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

Gerald B. Wetlaufer
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ARTICLES

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

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

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

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

My purpose in this Article is to address these problems, first by examining the structure of legal discourse and then by assessing the nature of our differences. In this modest way, I hope to increase the intelligibility of our continuing conversation and to shed some light on the problems of argumentative inconclusiveness, mutual unintelligibility, and, where it exists, mutual disrespect. I also hope to ease the burden on those who are beginning their study of law, to
expand the prospects for mutual understanding, to enhance regard for our differences and for the great and unanswered questions on which we are divided, and to enlarge the prospect of our actually joining issue on those great questions.

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

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

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

1. Turn-of-the-century formalism of the kind associated with Christopher Columbus Langdell and his Harvard Law School
associates and with the constitutional jurisprudence of the Lochner court;

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

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

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

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

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

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

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

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

(2) prime values and projects, as with the commitments of the formalists to stability and their understanding of economic liberty, of the legal realists to statutory reform and
their understanding of the public interest, and of contemporary critical theorists to their understandings of democracy and equality;

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

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

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

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

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

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

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

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

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

Each of the six second-level systems of belief is, as shall be shown, distinguished by a distinctive set of underlying assumptions and beliefs, prime values and projects, centers of attention, intellectual affiliations, and styles of interpretation and argument. Each of these six bodies of theory also has its particular strengths and weaknesses.
Thus certain problems may be more easily “solved” within one theoretical system than within others. Conversely, each of these systems of belief has certain questions to which it has great difficulty yielding satisfactory answers. The legal process school has, for example, a comparative advantage over its competitors in generating a satisfactory “theory of judicial review,” yet it has great difficulty persuading others of the “neutrality” of its principles. Similarly, and despite its manifold strengths, legal realism has a famously hard time generating what the positivist/analytics would regard as a satisfactory “theory of adjudication.” More generally, there is one weakness that is common to all six operating systems. That weakness is this: however satisfactory may be the conduct of business within each system, the arguments that one system’s proponents offer for the superiority of their system over its competitors often beg the question and are almost always unpersuasive to those who are already committed to the competing theory.

These six communities may also be distinguished from one another in terms of their cultural location, historical occasion, and historical adversaries. Our understanding of legal realism, for instance, cannot be complete without an appreciation of its adversarial relationship with turn-of-the-century formalism and with formalism’s constitutional jurisprudence. Neither can one appreciate the legal process school without reference to its historical occasion. Nor can the legal positivist/analytic tradition be fully understood without an appreciation of what is entailed in its relationship with the British academic elite and, for instance, the fact that British jurisprudence has developed largely without the stimulus provided, in America, by judicial review and legal realism. Finally, it is also useful, and sometimes necessary, to locate the six communities of belief in relationship to a number of important historical markers, including Lochner v. New York1 and its progeny, the New Deal, World War II and the Holocaust, Brown v. Board of Education2, the civil rights movement, and the disruptions of the 1960s.

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

1. 198 U.S. 45 (1905).
beliefs, and commitments.

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

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

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

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

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

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

I. The Range of Theoretical Perspectives

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

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

**A. Liberalism: The Master Paradigm**

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

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

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

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

B. Turn-of-the-Century Formalism

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


7. Langdell’s publications include, e.g., CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS: WITH REFERENCES AND CITATIONS (Little Brown & Co. 1899) (1871); CHRISTOPHER C. LANGDELL, DISCOVERY UNDER THE JUDICATURE ACTS, 1873, 1875 (1898); Christopher C. Langdell, Patent Rights and Copyrights, 12 Harv. L. Rev. 553 (1899); Christopher C. Langdell, The Status of Our New Territories, 12 Harv. L. Rev. 365 (1899); Christopher C. Langdell, Classification of Rights and Wrongs, 13 Harv. L. Rev. 537, 659 (1900); Christopher C. Langdell, Mutual Promises as a Consideration for Each Other, 14 Harv. L. Rev. 496 (1901); Christopher C. Langdell, The Northern Securities Case and the Sherman Anti-trust Act, 16 Harv. L. Rev. 539 (1903); Christopher C. Langdell, Northern Securities Case Under a New Aspect, 17 Harv. L. Rev. 41 (1903); Christopher C. Langdell, Dominant Opinions In England During the Nineteenth Century as to Legislation as Illustrated by English Legislating, or the
There, the formalist project was embodied in the work of Dean Langdell and a cadre of men who, for the most part, had been his students and then his colleagues at Harvard. They included James Barr Ames, Joseph Beale, and Samuel Williston. The other center of formalist activity was the politically conservative wing of the U.S. Supreme Court, comprised of Justices Rufus Peckham, Joseph McKenna, Willis Van Devanter, George Sutherland, Pierce Butler, and James McReynolds.

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

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

9. Beale's major publications include, e.g., 1-3 Joseph Beale, A Treatise on the Conflict of Laws (1935); Joseph Beale, Treatise on Conflict of Laws, or, Private International Law (1918); Joseph Beale, A Shorter Selection of Cases on the Conflict of Laws (1941). He served as a reporter for the Restatement of the Law of Conflict of Laws in 1925 and 1939. He also published a number of treatises on the measure of damages (1891), a treatise on the law of partnership (1893), criminal pleading and practice (1896), foreign corporations and the taxation of corporations both foreign and domestic (1904), innkeepers and hotels (1906), railroad rate regulation (1907, 1915); published casebooks on criminal law (1894 et seq.), the measure of damages (1895 et seq.), the law of torts (1900 et seq.), public service companies (1902), carriers and other bailment and quasi-bailment services (1909), criminal law (1894), municipal corporations (1911), legal liability (1915), federal taxation (1915 et seq.), and taxation (1922 et seq.); and assembled an extensive bibliography of early English cases.


11. Rufus Wheeler Peckham, Jr., served on the Court from 1896 to 1909; Joseph McKenna, from 1898 to 1925; Willis Van Devanter, from 1911 to 1937; George Sutherland, from 1922 to 1938; and Pierce Butler, from 1923 to 1939. Those of this group who were then on the Court all voted the formalist position with the majority in Allee v. Louisiana, 165 U.S. 578, 589 (1897) (asserting that "liberty" includes freedom of contract); Lochner v. New York, 198 U.S. 45 (1905) (same); Cogggins v. Kansas, 236 U.S. 1 (1915) (same, re employment contract); Adkins v. Children's Hosp., 261 U.S. 525 (1923) (same, re anti-union provision in employment contract); Black & White Taxicab & Transfer Co. v. Brown & Yellow Taxicab & Transfer Co., 276 U.S. 518 (1927) (defending Swift v. Tyson, which rests on assumptions concerning the law that are consistent with those of the formalists); Carter v. Carter Coal Co., 298 U.S. 238, 308 (1936) (invoking the conceptual distinction between "direct" and "indirect" in reading Commerce Clause); Morehead v. New York ex rel. Tipaldo, 298 U.S. 587 (1936) (asserting that "liberty" includes freedom of contract).
The formalists clearly believed that the law was comprised of principles—including definitions, concepts, and doctrines—broad in their generality, few in their number, and clear enough to permit answers to the questions of law to be more or less directly deduced. The formalists also believed that the law generally is, and should be, unresponsive to particular factual contexts and circumstances. They wrote as if such principles had an existence of their own, quite apart from what judges or legislators might actually have said or done, and that these principles were valid on grounds that were indifferent to what we have come to see as either the needs of society or the purposes that law might serve. Although such principles might develop and evolve over time, they did not do so in accordance with society’s changing needs. Neither were they influenced by custom.

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


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

Id.; see also Samuel Williston, The Work of Teachers of Law Affecting Its Development, in Some Modern Tendencies in the Law (1929) at 120 [hereinafter Williston, Teachers of Law (1929)] (citing Langdell’s preface as the best statement of method, restating its commitments); James Barr Ames, The Vocation of a Law Professor, 48 Am. L. Rev. 129, 145 (1900) (arguing that the legal academic’s job is to search for “original generalization, illuminating and simplifying the law”).


