

# 0660

## CRITICAL LEGAL STUDIES

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### Abstract

This chapter focuses on the relationship between critical legal studies as an intellectual movement in American law schools, and law and economics, in both Chicago and other forms. The critical legal studies critique of law and economics can reasonably be understood as an effort to foster alternative, radical approaches to law and economics that acknowledge and proceed from politically-charged contradictions within the discipline. The intellectual engagement between critical legal studies and law and economics over the last twenty years has not mediated the contradiction between the critical legal studies and law and economics views of law.

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### 1. The Institutional and Political Context

In the 1970s, just as the Chicago school of law and economics (0200, 0500) was moving beyond the relatively narrow doctrinal areas in which it had earlier been cabined, another movement, antithetical to the free market conservatism of the Chicago school and the kindred though distinct Virginia school (0610), arose in American law schools. This movement, critical legal studies (CLS), was launched as a theoretical school in substantial part through writings by Roberto Unger (1975) and Duncan Kennedy (1976, 1979) of Harvard Law School, and was institutionalized through the Conference on Critical Legal Studies, begun in 1977.

CLS drew much of its inspiration and many of its adherents from the rise in the 1960s in the United States and Europe of an egalitarian, anti-statist New Left politics. Though partisans of both the Chicago school and CLS tended to share a jaundiced view of the liberal centrist, New Deal/Great Society, 'welfare/warfare' state, their diagnoses of what was wrong with that state and the social order in which it was embedded were profoundly different. Where Chicago school academics saw inattention to the price mechanism and upheld an idealized common law that harkened back to the visions of late nineteenth-century laissez-faire legal theorists, CLS academics saw a troubling adherence to routine, hierarchy, and rationalized violence in the liberal order.

The sharply different political visions of CLS and Chicago law and economics, along with differences in cultural politics between typical partisans of the movements, reflected in matters such as hairstyle and dress, did not in themselves determine that there would be intellectual engagement between CLS and law and economics. But they foreshadowed that any engagement would likely be a conflictual one, and that once CLS arose as a distinct and assertive movement, the publication of an early article on legal form by Duncan Kennedy (1973) in the then-new Chicago school *Journal of Legal Studies* (0100) would not be followed by further articles by CLS advocates in the law and economics journals.

Beyond the general political divisions between them, the shared jurisprudential ambition of both CLS and Chicago law and economics to decode and translate the law according to their own distinctive methodologies - to, as it were, provide a Rosetta Stone for law - has been a crucial additional factor that has led to persistent conflict between CLS and law and economics. That conflict can be traced back to the underlying tension between the law and economics commitment to understanding law centrally in terms of economics and the CLS commitment to understanding law centrally in terms of politically-charged, deep-rooted yet also contingent patterns of contradiction.

This chapter essay will focus on the relationship between CLS as an intellectual movement in American law schools, one with the general approach to interpreting law noted above, and law and economics, in both Chicago and other forms. It does not deal with critical or leftist legal academic movements in general, such as Law and Society, that may have some interest in law and economics; nor does it deal with European scholarship that denominates itself as critical and that has some relationship to American CLS, but that is more closely connected outside the UK to a European tradition of contrasting formal approaches to social, or welfare state, approaches to law (see, for example, Wilhemsson, 1993 on critical contract law) and in the UK to a class-oriented analysis drawing on Marxism (see, for example, Fitzpatrick and Hunt, 1987).

The intellectual engagement between CLS and law and economics over the last twenty years has not mediated the contradiction between the CLS and law and economics views of law. At least two major reasons for the impasse can be offered. First, the engagement has overwhelmingly consisted of CLS analyses of law and economics, and the relative absence of back-and-forth exchange has made change in the terms of the debate difficult. Second, there has been a question as to whether advocates of law and economics and CLS believe there is any substantial value in appropriating at least some aspects of the other movement's approach; in the absence of such a belief, attempts from either CLS or law and economics to mediate the basic tension between the movements are unlikely.

The relative dearth of law and economics attention to CLS can be taken as reflective of law and economics supporters by and large viewing CLS as a movement that, whatever its merits as jurisprudence, has little or nothing to contribute to the law and economics project of relating economic reasoning to law. On the CLS side, the situation has been more complex. To interpret the CLS treatment of law and economics as a justification for a dismissive stance toward the genre by the legal left is oversimple, since that interpretation misses the substantial degree of attraction to as well as repulsion from law and economics in CLS work.

The two major figures in the CLS engagement with law and economics, Duncan Kennedy and Mark Kelman, have been substantially involved in doing what can be termed 'CLS law and economics', that is, law and economics from a CLS perspective (Kelman, 1979a, 1991a, 1993; Kennedy, 1987, 1992, 1994), as well as in critically analyzing non-CLS law and economics (Kelman, 1979a, 1979b, 1980, 1983, 1984, 1985, 1987a, 1987b, 1988; Kennedy, 1981a, 1981b, 1982, 1985; Kennedy and Michelman, 1980). Nevertheless, their work, especially their more theoretically aggressive work, and that of other CLS supporters has been more widely viewed as a powerful criticism of prevailing assumptions and practices in law and economics than as a charter for an alternative, radical law and economics. Though Kennedy's and Kelman's own practice contains an implicit defense of the value of doing radical law and economics and suggests certain contours that it can take, CLS law and economics is at this point a developing rather than a fully developed genre. Its future prospects will depend in part on whether CLS supporters can provide a persuasive rationale for how CLS analysis can aid in doing law and economics, as well as more examples of CLS law and economics.

## **2. The CLS Critique of Law and Economics: An Overview**

The major theme in CLS analysis of law and economics, which is closely parallel to the major theme in CLS analysis of law more generally, can be readily summarized: law and economics, though typically couched as an apolitical, technical exercise, is in fact an intensely political project. Arguments in law and economics both rely upon and themselves embody controversial political judgments. Law and economics argument, like legal argument, is ideological; both genres are structured by intractable though not immutable political contradictions. The dream of a meaningful technical efficiency discourse purged of political contradiction is a chimerical nightmare, both because it is false and because adherence to it tends to move political argument rightward to a band between pragmatic, technocratic centrism and free-market libertarianism. (How this rightward tendency operates and whether it is

potentially reversible in a revised law and economics are matters as to which there is no discernible consensus in CLS scholarship, in contrast to the consensus prevailing on the political nature of law and economics.) The central CLS theme of politics repressed and regained - which implicitly and sometimes explicitly relies on the idea of an awakening, an opening of argument to radical political possibilities (Kelman, 1987a, 294-95) - is present both in early and in more recent and contemporary CLS work on law and economics. Significant subthemes of the CLS critique of law and economics as political that have also persisted over time and that will be examined in this chapter include questioning the coherence of the notion of efficiency; questioning the scientific and logistic pretensions of law and economics rhetoric; and criticizing the Coase Theorem and transaction costs analysis.

One qualification to the general point that CLS analysis of law and economics parallels CLS analysis of law should be noted. In contrast to certain Marxist and other traditional leftist critiques that stress the function of law in upholding a coherent set of ruling-class interests, CLS has consistently emphasized the presence of multiple, contradictory strands within law. The Gramscian ideological hegemony that some CLS scholarship has seen as upheld and constituted through law is itself a field of contradiction, rather than a coherent articulation of a single set of ruling-class values. In thinking about law and economics, though, CLS supporters have sometimes been drawn toward viewing the genre as univocal and unambivalent, in a way that contrasts with the general CLS method of identifying contradiction in law and that in effect adopts (from an unfriendly perspective) the Chicago school's vision of law and economics as a genre that avoids the intractable political divides that attend law. How CLS views law and economics is consequential for CLS in the following way: an understanding of law and economics as a univocal instantiation of a particular set of values, especially conservative ones, is likely to rationalize disengagement from economics by the legal left. At any rate, such an understanding is less likely to foster CLS involvement in law and economics than an understanding of law and economics as an active field of ideological contestation, especially one that allows for the expression of radical as well as liberal politics.

### **3. Leaders in the CLS Engagement with law and economics**

Just as the vitality of Chicago law and economics as a mainstream, politically conservative academic movement has depended significantly upon the organizing energy and intellectual ambition of Richard Posner, the vitality of CLS as a dissenting, radical academic movement has in large part been a product of the organizing energy and intellectual ambition of Duncan Kennedy.

