
Linz Audain

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CRITICAL LEGAL STUDIES, FEMINISM, LAW AND ECONOMICS, AND THE VEIL OF INTELLECTUAL TOLERANCE: A TENTATIVE CASE FOR CROSS-JURISPRUDENTIAL DIALOGUE*

Linz Audain**

In this Article, Professor Audain asserts that common ground exists among the—at times—competing or conflicting schools of Critical Legal Studies, Feminist Jurisprudence, and Law and Economics. He argues that scholars writing in each school would find it beneficial to engage in dialogue with the others, and proposes a code of conduct within which such dialogue might take place.

The Article builds a strong case for increased dialogue among the movements, springing from the essential purposes of the Academy and University in our society, and the creative benefits which would derive from an active dialogue among academic movements.

Professor Audain posits intellectual intolerance as the primary barrier to the exchange of ideas among scholarly movements. He proposes a “veil of intellectual tolerance” to promote needed dialogue. The “veil” consists of a set of rules for approaching, evaluating, and responding to the work of other scholars, as well as rules for interaction with other scholars themselves.

Professor Audain argues that the various movements in today’s legal scholarship have much to gain and little to lose from increased interaction. At core, he is calling for dialogue, and pointing to a fundamental flaw in modern legal scholarship: its splintered and balkanized nature.


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Introduction ................................................................. 1019

I. The Disciplinary Structure of Jurisprudential Thought
   in the Legal Academy .................................................. 1023
   A. Feminist Jurisprudence ........................................... 1024
   B. Critical Legal Studies ............................................ 1032
   C. Law and Economics ............................................... 1038
   D. Mainstream Legal Thought ........................................ 1046

II. The Dialogic Structure of Jurisprudential Thought
   in the Legal Academy .................................................. 1047
   A. A Primer on Communication Network Analysis ................. 1047
      1. Communication and the Anatomy of a Communication Network .................................. 1047
      2. Attributes of Networks and Patterns of Networks ................................................... 1051
   B. A Theory of the Dialogic Structure of Jurisprudential Movements .................................. 1053
      1. The Basic Model, Organization, Network, and Nodes ................................................. 1053
      2. Jurisprudential Links and Channels ................................................................. 1057

III. Dialogue and the Missions of the University/Legal Academy
   A. The Mission of the University ..................................... 1062
   B. The Mission of the Law School .................................... 1069
   C. Dialogue, Creativity, and the Mission of the Legal Academy ....................................... 1071

IV. The Absence of Dialogue and the Veil of Intellectual Tolerance ............................................. 1076
   A. The Technology of Intolerance .................................... 1078
      1. Prefatory Comments ............................................... 1079
      2. A Psycho-Theoretical Framework of Intolerance ..................................................... 1082
      3. Applications to the Legal Academy ......................................... 1087
   B. The Unique Intolerance of Lawyers .................................. 1088
   C. The Limits of Tolerance ............................................. 1090

V. The Veil of Intellectual Tolerance ........................................ 1093
   A. Psycho-Theoretical Aspects of Increasing Dialogue ................... 1093
   B. Rules Behind the Veil of Intellectual Tolerance ..................... 1097
   C. Application: The Rule of Synergy ...................................... 1101

Conclusion ................................................................. 1104
INTRODUCTION

What do judges do? An instinctive response to this seemingly innocuous query would probably reflect the influence of the three broad modes of discourse which have vied for the reign of the jurisprudential realm over the past decade. Admitting of gross over-

1. I follow Gary Minda, The Jurisprudential Movements of the 1980s, 50 OHIO ST. L.J. 599 (1989), in arguing that the 1980s has witnessed "the almost simultaneous emergence and maturation of three influential jurisprudential movements—law and economics . . ., critical legal studies . . . and feminist legal thought." Id. at 600. My purpose in labelling these movements "modes of discourse," is to emphasize the fact that fundamentally, these movements represent different methods of dialogue within the broader jurisprudential dialogue carried on between and among legal scholars.

2. A point not stressed by Minda is that the "Mainstream Legal Thought," Minda, supra note 1, at 641, which is critiqued by the three movements of the 1980s, is in no danger of being supplanted by them. I offer an "armchair empirical" basis for this assertion, as well as a definition of Mainstream Legal Thought in Part I. See infra notes 124-30 and accompanying text.


Second and most importantly, however, my use of this particular set of metaphors reflects my hope that the future evolution of legal thought might parallel western civilization's evolution from medieval political forms to the present nation-state. A central theme of the Minda piece is that the present state of legal thought is a fractured one. See generally Minda, supra note 1, at 659 (discussing the "current malaise" in legal theory). But whether or not my hope for a unified jurisprudential thought is analytically supportable is a topic to be fully developed on another day. For example, if the analogy of law to science is a tight one, then unified jurisprudential thought is as realistic an aspiration as unified science (although law might conceivably lag science in that regard). For a discussion of the unity theory of science, see generally WILLIAM BECHTEL, PHILOSOPHY OF SCIENCE (1988). For a discussion of the proposition that law is not "evolving," see Richard A. Posner, The Jurisprudence of Skepticism, 86 MICH. L. REV. 827 (1988). For a discussion of evolutionary theories of law see E. Donald Elliott, The Evolutionary Tradition in Jurisprudence, 85 COLUM. L. REV. 38 (1985); Bruce W. Frier, Why Law Changes, 86 COLUM. L. REV. 888 (1986) (reviewing ALAN WATSON, THE EVOLUTION OF LAW (1985)); Herbert Hovenkamp, Evolutionary Models in Jurisprudence, 64 TEX. L. REV. 645 (1985). For a discussion of the political evolution of western civilization from medieval times to the present, see CARLTON HAYES & JOSEPH HUNTLEY, A POLITICAL AND SOCIAL HISTORY OF MODERN EUROPE (1916); C. Northcote Parkinson, The Evolution of Political Thought (1958); Henry Sidgwick, The Development of European Polity (Eleanor M. Sidgwick ed., Kraus 1969) (1920). For a discussion of the use of metaphors in law, see Mark M. Hager, Bodies Politic: The Progressive History of Organizational "Real Entity" Theory, 50 U. PITT. L. REV. 575 (1989).
simplification, I sense that the most probable response to this question on the Critical Legal Studies ("CLS") and Feminist Jurisprudence⁴ side of the realm might be stated as follows: Law is (sexual) politics ergo judges are politicians.⁵ Contrarily, the denizens of the Realm of Law & Economics ("L&E")⁶ might respond: ceteris paribus,⁷ judges behave as if they are maximizers of social wealth and occasionally maximizers of their own preferences.⁸

As a fledgling scribe within the Realm of L&E, the most remarkable feature of the intellectual jousting to me, has been the general failure of the cognoscente in any of the realms to recognize the extent to which the jurisprudential realm is fundamentally undivided.⁹ Indeed, a remarkable amount of energy has been expended describing and analyzing the monsters lurking in the intellectual moats which


This observation is for Jamie Boyle: no Jamie, my proposition is not that the various jurisprudential movements will someday meld into some unintelligible mush. A point that I now emphasize and will reemphasize throughout this Article, is that territorial integrity of the various movements is almost indispensable to the conduct of cross-jurisprudential dialogue between and among those movements.