14 See Langdell, Preface (1871), supra note 12, at vii (asserting that in the law of contracts, a small number of important cases have contributed to the “growth, development, or establishment of... its essential doctrines”); James Barr Ames, The Vocation of a Law Professor, 48 Am. L. Rev. 129, 140 (1900) (describing the legal academic’s historical investigations into the genesis and development of legal doctrine); James Barr Ames, Law and Morals, 22 Harv. L. Rev. 99 (1908) (explaining legal history as the evolution of legal rules to include equitable principles and ethical concerns); Williston, Teachers of Law (1929), supra note 12 (asserting Langdell’s disinterest in social desirability; Ames’ interest in desirability as expressed in his understanding of justice and business convenience; and Williston’s view of stability and simplicity as presumptively controlling aspects of social desirability, public interest and good consequences); see also James Barr Ames, Law and Morals, 22 Harv. L. Rev. 97, 110 (1908) (“The law is utilitarian. It exists for the realization of the
and practice nor by what people might "feel" to be "just." Yet when
the formalists’ procedures seemed to fail, and the conceptually-
indicated result was simply intolerable, they were quite willing to
solve the problem through the invention of “legal fictions.” These
men believed that, in doing law as they did, they were engaged in a
“science” of “facts,” and that, notwithstanding the conceptual nature
of the relevant “facts,” their work and their results had nothing to do
with theories or philosophies of law. Thus Joseph Beale could argue,
in 1935, that:

They reckon falsely who think of the author as an exponent of a
school of legal philosophy. Philosopher he is none; nor need he
apologize for this fact in a book written for lawyers. One deals in
facts only. One studies decisions, which are facts of our law, and
the inferences from these, which after forty years of study and
teaching seem to be necessary. At the same time, formalists were deeply concerned to establish the
law’s place within the university and their claim of “science” was
routinely put to that purpose. The academic formalists were strongly predisposed in favor of
“private” common law (the court-made law of, e.g., property,
contracts, and tort) and against public and statutory law. If they had
a “science,” it was a science of the common law. Their commitment
reasonable needs of the community. In context, this statement does not express a
general commitment to consequences and the changing needs of society.”); James
Barr Ames, The Vocation of a Law Professor, 48 Am. L. Reg. 129 (1900) (asserting that
law should promote “the legitimate needs and purposes of men,” which refers to
their private purposes and not to such public purposes as might be expressed
through law); Williston, Teachers of Law (1929), supra note 12 (claiming that stability
and simplicity are vital to the public interest and as properly controlling until
offsetting disadvantages are clearly greater).

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

(1887) (“Law is a science... and all the available materials are contained in printed
books.”); James Barr Ames, The Vocation of a Law Professor, 48 Am. L. Reg. 129, 130
(1900) (reflecting on the “steadily growing conviction, in this country, that law is a
science, and as such, can best be taught by the law faculty of a university”); Williston,
Teachers of Law (1929), supra note 12, at 112-23 (explaining the “scientific” study
of law); Joseph H. Beale, Preface to A Treatise on the Conflict of Laws, xiii-xiv
(1935) (stressing that “one deals in facts only”).

(claiming they are not theorists or philosophers but lawyers, theory has little to say to
practitioners); Williston, Teachers of Law (1929), supra note 12, at 119, 128 (asserting
that law teachers of his generation are pragmatists, see law as a practical profession,
and are distrustful of theory, philosophy, and speculative reasoning).

18. See Christopher C. Langdell, Harvard Celebrations Speeches, 3 Law Q. Rev. 123,
124 (1887) (arguing that law deserves a place in the university because it is a science
and because it is best learned not from practice but from books).
to private common law co-existed, perhaps inevitably, with a commitment to the rights of private property, the freedom and sanctity of contract, the priority of private over public interests, and a resistance to legislative reform. For their part, the formalists on the Supreme Court appear to have begun with their commitments to laissez-faire, to the rights of property owners, and, at least occasionally, to the interests of the industries they had served while in private practice. It is from this starting point that they proceed to their views on substantive due process, the contract clause, the unconstitutionality of progressive legislation, and the formalist judicial practices that supported their various commitments.

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

19. See Christopher C. Langdell, A Summary of the Law of Contracts 1-4 (1880) (indicating that performance implies acceptance of an offer); see also Thomas C. Grey, Langdell’s Orthodoxy, 45 U. Pitt. L. Rev. 1, 15 (1983) (indicating that Langdell’s formalist construction of the unilateral contract is demonstrated by his view that an offer was revocable until the performance was fully completed). Therefore, as in the flagpole case, A could offer B one hundred dollars if he will climb to the top of a flagpole, wait until B nears the top, and yell “I revoke,” and in Langdell’s doctrine, A would owe B nothing.

20. See Christopher C. Langdell, A Summary of the Law of Contracts 12-21 (1880) (asserting it to be in the nature of the concept of “consideration” that one is bound as soon as an acceptance letter is mailed); see also Thomas C. Grey, Langdell’s Orthodoxy, 45 U. Pitt. L. Rev. 1 (1983).

21. See Christopher C. Langdell, A Summary of the Law of Contract 240-41 (1880) (explaining that the offer is an element of the contract and that the wills of the contracting parties must concur at the moment of making); see also Robert S. Summers, Instrumentalism and American Legal Theory 11 (1982) (commenting generally that certain facets of the law are characterized as “instrumentalistic and pragmatic”).

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

23. See Joseph Beale, A Treatise on the Conflict of Laws 92-94 (1935) (asserting that domicile had, over 150 years, become a unitary concept).
his inattention to the purposes the law might serve. Among the members on the Court, formalism was manifest in their elaboration and defense of Pennoyer v. Neff, in their opposition to the reversal of Swift v. Tyson in Erie v. Tompkins, and in the positions they took in the debates over substantive due process and the Commerce Clause. Formalism's lasting contributions are the great treatises written by Professor Williston and his colleagues, including the "string cites" found in the footnotes for which they were justly famous, and the Restatements of Law and the Uniform Law

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

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

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

27. In the early twentieth century, numerous Supreme Court decisions held that the Fifth and Fourteenth Amendments protections of "life, liberty or property" unproblematically included the politically conservative laissez-faire concepts of marketplace "liberty" and "freedom of contract." See e.g., Allgeyer v. Louisiana, 165 U.S. 578 (1897) (finding "liberty" includes freedom of contract); Lochner v. New York, 198 U.S. 45 (1905) (invalidating maximum hours law); Coppage v. Kansas, 236 U.S. 1 (1915) (invalidating law forbidding employment contracts that prohibit membership in a union, or "yellow dog" contracts); Adkins v. Children's Hosp., 261 U.S. 321 (1922) (invalidating law setting minimum wages for children). This conceptualist doctrine was challenged in Charles Warren, The New "Liberty" under the Fourteenth Amendment, 39 HARV. L. REV. 431, 433 (1926), and was then abandoned by the Court in Nebbia v. New York, 291 U.S. 502 (1934), which upheld legislation designed to control the price of milk, and in West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937), in which the Court upheld minimum wage laws for women.

C. Legal Realism

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

\(^{30}\) See Walter P. Armstrong, Jr., *A Century of Service: A Centennial History of the National Conference of Commissioners on Uniform State Laws* (1991) (providing a history of the efforts to modify the different legal traditions of the 50 states and discussing Williston’s contributions to the Uniform Law initiatives, including the authorship of the Uniform Sales Act, Uniform Warehouse Receipts Act, Uniform Bills of Lading Act, and Uniform Stock Transfer Act).


\(^{34}\) Cardozo’s major publications include, e.g., *Benjamin N. Cardozo, The Nature of the Judicial Process* (1921); *Benjamin N. Cardozo, The Growth of the Law* (1924); *Benjamin N. Cardozo, Paradoxes of Legal Science* (1928).


41. See W.W. Cook, Scientific Method and the Law, 13 A.B.A. 303 (1927); Thurman Arnold, The Symbols of Government (1935); Thurman Arnold, The Folklore of
may be understood as a part of the political opposition to the static and politically conservative jurisprudence of turn-of-the-century formalism, as a part of the early twentieth-century “revolt against formalism” that manifested itself in a wide range of disciplines, as incorporating into the law the insights and instincts of American philosophical pragmatism, and as an attempt to bring to bear on the law a wide range of social sciences including, among other disciplines, sociology and psychoanalysis. Its lineal descendants include contemporary proponents of “law and social science,” “law and economics,” and “critical legal theory.”

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


42. See Morton White, Social Thought in America: The Revolt against Formalism 11-31 (1947); Robert S. Summers, Instrumentalism and American Legal Theory 33 (1982) (noting that pragmatists were antiformalistic).


45. See John Dewey, Logical Method and Law, 10 Cornell L.Q. 17, 23 (1925) ("[M]en do not begin thinking with premises"); Jerome Frank, Law and the
concerning the indeterminacy of legal texts, a critique of the public-private distinction; a critique of the consent-coercion distinction as found in the law of contract; and a critique of the supposed determinacy of the legislative histories. Together, these skepticisms contribute to sustained critiques both of claims concerning the separation of law from politics and of claims for that strong version of the rule of law in which we are said to be governed not by men but by laws.

