In the pioneering essay of this ilk, Cass Sunstein argued that several extant doctrines – including the "rationality requirement" that the Supreme Court had derived from the Due Process Clause of the Fourteenth Amendment, the "public use" requirement in the Eminent Domain Clause of the Fifth Amendment, and the "hard-look" doctrine in administrative law – were designed at least in part to compel or encourage legislators to engage in republican-style deliberation "instead of responding mechanically to interest-group pressures." In Sunstein's view, the courts should go further in this general direction, invalidating or impeding legislation whose content or genesis conflicted with the republican ideal. In several subsequent articles, Frank Michelman invoked republicanism in more complex and tentative ways. Less confident of the substantive merits of the ideology, Michelman nevertheless emphasized its heuristic value and contended that it alone provided a plausible way of reconciling two propositions equally central to our political culture: "first, that the American people are politically free insomuch as they are governed by themselves

collectively, and, second, that the American people are politically free insomuch as they are governed by laws and not men." Convinced, several other scholars began introducing republican themes into casebooks, law-review articles, and classrooms.

The heyday of this mini-movement came in 1987, when roughly a thousand law professors attended a session at the annual meeting of the Association of American Law Schools at which Sunstein and Michelman tried to address the criticisms of their arguments that had been made both by historians (who found their efforts to apply ancient ideas to modern issues troublingly anachronistic) and legal scholars who found the organicist, communitarian aspects of republicanism either naïve or repellent. Since then, this particular star in the firmament of legal theory has faded substantially, but has not disappeared altogether.

Critical Legal Studies

The first national conference on Critical Legal Studies (CLS) was held in Madison, Wisconsin, in March 1977. It attracted a wonderfully motley group of scholars (some of them former Marxists disillusioned by the sectarianism of the Left in the 1960s; many of them liberals disillusioned by the apparent failure of the civil rights movement and by the association of the Democratic Party with the war in Vietnam; and a few of them sociologists unsatisfied by the fare available at law and society conferences), legal activists (many working to improve the positions of workers or poor residential tenants), and law students. During the next few years, the number of people who attended the annual CLS meetings grew rapidly, and the body of writing they published mushroomed. After 1980, however, internecine struggles, denials of tenure to some of leading members of the movement, and the increasing disaffection of others eroded its ranks. By the early 1990s, it was moribund.

Though short-lived, CLS had a profound and lasting impact on American legal thought. As was true of legal realism, many of its most controversial claims later became widely accepted. And it helped spawn other clusters of people and ideas – critical race theory, feminist legal theory, and queer theory – that would remain vital far beyond its demise.

The central thesis of CLS was that legal discourse is highly patterned – and, more particularly, that it is organized around a series of oppositions or contradictions. The most detailed and influential map of those patterns was contained in Duncan Kennedy's pioneering 1976 essay, "Form and Substance in Private Law Adjudication." Kennedy argued that much legal argumentation could be reduced to two long-standing debates – the first over whether legal norms are best cast in the form of "clearly defined, highly administrable, general rules" or in the form of "equitable standards producing ad hoc decisions with relatively little precedential value"; the second over whether the content of legal norms should be guided by the substantive values associated with "individualism" or the values associated with "altruism." The latter pair of terms, Kennedy defined as follows:

> The essence of individualism is the making of a sharp distinction between one's interests and those of others, combined with the belief that a preference in conduct for one's own interests is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self-interested. The form of conduct associated with individualism is self-reliance. This means an insistence on defining and achieving objectives without help from others (i.e., without being dependent on them or asking sacrifices of them). It means accepting that they will neither share their gains nor one's own losses. And it means a firm conviction that I am entitled to enjoy the benefits of my efforts without an obligation to share or sacrifice them to the interests of others….
>
> The essence of altruism is the belief that one ought *not* to indulge a sharp preference for one's own interest over those of others. Altruism enjoins us to make sacrifices, to share, and to be merciful.

The arguments deployed in favor of any one of these positions, Kennedy argued, were "stereotyped," predictable, choreographed. For example, rules are conventionally defended on the grounds that they restrain official arbitrariness and favoritism, that they promote certainty (thus assisting private parties in planning their affairs), that they minimize judicial discretion and thus are more consistent than standards with democratic theory, and so forth. Standards are conventionally defended on the grounds that they are capable of advancing social objectives more precisely than inevitably under- or over-inclusive rules, that they are less likely to exacerbate inequalities of bargaining power, that they are less "dynamically unstable" because judges feel less need to carve exceptions out of them to favor sympathetic litigants, and so forth. Individualism is commonly buttressed with arguments that self-interestedness "is a moral good in itself," that the "invisible hand" will convert myriad uncoordinated selfish actions into collective gains, and that well-meant state efforts to curb selfish conduct typically do more harm than good. Altruism is buttressed by predictable criticisms of each of the foregoing propositions. Kennedy's most original claim was that the two rhetorical axes are connected – specifically, that the moral, economic, and political arguments associated with rules resonate with corresponding arguments for individualism and that there exists a comparable homology between the arguments for standards and the arguments for altruism. Now comes the rub. One can imagine larger argumentative structures – ways of stacking or arranging the pair of rhetorical axes – that would give lawmakers and law interpreters guidance concerning which set of claims (rules/individualism or standards/altruism) should be given precedence in which circumstances. Indeed, in both of what Kennedy dubbed the "pre-classical" period of American law (roughly 1800–1870) and the "classical" period (roughly 1850–1940), overarching theories were in place that purported to do just that. Those theories, however, have since collapsed. The result is that, today, the two sets of arguments are on the same plane. It is no longer possible to depict one as constituting the "core" of the legal system and the other as the "periphery." Rather, "[e]very occasion for lawmaking will raise the fundamental conflict of individualism and altruism, on both a substantive and a formal level."

Other writers associated with the CLS movement emphasized other tensions within legal argumentation. Some put more weight on what Mark Kelman described as "the contradiction between a commitment to the traditional liberal notion that values or desires are arbitrary, subjective, individual, and individuating while facts or reason are objective and universal *and* a commitment to the ideal that we can 'know' social and ethical truths objectively (through objective knowledge of true human nature) or to the hope that one can transcend the usual distinction between subjective and objective in seeking moral truth." Others focused on (again quoting Kelman) "the contradiction between a commitment to an intentionalistic discourse, in which human action is seen as the product of a self-determining individual will, and a determinist discourse, in which the activity of nominal subjects merits neither respect nor condemnation because it is simply deemed the expected outcome of existing structures." But common to most CLS writing was a conviction that deep divides of this general sort were ubiquitous in American law.