4. I realize that lumping CLS and Feminism together in this manner poses a danger that I, as a male, might be perceived to be "devalu[ing]" the female experience as argued by the "Fem-Crits." See, e.g., Carrie Menkel-Meadow, Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School," 38 J. Legal Educ. 61 (1988). I may also be perceived as "marginalizing" the female voice, as argued by "cultural feminists." See Minda, supra note 1, at 628; see also Carol Gilligan, In A Different Voice (1982). For a discussion of Gilligan's "different voice" theory of feminist jurisprudence and criticisms of it, see infra notes 30-33 and accompanying text (describing the "different voice" strand of feminist legal theory). CLS and Feminist Jurisprudence are lumped together for limited purposes only, and will be differentiated most of the time in the Article.

5. See infra part I (discussing this assertion in greater detail).

6. Under the label "denizens of the Realm," I include a whole host of scholars who have been active and successful in the L&E movement, regardless of the particular "branch" of L&E they practice. See Minda, supra note 1, at 608 n.35; see also infra part I, at notes 79-89 & 100.

7. This Latin phrase refers to the economist's assumption that when generalizations are being made, all other things are held equal. This assumption is often used in the natural sciences as well. See Campbell R. McConnell, Economics: Principles and Policies 7 (8th ed. 1981).

8. See infra notes 87-92 and accompanying text (discussing this assertion in greater detail).

9. Both the united nature of the jurisprudential realm, and the general failure of scholars in the three movements to recognize this nature, are discussed infra notes 245-59 and accompanying text. I should emphasize that I am aware of only one piece in which a L&E scholar has attempted to integrate a CLS perspective into his work. See Lewis A. Kornhauser, The Great Image of Authority, 36 Stan. L. Rev. 349, 375-76 (1984). My Article is therefore unique in its attempt to integrate and promote dialogue among the three movements.
divide us. This habitue, however, has reinforced the practice of ignoring the very necessary work of paving and widening the inexorable intellectual bridge which unites us.

I am a scribe without Arthurian delusions. Accordingly, one of my objectives in this Article is to demonstrate the existence of a path along this intellectual bridge which unites the realms of CLS, Feminist Jurisprudence, and L&Ec. Specifically, the central story, or thesis of this Article, is as follows. Let us all agree that law is indeed politics, and therefore judges are politicians. Sometimes. Having put that compromise behind us, it becomes possible to fruitfully advance the joint CLS, Feminist Jurisprudence and L&Ec jurisprudential enterprise ("joint enterprise") by asking the pragmatic question: When is law politics (and therefore judges politicians)? I will argue in this Article that the concept of agency costs (i.e., a path along the bridge which unites the kingdoms of CLS, Feminist Jurisprudence and L&Ec) provides a useful mechanism for understanding when it is that judges behave as politicians.

Yet the foregoing argument puts the intellectual cart before its horse. Indeed, the primary objective of this Article is to present an analysis of the "dialogic structure" of the three main jurisprudential movements (i.e., CLS, Feminism, and L&Ec). I argue that it is the dearth of intellectual tolerance which has prevented the participants within each movement from engaging in "full dialogue." I propose a

10. For a general discussion of the differences which exist among the three movements, see Minda, supra note 1, at 602-31. This portion of Minda's article is certainly an example of the energy spent analyzing the differences between and among the three movements. For further examples, see Gary Peller, The Metaphysics of American Law, 73 Cal. L. Rev. 1151 (1985). I think the energy spent in analyzing the differences between the three movements has been necessarily and justifiably spent simply because the continual defining of the res is a necessary aspect of any creative enterprise.

11. There are many ways of conceptualizing this intellectual bridge and its inexorability (e.g., all three movements are heirs of the "legal realist" movement of the 1930s). This and other similar points are discussed in greater detail, infra notes 365-70 and accompanying text.

12. I refer of course to the legendary King Arthur, and his uniting of the various warring knights at a "round table." See generally Sir Thomas Malory, King Arthur and His Knights of the Round Table (1950). My failure to see myself in Arthurian terms is not inconsistent with my vision of a "unified jurisprudence." That is, it is quite conceivable that there is presently some jurisprudential King Arthur, or his equivalent, in the legal academy who will eventually bring about a unified jurisprudence. If so, there is no harm in pursuing the joint enterprise while awaiting her arrival. If not, one can only hope that the pursuit of the joint enterprise will result in the coalescing of a (leaderless) band of jurisprudential knights committed to a unified jurisprudence. That must count for something.

13. These are defined more fully infra notes 365-70 and accompanying text.

14. See infra part II.B.
technique, the "Veil of Intellectual Tolerance," which might be used to achieve greater dialogue. Having presented the technique, my ensuing discussion of the agency cost model will merely reflect an application of this technique.

In view of the preceding multiple objectives, this Article is organized as follows. Part I provides a brief summary of the three jurisprudential movements and mainstream legal thought by focusing on the substance and form of each movement. In Part II I apply communication theory to provide a formal statement of the state of cross-jurisprudential dialogue in the legal academy (i.e., thesis: there is only "partial" and not "full" cross-jurisprudential dialogue in the legal academy). In Part III I offer a philosophical and psychological analysis of the missions of the university and the legal academy in an effort to explain why dialogue matters (i.e., thesis: to generate creativity). I argue that the main joint jurisprudential enterprise is maintaining and increasing the creativity of the legal academy.

Part IV presents mostly psychological and communication theoretical explanations for the reduced state of cross-jurisprudential dialogue in the legal academy (i.e., many reasons but the diminished level of cross-jurisprudential tolerance may be the most important one). In view of those explanations, in Part V I present and apply the Veil of Intellectual Tolerance as a suggested technique for increasing the level of cross-jurisprudential dialogue.

It may be useful to pause momentarily to place the agenda of this Article within a broader intellectual context. Specifically, my attempt to use communication theory to study the dialogue of those of us who are legal academics, falls squarely within the domain of the exciting new interdisciplinary field called law and semiotics.\(^\text{15}\)

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15. The "classic" work in law and semiotics is ROBERTA KEVELSON, THE LAW AS A SYSTEM OF SIGNS (1987). For a thoughtful review of this book, see Robin P. Malloy, A Sign of the Times—Law and Semiotics. The Law as a System of Signs, 65 TUL. L. REV. 211 (1990) (book review). For an article which takes issue with Kevelson's point that the work of Charles Pierce is seminal to the field of law and semiotics, see J.M. Balkin, The Hohfeldian Approach to Law and Semiotics, 44 U. MIAMI L. REV. 1119 (1990). Kevelson has also edited annual volumes summarizing research on law and semiotics from various disciplines. This research has also been presented at the annual "Round Table on Law and Semiotics" at Pennsylvania State University. See, e.g., 1 LAW AND SEMIOTICS (Roberta Kevelson ed., 1987) [hereinafter LAW AND SEMIOTICS]. As of this writing, I am aware of two law school symposia that have been held on the topic of law and semiotics: Symposium, Semiotics, Dialectic and the Law, 61 IND. L.J. 315 (1985); Symposium, Law and Economics and The Semiotic Process, 42 SYRACUSE L. REV. 1 (1991). At this rate of growth, it seems that law and semiotics will soon be an important jurisprudential force, if it isn't already.