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

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


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

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


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


54. See id. at 439.

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

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

56. See Oliver Wendell Holmes, The Path of the Law, 10 Harv. L. Rev. 457 (1897); Underhill Moore & Gilbert Sussman, The Lawyer's Law, 41 Yale L.J. 566 (1932); Lee Loewinger, Jurimetrics: The Next Step Forward, 33 Minn. L Rev. 455 (1949).
59. See Oliver W. Holmes, The Common Law 5 (1881) (asserting that law evolves in accordance with the felt necessities of the time).
60. See John Henry Schlegel, American Legal Realism and Empirical Social Science (1995); Alan Hunt, The Sociological Movement in Law (1978); Huntington Cairns, Law and the Social Sciences (1935) (observing the connection between sociology and the law, and how realists such as Holmes used sociological methods such as statistics in analyzing the law).
61. See Benjamin Cardozo, The Nature of the Judicial Process 167-77 (1921) (discussing the discovery of the subconscious judicial mind); Jerome N. Frank, Law and the Modern Mind (1930) (psychoanalysis); Thurman Arnold, The Symbols of Government (1935) (economics); Thurman Arnold, The Folklore of Capitalism (1937) (economics); Karl N. Llewellyn & E. Adamson Hoebel, The Cheyenne Way (1941) (providing an example of anthropological studies); Harold Laswell, Power and Personality 94-107 (1948) (psychoanalysis); Harold Laswell, Psychopathology and Politics (1930) (psychoanalysis).
63. See Benjamin Cardozo, The Nature of the Judicial Process 112 (1921) (noting that comparative importance or value of social interests are considered in shaping the law); Roscoe Pound, The Theory of Social Interests (1921), published as A Survey of Social Interests, 57 Harv. L. Rev. 1, 39 (1943) (recognizing the law's attempt to harmonize and balance competing interests); Harlan Fiske Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 10 (1936) (noting that "resourcefulness and insight with which judges and lawyers weigh competing demands of social advantage... in determining whether precedents shall be extended or restricted, chiefly give the measure of the vitality of the common law system and its capacity for growth"). See generally T. Alexander Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 948-72 (1987) (providing a history of balancing interests in the law).
general project of statutory reform. And finally, the legal realists may be understood in terms of their commitments to progressive legislation, to the work of the New Deal, and to the removal of the judicial and constitutional impediments to those political projects.

D. The Legal Process School

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

64. See generally, e.g., William O. Douglas, Go East, Young Man (1974); Peter H. Irons, The New Deal Lawyers (1982).


Frankfurter, by the political writings of Walter Lippman, and, near the mid-point of its development, by Learned Hand’s reservations about the legitimacy of judicial review. Early members of the legal process school included Henry M. Hart, Albert Sacks, Herbert Wechsler, Alexander Bickel, Gerald Gunther, Harry Wellington, and others.

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

See Walter Lippman, Inquiring into the Principles of the Good Society (1937); Walter Lippmann, The Public Philosophy (1955); see also Ronald Steel, Walter Lippman and the American Century (1980).


Sack’s writings include Albert Sacks, Foreword to The Supreme Court, 1953 Term, 68 Harv. L. Rev. 96 (1954); Hart & Sacks, The Legal Process (1958), supra note 65.


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

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Philip Kurland, and a handful of others, as well as, some years later, Antonin Scalia. All members of the original group were closely associated with Felix Frankfurter or Henry Hart, Harvard Law School, and the Harvard Law Review. The lasting contribution of
the legal process school, and the area of its greatest interest, involved
the theorizing of judicial review and numerous related
developments in constitutional and administrative law, as well as

Presidents) and either served as a junior co-author with Frankfurter before he was
appointed to the Court (Hart) or clerked for him after his appointment (Sacks,
Bickel, Wellington, and Kurland). A sixth (Gunther) graduated from the Harvard
Law School, served on the Law Review, but did not clerk for Frankfurter. Only the
seventh (Wechsler) neither went to Harvard, served on the Harvard faculty. It is not until the mid-sixties,
when legal process was less of a movement than simply a style of thought, that John
Hart Ely finally broke the mold. He did not attend Harvard, did not serve on the
Harvard Law Review, did not clerk for Frankfurter, and did not teach at Harvard.
Rather, he graduated from Yale—where he studied under Bickel and Wellington.

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

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

82. See FELIX FRANKFURTER & JAMES FORRESTER DAVISON, CASES AND MATERIALS ON
ADMINISTRATIVE LAW (1932); Felix Frankfurter, The Task of Administrative Law, 75 U.
Pa. L. Rev. 614 (1927); James M. Landis, The Administrative Process (1936); Louis
L. Jaffe & Nathaniel L. Nathanson, Administrative Law: Cases and Materials (1953);
JAMES M. LANDIS, REPORT ON THE REGULATORY AGENCIES TO THE PRESIDENT ELECT (1960);
Louis L. Jaffe, James Landis and the Administrative Process, 78 Harv. L.
Rev. 319 (1964); Philip Elman, Rulemaking Procedures in the FTC's Enforcement of the
Mergers Act, 78 Harv. L. Rev. 385 (1964); ARTHUR E. BONFIELD, STATE ADMINISTRATIVE
This school of thought reflects both a powerful reaction against the deeper skepticisms of legal realism and a deep concern for the life—literally the survival—of our institutions. Witnesses and participants in America’s mid-century battles first with fascism and then with communism, members of this group hold a distinctive belief in the fragility of democratic institutions and what I would call the thinness of the tissue of civility. Accordingly, they exhibit an urgent faith in


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


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

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

According to Beale, “At the end of this passage the Justice could not contain himself. ‘That’s the point,’ he kept whispering to us in the dark, ‘that’s it, that’s it!’” A Man for All Seasons, in FELIX FRANKFURTER: A TRIBUTE (Wallace Mendelson ed., 1964).

Although I claim no special expertise on the subject of Thomas More, my reading of his Utopia (1516) suggests to me that his faith in humanity, in humanity’s capacity for reason, was so great as to suggest he might not be among those who have thought the “tissue of civility” to be thin. Frankfurter, as well as those who followed him, also made a more specific point concerning the fragility of the courts’ authority. See Baker v. Carr, 369 U.S. 186 (1962) (Frankfurter, J., dissenting).

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

The Law is that which puts a difference betwixt Good and Evil, betwixt Just and Unjust; if you take away the Law, all things will fall into Confusion; every Man will become a Law to himself, which in the depraved condition of Human Nature, must needs produce great enormities; Lust will become a Law, and Envy will become a Law, Covetous and Ambition will become Laws . . . . Today’s “Levelers,” [continues Kurland,] would not understand this teaching . . . any more than they find Frankfurter’s teachings acceptable.
reason, objectivity, deliberation, the possibility of consensus, and the strong version of the rule of law. These—especially the rule of law—are, in the view of this community, the qualities that separate democracies from their totalitarian enemies and the faith by which our civility will be assured. Under the historical circumstances, these concerns and predispositions seem both reasonable and warranted.

In their commitment to the strong version of the rule of law, the legal process school envisions a society governed by laws not men, in which judicial decisions do not depend on the personal or political preferences of judges, and in which law is clearly separate from politics. Insofar as this vision can be sustained, the ideal of the
and in that sense, so far as possible, “impersonal”); BICKEL, LEAST DANGEROUS BRANCH (1962), supra note 73 (arguing that principled decision-making and maturation of collective judgment actually happen on courts); see also supra note 78 (noting Justice Scalia’s expressed commitments to “plain meaning” and “a law of rules,” and his distrust of judicial balancing and of reliance on legislative history).