This characterization of contemporary legal discourse had several important implications. The most important, perhaps, is that legal decision making – at both the legislative and the judicial levels – is highly indeterminate. Contradictory arguments of equal stature can be brought to bear on almost every issue. More subtly, many of those arguments, closely examined, consist of alloys, in which a large dollop of ideas drawn from one end of a spectrum is tempered by a few ideas drawn from the opposite end. For example, individualism is not a purely egoistic ideal, insofar as it acknowledges some duties to consider the welfare of others, just as altruism is not pure self-abnegation, but rather recognizes the legitimacy in many contexts of the pursuit of self-interest. Such tensions internal to each cluster of arguments increase the chances that a shrewd speaker of legal language could "flip" a conventional defense of any given proposition into a defense of its opposite. This is not to suggest that CLS scholars thought that legal decision making was unpredictable. Most freely acknowledged that, in Joseph Singer's words, a combination of "shared understandings of proper institutional roles and the extent to which the status quo should be maintained or altered, ... 'common sense' understandings of what rules mean, ... conventions (the identification of rules and exceptions), and politics (the differentiation between liberal and conservative judges)" often made it easy to predict how a court would resolve a given dispute. More fundamentally, even (or especially) Duncan Kennedy acknowledged that, for "mysterious" reasons, it is often impossible even for determined and sophisticated lawyers to construct plausible arguments for certain positions. But the zone of freedom is substantially wider than is commonly thought.

The sharply different depictions of the American legal system offered by all of the then-prominent schools of legal theory struck CLS scholars as ludicrous, pernicious, or both. They were especially scornful of process theory. Attempts to differentiate issues appropriate for resolution by the judiciary, issues best left to the legislature, and issues most sensibly decided through exercises of executive or administrative discretion in their judgment at best only separated the choices

confronting lawmakers into boxes. None of the methodologies that process theorists urged on officials of the three branches – and certainly not the kind of wise "balancing" of multiple competing policy considerations that they advocated for the judiciary – seemed to CLS scholars to provide any meaningful guidance.

In the judgment of CLS scholars, the lawyer-economists should be commended for acknowledging the many choices confronting lawmakers, but their quest (or, more precisely, the quest of the subset of lawyer-economists bent on maximizing allocative efficiency) to develop a methodology that would enable determinate, socially beneficial resolution of those choices had failed. In part, that failure derived from what CLS scholars referred to as "the offer-asking problem": when measuring the "wealth" fostered by a particular legal rule, should the value of the goods or states of affairs it affected (such as habitable apartments or protection against sexual assault) be priced on the basis of the amount of money consumers would be willing and able to pay to obtain them or the amount of money consumers would demand in return for surrendering them? The economists themselves were aware that the answers to these two inquiries would sometimes diverge – for instance, when the impact of the rule in question was large in relation to the total wealth of the affected parties – but they argued that circumstances in which that divergence would render the economic inquiry indeterminate were rare. Scholars like Mark Kelman, Ed Baker, and Duncan Kennedy, drawing on recent work by psychologists like Daniel Kahneman, Amos Tversky, and Richard Thaler, contended that gaps between "offer" and "asking" prices were both larger and more common than the economists believed and thus more threatening to the methodology as a whole.

An even more serious problem was what the CLS scholars called "general indeterminacy." Suppose, to illustrate, an economist or judge wishes to determine which combination of nuisance and premises-liability rules would most promote economic efficiency. The answer is likely to hinge on the order in which she considers the two fields. If, say, she starts by determining the optimal nuisance rule and then, taking as given the entitlements produced by that analysis and the associated effects on landowners' wealth, she determines the optimal rules governing landowners' liability to injured trespassers, she is likely to select a combination of rules different from the combination she would have generated if she proceeded in the opposite order. The more numerous the issues to be considered, the more likely it is that the sequence in which they are addressed will affect the outcome. The lawyer-economists had not and could not point to any meta-criterion that would dictate one sequence rather than another.

Some of the efforts by legal scholars to glean insight from moral philosophy – in particular, the attempts by a subgroup to articulate visions of human flourishing and then to identify legal reforms that would advance those visions – struck CLS scholars as less laughable. Indeed, in the late 1980s, some scholars formerly associated with CLS embarked on projects of just that sort. But to the majority, the Aristotelian expedition, though perhaps admirable, was doomed to failure. Peer into

your soul – or reflect on the best shared aspirations and commitments of your fellow citizens – and you are likely to find not the seeds of a coherent conception of the good life and the good society, but yet more contradictory impulses. In Kennedy's words,

> Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it. Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all – they provide us the stuff of our selves and protect us in crucial ways against destruction.... But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good.... Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment. The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose.

The bleakness of this outlook prompted many critics – including some on the political Left – to reject CLS as a theory of despair. To some extent, the charge is fair. Kennedy himself acknowledged that his methodology could be characterized as "tragic." Certainly, irony – a sense of the frequency with which good people are corrupted, well-meant reform efforts go awry, and in general "things fall apart" – permeates CLS writings. But the aspiration, at least, of the participants in the movement was to fuel, not enervate, projects for political and economic change by discrediting arguments that depicted the legal system as running reasonably well and susceptible of only modest adjustment, by exposing the extent to which it was designed to advance the interests of the wealthy and powerful, and by contributing to activist lawyers' awareness of the degree to which it was unstable and malleable.

Feminist Legal Theory

In the last quarter of the twentieth century, a growing group of scholars began to examine closely the relationships among law, gender, and sexuality. Their work rapidly became increasingly influential, despite (or perhaps because) of the range and depth of their disagreements.

The first of the issues on which they diverged was the ideal of equality. For centuries, successive groups of legal reformers in the United States have been striving to eliminate inequalities in the positions of women and men. In the early nineteenth century, for example, an improbable alliance of Jacksonian politicians, businessmen, and early feminists sought legislative changes that would give married women the same rights to engage in business and manage their own property that their husbands already enjoyed. The late nineteenth and early twentieth centuries witnessed a similar struggle to accord women the right to vote. In the late twentieth century, analogous campaigns were mounted to purge discrimination against women

in the workplace. And so forth. Some of these reformers argued (occasionally successfully) that, to provide women true substantive equality, it was necessary to accord them "special" (i.e., unequal) treatment – for example, by providing them health benefits to cover the costs associated with pregnancy. But the ultimate goal always remained to use the law to place women on a par with men. An important line of theoretical writing, beginning with John Stuart Mill's, "On the Subjection of Women," fed and was fed by these initiatives. The primary theme of this body of writing is that women have the same capacities and deserve the same legal entitlements as men.

In the 1970s and early 1980s, more and more feminist legal theorists repudiated this liberal vision and strategy. They took the position that women are different – have different experiences, outlooks, and needs – and that both a genuine understanding of women and the identification of opportunities for progressive legal reform require taking those differences seriously. The divisions within this group, however, were just as sharp as the divide between its members and the liberal feminists.