Before going to law school, Kennedy studied economics as an undergraduate and graduate student, and this biographical detail has shaped both his work and, through him, the direction of CLS. Even work by Kennedy that is not primarily concerned with law and economics, such as his analysis of how contract law is structured by a persistent tension between individualism and altruism that plays out in the form as well as the content of legal directives (1976), is marked by an attention to law and economics (see, for example, Kennedy, 1976, pp. 1746-51, describing *laissez-faire* and the altruist case against it, and pp. 1762-64, arguing that transaction costs analysis does not provide an objective basis for legal decisions). Both because of Kennedy's role in CLS in intellectually inspiring others' work and because of his own extensive body of law and economics work, which not only makes fundamental criticisms of mainstream approaches to law and economics but also includes a diverse group of articles in which he does law and economics from a CLS perspective, Kennedy has been the central figure in the CLS engagement with law and economics.

The second major figure in doing work that brings CLS and law and economics together has been Mark Kelman of Stanford Law School. Where Kennedy has written on a wide variety of legal topics in addition to law and economics, Kelman has devoted himself centrally to analyzing and doing law and economics, and his work over the years shows a close involvement with mainstream law and economics and economics literature. His 'A Guide to Critical Legal Studies' (1987a) contains an analysis of law and economics that is the clearest, most thoroughly worked out effort within the CLS literature to relate the critique of law and economics to the CLS critique of law more generally. In that work, Kelman contends that Chicago school law and economics represents an effort to repress intractable contradiction in liberal legal thought by unreflectively elevating certain privileged positions or poles, notably individualism and value subjectivity, over their polar opposites, altruism and value objectivity. These opposite positions are also subordinated, but less thoroughly so, Kelman suggests, in mainstream legal argument and in non-Chicago law and economics work, such as Calabresi's (1970), whose less monolithic repression of contradiction makes it less representative of law and economics as an intellectual genre than Chicago work.

Kelman's image of law and economics in 'A Guide to CLS' as pervaded at a deep level by a Chicago ideology that fails to acknowledge contradiction and strives for a unified, gapless view of the world might be taken as a brief against radical or even liberal involvement in the genre. Given among other things Kelman's own extensive involvement in doing law and economics and the possibility of splitting open a gapless law and economics discourse into one more obviously laden with contradiction, that is hardly an inevitable interpretation of Kelman's thesis. Nevertheless, his analysis in 'A Guide to CLS' and certain of his other work (see, for example, Kelman, 1984) suggests

an ambivalence about law and economics that is illustrative of a dilemma that has faced CLS supporters over the years, one that has often been misunderstood by those outside CLS. CLS as a movement has been devoted to rather than deprecatory of contradiction; given that perspective, discourses laden with profound internal contradiction are fine to participate in, contrary to mischaracterizations of CLS as supporting withdrawal from legal discourse because of its internal contradictions. Rather, the problem for CLS in regard to law and economics and particular subgenres of law and economics, such as efficiency arguments, lies with how to open up to contradiction discourses whose premises or rhetorical conventions are, or are perceived to be, structured so as to shut contradiction out.

#### **4. The Incoherence of Efficiency**

In modern law and economics (and economics more generally), efficiency is the central concept, the means by which normative evaluation and technical, value-free analysis are reconciled and brought together. That is, efficiency is the master device for mediating the fact-value antinomy (Unger, 1975) that pervades the social order in which law and economics is embedded. This CLS understanding of the linchpin role of efficiency in contemporary economic argument, which is differently expressed but hardly different in substance from that within mainstream law and economics, has naturally led to CLS scholarship that critically analyzes the notion of efficiency. The CLS article that focuses most directly and thoroughly on that theme is Duncan Kennedy's 'Cost-Benefit Analysis of Entitlement Problems' (1981a); early work of Kelman's on the Coase Theorem (1979b, 1980) and ambivalence and regret in consumers (1979a) makes related points, and complements and extends the discussion in 'Cost-Benefit Analysis' of some topics, such as offer-asking price disparities.

Kennedy's general claim in 'Cost-Benefit Analysis' is that efficiency claims lack the objectivity, coherence and autonomy from political value judgments that liberal law and economics (and presumably conservative law and economics as well, which he does not focus on) demands from them. After an historical review contending that efficiency arguments based on internalizing externalities became the mainstay of postwar liberal law reform movements in areas such as products liability, he describes how liberal law and economics responded creatively to Coase's criticism of Pigou's externalities analysis by broadening externalities to include psychic costs (such as unhappiness of New Jersey suburbanites at the destruction of Alaskan wilderness) that high transaction costs prevented from being recognized, but that should be recognized under liberal law and economics' version of Coasean analysis. Kennedy goes on to argue that proponents of liberal law and economics have

switched among different plausible methods of valuing entitlements in an ad hoc fashion that serves liberal policy goals but vitiates efficiency as a neutral, apolitical criterion. Consumers ask much more to give up a right than they will offer to obtain a monetarily equal right; it is not wrong to use high values to measure externalities, but any set of prices one uses involves a political judgment (see also Baker, 1975). He makes further arguments that the hope to achieve a determinate liberal efficiency calculus falls victim as well to problems of totalitarianism (that is, overcoming externalities and transaction costs entails an overweening state apparatus), wealth effects (that is, valuations and thus the efficiency calculus are distorted by wealth), and multiple equilibria (that is, determinate efficiency analyses break down when bargaining is allowed on all topics, rather than just one or a few).

In 'Cost-Benefit Analysis', Kennedy does not criticize the political values of the practitioners of liberal law and economics (who as identified by Kennedy include a writer also identified with CLS, Thomas Heller, 1976, and another, Frank Michelman, who co-authored an important law and economics article with Kennedy (Kennedy and Michelman, 1980)). As Kennedy articulates it, his dispute with liberal law and economics is a formal one, based on his disagreement with liberal law and economics' reliance on efficiency claims that conceal the political, value-laden nature of the choices that liberal law and economics supporters argue for. In a conclusion that in a sense reverses that of his earlier 'Form and Substance' in which he argued that the enterprise of liberal law reformers such as Skelly Wright should be wished 'what success is possible short of the overcoming of its contradictions' (Kennedy, 1976, p. 1778), in 'Cost-Benefit Analysis' Kennedy gives an equivocal, highly skeptical answer to the question of whether there is any role at all for efficiency in law and economics analysis: Coasean transaction costs analysis fails to increase the normative bite of economics, and the possibility of applying a technical efficiency criterion successfully is just as implausible, even absurd, as it was in the days of pre-Coasean welfare economics (1981a, pp. 444-45).

A noteworthy point about the early CLS critique of efficiency that is epitomized in 'Cost-Benefit Analysis' is the relatively limited, technical nature of the claim that efficiency is incoherent. In contrast to domains such as contract law, in which Kennedy and other CLS scholars traced out persistent, deep-seated conflict between different political visions, the incoherence of efficiency is presented in 'Cost-Benefit Analysis' in terms of offer-asking price disparities and wealth effects rather than of fundamental value contradictions inhering within the prevailing rhetoric of efficiency. 'Cost-Benefit Analysis' and the succeeding articles that criticize and defend Kennedy's arguments about the inability of efficiency discourse to provide determinate, apolitical conclusions on policy questions (see especially Carlson, 1986; Kelman, 1987b; Markovits, 1984) make an implicit choice to evaluate efficiency rhetoric on the basis of whether it can live up to a promise to provide determinate answers to

policy questions. Though this way of evaluating efficiency accords with a significant strain in CLS that condemns rhetoric that makes false claims of determinacy and objectivity, it could be taken to imply the conclusion that efficiency rhetoric would be more worthwhile to deploy by CLS lights if it were possible to purge it of its incoherence. But that conclusion is exactly backward. Instead, the objection in early CLS work to the deployment of the rhetoric of efficiency in law and economics is explicable if it is seen in terms of a belief that efficiency arguments were too circumscribed by their premises and too lacking in expressible political contradictions to be of significant value. (Other beliefs defensible at the time, and arguably still, may well of course have motivated CLS reluctance to deploy efficiency arguments, including a belief, suggested in the conclusion to 'Cost-Benefit Analysis' that efficiency analysis overall serves as a brake on reformist enthusiasm by postulating an efficiency-equity tradeoff, and a concomitant belief, pursued in later work by Kennedy (1982, 1987), and discussed in the section of this chapter on CLS law and economics, that CLS work in law and economics should eschew efficiency arguments in favor of distributional arguments.) What could make efficiency discourse worth deploying from a CLS perspective - and what certain recent CLS or CLS-like scholarship has reflected - is an understanding of efficiency as ridden with internal, politically-fraught contradiction.