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

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


92. Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 HARV. L. REV. 353 (1959); BICKEL, LEAST DANGEROUS BRANCH (1962), supra note 73, at 49-65, 73-84; ROBERT H. BORK, NEUTRAL PRINCIPLES AND SOME FIRST AMENDMENT PROBLEMS, 47 IND. L.J. 1 (1971). A commitment to “principles” is one of the points of overlap between the legal process school and what I shall describe as the legal positivist/analytic tradition. See RONALD DWORKIN, HARD CASES, in TAKING RIGHTS SERIOUSLY 81, 82 (1977) (arguing that courts should rely on principles not policies); WILLIAM N. ESKRIDGE & PHILIP P. FRICKEY, AN HISTORICAL AND CRITICAL INTRODUCTION TO THE LEGAL PROCESS, in HART & SACKS, THE
text, from the “hard facts” of constitutional design and institutional competence, from the presumed neutrality of procedural or process-based solutions, or from the presence or absence of a shared

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


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

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

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

95. Members of this community exhibit a strong interest in the correct design of institutions as inherently good, as important to the smooth working of government, as a factor contributing to the legitimacy and stability of the law in general and of our various particular institutions, and as a corollary to the principle of institutional settlement. See HART & SACKS, THE LEGAL PROCESS (1958), supra note 65, at 6 (asserting that the “second corollary” to the “principle of institutional settlement” is
The duty to attend "to the constant improvement of all of [our] procedures"; William N. Eskridge & Philip P. Frickey, An Historical and Critical Introduction to the Legal Process, in Hart & Sacks, THE LEGAL PROCESS (1958), supra note 65, at xcv-xcvr. Many of them seem also to have shared Professor Hart's view that "the first recourse of law, in dealing with intractable questions, is to seek not final answers but an agreeable procedure for getting acceptable answers" at least in part because "people are bound to disagree... about the substance of the answers." Henry M. Hart, "Note on Some Essentials of a Working Theory of Law" (ca 1950), Hart Papers, Box 17, Folder 1 (on file with the Harvard University Law Library).

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

Professor Bickel's argument concerning the passive virtues is a fairly straightforward extension of two arguments that Justice Frankfurter had long been making concerning the numerous rules by which, in his view, the Court ought to avoid constitutional questions whenever possible and concerning the prudential importance of the Court's steering clear of the political thicket. See United States v. Lovett, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring) (arguing that because
for which there is no general social consensus, both because such
impositions are illegitimate and because they may undermine
people's faith in the courts and in the rule of law. The legal process
school's commitment to neutral principles strongly predisposes it to
applications of the "gored ox test" to hypothetical extensions of an
argumentative position. Members of this community will criticize

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

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

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

Many who are not members of the legal process community find this form of
argument far less compelling than do those who are, and proponents of
contemporary critical theory are likely to be totally unpersuaded. From their
perspective, all legal principles are ineradically unstable, and none can be neutral.
See, e.g. Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L.
REV. 1685, 1687-1713 (1976) (criticizing the notion that rules and standards can be
applied in isolation from the substantive issue to which they purport to respond); Duncan Kennedy, The Structure of Blackstone’s Commentaries, 28 BUFF. L. REV. 209
(1979) (discussing altruism versus individualism); Gerald Frug, The Ideology of
judicial activism;99 judicial discretion, unconfined judicial balancing, and slippery slopes;100 unreasoned per curium decisions;101 and all other such “unprincipled” resolutions. Also among their rhetorical

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


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

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

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

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


104. Hart and Sacks write that:

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

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

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

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

[T]he judgments of this Court are collective judgments. Such judgments presuppose ample time and freshness of mind for private study and reflection in preparation for discussions in Conference. Without adequate
that through correct institutional design and the process of collective deliberation, sometimes led by the Supreme Court, we can find and agree upon the right answers to even the hardest questions of public policy and law, even on such difficult matters as race. This group is also distinguished by its concern for the fragility of democratic institutions and for the authority of the Court; its commitment to civility; and its opposition to the skepticism—they would call it “nihilism”—of the legal realists. Such skepticism is, to them, empirically unwarranted. Further, such talk is both dangerous and destructive insofar as it may undermine the public’s faith in reason and the rule of law and, if judges take it to heart, be an evil and self-fulfilling prophecy.

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

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

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

107. See Henry M. Hart, The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959) (asserting the maturing of collective thought); Erwin Griswold, The Supreme Court, 1959—Forward: Of Time and Attitudes—Professor Hart and Judge Arnold, 74 Harv. L. Rev. 81, 94 (1960); Herbert Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1 (1959); Bickel, Least Dangerous Branch (1962), supra note 73, at 23-29, 80-84, 111-96, 200-08, 235-43, 244-54 (asserting that “the maturing of collective thought” actually happens and that “reason” works and explaining the role of the Court and of principled decision-making in leading opinion toward eventual consensus); see also Walter Lippman, The Public Philosophy 40 (1955) (asserting that “the public interest may be presumed to be what man would choose if they saw clearly, thought rationally, acted disinterestedly and benevolently.”).

108. See Bickel, Least Dangerous Branch (1962), supra note 73, at 108.
While most of these men view themselves as political liberals, their time, place, and emotional and intellectual commitments all cast them as the defenders of existing institutions during the disturbances of the 1960s. At the time of the violence at Kent State, they stood on the inside of the barricades—and it is my experience that one cannot overstate the importance of this passionate standoff in the lives of these people. Across those barricades were the forces of darkness: those who spoke against the possibility of neutrality, objectivity, reason, and the rule of law; those who spoke against the settled expertise of the Cold War generation and who shouted down speakers; those who broke the laws, sometimes committed violence, and paid no heed to the principle of institutional settlement; those who rejected the claim that the existing order was fair and legitimate; and those who violated the fundamental rules of civility. The dis-ease of the legal process school, both with these events and with certain of the skepticisms associated with legal realism, reflect, at least in part, their deeply felt belief that their adversaries were undermining the people’s faith in reason and the rule of law, which faith was essential to the preservation of our fragile institutions; that those adversaries promoted cynicism; and that to promote cynicism was to put democracy at risk. If, as these “nihilists” saw it, reason were inherently infused with politics and power, then the strong version of the rule of law must fail, and the separation of law from politics is impossible. To the members of this community, such a result would be wholly intolerable.

E. Law and Economics

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

109. See, e.g., discussion supra note 85 (concerning Kurland’s discussion of these matters in Philip B. Kurland, Mr. Justice Frankfurter and the Constitution (1971).  
110. BICKEL, LEAST DANGEROUS BRANCH (1962), supra note 73, 81-84 (attacking “neo-realists” and “nihilists,” in the person of Thurman Arnold, for their “cynicism” and for “propagating a self-validating picture of reality”); Paul D. Carrington, Of Law and the River, 34 J. LEGAL ED. 222 (1984) (“A lawyer who succumbs to legal nihilism faces a far greater danger than mere professional incompetence. He must contemplate the dreadful reality of government by cunning and a society in which only right is might. Such a fright can sustain belief in many that law is at least possible and must matter.”); Owen Fiss, The Death of Law?, 72 CORNELL L. REV. 1 (1986).  
regulation, and major portions of corporate law. In a great many other areas of the law, including property, contract, torts, and environmental law, law and economics is a serious and important


117. See Ronald H. Coase, The Problem of Social Cost, 3 J.L. & Econ. 1 (1960) (discussing social costs of firms’ actions that harm the environment); Harold Demsetz, The Exchange and Enforcement of Property Rights, 7 J.L. & Econ. 11 (1964) (discussing costs imposed on traders and owners by exchange of goods and maintenance of control over use of goods); Orris C. Herfindahl & Allen V. Kneese, Quality of the Environment: An Economic Approach to Some Problems in Using Land, Water and Air (1965) (applying economic reasoning to problem of natural resource deterioration); Garrett Hardin, The Tragedy of the Commons, 162 Science 1243 (1968) (discussing inherent problems of policy of laissez-faire in reproduction); Bruce A. Ackerman et al., The Uncertain Search for Environmental Quality 1-6 (1974) (discussing contributions of nature, science, economics, politics, law and philosophy to formulation of public policy); Economics of the Environment: Selected Readings (Robert Dorfman & Nancy S. Dorfman eds., 2d ed. 1977) (providing a collection of essays addressing economic concerns that measures taken to protect environment are efficient); Tom Teitenberg, Environmental and Natural Resources Economics (2d ed. 1988); A. Myrick Freeman, III, The
contender for dominance. It has even laid an intelligible, if not necessarily persuasive, claim to providing a general theory, perhaps the general theory, of law. 118

Practitioners of law and economics include Robert Bork, Richard Posner, Frank Easterbrook and Guido Calabresi, all of whom had distinguished academic careers before being appointed to the U.S. Court of Appeals, as well as countless others. 121 The work that


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

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

124. See Cesare Bone Sana Beccaria, On Crimes and Punishments (1764) (discussing crime and punishment in terms of their social utility).
131. See, e.g., Susan Rose-Ackerman, Inalienability and the Theory of Property Rights, 85 Colum. L. Rev. 931 (1985); Susan Rose-Ackerman, Progressive Law and Economics—
progressive in its politics and less reductionist in its economics than its Chicago school counterparts. Apart from this division between the Chicago and the Not-Chicago schools, analysts have also divided the domain of law and economics between the “normative” and the “positive” (or descriptive) use of economics, and between the “politically conservative” and the “politically liberal” use of economic analysis.