Although my discussion in Parts I and II borrow from social psychology, political
A basic proposition of law and semiotics is that the legal system consists of "complex structures of signs and sign relationships."16 Those of us who are a part of the legal system are involved in the interpretation of those signs.17 Indeed, "[i]n a very practical sense, then, law and semiotics involves the study of legal discourse and legal practice."18 In view of this, it is not surprising that law and semiotics encompasses the application of communication theory to legal discourse. Of course, to the extent that the discussion in Parts I and II analyzes the legal discourse of those who analyze legal discourse (i.e., law professors), it seems appropriate to suggest that Parts I and II present work in what I now label as "law and meta-semiotics."19 I shall define law and meta-semiotics to be the analysis of the legal discourse of those who analyze legal discourse, by using communication theory in particular.

I. THE DISCIPLINARY STRUCTURE OF JURISPRUDENTIAL THOUGHT IN THE LEGAL ACADEMY

In the discussion that follows, I argue with Professor Minda that the past decade has been marked by the ascendancy of three main and influential jurisprudential movements: Feminist Jurisprudence, Critical Legal Studies, and Law and Economies.20 To be sure, there

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17. Id. at 18.
19. For a piece which classifies and critiques some of the work towards applying communication theory to (non-professorial) legal discourse, see Paul Evangelista, Communication Research and the Practice of Lawyering: Is the Tail Wagging the Dog?, in LAW AND SEMIOTICS, supra note 15, at 181. Evangelista makes the case for broadening the scope of communication research in the law beyond the analysis of lawyers' communication during trials. The discussion in Parts I and II represents a step in this direction. I feel it is important to distinguish the work presented here, from the work of multidisciplinary scholars involved in the analysis of "discourse processes." The distinction appears to be mainly one of scope. For example, discourse process analysts look at individual sentences. Accordingly, their tools include "sociolinguistics, psycholinguistics, ethnomethodology and the sociology of language, educational psychology . . . , the philosophy of language, computational linguistics . . . ." ALLEN D. GRIMSHAW, COLLEGIAL DISCOURSE: PROFESSIONAL CONVERSATION AMONG PEERS ix (Roy O. Freedle ed., 1989). In this Article, however, my concern is with the ideas expressed in massive collections of sentences. By making this distinction between the analysis in the present article, and discourse process analysis, I do not mean to suggest that discourse process analysis is of no use to the law.
20. See Minda, supra note 1, at 600. As far as I know, Minda's is the only article
have been other jurisprudential movements. These movements however have yet to achieve the degree of prominence and influence achieved by the three aforementioned movements. It is clear however that some of these other movements are well-poised to do so.21

As an organizing principle and to the extent possible within space limitations, I shall attempt to distinguish the substantive implications of a particular movement from its methodological implications. The purpose of this discussion of the jurisprudential movements is manifold. First, this common "substance-form" distinction will make it possible to compare the three movements in the remainder of the Article. Second, the summaries will also represent my attempt to have a common baseline of reference with the reader. Third, for readers who are unfamiliar with the various movements, it is my hope that the summaries will serve as a useful introduction that will lead to further study.

A. Feminist Jurisprudence

As with the other jurisprudential movements which will be discussed in this portion of the paper, the discussion of feminist jurisprudence will be divided into a discussion of its substantive aspects which provides such a comprehensive survey of these three movements. Readers who are interested in placing the three jurisprudential movements within the broader jurisprudential context, can consult any one of a number of good jurisprudence books currently on the market. See, e.g., Ervin H. Pollack, Jurisprudence: Principles and Applications (1979); W. Michael Reisman & Aaron M. Schreiber, Jurisprudence: Understanding and Shaping Law (1987).

21. The "other" movements which I have in mind are for example, movements such as law and semiotics, discussed supra note 15, and Critical Race Theory. To be as fair as possible, I am using the term "influence" to refer to objective indicators; such as the number of law review articles and books published in the movement, the number of legal scholars involved, the number of conferences held, etc. As someone who is interested in Critical Race Theory, I am almost sure that in the future, I (or someone I know and respect) will write an article making the case for why Critical Race Theory should have been included as a separate influential movement. At this point however, I do not see the balance of the arguments as favoring that position. I do however, see Critical Race Theory as a jurisprudential movement which is poised for greatness. The reader who is interested in this literature can perhaps begin with the controversial Kennedy piece, Randall L. Kennedy, Racial Critiques of Legal Academia, 102 Harv. L. Rev. 1745 (1989) (arguing that minority legal scholars have not met their burden of demonstrating that they have a distinctive voice within legal academia), followed by a reading of the significant literature in response to Kennedy. See, e.g., Scott Brewer, Introduction: Choosing Sides in the Racial Critiques Debate, 103 Harv. L. Rev. 1844 (1990) (suggesting that Kennedy harbored ill motives, was insincere, and was biased). This in turn can be followed by a reading of some of the original works discussed by both Kennedy and his critics.
and its methodological aspects. Catharine MacKinnon has defined Feminist Jurisprudence as “an examination of the relationship between law and society from the point of view of all women.”22 In essence then, Feminist Jurisprudence involves the application of feminist theory to the law.23 One possible benefit of such a definition is that it


23. Although the literature on the topic is sizeable, I am not aware of the existence of a book devoted exclusively and comprehensively to the topic of feminist jurisprudence. I am, however, aware of a forthcoming book by Frances Olsen of UCLA entitled Feminist Jurisprudence. I am also aware of a comprehensive “Feminist Jurisprudence” chapter in CAROL SMART, FEMINISM AND THE POWER OF LAW 66 (1989), in which she argues against a feminist jurisprudence to the extent that it would succeed in replacing “one hierarchy of truth with another.” Id. at 89. In addition to the foregoing possibilities, there are a number of specialized women’s law journals. Indeed, the following law schools have such journals: Yale, Harvard, Berkeley, Rutgers, and The University of Wisconsin. Recently, The Washington College of Law of The American University has been added to this growing list. The professional journal is the Women’s Rights Law Reporter.