The best-articulated recent working out of what could be described as a developing CLS position that efficiency discourse contains within it different models that are in serious political tension with one another and that have quite different, though not determinate, implications for law, is contained in Bill Bratton's 'Game Theory and the Restoration of Honor to Corporate Law's Duty of Loyalty' (1995). (Bratton, 1989a, describing different economic approaches to the firm, foreshadows some of these themes.) In his 1995 article, Bratton compares Jensen and Meckling's contractual, agency-theory view of the firm to Kreps' game-theoretic view of the firm, in which cooperative outcomes depend on at least the possibility of honorable behavior, and argues that Kreps' approach could (and, he suggests, should) lead to corporate law more supportive of the duty of loyalty than 1980s decisions influenced by the Jensen and Meckling model. Though Bratton's article is less insistent about the irrefragibility of contradiction than CLS scholarship has traditionally been, his is very much an argument about repressed internal political tension within the notion of efficiency, and as such (respecting that Bratton in the article does not identify his analysis with CLS) constitutes a significant contemporary CLS contribution to the critique of law and economics.

Another recent article, 'How Coasean Bargaining Entails a Prisoners' Dilemma' (Eastman, 1996b), is also structured in part around the notion of politically significant contradiction within efficiency discourse. The formal claim is that there is an equivalence between two stories, the Prisoners'

Dilemma and Coasean bargaining to achieve a surplus, that are generally seen as having very different meanings; the substantive claim is that efficiency discourse operates to repress awareness of contradiction by setting up two different stories with presumably different logical groundings, although these logical twists are actually the same. Though the article's focus on the formal link between Coasean bargaining and the Prisoners' Dilemma suggests that its objective is the traditional CLS one of debunking scientific pretension in law and economics, the overall argument, like that in Bratton's article, assumes and operates from the premise that there are meaningful political contradictions within the efficiency idea.

In developing further CLS analyses of contradictions within efficiency, there is relevant material to be drawn from Kelman's early arguments about psychological division in 'Choice and Utility' (1979a). Kelman's strategy was to debunk neoclassical theory that overlooked ambivalence and regret, but one could now point to economic approaches advanced since 1979, such as regret theory, that incorporate at least part of his argument and that are in politically-salient tension with subjective expected utility theory. Or (riskily for noneconomists, but CLS scholars accustomed to taking intellectual risks should not, one trusts, be paralyzed by this one) one could propose new law and economics models that are at least plausible in the terms of efficiency discourse and are also in self-conscious political tension with other, prevailing models.

Another significant source for the developing CLS argument about persistent contradiction within efficiency comes from work by mainstream law and economics scholars that has arguably though not necessarily been influenced by CLS. Cooter (1982) notes the sharp contrast between the optimistic Coase Theorem and a pessimistic 'Hobbes Theorem' that assumes strategic behavior will block desirable bargains. Neither approach to achieving efficiency is analytically preferable; rather, as Cooter notes, values and assumptions about human nature are at stake in any effort to mediate between them. A similar, somewhat broader point, is made by Hovenkamp (1992), who analyzes the inconsistent views of human nature and 'rationality' in the Coase Theorem, price theory, and Arrow's Theorem/social choice theory, which all enjoy high standing within orthodox efficiency analysis despite their contradictory features. Ian Ayres makes good observations on the politically significant contrast between game theory and price theory as approaches to efficiency, and the likely political correlates of the ascendancy of game theory (Ayres, 1990). Ayres' own game theoretic work, though it avoids assertive claims about contradiction, persistently deploys efficiency arguments in a fashion that flips Chicago orthodoxy. For example, Ayres and Talley (1995) argue that liability rules generate higher welfare than property rules under certain assumptions, an argument that flips the Chicago law and economics case for property rules in low transaction cost situations. Interestingly, Louis

Kaplow's and Stephen Shavell's response to Ayres and Talley is an indeterminacy argument that leaves the original Chicago claim undefended; the articles together suggest the space that has opened up in law and economics efficiency arguments for flipping and indeterminacy exercises that CLS scholars should be interested in carrying out and opening to radical as well as liberal politics.

### **5. The Coase Theorem**

Coasean analysis points out that externalities do not in and of themselves warrant regulation, given the possibility that the parties can reach an efficient outcome through bargaining. A major liberal law and economics response to that point, essentially the one criticized by Kennedy in 'Cost-Benefit Analysis', has been to stress the pervasiveness of transaction costs. This liberal response, plausible as it is in terms of Coase's argument, gives significant ground to the Chicago, anti-regulatory position: compared to the Pigouvian externalities framework, the externalities plus transaction costs framework requires an additional layer of justification for legal intervention, since the mere existence of externalities is no longer a sufficient warrant to regulate.

Since transaction cost analysis as a replacement for Pigouvian externalities analysis entailed a significant though indeterminate conservative, anti-regulatory shift in presumptions, the general reluctance within CLS to jump on board the Coasean bandwagon is entirely explicable. The transition from Pigou's framework to Coase's involved a shift of the ideological playing field toward the libertarian, Chicago right, and CLS as a left-of-center academic movement has had good reason to contest that shift, rather than simply play according to the new, Coasean rhetoric, as liberal law and economics was doing. Opting out of law and economics efficiency rhetoric, which CLS verged on doing in the early 1980s, can be seen as one response to the problem of a rightward shift in efficiency analysis. A second CLS response has been to develop arguments that Coase's analysis was wrong, or should be interpreted in a different way.

The initial major CLS work on the Coase Theorem was by Kelman (1979b, 1980, 1985). Kelman (1979b) makes a multi-pronged attack on the Theorem that criticizes both its empirical plausibility and its normative implications. First, because the amount that consumers want to give up an entitlement is likely to be much higher than the amount they will pay to obtain an entitlement they do not have, the Coase Theorem proposition that under zero transaction costs the same efficient pattern of activity will take place regardless of the legal rules in effect is likely to be wrong in practice. If neighbors have an initial entitlement to be free of pollution, it is unlikely the manufacturer will be able to buy them out; on the other hand, if the manufacturer has the initial

entitlement to pollute, it is much less likely, even with costless bargaining, that the neighbors will value freedom from pollution enough to bribe the manufacturer not to pollute. Second, the Theorem 'works' (that is, is counterintuitive rather than simply a truism) because it points out typically unsuspected opportunities to bargain, such as between the rancher and the farmer in Coase's original example. Kelman criticizes the Theorem's implicit support for making bargaining ubiquitous in strong terms: 'The real substantive vision of the Coase Theorem, its real cultural 'contribution', is to a particular worldview that seems to me both a distorted 'description' and a horrifying covert ideal' (Kelman, 1985, p. 1046).

In contrast, Schlag (1986) describes the Coase Theorem not as a charter for bargaining and commodification but rather as a potentially radical vehicle for the critique of legal concepts; he suggests that this critique can begin by substituting 'conceptualization' for 'choice of liability rule' in statements of the Theorem. His second take on the Theorem, and the transaction costs analysis associated with it, is less optimistic; he argues that transaction costs analysis has fallen prey to the same limitations and rigidities that were criticized by Coase in Pigouvian externalities analysis (Schlag, 1989).

Recently Eastman (1996a) has translated the Coase Theorem into game-theoretic terms. He argues that what distinguishes the Theorem from standard game-theoretic analyses is a Coasean assumption of payoff mutability, under which people engage in promises and threats in an effort to enhance their positions. Understanding the Coase Theorem in terms of this 'everything is up for grabs' assumption leads to quite different implications for law than those associated with standard interpretations of the Theorem. While the conventional wisdom associated with the Theorem supports bargaining and worries only about strategic behavior as an obstacle to desirable agreements, the game-theoretic understanding points out the significance of undesirable threat bargaining, and suggests a potential value for legal regulation that inhibits opportunities for threat bargaining.

## **6. The Critique of Law and Economics Rhetoric**

CLS scholarship from its inception has had a distinctive concern with the form in which academic and judicial arguments are made. In law and economics, that CLS concern has focused on arguments and interpretations that are ideological but are made in a fashion that suggests they are scientifically grounded in foundational logic or hard data. Through unmasking claims to scientific status, CLS advocates have hoped to bring political division to the discipline's surface and possibly to move liberals to the left.

Kennedy's first major published article on law and economics, 'Are Property and Contract Efficient?', written with Frank Michelman (Kennedy

and Michelman, 1980), a Harvard colleague of Kennedy's sympathetic to but not affiliated with CLS, is a central work in the critique of law and economics rhetoric. The basic point of the article is straightforward: arguments for the efficiency of private property (or alternatives to private property, such as the state of nature or forced sharing), and parallel arguments for the efficiency of free contract (or alternatives to contract), need to be made on a contextual, empirical basis. The efficiency of property or contract does not logically follow from the assumption that people are rational satisfiers of their desires. The authors modestly present their argument as one that should not surprise economically-sophisticated readers, describing the succession of efficiency arguments they debunk as mistakes, or 'traps for the unwary'.