For my money (as some might say), it is far more useful to distinguish between a “strong” and a “weak” version of law and economics. According to the strong version, justice is, and only is, the maximization of aggregate wealth and the promotion of allocative efficiency. This is a form of utilitarianism marked by its commitment not to the maximization of aggregate utility or happiness but to the maximization of aggregate wealth. Aggregate wealth and
allocative efficiency are, in turn, understood to be those things that are naturally maximized by a freely operating perfect market.\footnote{This proposition is given the status of an economic fact. See Posner, Economic Analysis (5th ed. 1998), supra note 118, at 11-12; Robert S. Pindyck & Daniel L. Rubinfeld, Microeconomics 6, 585-88 (2d ed. 1992). Once this is taken to be the case, aggregate wealth is neither the total sum of a society's money, as explained in Posner's Economic Analysis, supra note 118, nor the sum of the market value of all its assets. At this stage, I know of no better definition of aggregate wealth than this: that sum of those values that is maximized by a freely operating perfect market. As a technical matter, this definition is not circular. But it does suggest that, once we embraced as our objective the maximization of aggregate wealth, neither our preference for freely operating perfect market nor our distrust of state interference in the market require any further explanation.}

Then, if this is the meaning of justice, the purposes of law are: (1) to maximize the market's domain;\footnote{Posner urges us to maximize the market's domain when he argues that (1) everything, or at least everything of value, should be held as private property or, at the very least, managed as if it were private property; (2) everything should be transferable in voluntary and priced transactions; and (3) there should be strong incentives through the law of crimes and intentional torts to deter behavior that unnecessarily evades the market in favor of coerced transactions. See Posner, Economic Analysis (5th ed. 1998), supra note 118, at 36, 43-54, 61-72, 126, 224-29, 237-42.} (2) to facilitate the market's operation through, for instance, the minimization of transaction costs;\footnote{See id. at 101-08 (contract law); id. at 122-26 (minimization of transaction costs and optimization of administrative costs through prohibition of fraud).} (3) to correct the market's imperfections, whether they involve externalities, public goods, free riders, or certain forms of rent-seeking;\footnote{See generally George J. Stigler, The Citizen and the State: Essays on Regulation (1975); George J. Stigler, The Theory of Economic Regulation, 2 Bell. J. Econ. & Mgmt. Sci. 3 (1971).} and (4) where for instance there can be no market, as in the case of accidents, to do what the market would have done.\footnote{See Ronald H. Coase, The Problem of Social Cost, 3 J. L. & Econ. 1 (1960). Coase argues that, at least where transaction costs are very low, the market will efficiently allocate rights and entitlements, and the law need not be concerned with their allocation. Thus, Posner explains that where "the cost of voluntary transactions is low, common law doctrines create incentives for people to channel their transactions through the market." Posner, Economic Analysis (5th ed. 1998), supra note 118, at 277. It is only when "the cost of allocating resources by voluntary transactions is prohibitively high, making the market an infeasible method of allocating resources," that the common law must step in and "price[] behavior in such a way as to mimic the market." Id. Among the circumstances in which transaction costs are high, at least for Posner, are those he describes as "bilateral monopolies." See id. at 274.} Beyond these four purposes, there is an affirmative, efficiency-based
case against state action or legal intervention. Indeed, according to the Coase Theorem, except where transaction costs are relatively high, the law need not and ought not be concerned with the setting of rights and entitlements. Then when those costs are high, the law ought to allocate rights and entitlements so as to maximize aggregate wealth, which is, of course, what the market itself would have done in the absence of those transaction costs. Further in the same vein, proponents of the strong version of law and economics believe that the law need not be concerned with the mere transfer of wealth, except when such transfers have an adverse effect on allocative efficiency and aggregate wealth. Thus monopoly is a problem not because the taking—or, more neutrally, the transfer—of monopoly profits may be wrong in the way that theft is wrong, but because the monopolist will raise prices and restrict output. Insofar as these price and output levels differ from what would have been set by a freely operating perfect market, “too little” of the monopolist’s product is produced, resources are in that way “misallocated,” and aggregate wealth is reduced.

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

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

143. Robert H. Bork, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 100-01 (1978) (explaining and defending the monopolist will charge a higher price and produce “fewer widgets” than would have been produced if the industry were competitive). This “restriction of output . . . creates a misallocation of resources and thereby makes society poorer. The evil of monopoly . . . is not higher prices or smaller production (though these are its concomitants) but misallocated resources, or allocation inefficiency.” Id. Bork also acknowledges that “[t]hose who continue to buy after a
The strong version of law and economics is a theory of justice and law in which rights exist, and ought to exist, only insofar as they contribute to the maximization of aggregate wealth, and in which a person’s value and moral worth exist in and only in the degree to which that person is willing and able to pay. Accordingly, it is a theory of justice and law that embodies, reflects, and reproduces the existing distribution of wealth. Proponents of the strong version may also believe that economics explains everything and that, because allocative efficiency is our objective and markets are self-correcting, private economic power is not nearly so serious a problem as is government interference in the market. They are likely to believe that state action must either promote allocative efficiency or monopoly is formed pay more for the same output, and that shifts income from them to the monopoly and its owners...." Id. But he is absolutely clear that such "income distribution effects of economic activity should be completely excluded from the determination of the antitrust legality of the activity" because "the shift in income distribution does not lessen total wealth." See id.; see also Richard A. Posner, Antitrust Law: An Economic Perspective 8-11 (arguing that the taking of monopoly profits is itself objectionable and in so doing, they take a position more consonant with the weak version of law and economics than with the strong); Robert H. Lande, Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged, 34 Hastings L.J. 65, 72-74 (1982); Gerald B. Wetlaufer, Reconstructing the Sherman Act: Law, Economics, and the Ethics of Industry and Restraint (unpublished manuscript, on file with author).

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

145. The economic model:

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

Gary S. Becker, The Economic Approach to Human Behavior 8 (1976). See also Gary S. Becker, Elizabeth M. Landes & Robert T. Michael, An Economic Analysis of Marital Stability, 85 J. Polit. Econ. 1141 (1977); Posner, Economic Analysis (5th ed. 1998), supra 118, at 155-56 (explaining the institution of the family in terms of "economies of scale" and its facilitation of "the division of labor, yielding gains from specialization"); id. at 158 ("The pleasure we get from our children's presence is the result of 'consuming' the intangible 'services' that they render us.")

redistribute wealth,\textsuperscript{147} and that all such redistribution is presumed to diminish aggregate wealth,\textsuperscript{148} to result from the self-interested (rent-seeking) behavior of those who are its beneficiaries,\textsuperscript{149} and to be illegitimate\textsuperscript{150} and either ineffective or counterproductive.\textsuperscript{151} And they may well hold the views that a society’s practices and institutions will persist only insofar as they are efficient\textsuperscript{152} and that the common law, properly understood, has always been about the maximization of aggregate wealth.\textsuperscript{153}

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


\textsuperscript{148}See Posner, Economic Analysis (5th ed., 1998), supra note 118, at 7, 302-03 (asserting that the argument is not that redistribution, as such, causes a diminution in aggregate wealth, but rather, it is understood, standing alone, to have no such effect); see also Robert H. Bork, The Antitrust Paradox: A Policy at War with Itself 110-12 (1978) (expressing indifference to transfer of monopoly profits); id. at 72-89 (expressing indifference to harm that one competitor might do another); Herbert Hovenkamp, Economics and Federal Antitrust Law 48 (1985) (explaining that economic measures of efficiency are “indifferent to how resources are distributed in society”).

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


\textsuperscript{150}See Posner, Economic Analysis (4th ed., 1992), supra note 118, at 503 (“Involuntary [state-sponsored] redistribution is a coerced transfer not justified by high market-transaction costs; it is, in efficiency terms, a form of theft.”)

\textsuperscript{151}See Posner, Economic Analysis (5th ed., 1998), supra note 118, at 361-63 (arguing that minimum wage laws are counterproductive); id. at 514-18 (same regarding housing codes); see also Edgar O. Olsen, An Econometric Analysis of Rent Control, 80 J. Pol. Econ. 1081 (1972) (same regarding rent control); Milton Friedman, Capitalism and Freedom 180-81 (1962) (same regarding minimum wage laws); see also Albert O. Hirschman, The Rhetoric of Reaction: Perversity, Futility, Jeopardy (1991).

\textsuperscript{152}See Posner, Economic Analysis (5th ed., 1998), supra note 118, at 155 (“The persistence of the family as a social institution suggests . . . that the institution must have important economizing properties.”).