The following citations are merely illustrative of the sizeable and growing nature of the literature on Feminist Jurisprudence: NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); DOROTHY DINNERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE (1976); GILLIGAN, supra note 4; see also CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987) (providing edited speeches of herself on various topics pertaining to the second wave of feminism in the United States) [hereinafter MACKINNON, FEMINISM UNMODIFIED]; Leslie Bender, A Lawyer’s Primer on Feminist Theory and Tort, 39 J. LEGAL EDUC. 3 (1988) (introducing a few of the major components of feminist theory and an example of how feminist theory might be used to examine a particular area of law); Ruth Colker, Feminism, Sexuality, and Self: A Preliminary Inquiry into the Politics of Authenticity, 68 B.U. L. REV. 217 (1988) (reviewing MACKINNON, FEMINISM UNMODIFIED, supra); Lucinda M. Finley, Choice and Freedom: Elusive Issues in the Search for Gender Justice, 96 YALE L.J. 914 (1987) [hereinafter Choice and Freedom] (reviewing DAVID L. KIRP ET AL., GENDER JUSTICE (1986)); Lucinda M. Finley, Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate, 86 COLUM. L. REV. 1118 (1986) [hereinafter Transcending Equality Theory] (arguing that feminism implies that women recognize the inadequacy for them, the distortion of male-created ideologies, and women proceed to think and act out of that recognition); Kenneth L. Karst, Woman’s Constitution, 1984 DUKE L.J. 447 (discussing the role of constitutional law in the modern reconstruction of “woman’s place,” and its limitations); Kathleen A. Lahey, Until Women Themselves Have Told All That They Have to Tell, 23 OSOGOE HALL L.J. 519 (1985) (examining the unique methodologies and processes of feminist scholars who are speaking out against the universal acceptance of traditional (masculine) ideologies); Littleton, supra note 22, at 3-6 (examining the meaning of the Journal’s commitment to the goal of aiding in the development of a feminist jurisprudence); Catharine A. MacKinnon, Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence, in FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER (Katharine T. Bartlett & Rosanne Kennedy eds., 1991) (discussing three of many possible visions for the future of the psychology of women, in order to clarify the implications of feminist scholars’ research and political activities) [hereinafter MacKinnon, Marxism]; Mari J. Matsuda, Liberal
makes it possible to use feminist theory as a basis for understanding feminist jurisprudence.

My use of the preceding definition does not suggest that it is the only definition of Feminist Jurisprudence. Nor does it suggest that there should necessarily be a definition of Feminist Jurisprudence. I write merely as an outsider looking in, writing and reporting as fairly as I possibly can, for the benefit of other outsiders who like me seek to understand Feminist Jurisprudence.

It is in this spirit that I have tried to understand the relationship between feminist theory and Feminist Jurisprudence. Consistent with the literature that I cite, I will suggest that there are at least two "themes" in feminist theory, with three variations on the first ("gender difference") theme. These three variations can assist one in understanding what one author has identified as the four "strands" of Feminist Jurisprudence. It will be impossible, and I am indeed unqualified to attempt to capture the richness and complexity of Feminist Jurisprudence in the few paragraphs that follow. My apologies therefore, to those who might be offended by any aspect of my endeavor, and for the omissions that will necessarily occur.

Having said all of this, it seems that the substantive aspects of Feminist Jurisprudence become easier to grasp once one appreciates the two themes that recur in feminist theory. The first theme centers

Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice, 16 N.M. L. REV. 613 (1986) (presents the thesis that Rawls' "theory of justice" fails because of its central choice of abstraction as a method of inquiry); Martha Minow, Foreword: Justice Engendered, 101 HARV. L. REV. 10 (1987) (noticing the unstated point of comparison and point of view in assessment of gender differences does not eliminate the dilemma of difference; instead, it links problems of difference to questions of vantage points) [hereinafter Minow, Justice Engendered]; Deborah L. Rhode, The "Woman's Point of View," 38 J. LEGAL EDUC. 39 (1986) (providing cautionary remarks on the issue of perspective, and on the implications of the "woman's point of view" for legal, social, and feminist theory); Janet Rifkin, Toward a Theory of Law and Patriarchy, 3 HARV. WOMEN'S L.J. 83 (1980); Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 YALE L.J. 1373 (1986) (using the works of several non-legal authors to illustrate the impossibility of seeing solutions to inequality through an abstracted lens); Robin West, Jurisprudence and Gender, 55 U. CHI. L. REV. 1 (1988) (claiming that by virtue of their shared embrace of the separation thesis, all modern legal thought is essentially masculine; also discussing the possibility for, the promise of, and the obstacles to the present status of truly feminist jurisprudence); Heather R. Wishik, To Question Everything: The Inquiries of Feminist Jurisprudence, 1 BERKELEY WOMEN'S L.J. 64 (1985).

I am unaware of the existence of a scholarly association at the national level which is devoted uniquely, and exclusively to Feminist Jurisprudence. That, I am sure, is only a matter of time. It should be noted, however, that the National Conference on Women and the Law has met annually for quite some time.

24. See Minda, supra note 1, at 626.
on the importance of gender differences. In feminist theory, the variations on this theme are: gender difference does not matter (i.e., women should receive treatment equal to that received by men); gender difference does matter (i.e., women should receive special treatment because of their unique nature); it is possible and necessary to move beyond gender difference (e.g., imagine a world in which women construct their reality independently of the reality constructed by men).

Specifically, these three variations on the gender difference theme in Feminist Theory, can be used as a basis for organizing the four “strands” of feminist jurisprudence. The first two strands in feminist jurisprudence, the “equal treatment” and “difference” strands, follow rather directly from the first two variations on the gender difference theme in feminist theory. For example, the Equal Rights Amendment is called for to the extent that gender difference does not matter, and therefore, women should receive treatment equal to that received by men. Conversely, the Pregnancy Discrimination Act

25. These three variations on the gender difference theme, are summarized by Estelle B. Freedman, Theoretical Perspectives on Sexual Difference: An Overview, in THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE 257-61 (Deborah L. Rhode ed., 1990) [collection of works hereinafter THEORETICAL PERSPECTIVES]. The importance of these themes have also been recognized by scholars who are involved in feminist jurisprudence. See, e.g., id. at 2-9; CAROL SMART, FEMINISM AND THE POWER OF LAW 82-85 (1989). Of course it should be noted in passing that there are other classifications of feminist theory. See, e.g., JOSEPHINE DONOVAN, FEMINIST THEORY; THE INTELLECTUAL TRADITIONS OF AMERICAN FEMINISM (1985) (distinguishing cultural feminism, feminism and freudianism, and feminism and existentialism); ALISON M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1983) (classifying feminist theories as liberal, traditional, marxist, radical, or socialist).

26. Put differently, the four strands of feminist jurisprudence reflect the more fundamental and underlying gender difference theme in feminist theory. In suggesting that there are four strands of feminist jurisprudence, I follow Minda, supra note 1, at 626. Other scholars have suggested other ways to organize feminist jurisprudence. Although I have chosen to reconcile Minda’s organizational scheme with the gender difference theme in feminist theory, it seems clear that other organizational schemes can also be reconciled with the gender difference theme. For examples of these other organizational schemes, see SMART, supra note 25, at 72 (providing three categories of jurisprudential issues: the first dealing with “notions of morality, justice, and epistemology”; the second category deals with first category issues “in the context of legal practice”; and the third category “looks at jurisprudence more in terms of the deconstruction of legal discourse . . .”); Christine A. Littleton, Reconstructing Sexual Equality, 75 CAL. L. REV. 1279 (1987) (distinguishing symmetrical from asymmetrical feminist theories); West, supra note 23 (distinguishing the “connection thesis” shared by critical and radical feminism, from the “separation thesis” shared by liberal egalitarian and cultural legal theory).