The major arguments for the efficiency of private property over forced sharing or the state of nature that Kennedy and Michelman attack in their role as trap-shooters are briefly summarized below, along with the article's rebuttals:

1. 'Security increases production' - not necessarily, since people may work more if outcomes are uncertain; a state of nature or forced sharing might go along with an order under which there would be more rather than less industry.
2. Theft is inefficient - under private property, transaction costs may inhibit efficient transfers that would take place in a state of nature; there is no prior guarantee that private property will lead to more efficient transactions.
3. Private property reduces uncertainty - not necessarily; it all depends on whose uncertainty we are talking about, since more certainty for one party entails less certainty for another, as Hohfeldian analysis demonstrates.
4. Private property aids coordination - not necessarily, since private property is highly vulnerable to strategic behavior and associated prisoners' dilemmas that might be averted under forced sharing, or by a strong hand arising out of a state of nature.
5. Private property leads to an optimum work-leisure tradeoff - the tradeoff will vary according to the parties' initial entitlements, but there is no basis for imputing inefficiency to state of nature or forced sharing tradeoffs relative to private property tradeoffs.

Given the stark oppositions Kennedy and Michelman employ (for example, between 'private property' and 'forced sharing for needs', their article has a radical flavor, rather than the liberal flavor that would have been created by an argument that there is no necessary inefficiency associated with, say, Swedish social democracy compared to the less egalitarian American order. But because they do not challenge the efficiency criterion as incoherent and necessarily beset by political tensions, their article can be and has been (Kelman, 1987a) characterized as a criticism of an unwarranted conservative tilt in law and

economics rather than as a CLS argument.

Even allowing for the article's acceptance of the efficiency criterion, though, there is a significant sense in which it can and should be regarded as a major contribution to the CLS critique of law and economics. The basic point of the article is a claim about indeterminacy, specifically about the indeterminacy of the relationship between efficiency and institutional arrangements. This point resonates in CLS terms in a way that it does not in the terms of liberal or conservative law and economics. In a variety of domains apart from the critique of law and economics, CLS supporters have contended that mainstream legal argument unwarrantedly asserts or implies that there is a determinate, foundational link between logic and policy; sometimes CLS supporters have tried to tie their arguments to philosophical critiques of foundationalism (see, for example, Peller, 1985; Singer, 1984). Liberal law and economics, it would seem, lacks the distinctive interest in this issue of rhetorical form that CLS has had. Of all the critical works on law and economics, Kennedy and Michelman's article stands out as the one that is most clearly organized around the indeterminacy theme. Though it is quite right that the article's indeterminacy claims can be seen, as the authors suggest, as simply upholding economic conventional wisdom, the indeterminacy claims also serve as a criticism of law and economics rhetoric that implies a logic-based, determinate, efficiency foundation for some version of market capitalism. In that sense, Kennedy and Michelman's article is arguably the single one in the critique of law and economics that has the sharpest connection to the general CLS criticism of mainstream legal rhetoric; one's reaction to the article's basic indeterminacy theme is an excellent test for gauging one's overall reaction to the CLS critique of law and economics.

The CLS critique of law and economics rhetoric invites questions as to whether the desired outcome is an abandonment of law and economics, a modification of law and economics rhetoric in order to make it more politically candid and less scientific, or a sort of public advisory system about the hazards of law and economics, along the lines of the small craft warnings issued by the Coast Guard. The second alternative seems to be the preferred one among CLS supporters. For example, in the work of Mark Kelman (see especially Kelman, 1984, 1991a), one senses that the aim is modifying law and economics rhetoric rather than extirpating the genre (or simply advising its consumers), given Kelman's own work in law and economics as well as his disagreement with those on the left who wish to ignore economic arguments (Kelman, 1991b). Similarly, in a recent article that presents alternative versions of the Prisoners' Dilemma, the Coase Theorem, and price theory in the course of criticizing false determinacy in law and economics rhetoric and making a case for internal contradiction in efficiency claims, Eastman (1996c) endorses what amounts to a 'mend it, don't end it' attitude to law and economics that supports the telling of heterodox law and economics stories rather than abandonment of the genre.

To the extent CLS scholarship comes down in favor of the use of law and economics in some form, there is an issue, which CLS work to date has not dwelt on, as to the basis on which one might justify that stance. Kennedy (1992, p. 1314) makes a brief, ambivalent defense of the rhetoric of cost/benefit analysis: 'It is more "authentic" for me, than the voice of role-reversed male sensitivity ... This is so even though I am constituted in ways I don't like, and think are dangerous, by this very language ("it" speaks "me") and wish it were a different, better vehicle.' One can, as Eastman (1996c) does, simply rationalize law and economics as a storytelling project that is not necessarily worse than other, less logistic, types of storytelling. But this elides the issue, a sensitive one on the (post)modern, self-consciously non-foundationalist left, of whether one believes that through the logistic storytelling of law and economics one is discovering things about how the world works, or at least about how certain human communities organize their concepts. The issue is not significant to the extent CLS is not engaged in doing law and economics, but becomes a probably unavoidable, if perhaps annoying, issue for a philosophically-reflective CLS movement, some of whose supporters are committed to some kind of law and economics.

### **7. CLS Law and Economics: 'The Distributive Turn' and 'The Ideological Turn'**

Instead of making general arguments aimed at justifying CLS participation in law and economics, the leading figures in the CLS involvement with law and economics, Kennedy and Kelman, have done law and economics without extensive elaboration of their reasons. CLS law and economics as embodied in their work has spanned a wide gamut formally, ranging from technical analyses employing price theory (Kennedy, 1987) to relatively nontechnical arguments (Kennedy, 1992). But it is not patternless. Two main tendencies can be identified in their critical law and economics: (1) 'the distributive turn' - that is, analyses of the distributional consequences of contractual terms and legal rules and strategies (Kennedy, 1982, 1987, 1994); and (2) 'the ideological turn' - that is, work that may make cost-benefit or efficiency arguments in a fashion paralleling that in liberal law and economics, but with an overt specification of the ideological context and purpose of the arguments (Kelman, 1979b, 1991a, 1993; Kennedy, 1992; Kennedy and Specht, 1994). Of the two, the distributive turn has been the better articulated as a method (particularly in Kennedy, 1982, 1987). But the ideological turn, though currently less realized methodologically, is also a significant element in certain CLS law and economics, and is likely to assume increasing significance to the extent CLS scholarship further develops the analysis of internal contradictions within efficiency discourse and deploys efficiency arguments.

As a technical method, the distributive approach as carried out in Kennedy (1987) employs conventional price theoretic analysis for purposes of analyzing distributional consequences, thus flipping the mainstream preference for analyzing efficiency consequences. The basic idea in Kennedy's article is that selective intervention to enforce the warranty of habitability (selective in that it focuses on periods when landlords in declining neighborhoods would otherwise 'milk' their properties by ending maintenance, even though the property remains profitable enough to maintain), can redistribute income to tenants without reducing the supply of low income housing. Because the technical apparatus employed by Kennedy is that of neoclassical price theory, his method is well-suited to being adopted or adapted by non-CLS law and economics scholars. A potentially promising channel for future development of the distributive turn in CLS law and economics lies in the deployment of game theory rather than, or along with, price theory. The opportunities price theory alone offers for CLS are arguably constrained by its built-in opposition between distributional and efficiency analyses; the overt, surfaced quality of this opposition within the mainstream to some extent defangs a CLS project of surfacing contradiction, though it does not vitiate the value of work that upholds the subordinated, distributional part of price-theoretic analysis.

The turn toward highlighting the ideological context and nature of the law and economics arguments one makes is seen in law and economics work by Kelman that could otherwise be plausibly classified as liberal law and economics. For instance, his analysis of concepts of discrimination (1991a) has a central logical nub (that even 'unbiased' tests that predict the job performance of blacks and whites equally well may result in substantially higher proportions of blacks who could do the job successfully not getting hired) that could reasonably be viewed as liberal law and economics. But Kelman's analysis of that point is embedded in a lengthy analysis of the ideological correlates of different approaches to understanding discrimination. His logicizing of different stories of discrimination is law and economics; his placing all these stories, in their logicized as well as their initial forms, in ideological context is CLS, and makes the overall project of the article one in CLS law and economics. The combination of logicizing and ideological analysis makes the article quite complex, more so than either mainstream law and economics that ignores the ideological content of the arguments it makes or critical literature that eschews law and economics logicizing. This complexity is arguably a major virtue of CLS law and economics that takes the ideological turn; it will require some adjustment for academic readers accustomed to established forms of law and economics and CLS.