\textsuperscript{153}See id. at 29-268 and especially at 251-68; Herbert Hovenkamp, The Economics of Legal History, 67 Minn. L. Rev. 645, 647-70 (1983).
ideas that the only legitimate purpose of law and other forms of state action is expanding, facilitating, fixing, and mimicking the market; that state action is inherently a problem; that institutions persist only if they are efficient; and that the purpose of the common law is, and always has been, the maximization of aggregate wealth. Proponents of the weak version are likely to believe that people have rights over and above those that may be warranted by efficiency.\textsuperscript{154} They are also likely to believe that the law may properly serve social needs or interests other than efficiency and the vindication of rights,\textsuperscript{155} or that it may properly prohibit bad conduct.\textsuperscript{156} Finally, despite their reservations about certain “applications” of economics to law, proponents of the weak version will find numerous ways in which economic analysis may be useful in understanding or applying the law.\textsuperscript{157} While these applications would not distinguish for us between what is right and what is wrong, they might tell us whether or not there exists some legally significant economic predicate (e.g., monopoly power or lessening of competition); help us to identify the most cost-effective way of accomplishing some goal, whether it be minimizing criminal behavior, regulating natural monopolies, or protecting the environment; or permit us to assess the economic consequences, including for instance the economic injury, arising from some conduct or act.

F. The Legal Positivist/Analytic Tradition

The legal positivist/analytic tradition is less a single school of thought than a continuous intellectual tradition that probably begins with Thomas Hobbes\textsuperscript{158} and that includes Jeremy Bentham,\textsuperscript{159} John


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

\textsuperscript{157} See Tom Teitenberg, ENVIRONMENTAL AND NATURAL RESOURCE ECONOMICS (1984).

\textsuperscript{158} See Thomas Hobbes, LEVIATHAN (1651).

\textsuperscript{159} See Jeremy Bentham, A Fragment on Government: The Limits of
Austin, H.L.A. Hart, Ronald Dworkin, Joseph Raz, Ernest Weinrib, Jeremy Waldron, and others. The tradition is largely

Jurisprudence Determined (1832).
British, or at least Anglocentric. As such, it is distinguished by its associations with the universities at Oxford and Cambridge, and with the last three centuries of British political theory—including its commitments to positivism, utilitarianism, and classical liberalism. It is similarly distinguished by its strong connections with twentieth-century British philosophy, a discipline that includes the analytic philosophy of Bertrand Russell, G.E. Moore, Gilbert Ryle, and J.L. Austin and that, in Britain, has often been taken to be both the “master discipline” and the crown jewel of the academy. Finally, it is marked as an essentially British intellectual tradition by its resistance to the claims of legal realism and its open hostility to


167. If we accept the main line of British political theory to include, among many others, Thomas Hobbes, John Locke, Jeremy Bentham, James and John Stuart Mill, and John Rawls, we then have a tradition that is inseparable from the positivist/analytic tradition in law. Hobbes and Bentham were themselves the most prominent early legal positivists. John Austin’s primary intellectual relationships were with Bentham and the Mills, and, among his predecessors, with Hobbes and Locke. See e.g., John Austin, The Province of Jurisprudence Determined (1832); Morrison, John Austin 34-60 (1982) (discussing John Austin’s relationship with Bentham and James and John Mill); Ronald Dworkin, Taking Rights Seriously (1977) (stating ruling theory is composed of positivism and utilitarianism which is derived from philosophy of Jeremy Bentham); H.L.A. Hart, The Concept of Law (1961) (referring to intellectual similarities between John Austin and Jeremy Bentham and John and James Mill); H.L.A. Hart, Law, Liberty and Morality (1963).


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

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


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

The heirs to this tradition have a distinctive understanding of law as a discipline and, more specifically, the boundaries and affiliations that are appropriate to the discipline of law. For this group, the discipline of law is defined narrowly so as to be distinctly separated from, for instance, the study of sociology, psychology, economics, virtually all forms of empiricism, and even attention to what judges actually do.\textsuperscript{174} At the same time, through its close affiliation with British philosophy, this school of legal theory gets its commitments to analysis and clarification through the meaning of words,\textsuperscript{175} to its particular form of “conceptual” analysis,\textsuperscript{176} “integrity,”,\textsuperscript{177} “fit,”,\textsuperscript{178} “immanent rationality”\textsuperscript{180} and “intrinsic ordering,”\textsuperscript{181} and to the view that language is largely determinate.\textsuperscript{182}
Also through that affiliation, they acquire their distinctively Aristotelian commitments to corrective and distributive justice\(^\text{183}\) and to “practical reason,”\(^\text{184}\) to the appropriateness of reasoning about some thing (e.g., human beings, tort law) from that which is either essential or distinctive to that thing,\(^\text{185}\) and to the idea that things like tort law might have yearnings or aspirations toward particular ideals.\(^\text{186}\) Members of this community are inclined toward the beliefs that moral knowledge is available, that such knowledge is unrelated to our religious traditions, and that it is to be found instead in the last two hundred years of British philosophy and political theory and in those other texts (e.g., Aristotle and occasionally Kant) that have been accepted into the canon of modern British philosophy.\(^\text{187}\) This, in turn, is the source of their persistent flirtation with what is called “moral realism.”\(^\text{188}\)

Many of the modern heirs to this tradition seem predisposed, at least to this outsider and at least as a relative matter, to see existing hierarchies as both steep and legitimate, whether those hierarchies be social, cultural, intellectual, or judicial.\(^\text{189}\) They sometimes exhibit what, to an outsider, seems to be an unexplained confidence in the wisdom, sufficiency, and superiority of the institutions, traditions, and
philosophy of Anglo-America and in the idea that the day-to-day behavior of judges is in actual fact guided by the law, and not personal preference, in exactly the way the judges say it is. They often make and accept arguments from the presumed propriety of existing arrangements and from the felt legitimacy of the system and the felt duty to obey the law. They are inclined to see their own work as the whole of jurisprudence and to dismiss those outside their community for having “gotten it wrong,” by which they usually refer to some supposed linguistic, conceptual, or philosophical error. Having said all that, their faith in the rule of law, however great, expresses a commitment to liberal legalism that is distinguishable only in degree from the commitment to liberal legalism that almost all of us share.

G. Contemporary Critical Theory

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


Mensch,¹⁹ Karl Klare,²⁰⁰ and Peter Gabel,²⁰¹ of Martha Minow,²⁰²


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


205. Bell’s works include, e.g., Derek Bell, Shades of Brown (1980); Derek Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987); Derek Bell, Race, Racism, and American Law (3d ed. 1992); Derek Bell, Faces at the Bottom of the Well: The Permanence of Racism (1992); Derek Bell, Confronting Authority: Reflections of an Ardent Protestor (1994); Derek Bell, Constitutional Conflicts (1997); Derek Bell, Gospel Choirs: Psalms of Survival for an Alien Land Called Home (1996).


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


212. See MacKinnon, Feminism Unmodified (1987), supra note 203, at 169, 202 (law is unfair to women); Williams, Alchemy (1991), supra note 207; Derrick A. Bell, Jr., Faces at the Bottom of the Well: The Permanence of Racism (1992) (racism is inescapable); Derrick A. Bell, Jr., Racial Realism, 24 Cornell L. Rev. 363 (1992) (racial equality is unattainable); Derrick A. Bell, Jr., Race, Racism, and American Law (3d ed. 1992).

213. See MacKinnon, Feminism Unmodified (1987), supra note 203; Kimberle Williams Crenshaw, Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 Harv. L. Rev. 1331 (1991); Williams, Alchemy (1991), supra note 207. It is important to note that many within this community understand the mechanisms of power and of domination and submission in a way that is infinitely closer to Gramsci, de Beauvoir and Foucault’s understandings of these matters than, say, to Locke’s. Catharine MacKinnon, for instance, offers feminism as a theory of power and of the coherence, rationality, and pervasiveness of unjust domination. But she also sees power and domination as largely extra-legal constructs, domination, and submission as reciprocal relations, and sexuality as whatever is constructed as erotic as well as a principle mechanism for the objectification, control and domination of women. See MacKinnon, Feminism Unmodified (1987), supra note 203; see also Gordon, New Developments (1982), supra note 197; Duncan Kennedy, The Role of Law in Economic Thought: Essays on the Fetishism of Commodities, 34 Am. U. L. Rev. 939, 940 (1985) (arguing that “the totality [of nineteenth-century classical economics and law] functioned ideologically: it operated as a legitimator of oppression”); Duncan Kennedy, The Stakes of Law, or Hale and Foucault, 15 Legal Stud. F. 327 (1991) (noting the relationship between power and knowledge), reprinted in Kennedy, Sexy Dressing, Etc. (1993); Antonio Gramsci,
Although these four beliefs are shared by all members of this community, it must be said that these beliefs are not absolute. Thus, few will argue that the “law is absolutely and in all respects indistinguishable from what we generally recognize as politics.” Instead, the members of this community share a relatively strong belief in the idea that law is politics. In other words, they believe that law is politics in a way that, although not absolute, is consistently and markedly stronger than the corresponding views of their adversaries within the larger legal community.