27. Minda, supra note 1, at 626.

is called for to the extent that gender difference does matter because of the unique nature of differences attributable to women.\(^3\)

The third strand of Feminist Jurisprudence, the “different voice” strand, is based on the work of feminist theorist Carol Gilligan.\(^4\) Gilligan’s thesis is that the psycho-social development of female children leads them to develop a moral code which is based on maintaining relationships and caring. It is the impersonal and objective moral code developed in male children however, which ultimately finds expression in the social fabric.\(^2\) Feminist theorists view Gilligan’s work as falling squarely within the “difference” side of the gender difference theme in feminist theory.\(^3\) The different voice

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Choice and Freedom, supra note 23 (reviewing David L. Kirp et al., Gender Justice (1986)); Finley, Transcending Equality Theory, supra note 23, at 1118 (reviewing the assumptions, stereotypes and values underlying pregnancy and maternity policies, and judicial and legislative approaches to them); Ann E. Freedman, Sex Equality, Sex Differences, and the Supreme Court, 92 Yale L.J. 913 (1983) (presenting an analysis and critique of two major approaches concerning the meaning of sexual equality, and the underlying problem of sex discrimination in Supreme Court decisions regarding employment discrimination and Equal Protection); Minow, supra note 23, at 10 (noticing that the unstated point of comparison and point of view in the assessment of gender differences does not eliminate the dilemma of difference; instead, it links problems of difference to questions of vantage points); Cass R. Sunstein, Feminism and Legal Theory, 101 Harv. L. Rev. 826 (1988) (reviewing MacKinnon, Feminism Unmodified, supra note 23); Stephanie M. Wildman, The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence, 63 Or. L. Rev. 265 (1984) (examining the evolution of the comparison mode of Equal Protection review, and the history of sex discrimination law in the Supreme Court).


30. This intellectual tension between equal treatment and different treatment is, of course, reflected in feminist theory proper. See, e.g., Freedman, supra note 25. Accordingly, the tension is also reflected in feminist jurisprudence. See, e.g., Finley, Choice and Freedom, supra note 23; Littleton, supra note 26 (distinguishing symmetrical from asymmetrical feminist theories); Wendy W. Williams, The Equality Crises: Some Reflections on Culture, Courts and Feminism, 7 Women's Rs. L. Rep. 172 (1982) (arguing that feminists are at a crisis point in their evaluation of equality and women); Menkel-Meadow, supra note 4, at 61 (reviewing the "intersections and divergences in the critiques of legal education offered by critical legal studies and feminist theory").

31. See Gilligan, supra note 4.

32. Id. at 24.

33. Gilligan's is a "theory of socially constructed difference." It differs from "nineteenth-century concepts of female moral superiority" in that it suggests psycho-social as opposed to
The fourth strand of Feminist Jurisprudence, the “dominance,” or “radical feminist” strand, is consistent with the variation of the gender difference theme in feminist theory that seeks to move beyond gender difference. This strand has been associated with the work of legal scholars Catharine MacKinnon and Andrea Dworkin. The basic position of the dominance strand is that all female reality, including a female’s enjoyment of heterosexual activity, is male constructed for the explicit and conscious purpose of male dominance/female subordination. Furthermore, MacKinnon at least, claims that radical feminism is the only feminism. Although MacKinnon’s work has been praised by some, it has also been the focus of vehement criticism from feminists and nonfeminists alike.

The preceding paragraph is not meant to suggest that the work of radical feminists, like MacKinnon, is the only Feminist Jurisprudence which seeks to go beyond gender difference. For example,
feminist legal scholars like Rhode and (in particular) Minow, have argued that Feminist Jurisprudence calls for a new dialogue in which all "minority perspectives" are seriously considered.\(^{41}\) Similarly, Menkel-Meadow has called for a perspective which goes beyond gender difference by combining aspects of the male and female perspective.\(^{42}\)

It cannot be emphasized enough that the idea of these "four strands" of Feminist Jurisprudence is a simplification for the limited purpose of providing an introduction to Feminist Jurisprudence. I have made no attempt to discuss the complex overlaps and interconnections among the strands which likely exist.

In addition to the gender difference theme, the second substantive theme which one finds in feminist theory, centers on the issue of differences \textit{within} the female gender.\(^{43}\) Although individual feminists may be categorized in many different ways (e.g., race, class), for purposes of this Article, I will agree with some feminist theorists that the category that is most dispositive of a woman's feminist views, is her political ideology.\(^{44}\)

Having said that, it would seem that all feminist theorists have an ideology in common that recognizes the present subordination of women.\(^{45}\) Feminists may disagree over such things as the extent of that subordination, whether it is social or political, or the method by


\(^{42}\) For example, going beyond gender difference might mean demonstrating the rationality of emotionalism, see Menkel-Meadow, supra note 4, at 74.

\(^{43}\) For a sampling of the available literature dealing with this issue, see Deborah L. Rhode, \textit{Theoretical Perspectives on Sexual Difference}, and Estelle B. Freedman, \textit{Theoretical Perspectives on Sexual Differences: An Overview, in THEORETICAL PERSPECTIVES}, supra note 25, at 5, 9, 259.

\(^{44}\) For a discussion of the various types of ideologies which are possible within feminist theory, see STEVEN M. BUECHLER, \textit{WOMEN'S MOVEMENTS IN THE UNITED STATES: WOMAN SUFFRAGE, EQUAL RIGHTS, AND BEYOND} 85-129 (1990); JAGGAR, supra note 25, at 10. For some good, readable introductions to political ideologies, see WILLIAM E. CONNOLLY, \textit{POLITICAL SCIENCE AND IDEOLOGY} (1967); \textit{POLITICAL IDEOLOGIES} (James A. Gould & Willis H. Truitt eds., 1973); NEAL RIEMER, \textit{POLITICAL SCIENCE: AN INTRODUCTION TO POLITICS} 91-198 (1983).

\(^{45}\) I don't think anyone is about to claim that Phyllis Schlafly is a feminist. \textit{See generally} MACKINNON, \textit{FEMINISM UNMODIFIED}, supra note 23, at 21-31 (noting that Schlafly interprets the distinctions between the situations of women and of men as natural, inevitable, and just). In any event, the issue may be irrelevant to the point I wish to make in this paragraph, because I am unaware of any legal scholar who takes Schlafly's point of view as a basis for a feminist jurisprudence.
which it can be eradicated. They will not, however, disagree that some female subordination is present in the social and political order. The degree of female subordination perceived by feminists will, in all likelihood, exceed the degree of female subordination perceived by the average non-feminist male. I submit that this ideology of female subordination informs all feminist jurisprudence. This latter observation is critical to my theory of the dialogic structure of jurisprudential movements in the legal academy.

Turning briefly to the methodology of Feminist Jurisprudence, I submit that there are three phases\(^4\) of analytical methodology that roughly correspond to the three variations on the gender difference theme delineated above. Like those variations, the methodological phases are not mutually exclusive, and indeed, are all concurrently operational.\(^4\) The third methodological phase corresponds to the “beyond gender difference” variation of the gender difference theme in Feminist Jurisprudence. The methodology in this phase focuses on women using their experience to inform their legal analysis.