The members of one subgroup – sometimes known as "maternal" or "cultural" feminists – were inspired by the work of Carol Gilligan, Nancy Chodorow, Jean Baker Miller, and Anne Schaef, who documented important differences in the self-conceptions and habits of mind of girls and boys, women and men. Robin West summarizes this body of work as follows:

> [A]ccording to Gilligan (and her subjects), women view themselves as fundamentally connected to, not separate from, the rest of life. This difference permeates virtually every aspect of our lives. According to the vast literature on difference now being developed by cultural feminists, women's cognitive development, literary sensibility, aesthetic taste, and psychological development, no less than our anatomy, are all fundamentally different from men's, and are different in the same way: unlike men, we view ourselves as connected to, not separate from, the other. As a consequence, women's ways of knowing are more "integrative" than men's; women's aesthetic and critical sense is "embroidered" rather than "laddered;" women's psychological development remains within the sphere of "attachment" rather than "individuation."
>
> The most significant aspect of our difference, though, is surely the moral difference. According to cultural feminism, women are more nurturant, caring, loving, and responsible to others than are men. This capacity for nurturance and care dictates the moral terms in which women, distinctively, construct social relations: women view the morality of actions against a standard of responsibility to others, rather than against a standard of rights and autonomy from others. As Gilligan puts it:
>
> > The moral imperative... [for] women is an injunction to care, a responsibility to discern and alleviate the "real and recognizable trouble" of this world. For men, the moral imperative appears rather as an injunction to respect the rights of others and thus to protect from interference the rights to life and self-fulfillment.

The sources of these differences were much debated by the members of the group. Were they rooted somehow in biology? The results of evolution? The

byproducts of a childrearing system based on mothering – so that, in Carrie Menkel-Meadow's words, "growing up is a process of identification and connection for a girl and separation and individuation for a boy"? The byproducts of women's experiences in taking care of young children? The answers were uncertain. What was clear, however, was the presence of systematic and durable differences between the genders.

That insight, in the judgment of the cultural feminists, had various implications for law. Menkel-Meadow, for example, predicted that, once women lawyers achieved a critical mass, we would likely see several changes in the practice of law (for example, more use of mediation, more settlements, less reliance in jury arguments on rhetorical styles based on "persuasive intimidation" and more efforts on the part of advocates to create "a personal relationship with the jury in which they urge the jurors to examine their own perceptions and values and encourage them to think for themselves"); in the organization of the profession (for example, more collegiality in writing briefs, changes in the canons of ethics softening a lawyer's obligation to serve her client's needs exclusively and mandating more disclosures of information to opponents); and in legal doctrine (for example, wider definitions of relevance and admissibility in the law of evidence). Other scholars were even more explicit in urging that major fields of law should be modified to make them less male and more female. For example, Leslie Bender argued on Gilliganesque premises that the law of torts should be refashioned so as to permit a plaintiff who makes a minimal showing that a defendant has exposed her to serious risk to begin collecting from the defendant medical expenses, lost wages, and other damages – and if her claim is ultimately found to be meritorious, to force the defendant, not only to pay the plaintiff money, but to assume non-delegable responsibility to provide her direct physical care.

A second subgroup, led by Catharine MacKinnon, argued that the gender differences identified by the cultural feminists, if they existed at all, were the fruits of a socioeconomic system that enabled women to acquire status and power only through their associations with men. A reform program that celebrated and sought to generalize feminine virtues thus seemed distinctly unpromising. Rather, MacKinnon argued, we should focus on a different respect in which women are different: namely, that they are dominated by men. That dominance has many dimensions, but at base it is sexual. The nub of the matter, she argued, is that, in contemporary society, men fuck, while women are fucked. MacKinnon's claim was sweeping: "the molding, direction, and expression of sexuality organizes society into two sexes – women and men – which division underlies the totality of social relations." The central project of men, she argued, was to control all aspects of women's sexuality, from reproduction to "the social rhythms and mores of sexual intercourse." In this, they have been highly successful, not just through the establishment and enforcement of formal rules that reinforce their sexual power, but more fundamentally through the elaboration of an ideal of femininity, centered on the traits of docility, softness, passivity, nurturance, weakness, narcissism, incompetence, domesticity, and fidelity, all of

which implicitly emphasize women's sexual accessibility and subordination. Females internalize that ideal in order to become women; to be a woman is to be sexually desirable to men by manifesting these features.

The mission of feminism, MacKinnon claimed, is to overturn this structure of domination. The obstacles are formidable. The infusion of contemporary institutions and culture with the male point of view is so thorough that it is extremely difficult for women to achieve an independent vantage point. In a passage that revealed at once the harshness of her diagnosis of the current situation and the ambitiousness of her hopes for the future, she argued as follows:

> Feminism criticizes this male totality without an account of our capacity to do so or to imagine or realize a more whole truth. Feminism affirms women's point of view by revealing, criticizing, and explaining its impossibility. This is not a dialectical paradox. It is a methodological expression of women's situation, in which the struggle for consciousness is a struggle for world: for a sexuality, a history, a culture, a community, a form of power, an experience of the sacred.

The task of constructing such a consciousness would be made easier if we could eliminate the legal rules that sustain male dominance. Proceeding on that assumption, MacKinnon and her allies launched in the 1980s and '90s a formidable set of reform initiatives. The most successful and deservedly famous was their effort to establish the illegality of sexual harassment. Almost as notorious was their campaign to tighten prohibitions on the distribution of pornography. The city of Indianapolis did indeed adopt such an ordinance, but a federal court struck it down as a violation of the First Amendment. (Not all feminists were dismayed by the court's ruling; so-called "sex-positive" or "sex-affirmative" feminists thought the suppression of pornography would do more harm than good.) MacKinnon's most recent initiative has been an effort to secure international legal recognition of rape as a war crime.

Is there any thing, then, that feminist legal theorists have in common? Perhaps one – a methodology. Much more than any of the other groups of scholars we have considered, feminist legal theorists were and are concerned with the manner in which insights concerning the nature of law are developed and disseminated. Specifically, they emphasize *conversations* with or among women. For some, like Joan Williams, this commitment is connected to an "antifoundationalist epistemology" – the notion that our identities and our aspirations are entirely socially constructed and thus that the only way in which we can hope to identify normative criteria is to explore and debate the shared commitments of the communities to which we belong and in which we must continue to make ourselves. For others, like MacKinnon, it is rooted in appreciation of the revelatory power of the activity of "consciousness raising":

> Consciousness raising is the major technique of analysis, structure of organization, method of practice, and theory of social change of the women's movement. In consciousness raising, often in groups, the impact of male dominance is concretely uncovered and analyzed through the collective speaking of women's experience, from the perspective of that experience.

Whatever its origins, this approach differs radically from the solitary, introspective methods employed by most other American legal theorists – indeed, by most scholars of all sorts.

To sum up, American legal theory in the twentieth century can be divided roughly into thirds. In the first trimester, scholars associated initially with sociological jurisprudence and then with legal realism led an ultimately successful assault on the fortress of classical legal thought. In the second, a new orthodoxy emerged, organized around the methodological commitments and political centrism of legal process theory. In the third, process theory fell from grace, succeeded not by a single revolutionary creed, but by sustained conflict between the adherents of several incompatible schools of thought: law and economics, law and society, several variants of moral philosophy, critical legal studies, and feminist legal theory. At the beginning of the twenty-first century, no resolution of this controversy was yet in sight.