The structural complexity of CLS law and economics that places its arguments in ideological context is also shown in Kennedy's 'Sexy Dressing' (Kennedy, 1992), which makes a cost-benefit argument that men have an erotic

self-interest in fighting the sexual abuse of women. Here, Kennedy combines Calabresian, Posnerian law and economics with Saussurian structuralism, postmodern pro-sex feminism, simultaneously self-critical and self-justifying 'straight white male middle class radical' introspection, and close reading of many fashion magazines. The resulting article is a sufficiently complex brew to make any suggestion for further complexifying it, or work drawing upon it, seem counterintuitive, even outright wrong. But in terms of CLS law and economics there is a plausible case for heightening the formality of the law and economics argument in ambitious articles like 'Sexy Dressing'. Doing so would not only tend to stretch the boundaries of law and economics but also might heighten tensions that ideologically-reflective CLS law and economics plays off of and tries to accentuate. 'Sexy Dressing', in this view, should not be seen as a non-law and economics article with minor law and economics window dressing, or as a *sui generis* effort unsuitable for emulation by anyone without command of all the elements in Kennedy's eclectic theoretical toolkit. Rather, the article can serve as a template for future CLS law and economics projects, ones that may well complexify or 'tech up' their law and economics to a greater extent than Kennedy chose to in his article.

#### **8. Additional Themes in the CLS Engagement with Law and Economics: Historical, Philosophical, and Discipline-Specific Work**

CLS work relating to law and economics is by no means limited to the broad subjects treated thus far. Although this review essay focuses on themes in CLS scholarship on law and economics that cut across particular areas of law, arguably the most significant work in terms of the long-term viability of the CLS engagement with law and economics is discipline-specific work in corporate law, labor law, housing law and other areas.

An area in which a substantial body of CLS law and economics has developed is housing law and policy (Aoki, 1993; Ford, 1994; Fox, 1991; Keller, 1988; Kennedy, 1987, 1994; Kennedy and Specht, 1994; Kinning, 1993; Kolodney, 1991; McUsic, 1988). That work has considerable diversity in approach, ranging as it does from Kolodney's use of tipping models to analyze gentrification (1991) to Kinning's empirical survey of selective code enforcement in Minneapolis (1993) to Keller's proposal for a tort remedy for breaches of landlord duty (1988) to Ford's mixture of economic analysis, critical legal theory, critical race theory, and aspirational proposals for combatting segregation (1994). But for all these differences in approach, the housing literature constitutes a collective whole that is identifiably CLS law and economics in its simultaneous commitment to economic analysis and to critical analysis of the politics of law.

Although housing law stands out for its overall body of CLS law and economics, there are other areas of law in which CLS scholarship has fruitfully engaged law and economics, among them antitrust (Peritz 1984, 1989, 1990), debtor-creditor (Carlson, 1992, 1994), labor and employment (Klare, 1988; Stone, 1991), contract (Kennedy, 1976, 1982), discrimination (Kelman, 1991a), critical race theory (Audain, 1995), transitional economies (Alexander, 1994; David Kennedy, 1991), property (Alexander, 1982), tort (Kennedy, 1982; Kelman, 1988), international law (David Kennedy, 1994), and tax (Heller, 1979). Also worthy of note is work that, although done by writers not necessarily identified with CLS, applies a critical approach of identifying contradiction and parsing the politics of legal and economic argument: Bratton's work in corporate law (Bratton 1984, 1989a, 1989b, 1995) is especially noteworthy in this regard, and one could also note Millon's (1990) work on corporate law and Harrison's (1995) on contract law. A final category of work worth noting is scholarship by certain founding figures in CLS whose interests were centered around the application of social science to law, not through law and economics but through empirical sociology in the radical Weberian tradition (see, for example, Richard Abel, 1982, on tort law and David Trubek, 1984 on the use of empirical methods in CLS). Though their work is more in keeping with the Law and Society movement than with CLS as it developed through the theorizing of Unger and Kennedy, some work in this line, such as Trubek's, deals with both CLS and social science, if not law and economics in particular.

A considerable amount of CLS scholarship is historical, and some of that work deals with law and economics. For example, in 'Essays on the Fetishism of Commodities' (1985), Kennedy carries out an historical analysis of the role of law in classical economics, Marx's discussion of commodity fetishism and neoclassical economics and argues that a realist understanding of law destabilizes the sense of law as a coherent block that appears in classical economics, in Marx's response to it, and in neoclassical economics' effort to overcome and partially acknowledge Marx's critique. In a more contemporary context, Bratton (1989a) provides an historical examination of theories of the firm.

Finally, some CLS scholars, such as Unger, have had a particular concern with philosophy, or with the work of particular philosophers. On occasion, such concerns have intersected with the analysis of law and economics in CLS work. Work by David Carlson criticizing Chicago work on bankruptcy in the course of analyzing Rawls' political philosophy, and arguing that the notion of the perfect market embodies in Derridean terms an incoherent philosophy of presence that both presupposes and negates the idea of an opportunity cost (Carlson, 1993), exemplify this intersection. A further subtheme in the CLS critique of law and economics that is to some degree related to the concern with analyzing the work of particular philosophers involves personalizing the critique, by focusing specifically on the work of Richard Posner (see, for

example, Balkin, 1987; Minda, 1978; for a good example of such work by an author less identified with CLS, see also West, 1986).

### **9. Carrying the CLS Critique Forward: The Ideological Structuring of Economic Argument**

CLS scholarship has focused its attention on law and economics, instead of the economic discourse from which law and economics draws. One can certainly understand the reasons that have led legal critics to engage in a critique of the work of legal economists such as Posner rather than of economists more generally. But given that economics, for all the formidable and specialized analytical talent of many in the discipline, operates under social scientific rhetorical constraints that inhibit the critical analysis of how economic arguments are constructed and achieve their effects, there is a significant gap that CLS can help fill. The critique of law and economics is also the critique of economics, and there is a relative openness in law reviews, much of it won by CLS efforts over the years, to the kind of serious critical analysis of patterns of argument that is not currently cognizable within the conventions of social science publication. What follows are preliminary observations on the kind of critique of economic argument that CLS is particularly qualified to make. These observations are followed by an analysis of the contents of a recent issue of the *American Economic Review*, designed to show how a critical theory of the ideological structuring of economic argument can be hooked up to current practice in the field. Finally, the analysis of the ideological nature of economic discourse will be drawn on for a brief 'how to' guide for creating critical law and economics.

On economic arguments: A starting point of CLS theory on this point is that economic discourse is ideological. What does that mean? Just as legal discourse is largely constituted by liberal and conservative argument bites, economic discourse largely consists of similar ideological argument bites, more logically elaborate than in law, that are associated with economic models. 'Public goods', 'externalities', and 'underconsumption' are a few terms evoking argument bites and models that are typically though by no means necessarily liberal ('asymmetric information', 'adverse selection' and 'relational contracting' are others); 'rational expectations', 'monetarism' and 'supply side' evoke typically conservative argument bites/models (also 'transaction costs', 'Coase Theorem' 'contract law').

How does economic argument work? One tries to make a connection between analytical logic and a real world situation. Typically, what makes the connection interesting is that it has ideological, liberal-conservative significance. Empirical economics is also ideological; what makes an empirical

study work is that it suggests - and it may do so allusively rather than dogmatically - a moral about the way the world works.

Both legal argument and economic argument involve issues of methodological or stylistic politics as well as issues of substantive politics. In law, many cases involve politics at the level of form or style - for example, in deciding whether to use a standard or a rule. In economics, similar formal choices exist as to type of analysis on conducts - say game theory vs. supply-demand analysis - and as to level of technicality.

In one type of legal argument, one tries to rationalize a field, such as First Amendment law, by providing a theoretical rationale for deciding cases in a certain way - for example, the government must not restrict speech based on the notion that one way of seeking the good is superior to another way. Here legal argument is ideological in a way that is closely parallel to the way economic argument is ideological. Talent in making legal arguments to rationalize a field involves the ability to convert a politically significant analytical framework into something that can be plugged into a variety of real world situations. Similarly, economic models can potentially be applied to a wide array of circumstances; talent in making economic arguments in part involves the ability to see how the logic of certain models can have a home in novel contexts.

#### **10. An Example of the Ideological Structuring of Economic Argument: Articles in an Issue of *American Economic Review***

The CLS understanding of economic argument as ideological should be justifiable in relation to specific cases. What follows is an examination of all the articles in a recent issue of a leading American economics journal, carried out in some detail for one article and more briefly for the remaining thirteen. (The reader who wants exposition of the general CLS position on law and economics rather than a fairly detailed empirical case for its plausibility may wish to skim or skip this section.) Apart from whatever value the examination of these articles may have in informally testing the CLS proposition that argument in economics is ideological, another purpose of the examination of the articles conducted here is to suggest potential ways to create law and economics in general and CLS law and economics in particular.

'Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms' (1996), the first article in the issue in question, shows how suboptimal 'rat race' equilibria with excessively high hours can develop as a result of partners using hours worked as an indicator of how associates will behave if they become partners. The article uses an adverse selection model with two imperfectly observable types of lawyers - long-hours workers and

short-hours workers - to show how employers' desire to differentiate between long- and short-hours workers can lead to inefficiently high hours equilibria. Maximum hours laws can break the inefficient separating equilibrium and lead to an efficient equilibrium.