The most popular formulation of the feminist method in this third phase was originally provided by MacKinnon. Following her Marxist analogy of “sex” to “labor,” she claimed that the male exploitation and domination of the female sex has led to a “false-consciousness” on the part of women.\(^4\) According to MacKinnon, “consciousness-raising” is necessary for women to discover what is truly female.\(^5\) Other feminist legal scholars have interpreted consciousness-raising to mean a multi-disciplinary methodological framework in which the relaying of gender (female) experiences plays a large role.\(^5\) Indeed, in one version of this third phase methodology, the “Fem-Crits” argue that, unlike their male CLS counterparts, they write about domination and oppression from the perspective of personal experience.\(^5\)

\(^4\) Interestingly, I discovered these “phases” identified by Lynn Smith, *What is Feminist Legal Research?*, in *THE EFFECTS OF FEMINIST APPROACHES ON RESEARCH METHODOLOGIES* 75-96 (Winnie Tomm ed., 1989) only after I had written the section on the substantive aspect of feminist jurisprudence. Such independent corroboration is heartening.

\(^4\) Id. at 95.


\(^4\) Id. at 181-86.

\(^5\) See, e.g., Susan Estrich, *Rape*, 95 YALE L.J. 1087 (1986); Scales, supra note 23, at 1402 (consciousness raising means that women have the confidence to declare that “eye witness testimony is being given”).

\(^5\) Note that the Fem-Crits use the critical methodology of their male CLS counterparts. See *infra* note 73 and accompanying text (discussing the methodology of CLS). The Fem-
In the second phase of feminist legal methodology, because female difference is celebrated, the methodology calls for "identifying areas in which the law has particularly important implications for women [e.g., maternity, sex offenses and] ... mustering arguments justifying special treatment for women." Finally, in the first phase of feminist legal methodology, the substantive emphasis on sameness requires that a feminist legal scholar find laws in which men and women are treated differently (e.g., family law). Having pinpointed the differences in the law, the scholar inquires as to whether or not the law could be made more gender neutral.

B. Critical Legal Studies

It is with much trepidation that I now attempt to provide a synopsis of the substance and method of CLS. For, unlike a discussion of Feminist Jurisprudence, a discussion of CLS requires more of me than merely the negotiation of my ignorance. Specifically, there are strains within CLS which suggest that any effort to systematize CLS runs counter to the central critical message of CLS. Because the systematization of CLS is indispensable to the fulfillment of the ob-

Crits' main methodological distinction is that they interweave stories about their own experiences into their critical methodology. For further discussion of the Fem-Crits and their experiential approach, see Guyora Binder, On Critical Legal Studies as Guerrilla Warfare, 76 Geo. L.J. 1, 13 (1987) (arguing that critical legal studies is rooted in "the particular historical experience of the generation that produced it"); Menkel-Meadow, supra note 4, at 61 (observing that the feminist critique of legal education, originating in experience, offers greater promise than the critical legal studies critique for the task of reconstruction); Elizabeth Schneider et al., Lesbians, Gays, and Feminists at the Bar: Translating Personal Experience into Effective Legal Argument—A Symposium, 10 WOMEN'S RTS. L. REP. 107 (1988) (transcript of symposium that began with group consciousness raising, followed by presentations that focused on the ways that personal experience has affected legal strategy).

However, not all feminists agree with the experiential methodology. See, e.g., Minow, Justice Engendered, supra note 23, at 10.

52. Smith, supra note 46, at 80.

53. Id. at 78.

54. There is much wisdom in this position. The essential idea is that systematization might be interpreted to signal "the attainment of institutional respectability and legitimacy . . . ." The attendant "cooptation" might imply that CLS would cease to perform, as effectively, its function of being critical. CRITICAL LEGAL STUDIES 9 (Allan C. Hutchinson ed., 1989) [hereinafter Hutchinson]. I should point out that although the quotes are direct ones, Hutchinson's is a discussion of the cooptation of CLS generally, not specifically as a result of systematization. A more direct statement of the CLS aversion to systematization, is given by Minow: "To advance this commitment [to explain both that legal principles and doctrines are open-textured and capable of yielding contradictory results], critical legal scholars often resist or reject efforts to systematize their own work . . . ." Minow, Law Turning Outward, supra note 40, at 83.
objective of this Article, I apologize to those who oppose such systematization. I also apologize for any gross oversimplification which occurs in the ensuing paragraphs, while taking solace in the fact that others more qualified than I have preceded me in exploring the systematization of CLS.  

55. Minow, for example, has suggested that CLS scholars engage in four "activities": demonstrating "the indeterminacy of legal doctrine"; identifying "how particular interest groups, social classes, or entrenched economic institutions benefit from legal decisions despite [this] indeterminacy"; "expose[s] how legal analysis and legal culture mystifies outsiders and legitimates its results"; and "elucidate new or previously disfavored social visions and argue for their realization [through] legal discourse." Minow, Law Turning Outward, supra note 40, at 84-85. Her four activities reflect both the substance and form of CLS. My systematization will attempt to segregate the two.

This seems a suitable place to present a summary of sources of introductory CLS material since, in a sense, these ensuing introductions present a systematization of their own. Although there is no professional CLS association per se, The Conference on Critical Legal Studies appears to be fulfilling some of that function. It held its first meeting at the University of Wisconsin Law School in 1977. Since that time, the Conference has reconvened numerous times at various law schools. Although consisting mainly of law professors, there are legal practitioners, and others, who are members of the Conference. There is also a European Conference on Critical Legal Studies, although CLS is chiefly an American phenomenon. See CRITICAL LEGAL STUDIES (James Boyle ed., 1992) [hereinafter Boyle] (Boyle's introduction is particularly instructive on this point). Numerous CLS symposia have been held since the time of the original meeting in 1977. At least one law school (Harvard) holds an annual CLS conference. The CLS movement has not been free of controversy. See infra note 73 and accompanying text (discussing the controversy further).

I am not aware of the existence of a journal which is devoted exclusively to the publication of CLS work. Given the volume of scholarly output however, this development is just a matter of time. I am aware of five general books on CLS. Three of them are books of readings: Boyle, supra; CRITICAL LEGAL STUDIES (Harvard Law Review Association ed., 1986) (providing selected CLS essays published in the pages of the Harvard Law Review); Hutchinson, supra note 54. I do not include in this count, a fourth book of original essays, many of which are by notable CLS scholars: THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (David Kairys ed., 1990) [hereinafter POLITICS OF LAW]. The two other introductory books on the topic include: MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987); ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986). ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990) summarizes and presents a response to the CLS "attack" of liberalism.

Focusing on the substance of CLS, I propose that it is possible to organize and understand that substance by understanding the nature of three of the components of CLS: the first component is the central proposition of CLS; the second component is the subsidiary propositions or "critiques"; and the third component is the objects of those critiques. The basic descriptive model which I propose then, is one in which various "standard" CLS critiques have been directed at various objects.\(^{56}\)

The first component, the central proposition or \textit{raison d'etre} of CLS seems to be that it is the critique that is the thing. Tushnet, a CLS scholar, has recognized the nature of this "interminable critique."\(^{57}\) Boyle, another CLS scholar, has suggested that the central message of CLS is that "things could be otherwise."\(^{58}\) CLS as interminable critique is reflected in this statement to the extent that it is an existential axiom that things could \textit{always} be otherwise.