II. Education

The Emergence of the Harvard System

The central event in the history of American legal education was the establishment and dissemination of the Harvard model. This transformation began in 1870, when President Charles Eliot of Harvard University appointed Christopher Columbus Langdell as dean of the law school there, and Langdell, with Eliot's aid, set in motion a set of related changes in the structure and pedagogy of the school. By 1920, the majority of American law schools – and virtually all of the elite, full-time schools – had implemented most aspects of the new system (some eagerly, some grudgingly, some after bitter internal struggles), and the increasingly powerful American Bar Association and Association of American Law Schools, formerly often divided on the issue, were now reasonably united in advocating its universal adoption.

Although the transformation in legal education was well underway before 1920, understanding the new model at its inception is crucial to comprehension of developments in legal education that occurred thereafter. So let us first briefly review its main features.

The Harvard system had five related components. First, law should be learned, not through an apprenticeship, not in an undergraduate program, but through a three or four-year formal program of study in a graduate school.

Second, the primary materials one studied in law school were appellate judicial opinions applying legal doctrines to particular sets of facts. In his pioneering casebook on the law of contracts, Langdell justified this so-called case method on the following grounds: "[L]aw, considered as a science, consists of certain principles or doctrines. To have such mastery of these as to be able to apply them with constant

facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer … and the shortest and the best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied…. Moreover, the number of legal doctrines is much less than is commonly supposed." Gradually, this initial justification gave way to a different theory. James Barr Ames, Langdell's successor as dean at Harvard, contended that the purpose of the case method was not to teach students the content of legal principles, which were too multifarious to be conveyed in any course of study, but rather to equip them with "the power of solving legal problems" – in other words, to train them to "think like lawyers." (The second justification, even more than the first, suggested that the jurisdictions from which the judicial opinions in question were drawn were unimportant. It thus made sense for students in schools located in different states to learn from the same casebooks – and for students to attend law schools in states other than those in which they expected to practice. Thus was born the idea of the "national law school.")

Third, classroom instruction consisted primarily of so-called Socratic questioning. The professor asked students to describe the facts of the cases and to analyze the courts' reasoning. Through repeated inquisitorial exercises, the students were expected to learn how to ferret out the principles underlying decisions and to recognize the relatively few instances in which courts had gone astray. (Interestingly, recent scholarship suggests that Langdell himself, the popularizer if not the inventor of this method, used it in a somewhat different spirit, encouraging students to think critically and frequently acknowledging "his ignorance or uncertainty about points of doctrine." But, in this respect, Langdell seems to have been atypical.)

Fourth, the subjects taught in this fashion should consist of "pure law" courses. Political science, philosophy, and economics had no place, so the proponents of the model argued, in a law school curriculum. Indeed, though the set of subjects taught in most law schools in 1920 was somewhat larger than the set taught in the middle of the nineteenth century, it did not differ in kind.

Fifth and finally, students demonstrated their competence not by writing essays expounding legal doctrine, but by applying what they had learned to hypothetical problems. Initially, those problems were brief and schematic. Over time, they became increasingly complex.

Several factors help explain why this system took root and then, like kudzu, spread so rapidly. The system rested on a particular variant of the old idea of law as a science that both resonated with the classical style of legal thought (which, as we have seen, was dominant around the turn of the century) and appealed to university administrators then in the process of refashioning American higher education along German lines. It was also, in Ames's words, "a virile system," in which learning was achieved through self-reliance, struggle, and competition, activities celebrated by the then-popular ideology of Social Darwinism. On a more practical level, it was inexpensive, enabling small faculties to teach large bodies of students. In the opinion of advocates such as Eliot and of some modern historians (such as William LaPiana),

it was functional, in the senses that it did a good job of imparting to students skills they would actually need when practicing law (although many practitioners during the period were skeptical on precisely this point) and that insights gleaned through combative Socratic exchanges were more likely to be retained by students than knowledge imparted through more traditional lectures. In the opinion of other historians (such as Harry First), it served the less noble interests of a subset of law schools in controlling the market for legal education and of established practitioners in reducing competition in the provision of legal services. Finally, in the opinions of still others (such as Robert Stevens and Jerold Auerbach), it was one of many devices by which elite lawyers sought to limit the number of Irish, Italians, Poles, Jews, and African Americans who entered the profession – and to inculcate "proper principles" and respect for the American system of government in the few who were admitted. Whatever its causes, by 1920, it exerted a powerful grip on American legal education.

Criticisms (Round One)

In the first half of the twentieth century, the Harvard model was attacked from two quarters, but withstood both assaults. The first came from Alfred Reed, a non-lawyer who, under the auspices of the Carnegie Foundation, published a set of high-profile studies of legal education and the legal profession in the United States. In Reed's view, the joint aspiration of the elite university-affiliated schools, the ABA, and the AALS to create a "unitary" bar through universal adoption of the Harvard system was misguided. Instead of seeking to eliminate the rapidly growing set of unaccredited, proprietary, part-time, and night law schools, which catered to poorer students and second-generation immigrants, the bar should embrace them. Drawing loosely on the British system, which separated lawyers into barristers and solicitors, Reed argued that the United States, as a large, pluralistic society, needed more than one type of lawyer. The elite schools should train the elite; the proprietary schools should train the rest. Reed's comments on pedagogy were closely related to this vision. The case method and Socratic questioning, he acknowledged, were excellent tools in the hands of "genuine scholars" training smart, well-prepared students. But they were inferior to older, more straightforward teaching techniques when it came to training the harried students of "ordinary" abilities who filled the proprietary schools.

As one might imagine, Reed's report found favor among the deans and faculties of the proprietary schools, but did not persuade the increasingly consolidated leadership of the ABA and AALS. Elihu Root of Harvard, then chair of the ABA Section of Legal Education and Admissions to the Bar, denounced Reed's proposal for a stratified bar as undemocratic and un-American and his overall message as "reactionary," "narrow," and "unfair." Arthur Corbin of Yale, then president of the AALS, was similarly hostile. The increasingly shrill complaints of people like Gleason Archer, dean of Boston's Suffolk Law School (which, though

unaccredited, was then the largest law school in the world), that the elite were conspiring to drive them out of business fell on deaf ears.