The authors note how Akerlof originally set up a rat race equilibrium in a highly unrealistic fashion that might have created the impression that such a situation is an impractical oddity. Their model, on the other hand, is clearly one that is designed to be significant in real-world terms:

Rat race equilibria reduce access to powerful positions for those unwilling to tolerate excessive work hours early in their careers. This selection process may have the effect, although not the intent, of keeping a disproportionate number of qualified women out of leadership positions in business and professional organizations. (p. 347)

Adverse selection models have grown enough in influence and recognition to be applied in a context that gives them a sharper left/liberal edge, as in 'Rat Race Redux', which makes an argument with a conclusion parallel to Schor's in *The Overworked American* (Schor, 1991). Compare the early use of adverse selection to defend lemon disclosure laws in the used car market - here the model was being used in a more politically innocuous, centrist fashion. Akerlof's expressing his rat race equilibrium in an unrealistic fashion was quite possibly related to the existence of a centrist consensus that the issue of high professional-managerial work hours was not one to be taken seriously. 'Rat Race Redux', which does take the issue seriously, challenges that centrist consensus.

In thinking about the development of adverse selection models from Akerlof to 'Rat Race Redux', one sees a rational basis for the intuition that novel as opposed to accepted high-tech methods in economics may well have a centrist, nonradical cast. To introduce a new high-tech model on behalf of a way of thinking about the world that is not already familiar to readers is to court bafflement. Tech 'works' - produces a nod and a sense of 'aha' insight on the reader's part - by linking up a more or less recondite, intricate and aesthetically pleasing set of logical/mathematical operations with a real world phenomenon. But if the author's attitude toward the real world phenomenon is itself recondite and counterintuitive, the result of combining that attitude with unfamiliar high tech may well be confusing at best and incomprehensible at worst. A genre of CLS law and economics that creates new technology would be a very fine thing indeed to have. But a more plausible direction for CLS law and economics involves turning technology that is already recognizable from its use on behalf of centrist conclusions to more radical ends, as 'Rat Race Redux' ably does.

In 'Rat Race Redux' as with economic arguments in general, the tech can be flipped. Instead of the article's overwork equilibria, what about an

underwork equilibrium? Suppose the partners in a law firm believe that success depends on identifying future partners who will fit in well into their white shoe club, and weeding out associates who will not. Type 1 attorneys are the 'clubbable' ones, while Type 2 are the overly aggressive, 'unclubbable' ones, who generate more short-term billings from their high hours, but who are not desirable as rainmakers or future members of the partnership. Of course, knowing the partners' preferences, Type 2 associates have an incentive to disguise their status by not working longer hours. But by establishing a firm culture with a sufficiently white shoe atmosphere and low work hours ceilings, the partners can drive out the Type 2 attorneys by making the firm an uncomfortable place for them to work. The result is an inefficient underwork equilibrium.

Readers may differ in their evaluation of the relative plausibility of the 'Rat Race' and 'Reverse Rat Race' stories. In my view, the authors' rat race story seems like a much convincing evocation of contemporary Wall Street law firms than the flipped story, but that is of course not a matter of the logic of adverse selection tilting one way or another but of contingent, empirical factors. The point here is not to insist on one story or the other, but to support the critical intuition that the logical apparatus of the adverse selection model does not in itself carry the day for a particular political moral.

'Rat Race Redux' illustrates the complexities of telling an economic story that resonates in critical terms. The article accomplishes the considerable feat of telling a clever story with a potentially radical moral while using standard economic assumptions. But in relation to the adverse selection model, the lower work preference attorneys whom the partners are trying to ferret out are like the lemons in Akerlof's used-car story - not people one necessarily feels empathy or support for. The adverse selection story of 'Rat Race Redux' is technically prettier than the simpler, 'keeping up with the Joneses' Prisoners' Dilemma story of competition for material goods leading people to work excessively long hours that Schor (1991) tells. But Schor's Dilemma story accords more readily with the spirit of the case for reducing work hours than the adverse selection story of attorneys trying to disguise their low work hours preferences. Both stories are good liberal law and economics stories that can be made radical by being told with attention to their ideological context; whether one values the greater technical elegance of the 'Rat Race Redux' adverse selection argument or the closer connection to critical feeling in the Overworked American Prisoners' Dilemma argument is a matter of aesthetic and political judgment.

The CLS law and economics analysis just carried out for 'Rat Race Redux' can be compressed into a brief description of the article's story, its ideology, its legal implications, and possibilities for reversing or flipping the story's moral. What follows is a concise analysis of 'Rat Race Redux' and of all the remaining papers in the issue of AER in which it appears.

(1) *Rat Race Redux: Adverse Selection in the Determination of Work Hours in Law Firms*, Renee M. Landers, James B. Rebitzer and Lowell J. Taylor, *AER*, Vol. 86 (1996): 329-348.

*The story*: Adverse selection/asymmetric information. Adverse selection may lead to an inefficiently high number of hours worked, with firms setting a very high hours standard to drive out associates who pretend to be interested in working long hours to win the favor of partners.

*The story's ideology*: Liberal/radical.

*Legal implications*: Cut work hours.

*Possibilities for flipping the model*: Adverse selection may lead to an inefficiently low level of hours worked, given an incentive of associates to pretend to be 'clubbable' to win the favor of partners.

(2) *Veblen Effects in a Theory of Conspicuous Consumption*, Laurie Simon Bagwell and B. Douglas Bernheim, *AER*, Vol. 86 (1996): 349-373.

*The story*: Signalling/asymmetric information. Given certain assumptions about demand for luxury goods by lower income and high income households, a desire to signal wealth can produce willingness to pay a high price for a good that is identical in quality to a lower price good (that is, a 'Veblen effect'). Excise taxes on such a luxury good are nondistortionary taxes on pure profit.

*The story's ideology*: Liberal.

*Legal implications*: Tax luxury goods.

*Possibilities for flipping the model*: The argument here flips itself in a sense, in that the authors discuss how the presence of Veblen effects depends on empirical assumptions about luxury and budget goods. This type of flipping, though, leaves the overall politics of the model unscathed. That is, by employing a model that assumes the significance of status concerns in motivating people, the article's perspective accords well with liberal skepticism about the value of material acquisitiveness; noting that the Veblen effects are empirically contingent does not flip the model's politics. One way to produce a flipped, conservative version of this article would involve setting up an analytical model that overall embodies conservative skepticism about liberal values (a public choice model might be good for that purpose) and then going through the technical hoops to show how how, based on certain plausible assumptions about the shape of functions, a particular inefficiency will be generated.

(3) *The Gender Gap, Fertility, and Growth*, Oded Galil and David N. Weil, *AER*, Vol. 86 (1996): 374-387.

*The story*: Assuming that men have an advantage in 'brawn' while the sexes are equal in 'brains', an increase in capital per worker will raise women's relative wages, which in turn will decrease fertility, which in turn will increase

capital per worker. Thus, a positive feedback loop exists; further, technology is a way to escape high fertility/low capital equilibria.

*The story's ideology:* Conservative.

*Legal implications:* The gender gap will likely narrow without legal intervention, which reduces the case for such intervention.

*Possibilities for flipping the model:* The optimistic invisible hand story of increasing growth and gender equality that is told here depends on a model that employs a simple 'brains' vs. 'brawn' dichotomy. Alternative models that employ different dichotomies - for example, models in which higher capital levels increase returns to very high levels of work hours as opposed to moderate hours, or to mathematical as opposed to verbal skills - could be used to suggest that economic growth without legal and political activism by and for women is likely to generate an increasing rather than a diminishing gender gap.

(4) *The Timing and Incidence of Exploratory Drilling in Offshore Wildcat Tracts*, Kenneth Hendricks and Robert H. Porter, *AER*, Vol. 86 (1996): 388-407.

*The story:* Free rider effect/asymmetric information. Holders of oil leases face a free rider problem, in that the outcome of one's neighbor's drilling provides useful information. An empirical study indicates that many tracts are drilled toward the end of the lease period, suggesting that companies are often unsuccessful in cooperating to solve the free rider problem.

*The story's ideology:* Liberal.

*Legal implications:* Although the authors do not give policy implications, one can infer that it might be a good idea for the government to require winning bidders to drill (assuming the free-rider behavior here is socially undesirable).

*Possibilities for flipping the model:* Since this is an empirical study, flipping does not work in the same way here as it does with theoretical papers. One could reinterpret the results to emphasize that leaseholders most of the time avoid a 'war of attrition' in which they wait to see what others do, and thus bill the study as supportive of a conservative position that free rider inefficiencies can be resolved without outside intervention, rather than a liberal position that free rider market failures are widespread.