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


214. See Gordon, New Developments (1982), supra note 197 (asserting the social constructionist position but also that certain “there’s” are really “there”); MacKinnon, Feminism Unmodified (1987), supra note 203 (asserting that domination is socially constructed); Catharine A. MacKinnon, Toward A Feminist Theory of the State (1989); Duncan Kennedy, The Role of Law in Economic Thought: Essays on the Fetishism of Commodities, 34 Am. U. L. Rev. 939 (1985) (on false consciousness, law, and de-reification).


216. See Susan Estrich, Rape, 95 Yale L.J. 1086 (1986) (critiquing claims of objectivity, asserting that knowledge of facts relevant to the law is perspectival); MacKinnon, Feminism Unmodified (1987), supra note 203, at 50 (critiquing
again, however, when we speak of a commitment to the social constructionist position, we are speaking of a commitment that although not absolute, is still relatively strong. Few, if any, proponents of critical legal theory hold the absolute view that “there is no there there” or that supposedly factual statements may not sometimes be proven wrong. None would linguistically “reconstruct” a “wall” as a “door” and then attempt to walk through that “door.” Nevertheless, real differences on the matter of “social construction,” even if they are only differences in degree, are some of the clearest demarcations between the proponents and the opponents of critical theory.

Proponents of contemporary critical theory can also be understood in terms of their distinctive projects, all of which express their core commitments and their central beliefs. Much of this work seeks to demonstrate the constructedness and the contingency of our settled understandings, including our understandings about the law. Thus, Robert Gordon suggests a “struggle” against “conventional beliefs” by using “the ordinary rational tools of intellectual inquiry to expose belief-structures that claim that things as they are must necessarily be as they are.” The point of this “critical exercise,” he explains, “is to unfreeze the world as it appears to common sense as a bunch of more or less objectively determined social relations and to make it appear as (we believe) it really is: people acting, imagining, rationalizing, justifying.”


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

In all of these ways, proponents of contemporary critical theory seek to demonstrate the constructedness and the contingency of those settled understandings that hold in place, or perhaps that simply are, the existing order. In all these ways, they seek to unmask the operation of power and politics within legal discourse and to expose the existence and operation of illegitimate structures of domination. This first set of projects includes sustained critiques of the distinction between public and private and between consent and coercion, of our conventional understandings of individual rights including rights in property, of the assumption that the market is...
somehow natural and given, of the meaning of equality, and of the meanings of the Constitution. Members of this community critique our understandings of language, knowledge, racial and gender differences, human nature, and even "the self." And they critique claims made in the name of reason, objectivity, nonproblematic foundations, the possibilities of stable meaning, of legal reasoning, and of the rule of law.\textsuperscript{222} Taken together, this is a sustained demonstration that knowledge is perspectival and political, and that law is indeterminate and political. If successful, it is thought to show that many of the claims made on behalf of the existing distribution of power and resources are false, incoherent, inherently contestable, or simply bad faith apologetics.

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

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


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

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

228. Consciousness-raising is named and discussed as a strategy in CATHERINE MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 83-105 (1989), and is found, in practice, across an enormous range of literature. Interrogations of the workings of power in law school include, e.g., Duncan Kennedy, Legal Education as Training for Hierarchy, in THE POLITICS OF LAW (D. Kairys ed., 1982); Gordon, New Developments (1982), supra note 194, at 290. MacKinnon writes that: “What law school does for you is this: it tells you that to become a lawyer means to forget your feelings, forget your community, most of all, if you are a woman, forget your experience. Become a
If this community is held together by a set of common commitments and a linked set of projects, it also marked by a number of important and visible differences, the resolution of which differences may be largely unnecessary. Thus there have been tensions and conflicts between the practitioners and the theorists and between the liberals and the radicals. Some of the work done within this community is devoted to the possibilities of incremental change, while some is committed, instead, to unmasking incrementalism as a strategy doomed to perpetuate existing structures of domination. Some of its work is committed to the construction and vindication of rights, while other such work is no less committed to demonstrating the incoherence and disutility of rights-discourse. Some of this group’s work is done within the domain of legal reasoning, while other such work seeks to prove law’s indeterminacy, the inseparability of law from politics, and thus the bankruptcy of legal reasoning. Equality is sometimes pursued through efforts to end discrimination and eliminate formal inequalities in the ways that people are treated, and it is sometimes pursued through a critique of formal equality and through efforts to promote the politics of identity and the rhetoric of diversity. Empowerment is sometimes sought through demands for the accommodation of differences (e.g., of race or gender) and sometimes by proofs that those differences, or our understandings of those differences, are merely a social construction. Finally, and at the highest level of abstraction, most of the work of this community is done within the master paradigm of liberalism, and within the assumption that we live in a political society comprised of rights-bearing individuals, while some of the work of this community is a full-throated critique of liberalism as a set of beliefs that needlessly privileges separateness, individualism, and disregard for others.

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


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

II. DIMENSIONS OF DIFFERENCE

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

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

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

For her part, Catharine MacKinnon moves easily back and forth between appeals to end such formal inequalities as sexual harassment and the legal subordination of women as women and a devastating critique of the insufficiency and “the substantive misogyny” of liberal neutrality, formal equality and law’s supposed objectivity. See MACKINNON, FEMINISM UNMODIFIED (1987), supra note 203. I don’t think a generous reader will find any incompatibility between these two forms of work, or between these forms of work and Professor Mackinnon’s understandings of power and of law. Nor is Patricia Williams’s “devoutly wishing this to be a colorblind society, in which removing the words ‘black’ and ‘white’ from our vocabulary would render the world, in a miraculous flash, free of all division” and her continuing real-world commitment to the politics of racial identity. See WILLIAMS, ALCHEMY (1991), supra note 207, at 83.
I will take up ten “dimensions of difference” on which one may sort and distinguish these six communities. In the order of their presentation, they are:

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

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

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

Next, we come to the possibility of the rule of law (item 9). Our beliefs in this area may flow fairly directly from our assessment of the
fairness and legitimacy of the existing order, including the existing legal order (item 1), and from beliefs regarding human nature (item 4), the nature and consequences of language (item 5) and, perhaps most importantly, the nature of knowledge and the possibilities of reason and objectivity (item 6).

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

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

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233. See Bickel, Least Dangerous Branch (1962), supra note 73, at 81-82 (attacking “neo-realists” and “nihilists,” such as Thurman Arnold, for their “cynicism” and for “propagating a self-validating picture of reality”).
234. See Paul D. Carrington, Of Law and the River, 34 J. Legal Educ. 222, 227 (1984) (arguing that critical legal studies is nihilism and there is no place for nihilism, or for nihilists, in the legal academy).
on Team Faithful those who have a relatively high degree of faith in the fairness and legitimacy of the existing order (item 1); the possibility that language can hold stable and determinate meaning (item 5); the possibilities of knowledge, reason, and objectivity (item 6); and the possibility they know as "the rule of law" (item 8). In contrast, Team Skeptical holds a relatively low degree of faith in each of these matters. As previously suggested, Team Faithful includes most of the proponents of turn-of-the-century formalism, the legal process school, law and economics, and the legal positivist/analytic tradition. It may also include those legal realists whose faith in the social sciences exceeds their skepticism of formalist logic and the rule of law. For its part, Team Skeptical claims the remainder of the legal realists as well as the proponents of contemporary critical theory.

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

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

A. The Fairness and Legitimacy of the Existing Order

This first dimension of difference involves differing beliefs concerning the fairness and legitimacy of the existing order and of the existing distribution of power and resources within our society. For some, this is a matter of differing beliefs concerning the power,
pervasiveness, and persistence of illegitimate structures of domination (sometimes known by the acronym P.P.I.S.D.) based on race, gender, sexual orientation, class, or wealth. Differences in this dimension may also extend to, or to be correlated with, differences in the degree to which the existing legal order is thought to conform to the strong version of the rule of law. They also extend to differences in the degree to which the law's existing procedures—namely the systems of democratic politics and of civil and criminal justice—are seen as fair and evenhanded.