The second of the attacks came from inside the elite law schools themselves. For years, some of the faculty of major schools other than Harvard had been expressing doubts about the merits of the case method, Socratic questioning, and exclusive focus on "pure law" subjects. For example, in 1912, George Chase, formerly a professor at Columbia and by then the dean of the New York Law School, argued that "case-books take a good deal more space to set forth the law on a given subject than do text-books, and even then they may not do this with satisfactory completeness," and that "it will not seem surprising that a law school using treatises as the fundamental basis of its instruction can cover the same field of legal knowledge in a shorter time than schools which confine themselves to case-books." Legal realism threw wood onto this smoldering fire. For example, Jerome Frank, drawing directly on his views concerning the limited explanatory or predictive power of appellate opinions, argued that, if students were to learn the law through the study of cases, they should at least be provided with full information concerning the genesis of those controversies and the various factors, both "rational" and "non-rational," that shaped the conduct of the parties, lawyers, juries, and judges. More broadly, he urged law schools to recapture some of the good features of the old "legal apprenticeship system" – for example, by requiring students to visit trial and appellate courts and to participate in legal clinics, providing legal aid to the poor, to the government, or to quasi-governmental agencies. Karl Llewellyn echoed many of Frank's arguments and in addition urged law schools to abandon their misguided effort to separate pure law topics from the "background of social and economic fact and policy." History, philosophy, economics, and the like, he contended, should be introduced into the law school curriculum, not by creating courses offering interdisciplinary "perspectives" on doctrine, but by integrating serious analysis of such matters into every course.

Sentiments of these sorts, widely shared at schools where realism was well represented, generated some serious efforts to institute major pedagogic reforms. The most serious of all came at Columbia, where, with the encouragement of Dean Harlan Fiske Stone, ten faculty committees worked for two years to refashion the curriculum along "functional" lines. The effort bore some fruit – a few new courses, most pertaining to economics or trade regulation; some unconventional casebooks; and the addition of business experts, philosophers, and political scientists to the law school faculty. But the reformers lost the faculty fight over the committees' more sweeping recommendations. After the appointment in 1928 of a new, more conservative dean, the principal agitators resigned. William O. Douglas and Underhill Moore left for Yale, and Herman Oliphant and Hessel Yntema joined Walter Wheeler Cook in founding a new research center at Johns Hopkins.

Influenced in part by the arrival of Douglas and Moore, Yale Law School at the end of the decade experimented with its own curriculum a more modest scale. Dean Robert Hutchins was supportive, and some new empirically oriented courses

were developed. But increasing disillusionment concerning the insights into law that could be gleaned from the social sciences and Hutchins' departure for the University of Chicago stunted the initiative. The Johns Hopkins Institute, for its part, fell prey to economic pressure. Disdaining the training of practitioners and focused exclusively on research, it was financially dependent on donors. Funded for only five years, it could not survive the philanthropic drought of the Depression.

Hegemony and Evolution

The main storyline in American legal education during the remainder of the twentieth century was the continued spread and consolidation of the Harvard model. The ABA and AALS, working increasingly collaboratively, adopted ever stricter guidelines – intended to apply to all law schools – on minimum numbers of faculty, maximum student/faculty ratios, the number of years of undergraduate study that were required for admittance (first two, then three, finally four), and the size of and funding for law libraries. For many years, these guidelines were paper tigers. Students graduating from nonconforming (and thus unaccredited) schools could still take state bar examinations and thus enter the profession. But the rules gradually grew teeth. Bar examiners acceded to pressure from the elite schools to adopt questions that resembled the problem-based questions used in the course examinations in the elite schools, and state legislatures began to make some of the guidelines (for example, two years of college study before law school and three years of law study) mandatory for admission to practice. California continued to allow graduates of unaccredited schools to become lawyers, but required them to take special tests from which students in accredited schools were exempt.

Many of the unaccredited proprietary schools responded to these growing pressures by conforming. A growing percentage adopted the case method. Some added undergraduate programs to their curricula, enabling admitted students to perform their obligatory years of pre-law study before beginning their law school courses. Others hired new faculty and expanded their libraries. But, just as the proponents of the new rules anticipated, many of the lower tier schools were incapable of complying and went out of business. The net result: the percentage of students enrolled in accredited schools steadily rose.

Yet, even as its grip was tightening, the Harvard system of legal education began to change – incrementally, to be sure, but ultimately in substantial ways. Perhaps the most obvious area of adjustment concerned the subject matter of the courses offered in the accredited schools. The absolute numbers of course offerings increased steadily. Equally important, the proportion focused exclusively on pure law topics slowly declined, whereas the proportion overtly addressing "policy" issues or drawing on disciplines other than law rose. This trend accelerated after 1970, reinforced by the addition of courses concerned with (and typically promoting) means of dispute resolution other than litigation – negotiation, mediation, and arbitration. The impact on this axis of change of the major schools of legal thought

traced in the first half of this essay was obvious: More and more courses addressed such themes as the legal process, law and economics (in general or of particular subjects), law and society, critical theory, and feminist legal theory.

Even by mid-century, the number of course offerings in most schools was such that no student could take them all in three years. As a result, all schools (even Harvard, nudged by a 1947 report from a curricular reform committee chaired by Lon Fuller) reduced the number of courses students were obliged to take, increasing their freedom to pick and choose in their second and third years from a growing collection of electives. Another side effect was that the average size of upper-level classes decreased steadily. That trend, plus the proliferation of seminars, modeled loosely on those available in arts-and-sciences graduate schools, afforded some students increased contact with faculty members.

Another area of adjustment concerned the character of assigned readings. Casebooks containing nothing but appellate opinions were gradually displaced by collections of "cases and materials" – the "materials" typically consisting of bits and pieces of philosophy, sociology, political science, economics, and editorial commentary. The organization of the new books commonly reflected the schools of legal thought that their authors found most congenial. For example, Lon Fuller's 1947 contracts casebook bears many marks of legal realism. Most famously, the placement of the section on remedies at the beginning rather than at the end of the book was clearly motivated by the realist insistence that rights are derivative of remedies, not the reverse – that a right exists only to the extent that effective procedures are in place to enforce it. But it also showed the extent to which Fuller thought he had transcended realism. Specifically, the inclusion of many notes and references designed to elucidate the various policies underlying each doctrine reflected Fuller's faith that a mature judge or other decision maker could, through careful weighing of those considerations in particular contexts, resolve controversies among contracting parties in wise and reasonably determinate ways.

Pedagogy changed too. Professors continued to question students. But gradually, as the century wore on, the interrogations became less fierce, less concerned with explicating cases, and more with exploring policy issues. Professors tipped their hands more, humiliated students less, and interspersed Socratic questioning increasingly often with mini-lectures. Defenders of the new style argued that it was both more efficient and more humane than the older approach. Traditionalists, like Roger Cramton, lamented the resultant decline in "the kind of hard-nosed, analytical and disciplined thinking on which the best law schools used to pride themselves" and attributed the declension to growing "malaise" among law teachers – "uncertainty about what they are teaching and why." (Interestingly, critics from the Left offered a similar diagnosis. Roberto Unger, for example, closed his book on *The Critical Legal Studies Movement* with a harsh depiction of the mainstream law teachers that the movement was seeking to discredit and displace: "[T]hey were like a priesthood that had lost their faith and kept their jobs. They stood in tedious embarrassment before cold altars.")