(5) *The Swing Voter's Curse*, Timothy J. Feddersen and Wolfgang Posendorfer, *AER*, Vol. 86 (1996): 408-424.

*The story:* Winner's curse/asymmetric information. Abstention from voting can be rational for less-informed voters, because they have an interest in allowing voters who know which candidate is preferable to control the result.

*The story's ideology:* Conservative.

*Legal implications:* Efforts to create higher turnout through, for example, mandatory voting laws are misconceived, as are efforts to reduce the difference

in turnout in the US between more educated and less educated people.

*Possibilities for flipping the model:* The article uses the winner's curse apparatus in a way that lends implicit support to a traditionalist conservative belief in the superior qualifications of some voters to decide elections. (The model also upholds a centrist, 'ticket-splitting' view of politics by postulating two classes of voters: independents who are sensitive to the state of the world and partisans who are not.) The contrary liberal argument about abstention (which is probably more orthodox than the article's conservative argument, at least among policy intellectuals) is a free-rider claim about an individually 'rational' incentive to abstain that is collectively undesirable. This liberal argument supports voluntary or mandatory measures to increase turnout, and can be given a sharper edge by combining it with an argument that the substantial social class disparity in abstention in the US is a 'rational' response to class bias in the US political system, rather than to deference by the less educated to the superior judgments of the more educated.

(6) *How do Senators Vote? Disentangling the Role of Voter Preferences, Party Affiliation, and Senator Ideology*, Steven D. Levitt, *AER*, Vol. 86 (1996): 425-441.

*The story:* The liberalism or conservatism of senatorial voting, as measured by ADA score, is more dependent on the senator's own ideology than on other factors such as party affiliation and degree of constituency liberalism.

*The story's ideology:* Unclear.

*Legal implications:* Unclear.

*Possibilities for flipping the model:* This is a methodological article that studies liberal-conservative politics but does not itself have a clear liberal-conservative significance. The model assumes that the senator's ideology is the residual influence, which is certainly debatable - what about error in measuring other variables, or unmeasured potential influences such as the economic interests of the senator's constituency? But the article's modeling of the centrality of ideology does not have a clear methodological politics; the model could accord either with a new left/CLS belief in the value as well as the inevitability of ideology and ideological debate, or with a new right/public choice belief in representatives' ideology as rent-seeking.

(7) *Revenue Effects and Information Processing in English Common Value Auctions*, Dan Levin, John H. Kagel and Jean-Francois Richard, *AER*, Vol. 86 (1996): 442-460

*The story:* Behavioral economics/winner's curse/auction theory. Theoretically, one would expect English common value auctions in which the high bidder wins at the second highest price to raise more revenue than first price, sealed bid auctions, because bidders can use other bidders' behavior to help them

avoid winner's curse problems. Experimentally, though, sealed bid auctions raise more revenue from inexperienced bidders, who suffer from the winner's curse; for experienced bidders, English auctions did increase revenue.

*The story's ideology:* Liberal.

*Legal implications:* The recommendation for the government to use English auctions to maximize revenue does not necessarily apply when bidders are inexperienced.

*Possibilities for flipping the model:* Behavioral economics typically deals with whether people do or do not conform to 'rational choice' predictions in practice. Articles such as this one that show people acting 'irrationally' are not politically clear-cut. This empirical study has been classified as having a liberal politics, both because a finding that people do not actually act in accord with 'rational choice' predictions helps undermine one of the tenets of free-market ideology, and because the authors here were sympathetic in their attitude toward the heuristic their experimental subjects used as a substitute for maximizing. At the same time, the study, like much behavioral economics, has potential to be understood in a conservative fashion as a how-to manual on how to take advantage of people whose behavior does not accord with 'rational choice.'

(8) *Avoidable Cost: Ride a Double Auction Roller Coaster*, Mark H. Van Boening and Nathaniel Wilcox, *AER*, Vol. 86 (1996): 461-477.

*The story:* Double auction markets such as those employed on stock exchanges are usually supported as efficient, but in a situation characterized by high 'avoidable costs' (that is, high costs for any level of production above zero, as with flying a plane), experiments indicate that double auctions may well be inefficient. There, cooperative institutions may well have a role in creating efficient outcomes.

*The story's ideology:* Liberal.

*Legal implications:* For regulators to impose double auction markets is not necessarily a good idea; sometimes cooperative institutions may work better.

*Possibilities for flipping the model:* Although the overall point about the failure of a competitive market is a liberal one, in the regulatory context the message may be opposed to certain antitrust initiatives associated with political liberals. More broadly, the conservative flip on this type of experimental economic work would involve looking at an institutional situation in which the prevailing (liberal) assumption is that free-rider problems or other market failures will prevent an efficient solution from being achieved in the absence of regulation, and showing experimentally that, at least in a significant category of these situations, efficient solutions will in fact be reached without regulation.

(9) *Holdups, Standard Breach Remedies, and Optimal Investment*, Aaron S. Edlin and Stefan Reichelstein, *AER*, Vol. 86 (1996): 478-501.

*The story*: The law and economics literature contains both arguments that contracting parties will *underinvest* because their relationship-specific investments will be subject to opportunism and that they will *overinvest* because an expectation measure of damages will compensate them for inefficient investment. For the parties, the solution to the investment problem is to specify a quantity at which the opportunism tax on investment is balanced by the breach subsidy to investment. For the legal system, both expectation damages and specific performance will lead to efficient outcomes when only one party makes relationship-specific investments; only specific performance is efficient when both parties do so.

*The story's ideology*: Conservative.

*Legal implications*: If possible, grant specific performance when both parties make relationship-specific investments.

*Possibilities for flipping the model*: The story here has been classified as conservative because the contemporary liberal position on contractual opportunism and regard for the other's welfare seems to rely centrally on notions of moral standards, such as good faith and promissory estoppel, and status, such as inequality in bargaining power and unconscionability, that the model eschews in favor of apparently nonevaluative, nonstatus-based decision making rules. At the same time, the story's recommendation of specific performance by itself could be either liberal or conservative, depending on factors such as the status of the parties that the model abstracts from. Also, at a general level, a political preference for specific performance over expectation goes along with liberal doubts about the effectiveness of markets; the combination of all these factors, along with certain differences between the political center in legal and economic discourse (the failure of the model to consider value-oriented alternatives to rule-based decision-making, which makes it right of center in relation to law, does not necessarily do so in relation to economics) makes the politics of the model complex, though fair to classify in the final analysis as conservative. One way to flip this model into a liberal one would be to begin from a set of assumptions under which opportunism and lack of regard for the other's welfare will generate inefficient results absent particularized, status-conscious legal strategies. Another, critical approach to flipping the story would be to structure a model in which the assumptions lead to no efficient solution being available either through the parties' negotiation or through regulation.

(10) *Employee Buyout in a Bargaining Game with Asymmetric Information*, Avner Ben-Neur and Byoung Jun, *AER*, Vol. 86 (1996): 502-523.

*The story*: Asymmetric information/signalling. Employees who do not know the true profitability of a firm can make offers to buy the firm as well as wage demands; unprofitable owners will agree to sell, while profitable ones will prefer to meet the wage demands.

*The story's ideology*: Liberal.

*Legal implications*: The expansion of negotiations between employers and employees from wages only to employee ownership (and by extension, from wages to other typically unnegotiated subjects) enhances efficiency by providing opportunities for overcoming asymmetric information problems.

*Possibilities for flipping the model*: A conservative flip: Suppose the employees have private information about their likely future contributions to the firm; the employer allows 'profitable' and 'unprofitable' employees to signal their status by telling all employees they are subject to downsizing and allowing them all to quit with a bit of severance pay, as well as by making a wage offer. The general point in flipping the liberal, potentially radical, model presented in the article is that the additional subjects that are placed on the table to facilitate efficiency-enhancing signalling need not be subjects that accord with a liberal (or radical) reformist agenda; they may be instead be subjects like mass termination of employees that accord better with a conservative politics.

(11) *Aggregation Without Separability: A Generalized Composite Commodity Theorem*, Arthur Lewbel, *AER*, Vol. 86 (1996): 524-543.

*The story*: A methodological piece that focuses on technical assumptions underlying the construction of price indices.

*The story's ideology*: Unclear. The story lacked the ideologically significant punchline that nearly all the other articles had. Certainly the general topic of price indices and inflation is a politically sensitive one, and there may be a hidden moral that escaped this reviewer's attention.

*Legal implications*: Unclear.