In "naming" this central proposition, I do not mean to suggest that there is unanimity amongst CLS scholars as to the nature of this proposition. For example, there is some disagreement among CLS scholars as to whether any effort should be devoted to the eventual "reconstruction" of legal doctrine.\(^{59}\) Additionally, and as a corollary to this central proposition, it should be noted that because it is the critique that is the thing, it follows that there is no legal or near-legal object that is beyond critiquing. This latter idea has led to a proliferation of objects that have been subject to the various CLS critiques.

The second component of CLS consists of a list of the critiques that are in common use by CLS scholars. I have labelled these critiques subsidiary propositions simply because they seem to approach the central proposition in their importance to the CLS endeavor. I have identified at least six distinct CLS critiques and labelled them as

\begin{footnotes}
56. It is clear that certain CLS critiques have been consistently directed at certain legal objects (e.g., the Indeterminacy Critique has been consistently directed at legal rules). I leave for another day the task of determining which CLS critiques have been directed at which legal objects.

57. \textit{See Tushnet, supra note 55, at 516 ("[T]he work should not be defended on grounds that suggest that something more enduring than interminable critique might result from following it through.")}.

58. \textit{See Boyle, supra note 55, at 35.}

59. For a discussion of the division between the "rationalists" (i.e., critical theory can be used to reconstruct legal doctrine) and the "irrationalists" (i.e., no, it cannot), see Minda, \textit{supra note 1, at 619-20.}
\end{footnotes}
follows: the Neutrality Critique, the Indeterminacy Critique, the Entrenchment Critique, the Disenfranchised Critique, the Ideals Critique, and the Power Critique.

These critiques overlap, are used in conjunction with one another, and have subsidiary critiques embedded within them. There appears to be no expectation on the part of CLS scholars that a given critique will be directed exclusively at a given object. Additionally, it is important to note that this list is by no means a comprehensive one. However, it seems a useful starting place for those of us who endeavor to understand Critical Legal Studies. In the ensuing paragraphs, each critique is briefly discussed.

The Neutrality Critique asserts that there is no such thing as a politically neutral discourse. The CLS scholar who invokes this critique, therefore, is led to search out and identify the various ideologies which inhere in any given legal object (e.g., legal discourse, legal rule etc.). It is the Neutrality Critique which is best represented in the CLS slogan that “law is politics.” A subsidiary critique is one which might be termed the Reification Critique. This Critique motivates the CLS scholar to uncover what it is that becomes or has become hidden once the law has reified (i.e., made a thing) a person or an idea (e.g., a “legal party”). It is often possible to show that the legal reification in question is an ideologically-motivated one.

The Indeterminacy Critique leads the CLS scholar to demonstrate the manner in which the legal object (e.g., legal rule) is indeterminate (e.g., in application). A common way of doing this is to identify the “fundamental” contradiction, distinction, inconsistency, or incoherence which makes the legal object indeterminate.

60. See Gary Minda, The Jurisprudential Movements of the 1980s, 50 OHIO ST. L.J. 621 (1989). A more eloquent statement of this proposition is: “Legal epistemology is ideological warfare fought by other, more esoteric means.” Hutchinson, supra note 54, at 6. For an illustration of an application of this critique, see Jay M. Feinman & Peter Gabel, Contract Law as Ideology, in POLITICS OF LAW, supra note 55, at 373.


62. Perhaps the most famous example of this is Kennedy's notion that the law seeks to mediate the “fundamental contradiction” which exists between self and others. See Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 BUFF. L. REV. 209 (1979). But see Peter Gabel & Duncan Kennedy, Roll Over Beethoven, 36 STAN. L. REV. 1, 36 (1984) (Kennedy claims to have recanted this fundamental contradiction). It is possible to argue that this tension between self and community in the law was foreshadowed in UNGER, supra note
The Entrenchment Critique directs the CLS scholar to discover the manner in which the legal object under analysis serves to perpetuate and legitimate the interests of those who are already entrenched (i.e., in power, prestige, economics etc.). Its close cousin, the Disenfranchised Critique, directs the scholar to identify those who will become and continue to be disenfranchised (economically, politically and otherwise) as a result of the legal object under analysis.63

The Ideals Critique directs the CLS scholar to demonstrate the manner in which the legal object fails to live up to its announced ideals.64

Finally, the main endeavor of the Power Critique is to demonstrate the manner in which knowledge reflected in, or knowledge of the legal object confers power upon those who possess it.65 A subsidiary critique is the Mystification Critique which directs the CLS scholar to show how a legal object confers power by mystifying outsiders.66 An additional subsidiary critique, the Constraining Critique, directs the CLS scholar to demonstrate the manner in which a particular legal object fails to constrain the exercise of raw power.67

The third component of CLS consists of the legal object towards which the preceding critiques are directed. In the interest of brevity, those objects will only be listed here. The exercise of pairing legal objects with the specific CLS critique of the object, is an undertaking for another day. At the most general level, CLS scholars have critiqued social theories68 and "liberalism."69 CLS scholars have critiqued entire schools of legal thought, including "mainstream" legal

55, at 104-05. Put more broadly, the Indeterminacy Critique challenges the proposition that dualities “such as subjective/objective, male/female, public/private, self/other, individual/community . . . [can be] mediate[d] [so as to] sustain a position of normative equilibrium.” Hutchinson, supra note 54, at 4-5.

63. Examples of both of these critiques can be found in MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); MARK V. TUSHNET, THE AMERICAN LAW OF SLAVERY, 1810-1860 (1981); Duncan Kennedy, Cost-Reduction Theory as Legitimation, 90 YALE L.J. 1275 (1981).

64. See, e.g., Gary Minda, Of Law, the River and Legal Education, 10 NOVA L.J. 705 (1986) (arguing that legal educators should be committed to teaching the ideals of law, not a simple view of rules of law in force).

65. See, e.g., ROBERTO M. UNGER, KNOWLEDGE AND POLITICS (1975).


67. See Minow, supra note 40, at 82 (discussing the Constraining Critique).


69. See ALTMAN, supra note 55.
In tandem with this observation, it should be noted that CLS scholars have been the most ardent critics of CLS, leading at times to divisions in their ranks. Finally, CLS scholars have critiqued entire substantive areas of law, long-standing ideas or constructs within law (e.g., "rights"), specific legal rules, and legal practice (i.e., academic and non-academic legal practice).

Having considered the three components of the substance of CLS, it is now possible to consider briefly the method of CLS. The method of CLS refers to the manner in which the critiques and legal objects of those critiques are selected, as well as the manner in which the critiques are applied to the various legal objects. In considering the CLS method, there can be little doubt that CLS is the most methodologically eclectic of any existing jurisprudential movement. At a minimum, it appears that CLS scholars have made use of the critical sub-fields of any field that has such a sub-field (e.g., critical sociology). In the limit, and by the admission of some of the leading proponents of CLS, it seems clear that methodologically-speaking, literally anything goes. After all, it is not the method of critique—it is the critique that is the thing.