Clinical legal education also rose in importance and popularity during the second half of the twentieth century. Clinical instruction has a long pedigree. The apprenticeship system by which most early nineteenth-century lawyers were trained can fairly be described as a form of clinical teaching. Around the turn of the century, a few law schools sought to recapture some of the benefits of that system by establishing legal aid clinics in which students could gain experience representing real (typically poor) clients. The University of Pennsylvania did so in 1893, the University of Denver in 1904, Harvard itself in 1912, and Yale in 1915. But several factors reduced the impact of these early programs. With rare exceptions (such as at the University of Southern California), students could not earn credit for participating in them, the instructors who guided the students lacked both tenure and prestige, and the most ambitious and competitive students usually avoided them. As we have seen, some legal realists argued that these programs should be radically expanded and made central to legal education, but their agitation had little impact.

Beginning in the 1960s, three forces combined to boost clinical education substantially. The first and probably most important was money. Between 1959 and 1965, the National Council on Legal Clinics, supported by the Ford Foundation, awarded grants totaling roughly $500,000 to nineteen law schools to enable them to create or expand clinical programs. In 1968, the Ford Foundation increased this level of support dramatically. Over the next decade, through the Council on Legal Education for Professional Responsibility (CLEPR), it granted roughly $12 million to more than 100 law schools to help them increase their for-credit clinical offerings. The second factor was social and political unrest. Starting in the 1960s, growing numbers of students became dissatisfied with the apolitical or conservative character of regular law school instruction and saw in the expanding clinics opportunities to put their skills to progressive purposes even before graduating. The growing set of clinical instructors, most of them drawn from the public interest bar, were eager to satisfy this demand. Third, the organized bar became increasingly convinced that the law schools were failing in their responsibility to provide students practical lawyering skills – facility in legal research, document drafting, counseling, initiating litigation, and so forth – and urged the schools to fill the gap through increased clinical instruction. One relatively late manifestation of this pressure was the "MacCrate Report" (named after Robert MacCrate, the chair of the ABA Task Force from which it issued), which, among other things, urged the schools to create more "opportunit[ies] for students to perform lawyering skills with appropriate feedback." By the turn of the century, the intersection of these forces had prompted the large majority of law schools to offer their students for-credit clinical instruction.

The final dimension along which the Harvard model changed was the manner in which students were differentiated. In the 1920s and 1930s, the elite schools sorted students, not at the doorstep, but after they were admitted. Even Harvard demanded of applicants nothing more than an undergraduate degree from an accredited college. But then more than half of each entering class "flunked out" before graduation. Gradually, the elite schools became ever more selective in determining which

candidates they would admit while reducing the percentages they discarded after admission. This change is not to suggest, however, that the law school experience for admitted students became more egalitarian. On the contrary, the divisions drawn among the students became ever sharper.

One of the principal vehicles of stratification was the law review – an institution (puzzling to academics in other disciplines) in which students select, edit, and publish most of the articles written by law professors. The first law reviews were established in the late nineteenth century. Their number increased slowly in the first quarter of the twentieth century and rapidly thereafter. One of the reasons for their proliferation was that membership on the editorial board of a law review, typically determined entirely on the basis of first-year grades, came to function as a badge – a signal to prospective employers, among other audiences, of students' abilities and accomplishments. (Another reason, as Karl Llewellyn acidly observed, is that law review members in their second year of school could obtain from their comrades in their third year effective, personalized instruction, including close editing of their written work, that the law school faculty was unable or unwilling to provide them.) By the middle of the century, competition for such positions became fierce. Students' job opportunities, self-images, and friendship networks came to depend, to distressing degrees, on whether they had "made" law review. Starting in the 1970s, the proliferation of student-edited journals and the growing status of interdisciplinary work eroded the accreditation power of the flagship law reviews, but at the end of the century it was still formidable.

Diversity

Over the course of the twentieth century, the range of options open to people other than white men who wished to obtain legal educations expanded slowly and erratically. In 1900, no top school admitted women, although some second-tier schools – Iowa, Michigan, Boston University, and Hastings – had opened their doors to them . But the most prestigious institutions – Harvard and Yale among them – expressly refused to do so. Some proprietary schools sought to fill the resultant gap. For example, in 1908, Arthur MacLean founded the Portia Law School in Boston, initially limiting admission to women students. Over the course of the early twentieth century, the top schools, one after another, relented. Harvard, to its shame, was the last of the lot, waiting until 1950. As one might expect, the net result was that, in the second half of the century, the percentage of women among law students increased steadily. By 2000, women constituted a majority of the graduates of several schools.

In the early twentieth century, the sharply limited opportunities available to African Americans worsened even further. The campaign to "raise standards" in legal education had the predictable effect (arguably, the purpose) of constricting the number of African Americans who could gain access to the profession. In part, this constriction resulted from the increase in the number and height of the hurdles that one had to clear to be admitted, disadvantaging African Americans who, on average,

had more limited educations and financial resources. And it part, it resulted from the adverse effect of the campaign on schools that specialized in training African Americans. In 1928, there were four such schools: Howard, Freylinghuysen, Simmons, and Virginia Union. A decade later, only Howard was thriving.

Only after 1950 did the situation materially improve. Some law schools (most of them in the South) were forced through litigation to abandon admissions policies that overtly discriminated against African Americans. Then, in the 1960s, other law schools adopted affirmative action admissions policies that, in one way or another, granted preferential treatment to African American, Hispanic, and Native American applicants.

In the late twentieth century, affirmative action was employed in the United States in a wide variety of economic and social contexts in efforts to remedy histories of invidious discrimination. In most of those settings, it was highly controversial, and its application to law school admissions was no exception. Some observers defended its use either as essential to affording members of minority groups access to positions of power (many of which required legal training) from which they had long been wrongly excluded or as necessary to provide all law students a learning environment in which could be found a range of views (on matters of all sorts) that was representative of the opinion spectrum of the society at large. Other observers criticized the practice either as unjust (to the whites disadvantaged by it) or as corrosive of sound pedagogy. Richard Posner, for example, traced the decreased use of Socratic questioning in the classroom in part to affirmative action, "which, virtually by definition, entails the admission of minority students less qualified on average than the law school's non-minority students, hence more likely to be embarrassed by the 'cold call' method of Socratic teaching."

To some extent, the struggle over the legitimacy of affirmative action – both in the context of law school admissions and in other settings – was a legal question. When employed by public institutions (such as law schools associated with state universities), it was challenged as violative of the Equal Protection Clause of the Federal Constitution, and when employed by private institutions, it was challenged as violative of civil rights statutes. Not surprisingly, law school faculty frequently expressed views about the merits of those challenges. In their arguments, the commentators often drew explicitly on one or another of the then-popular schools of legal thought. For example, Terrence Sandalow and John Ely both offered defenses of affirmative action grounded in process theory, and Ronald Dworkin drew overtly on his particular brand of Kantian liberalism in justifying the practice. But the connection between scholars' theoretical commitments and their views on the issue was not tight; scholars within a given school of thought sometimes disagreed. For instance, whereas some economists (like Posner) criticized the practice, others (like Robert Cooter) argued that, at least under some circumstances, it could be efficient. And while many scholars affiliated either with critical legal studies or critical race theory (such as Duncan Kennedy and Charles Lawrence) defended its use by law schools, others (such as Richard Delgado) were much more skeptical of the practice.