*Possibilities for flipping the model*: Unclear. For one with a closer sense of different schools within econometrics, the article would quite possibly embody a methodological politics (just as a law review article that apparently eschews substantive political storytelling in favor of a focus on methodological or procedural matters embodies some kind of politics of form), and possibilities for flipping would accordingly present themselves.

(12) *Voluntary Export Restraints, Antidumping Procedure and Domestic Politics*, B. Peter Rosendorff, *AER*, Vol. 86 (1996): 544-561.

*The story*: Signalling. Anti-dumping legislation leads to inefficient voluntary export restraints as the outcome of a game in which actions on anti-dumping

petitions signal the desire of governments for voluntary export restraints by foreign producers. Given the median voter theorem and widely dispersed stock ownership, governments may well value firm profits more than tariff revenues, while at the same time asserting a rhetorical commitment to free trade.

*The story's ideology:* Conservative.

*Legal implications:* Anti-dumping laws are undesirable.

*Possibilities for flipping the model:* Here, the signalling model relies on assumptions that welfare is lowered by tariffs and voluntary export restraints; given that, the pro-free trade politics of the story are both transparent and readily flipped by making different assumptions.

(13) *Entry, Exit, Growth, and Innovation over the Product Life Cycle*, Steven Klepper, *AER*, Vol. 86 (1996): 562-583.

*The story:* The idea is to explain a pattern in which product markets are characterized by an initial phase with innovative products and competing designs to a later stage in which a dominant design emerges, market shares stabilize, and larger firms predominate. The model assumes that the ability to appropriate returns from process R&D (that is, production-oriented rather than new product-oriented R&D) depends on firm size, which leads to large firms and a shutout of new entrants.

*The story's ideology:* Conservative.

*Legal implications:* An anti-regulation, hands-off message is the logical accompaniment of this type of economic storytelling.

*Possibilities for flipping the model:* This is economics in the conservative genre of providing a more or less sunny explanation of why things are the way they are, or at least seem to be. The corresponding liberal genre would explain the product life cycle in a less sunny fashion, perhaps by using monopoly power rather than process R&D as the driving assumption in the model. Either way, the aesthetics of the exercise depend on whether the particular simple conditions of the model seem to determine the situation in a persuasive, interesting fashion.

(14) *Heterogeneity, Stratification, and Growth: Macroeconomic Implications of Community Structure and School Finance*, Roland Benabou, *AER*, Vol. 86 (1996): 584-609.

*The story:* Sorting families homogeneously in schooling minimizes the costs of existing heterogeneity, but integration reduces heterogeneity faster, thus reducing growth in the short term but raising it in the long term.

*The story's ideology:* Liberal.

*Legal implications:* Integrate and equalize. Specifically, avoid stratification in schooling through school finance reform, and state rather than private or local control of schools.

*Possibilities for flipping the model:* The liberal heart of the story - the

long-term positive effects of socioeconomic (and by extension racial and ethnic) integration overriding the short-term negative effects - depends on the assumptions made in the model about economic heterogeneity and its negative effects. To tell a conservative story, switch the negative assumptions about heterogeneity. To tell a radical story about, say, the superiority of raising children in kibbutzes rather than in individual homes, only a small tweaking of the model would be necessary.

### **11. Law and Economics: A Critical How-To**

A theoretical law and economics story may begin with a logical puzzle or it may begin with a question about a rule, an institution or people's actions. But whether the initial kernel is a 'real world' situation or a logical model, the point of the storytelling exercise, as suggested by the foregoing review of current economic articles, is to hook up logic with some significant situation in a politically significant fashion. Or, to put the how-to process for doing law and economics in outline form:

1. Start with either a juicy logical twist *or* some significant real-world situation.
2. Now connect up your starting point to a real-world situation, if you started with logic, or to a neat logical point, if you started with a situation.
3. Make sure there's something politically significant - that is, ideologically pointed - in the connection you make.

Since the linking of logic, situation, and moral in law and economics storytelling/model building involves a substantial degree of creativity, it is not possible to produce a law and economics story in the same way that one can produce results using the formula for quadratic equations. A major premise of CLS law and economics is that one has a high level of freedom in hooking up logical models and salient real world situations. That freedom to choose a particular phenomenon out of all the ones in the world to which the model might be applicable makes hash out of any claim that the logic has now been shown to have determinate real-world implications. The inventive researcher trying to think of an application for the model is in effect rummaging through a huge number of potential real-world situations, very likely without being aware of how many she is implicitly considering and rejecting. When she finds a phenomenon for which there is a feeling of match or fit, the connection she draws between the logic and the phenomenon may be convincing to her and to her readers. But she has not proven that the connection is something other than fortuitous, and she and her readers, no matter how plausible they find the connection, should carry more than a twinge of doubt about it, given the

uncontrolled way in which models are linked to phenomena in law and economics.

More doubts are in order. Even if one believes there is a truly pretty and convincing connection between a particular logical twist and a particular phenomenon, one has not shown that the logic is the driver of the phenomenon. What one has shown by mapping logic onto phenomenon is a connection, an analogy of sorts. One has not shown causality. It is just as plausible - more plausible in most circumstances in law and economics - to view the link between logic and phenomenon not in terms of an underlying, causally prior mathematical substrate of the phenomenon, but in causally agnostic terms. Discovering that logical twist A has a pleasing, powerful correspondence to a particular facet of the world does not show that that facet is determined by the logic. When one discovers a pleasing, powerful connection between a legal category and a phenomenon, one is, as a participant in the culture of modern 'legal science', skeptical about any claim that the legal category somehow captures or causes the situation; rather, one is likely to believe, in keeping with the arguments of antiformalist critics in law, that the sense of connection or correspondence between legal models and phenomena reflects socially and politically contingent states of consciousness rather than the causal efficacy of legal categories. A similar caution, rather than an overexuberant sense of economic reason as laying bare the logic of the world's workings, would seem to be advisable in economics in general and in law and economics in particular.

A how-to approach to creating law and economics stories that reflects CLS assumptions about the ideological, contested, and indeterminate nature of law and economics arguments is of course not uniquely the property of those who want to tell critical rather than other kinds of stories. But there is at least some reason to believe that understanding law and economics as a process of ideological storytelling is more empowering for CLS law and economics than it is for, say, Chicago law and economics. A group of law and economics practitioners who can candidly talk about how to put together and flip ideological law and economics can arguably do a better job at it than those whose rhetorical conventions make that kind of discussion taboo, at least in public. To be sure, there is the counterclaim that CLS law and economics, at least if it takes the ideological turn of exposing the politics of its own arguments and even considering how they could be flipped, is shooting itself in the foot compared to law and economics that represses at every turn its status as ideology. But it could also be the case that politically-reflective CLS law and economics such as Kelman (1993) and Kennedy (1992) might over time benefit in the marketplace of ideas from the way it can make other versions of law and economics seem simplistic.

## 12. Conclusion

The CLS critique of law and economics can reasonably be understood as an effort to foster alternative, radical approaches to law and economics that acknowledge and proceed from politically-charged contradictions within the discipline. Thus understood, the relative lack of engagement of much of the legal left with economics becomes a sign of loss rather than victory for the CLS critique. At the same time, though, the growth of a larger and more politically diverse law and economics movement becomes interpretable as a success, one that may be related in part to CLS denunciations of the right-wing tilt in the Posnerian, Coasean version of law and economics. Though CLS attacks on ideological tilt in law and economics have not made for amicable relations between the movements, the CLS critique has likely enhanced the viability of liberal law and economics. Liberal dissent from Chicago orthodoxy has been easier to take by comparison with the more fundamental CLS critique, and the rise of liberal law and economics in the law reviews has enhanced the academic credibility of a movement under attack as right-wing ideology. Nor was the opening to liberalism especially threatening to conservatives if liberal law and economics could be contained, as it has been thus far in the US, within the framework of continuing conservative control of the major journals and professional association in the discipline.

Given the predominant role of Chicago, law and economics over the last twenty years has helped move law in the US to the right. But in the future, law and economics may well help move economics to the left. The law and economics project can certainly operate in the direction of making legal argument more purportedly scientific and value-free, but it also inherently has the potential to tip in the direction of making economics a more overt domain of logicized ideological argument. The politics of such a tipping are themselves contingent, but there is a major future risk for the right in the contemporary burgeoning of law and economics that, in the US, has been one of the right's great intellectual triumphs.

As for CLS: the movement's identity has always been as a counterhegemonic, dissenting one, and there is no likelihood of that stance changing. But especially given the continued rise of law and economics, a counterhegemonic, dissenting CLS involvement in the discipline as critics and also as participants is both likely and called for. Legal leftist ambivalence about employing 'the master's tools' of technical economic analysis can and should be overcome, aided by the realization that such tools are not the predetermined property of the liberal center and the right but are available for deployment on behalf of more radical visions.

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