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

B. Prime Values and Projects

Our six schools of thought also differ with regard to what we might call the “prime values” to which they are devoted. Turn-of-the-century formalists cannot be reasonably understood without reference to their commitments to order and stability; to promoting law's claim to academic status through, for instance, their claim that their work is scientific; to conceptual clarity understood in terms of progressive simplification; and to economic freedom. For their part, the legal realists, at least in the first generation, were devoted to the public interest they saw embedded in progressive legislation and the work of the New Deal, to economic justice, and, perhaps to those ends, to demystifying the work of the courts, to exposing the personal and political judgments embedded in existing law, and to a critique of formalist logic. In their turn, the legal process school pursued, above all else, the legitimacy of judicial and other governmental action, the separation of law from politics, respect for the law and for the possibility of neutral and objective
reason, and the correct design of our legal processes. Law and economics is marked by its commitment to allocative efficiency and the maximization of aggregate wealth, to the work of freely operating perfect markets, and to the belief that government action is justified by the absence of a market or by the presence of some market failure (e.g., public goods, externalities, free riders). The legal positivist/analytic tradition often takes, as its prime values, the legitimacy of judicial behavior and existing institutions, conceptual clarification in the manner of ordinary language philosophy, the separation of law from politics, and the separation of law from religious morality. Finally, contemporary critical theory pursues commitments to its expansive understandings of equality, democracy, and economic justice, to the empowerment of the disempowered, to existential freedom, and, perhaps to those ends, to exposing and deconstructing illegitimate structures of domination and loosening regard for order and stability, faith in the possibility of objective reason, and faith in the authority and legitimacy of the law.

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

C. Centers of Activity and Attention

While the members of our six communities have worked throughout the entire range of the law, each of these communities also has its own distinctive focus, or center of attention, within the law. Such centers of attention may reflect a community’s substantive commitments, as with contemporary critical theory’s commitments to
race, gender, and equality. They may reflect a preoccupation with a particular problem, as in the case of the legal process school’s concern with the legitimacy of judicial review. Or they may arise from an affinity between a community’s particular methods and particular areas of the law, as with the relationship between law and economics and the law of antitrust and economic regulation.

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

D. Human Nature

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

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

2. Pessimism v. optimism

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

3. "Tissue of civility" thin v. thick

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

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

4. The place of reason

As to the place of reason in human nature and human affairs, some—chiefly the members of Team Faithful—either assume that humans always act rationally (law and economics), take reason to be the very essence of human nature (e.g., the Aristotelians of the legal positivist/analytic tradition), or see it as the only road to progress and salvation (legal process). At the same time, others, mostly members of Team Skepticism, see reason as significantly less powerful and less central to man’s life, sometimes as an appealing delusion, and
sometimes as the source of our greatest errors. This second group includes the legal realists, except when they become credulous of the possibilities of social science, and the proponents of contemporary critical theory.

5. Innate nature v. social construction

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

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

However complex might be a map of our differences concerning human nature and the place of reason within that nature, those differences are enormously important. They inform our choice of legal theoretical perspectives and, even if they cannot be resolved, these differences can be identified. Once identified, they can and ought to be made the subject of discussion, argument, and counter-
argument. And it seems clear that time would be better spent trying to understand how to engage in arguments about these differences than in simply holding to our different and unargued positions and shouting our disagreements about the diverse and incompatible implications of those different positions.

E. The Nature and Consequences of Language

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

243. See Stanley Fish, Rhetoric in Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies (1989) (drawing a distinction between Serious Man and Rhetorical Man, which is in turn drawn from Richard Lanham, The Motives of Eloquence (1976)).
distinction drawn in the introduction to this section, Team Serious is closely affiliated with the Alliance of the Faithful and Team Rhetoric, with the League of Skeptics.

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

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

Although many people hold to relatively moderate positions along the continuum between Team Serious and Team Rhetoric, the differences even between these moderate positions are serious and sometimes intractable. Take, as an example, the word “rhetoric.” To Team Serious, the word is always prefaced by “mere,” express or implied, and it refers to linguistic ornamentation.¹⁴⁴ It is difficult for

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

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

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

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

Among those who have a high level of faith in the possibilities of neutral and objective reason, some, but not all, will assert that our concepts and categories are real, actual, and natural things. This is the position of the philosophical “realists,” a group named for their belief in the “reality” of such things, and a group that could not be further removed from those we know as “legal realists.” Subject to
certain differences as to where these “realities” are to be found, this is the position both of the Platonists and of the Aristotelians among us. Some among Team Faithful, a subset of the philosophical realists, support strong claims for the possibility of reason through the assertion that our moral understandings are understandings of real things—real like the color green is real or some particular table is real. This is the position of the “moral realists.” Again, because the risks of confusion are so great, the position of the “moral realists” could not be further from, or in greater opposition to, the position of the “legal realists.”

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

245. See Plato, The Republic (Benjamin Jowett trans., 1941); Aristotle, Metaphysics, Posterior Analytics II 19, reprinted in Introduction to Aristotle (Richard McKeon ed., 1947); see also David Ross, Plato’s Theory of Ideas (1951).


248. See, e.g., Plato, The Republic (Benjamin Jowett trans., 1941); Aristotle, Nicomachean Ethics and Politics, reprinted in Introduction to Aristotle (Richard McKeon ed., 1947); Cicero, De Re Publica (51 B.C.) (G.H. Sabine & S.B. Smith, trans. 1929); Aquinas, Summa Theologica (1265-73); John Locke, Essays on the Law of Nature (1660-64); Lon L. Fuller, The Law in Quest of Itself (1940); Lon L. Fuller, The Morality of Law (1964); see also John Finnis, Natural Law and Natural Rights (1980); Lloyd Weinreb, Natural Law and Justice (1987); Natural Law (John Finnis ed., 1991).
texts by reference to their plain or literal meaning; their plain meaning as supplemented by necessary or appropriate implications; their original meaning or intention; the purposes taken to be inherent in them; their meaning in light of the policies and purposes that current decision-makers ought to promote, whatever these might be; neutral principles; institutional competence; consensus; conceptual clarity; coherence; immanent rationality; or some supposedly non-problematic strategy for assigning meaning to cases.

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

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

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


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


255. See supra note 95.

256. See supra note 97.


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

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

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

G. The Relationship between Law and Other Disciplines

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

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

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

H. Interpretive Strategies and Forms of Argument

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

Proponents of law and economics, at least in its stronger versions, are clearly marked by their commitment to the argumentative premise that the justice is the maximization of aggregate wealth and the promotion of allocative efficiency. In this sense, they are like the legal realists except that, for them, the consequence that defines the public interest is and only is the maximization of aggregate wealth. In their turn, members of the positivist/analytic tradition are predisposed to favor legal premises reflecting the right definition of a term or the proper meaning of a concept; an understanding of existing law in light of its presumed coherence or “integrity” or of its “immanent rationality”; or the reading of cases in light of such distinctions as “holding,” “dicta,” and “ratio decidendi.” And finally, proponents of contemporary critical theory are predisposed in favor of premises based upon their assertions that language is indeterminate, that law is politics, and that much of what we take to be natural is socially constructed.
So short a catalogue cannot be comprehensive and cannot do justice to the complexities, qualifications, and interrelationships that inhere in this question. But it may be enough to suggest that there exist identifiable affinities between, on the one hand, the six basic systems of belief and, on the other, the interpretive strategies and the forms of argument that may be brought to bear upon the law.

I. The Possibility of the Rule of Law

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

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

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

On this question of consequences, one position, taken most commonly by members of the legal process school, is that the tissue of civility is thin and that disorder will engulf us if people become persuaded that the existing system is unfair and illegitimate, or that
the rule of law is a delusion or a sham. For these people, and in at least a small degree they include most members of Team Faithful, the disorder in question will bring with it chaos, inefficiency, and violence.

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

CONCLUSION

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

260. See BICKEL, LEAST DANGEROUS BRANCH (1962), supra note 73, at 82-84; Paul D. Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222 (1984).
As between our legal theoretical perspectives, the conditions of disagreement are infinitely less satisfactory. There is no general agreement about what reasons count and what kinds of arguments are valid. Standards are not shared, arguments are incommensurable, and, for the most part, issues are not joined. If there is agreement on some point, it is accidental. One side offers an argument that they know to be a winner and what they get in return is a blank stare, a disrespectful dismissal of their argument, and sometimes a charge of bad faith. As between these ships in the night, it is sometimes genuinely the case that the minimal conditions of civility do not exist.

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

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

261. See Martin Buber, I and Thou (1937).
which people offered reasons and arguments in support of their wildly disparate beliefs concerning the place of reason in people's lives or the determinacy of legal texts.