In the end, affirmative action survived (more or less) the legal attack on it. In the 1978 *Bakke* case, a plurality of the Supreme Court, in an opinion by Justice Powell, recognized that the promotion of diversity within its student body was "a constitutionally permissible goal for an institution of higher education." Commenting specifically on its use by law schools, Powell observed, "The law school, the proving ground for legal learning and practice, cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned." In the 2003 *Grutter* cases, the Court took much the same position, upholding reference to race in admissions decisions, so long as it is achieved not by mechanically adding points to applicants' scores to reflect their racial identities, but by taking race into account when making individualized admission decisions.

By most accounts, affirmative action, at least as employed in law school admission decisions, has been an enormous success. For example, an empirical study of the effects of the race-conscious admissions policies employed by the University of Michigan Law School since the late 1960s, concluded as follows:

> By any of our study's measures Michigan's minority alumni are, as a group, highly successful in their careers. Although, as a group, they entered Michigan with lower LSAT scores and lower UGPAs [undergraduate grade point averages] than other students, in their jobs immediately after law school and in their jobs today, Michigan's minority alumni are professionals fully in the mainstream of the American economy. They are well represented in all sectors of the legal profession. They are successful financially, leaders in their communities, and generous donors of their time to pro bono work and nonprofit organizations. Most are happy with their careers, and minority alumni respond no differently than white alumni when asked about overall career satisfaction. LSAT scores and UGPA scores, two factors that figure prominently in admissions decisions, correlate with law school grades, but they seem to have no relationship to success after law school, whether success is measured by earned income, career satisfaction, or service contributions. If admission to Michigan had been determined entirely by LSAT scores and UGPA, most of the minority students who graduated from Michigan would not have been admitted even though the measures that would have worked to exclude them seem to have virtually no value as predictors of post-law school accomplishments and success.

Criticisms (Round Two)

In the last two decades of the twentieth century, the dramatic increase in the diversity of law school student bodies helped fuel another round of calls for reform of the character and content of legal education. In the judgment of the critics, the (reformed) Harvard model remained inexcusably sexist, racist, and conservative. Three clusters of criticisms loomed largest.

First, many feminists scholars argued that American law schools were inhospitable places for women students. To some extent, this was the result of overtly sexist behavior by male students or by the overwhelmingly male faculty. In class,

women students were interrupted more often and were called on less often. When judging moot court competitions, faculty judges would comment on women students' dress. Criminal law professors would deliberately ask women to state the facts of rape cases. Male pronouns were commonly employed to refer to judges, lawyers, and reasonable persons; female pronouns were employed to refer to emotional or unstable persons. Casebooks and syllabi omitted or deemphasized topics of particular interest to women. The extent to which gender bias contributed to the origins or resolutions of particular controversies or to the shape of particular doctrines was typically ignored. And so forth. More fundamentally, various aspects of the prevailing pedagogy, the critics argued, disadvantaged women. The ethos of "rigor"; the privileging of general rules and arguments over context-specific considerations; the hierarchical, authoritarian Socratic method; inattention to the wisdom that can be gleaned from personal experiences – all these contributed to an environment hostile to the "female voice" and intimidating to women students.

Empirical studies lent support to these claims. The most comprehensive was conducted at the University of Pennsylvania in the early 1990s. Its principal findings were that the Socratic method made women students there feel "strange, alienated, and 'delegitimated'"; that, as a result, women participated in classroom discussions less often than men; and that, by the end of their first year of legal education, women students were three times less likely than men to rank in the top 10 percent of their class. In language that echoed one branch of feminist legal theory, the authors of the study concluded that even women who do well academically succeed in part by transforming themselves: "For these women, learning to think like a lawyer means learning to think and act like a man. As one male professor told a first-year class, 'to be a good lawyer, behave like a gentleman.'" A less formal study conducted at Harvard in 2002 came to similar conclusions: female students were less likely than males to talk in class or to graduate with honors and more likely to describe the law school experience as "alienating" – although they were more likely than men to occupy top-tier positions in student-run journals.

Critical race theorists offered analogous criticisms. The curricula of most law schools neglected racial issues, they argued, and the prevailing pedagogy erected unnecessary barriers for members of minority groups. They urged greater use in the classroom of such devices as narratives, simulations, and "reflection pieces," which would both empower minority students and highlight the racial dimensions of legal controversies and doctrines. Of special concern to many critical race theorists was the under-representation of minorities in legal scholarship. Derrick Bell, Richard Delgado, and Mari Matsuda, among others, argued that persons of color, largely because of their experiences of racial oppression, had something distinctive to contribute to scholarly debates, but had trouble finding publication outlets. Partly for that reason, they urged law schools to employ affirmative action, not just (as suggested above) when deciding which students to admit, but also when hiring and promoting faculty (although at the same time they warned of the hazards of "tokenism"). Many white professors and a few minority professors (for example,

Randall Kennedy and Stephen Carter) contended, by contrast, that affirmative action was inappropriate in this context; a genuinely meritocratic standard was sufficient.

The third cluster of criticisms came from scholars associated with CLS. The most ambitious and influential essay in this genre was Duncan Kennedy's 1982 pamphlet, *Legal Education and the Reproduction of Hierarchy*. Kennedy's thesis was that, in myriad ways, law schools convey to students that "it is natural, efficient, and fair for law firms, the bar as a whole, and the society the bar services to be organized in their actual patterns of hierarchy and domination." Among the features that contribute to this message are: the "patriarchal" Socratic method, still used often in first-year classes, which inculcates ambivalence and conservatism; the technique of burying emotional or outrageous cases within casebooks dominated by run-of-the-mill cases, which pressures students to ignore their moral intuitions; the failure to provide students training in practical skills of lawyering, leaving them little choice but to seek employment after graduation in private law firms, which replicate the controlled and supervised law school experience; and a rigid grading system, which reinforces students' senses of both the inevitability and the justice of hierarchy. Only radical change in many of these dimensions could make the schools effective training grounds for lawyers interested in progressive social and political work.

As was true of the first round of criticisms, these attacks on the dominant form of legal education had relatively little impact. Overtly sexist behavior by faculty and students diminished. Some schools gave preferential treatment to minorities and, less often, to women in faculty hiring and promotion. And a few dedicated Left professors – such as Gerald Lopez at Stanford – developed courses and clinical programs intended to be more politically progressive. But, by the turn of the century, no school had developed a "radically reconceived training regimen." A chastened version of the Harvard model still ruled the waves.

Conclusion

In retrospect, we can see that some innovations both in American legal theory and in American legal education were shaped or provoked by developments in other dimensions of American politics and culture. For example, legal realism was inspired in part by Progressivism and was reinforced by the New Deal. Likewise, the effort during the 1960s and 1970s to achieve greater diversity in law school student bodies and the intense concern on the part of several groups of legal theorists in the various meanings of "equality" are traceable in large part to the civil rights movement. Other innovations seem more connected to developments in other academic disciplines. For example, to some extent legal realism echoed recent developments in psychology and anthropology; neo-Kantian legal theory was inspired, as the label suggests, by contemporary currents in philosophy; and CLS incorporated aspects of structuralism and postmodernism. Still other innovations seem at least partially serendipitous; a particular person with an idiosyncratic set of ideas happened to occupy a position of influence at a particular time, and much changed as a result. Examples of such

figures would include Langdell, whose educational philosophy so heavily colored late-nineteenth- and twentieth-century pedagogy, and Richard Posner, whose limitless faith in the power of economics and seemingly boundless energy were crucial in launching and sustaining a variant of utilitarian analysis that continues to infuse large sectors of legal scholarship and instruction.

The result of this confluence of forces is a highly distinctive legal culture and system of legal education. Scholars and students from other countries who come to law schools in the United States are often disoriented. Much, initially, seems to them peculiar. Whether that distinctiveness will survive the twenty-first century remains to be seen.

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The essay by Duncan Kennedy mentioned in the text was published in several forms – as a law review article ("Legal Education as the Reproduction of Hierarchy," *Journal of Legal Education* 32 [1982], 591); as a free-standing pamphlet (by Afar, Cambridge, MA, 1983); in a compressed form in David Kairys, ed., *The Politics of Law* (1982); and most recently in an expanded form, along with commentary by other scholars, by the New York University Press (2004). Other essays in the same vein are Gerald P. Lopez, "Training Future Lawyers to Work with the Politically and Socially Subordinated: Anti-Generic Legal Education," *West Virginia Law Review* 91 (1989), 305 and Gerald Torres, "Teaching and Writing: Curriculum Reform as an Exercise in Critical Education," *Nova Law Journal* 10 (1986), 867.

The question whether affirmative action is defensible – in general, as applied to law school admissions, or as applied to the hiring and promotion of law school faculty – was addressed by legal scholars in many books and articles. In addition to several mentioned in the previous two paragraphs, the following were influential: Carl A. Auerbach, "The Silent Opposition of Professors and Graduate Students to Preferential Affirmative Action Programs: 1969 and 1975," *Minnesota Law Review* 72 (1988), 1233; Derrick Bell, "Application of the 'Tipping' Point Principle to Law

Faculty Hiring Policies," *Nova Law Journal* 10 (1986): 319 and "The Final Report: Harvard's Affirmative Action Allegory," *Michigan Law Review* 87 (1989), 2382; William G. Bowen and Derek Bok, *The Shape of the River: Long-Term Consequences of Considering Race in College and University Admissions* (Cambridge, MA, 1998); Paul Brest and Miranda Oshige, "Affirmative Action for Whom?," *Stanford Law Review* 47 (1995), 855; Robert Cooter, "Market Affirmative Action," *San Diego Law Review* 31 (1994), 133; Kimberle Williams Crenshaw, "Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law," *Harvard Law Review* 101 (1998), 1331; Richard Delgado, "Affirmative Action as a Majoritarian Device: Or Do You Really Want to Be a Role Model," *Michigan Law Review* 89 (1991), 1222; Ronald Dworkin, *A Matter of Principle* (1985), 293–315; John Hart Ely, "The Constitutionality of Reverse Racial Discrimination," *University of Chicago Law Review* 41 (1974), 723; Kent Greenawalt, "Judicial Scrutiny of 'Benign' Racial Preference in Law School Admissions," *Columbia Law Review* 75 (1975), 559; Kenneth L. Karst and Harold W. Horowitz, "Affirmative Action and Equal Protection," *Virginia Law Review* 60 (1974), 955; Duncan Kennedy, "A Cultural Pluralist Case for Affirmative Action in Legal Academia," *Duke Law Journal* 705 (1990); Randall Kennedy, "Persuasion and Distrust: A Comment on the Affirmative Action Debate," *Harvard Law Review* 99 (1986), 1327; Charles R. Lawrence III, "Minority Hiring in AALS Law Schools: The Need for Voluntary Quotas," *University of San Francisco Law Review* 20 (1986), 429; Sanford Levinson, "Diversity," *University of Pennsylvania Journal of Constitutional Law* 2 (2000): 573; Jose F. Moreno, *Affirmative Actions: The Educational Influence of Racial/Ethic Diversity on Law School Faculty* (Los Angeles, 2000); Robert M. O'Neil, "Preferential Admissions: Equalizing the Access of Minority Groups to Higher Education," *Yale Law Journal* 80 (1971), 699 and "Racial Preference and Higher Education: The Larger Context," *Virginia Law Review* 60 (1974), 925; Richard A. Posner, "The *DeFunis* Case and the Constitutionality of Preferential Treatment of Racial Minorities," *Supreme Court Review* (1974), 1 and "Comment: Duncan Kennedy on Affirmative Action," *Duke Law Journal* (1990), 1157; Martin H. Redish, "Preferential Law School Admissions and the Equal Protection Clause: An Analysis of the Competing Arguments," *UCLA Law Review* 22 (1974), 343; Jed Rubenfeld, "Affirmative Action," *Yale Law Journal* 107 (1997), 427; Laurence H. Tribe, "Perspectives on *Bakke*: Equal Protection, Procedural Fairness, or Structural Justice?," *Harvard Law Review* 92 (1979), 864; Terrance Sandalow, "Racial Preferences in Higher Education: Political Responsibility and the Judicial Role," *University of Chicago Law Review* 42 (1975), 653; Peter H. Schuck, "Affirmative Action: Past, Present, and Future," *Yale Law and Policy Review* 20 (2002), 1; Richard H. Seeburger, "A Heuristic Argument Against Preferential Admissions," *University of Pittsburgh Law Review* 39 (1977), 285; and Kathleen Sullivan, "Sins of Discrimination: Last Term's Affirmative Action Cases," *Harvard Law Review* 100 (1986), 78. The empirical study discussed and quoted in the text of the Michigan affirmative-action admissions policies is Richard O. Lempert, David L. Chambers, and Terry K. Adams, "From the Trenches and Towers:

Law School Affirmative Action: An Empirical Study of Michigan's Minority Graduates in Practice: The River Runs Through Law School," *Law and Social Inquiry* 25 (2000), 295. The citations for the cases discussed in the text are *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), *Gratz v. Bollinger*, 539 U.S. 244 (2003)*, Grutter v. Bollinger*, 539 U.S. 306 (2003).

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