70. See, e.g., Elizabeth Mensch, The History of Mainstream Legal Thought, in POLITICS OF LAW, supra note 55, at 13.
71. See, e.g., KELMAN, supra note 55, at 151.
72. See, e.g., Minda, supra note 1, at 620 nn.99, 101 & 103 (discussing the “rationalists” versus the “irrationalists,” and “moderns” versus the “postmoderns”). Of course the idea that CLS scholars would spend time critiquing one another is consistent with what I have suggested is the first component of CLS (i.e., the critique is the thing, and no legal object is immune from criticism).
77. For an example of a CLS critique of private practice, see Gabel & Harris, supra note 61, at 369. For an example of a CLS critique of non-academic practice, see Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology 36 J. LEGAL EDUC. 518 (1986).
79. See Gabel & Kennedy, supra note 62, at 4; Tushnet, supra note 55, at 516 (providing statements of the anything goes (methodologically) proposition). For examples, see Minda, supra note 1, at 615 n.72.
C. Law and Economics

Unlike the substance of CLS, which involves the directing of critiques at legal objects, the substance of L&E primarily involves using legal objects as a translating medium—a means by which principles and assumptions of economic analysis are translated into principles and assumptions of L&E. These principles and assumptions are in turn used to explain, critique, and make predictions regarding legal objects. The latter activity represents the bulk of L&E scholarship.80

It should be clear that there is a dynamic loop in operation here. The explanations, critiques, and predictions provided by L&E principles and assumptions, in addition to having value in their own right, may lead to the creation of new, or modification of existing principles and assumptions of L&E, etc. At the same time, the principles and assumptions of economic analysis proper, continue to be used to generate new, or modify existing principles and assumptions of L&E.81 I propose that this entire dynamic cycle is perhaps what is meant by defining L&E as the application of economic analysis to the law.82


81. For example, the newest set of economic principles to be integrated into law and economics are principles of "game theory." See Jason S. Johnston, Law, Economics, and Post-Realist Explanation, 24 Law & Soc'y Rev. 1217, 1247 (1990).

82. This definition of Law and Economics is the "standard" one. See, e.g., Posner, supra note 80, at 19-20 (providing definition). My point in the text is that the process of how economics is applied to the law has not been the focus of much study.
**Figure 1: Structure of Law and Economics Substance**

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<tr>
<th>BLOCK 1</th>
<th>BLOCK 2</th>
<th>BLOCK 3</th>
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<tbody>
<tr>
<td><strong>Principles &amp; Assumptions of Econ. (Micro mostly)</strong></td>
<td><strong>Legal Areas (&quot;Translating Media&quot;)</strong></td>
<td><strong>Principles &amp; Assumptions of Law &amp; Economics</strong></td>
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<tr>
<td>1. Assumptions (e.g.)</td>
<td><strong>Pane A</strong></td>
<td>1. Assumptions (Block 1)</td>
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<tr>
<td>a) self-interest</td>
<td>Legal Areas w/ Explicit markets</td>
<td>2. Principles (e.g.)</td>
</tr>
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<td>b) rationality</td>
<td>e.g. Antitrust</td>
<td>a) Coase Theorem</td>
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<tr>
<td>c) &quot;as if&quot;</td>
<td><strong>Pane B</strong></td>
<td>b) Efficient Common 1.</td>
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<td>d) cost/benefit implicit</td>
<td>Legal Areas w/ Implicit Markets</td>
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<tr>
<td>e) group behavior</td>
<td>e.g. Common Law</td>
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<td>2. Principles (e.g.)</td>
<td><strong>Pane C</strong></td>
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<tr>
<td>a) Scarce resources/ unlimited wants</td>
<td>Legal Areas w/o Substantive Rules</td>
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<tr>
<td>b) efficiency matters</td>
<td>e.g. legal procedure</td>
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<td>c) market is most efficient</td>
<td>Legal Areas w/ Regulation of Non-Market Activities</td>
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<td>e.g. Constitutional Law</td>
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<td><strong>Pane D</strong></td>
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<tr>
<td></td>
<td>Legal Areas Involving Non-Market Decisions</td>
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<td>e.g. voting, Constitutional Law</td>
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Figure 1 represents only one (the initial) cycle of this dynamic loop. The diagram also provides a basis for structuring the ensuing discussion of the substance of L&Ec. Of the three blocks in Figure 1, the first block (Block 1) represents the list of relevant principles and assumptions of economic analysis. The second block (Block 2) consists of the translating medium—those legal objects to which the economic principles and assumptions are applied. The third block (Block 3) reflects the outcome of this translation process: principles and assumptions of L&Ec analysis. Each of the three blocks will be discussed briefly in turn.

In considering Block 1, note that as a general matter, the relevant economic principles and assumptions have come from microeconomic as opposed to macroeconomic analysis. Microeconomics is the study of decision-making by individuals and groups of individuals. Macroeconomics is the study of aggregate variables (e.g., unemployment or inflation). Yet even within microeconomic analysis, there have been some types of analyses which have been systematically overlooked by current L&Ec scholars. For example, much of prevailing L&Ec has made use of microeconomic theories of the household, and theories of the firm, without paying much attention to microeconomic theories of markets.

At a more specific level, examples of neoclassical microeconomic assumptions used by L&Ec include the following. First, economists assume that individuals and groups of individuals pursue their self-interest (i.e., maximization of satisfaction (“utility”), or profits in the case of the firm). Second, the assumption that they do so rational-
ly, implies only that means are consistent with ends, or ends are consistent with one another. Third, it is assumed that an individual need not be cognitively aware of the economist’s model in order for the model to be an accurate descriptor of their behavior. Consistent with the second and third assumption, a fourth assumption is that the weighing of the costs and benefits of actions is a useful analytical tool to be used by individuals. Finally, it is assumed that a given economic model may be used to predict the behavior of a group of individuals as opposed to the behavior of a single individual.

Turning briefly to principles of economics, a first and abiding principle is that life requires that scarce resources be used to satisfy unlimited human wants. This first principle leads to the second: Individuals are necessarily led to be concerned about efficiency in the use of resources. In a situation where there are gainers and losers, Kaldor-Hicks efficiency can be said to exist if it is possible for the gains of the gainers to compensate the losses of the losers. Apart from this particular definition of efficiency, the general principle of efficiency motivates the economists to conduct cost-benefit analyses of actions to assure that the principle is not violated. These analyses often involve the identification and explication of previously undiscovered costs. The third principle asserts that the market is the best mechanism for achieving efficiency.

The strongest adherent of the neoclassical (“free market”) school of economic thought has been the University of Chicago Economics Department (the “Chicago School”). Other schools of economic

88. See COOTER & ULEN, supra note 80, at 11.
89. See generally Milton Friedman, The Methodology of Positive Economics, in MILTON FRIEDMAN, ESSAYS IN POSITIVE ECONOMICS (1953) (discussing the “as if” assumption: individuals behave as if they are aware of the economic models which describe their behavior).
90. For some good references to cost-benefit analysis as used by economists, see POSNER, supra note 80, at 357 n.2.
91. This is called the “law of large numbers.” See LIPSEY ET AL., supra note 84, at 19.
92. Id. at 3.
93. Id. at 247.
95. See POSNER, supra note 80, at 357 n.2.
96. See infra note 369 and accompanying text (defining “agency cost”).
97. This is, of course, the essence of Adam Smith’s “Theorem of the Invisible Hand”: the market is the mechanism that allows the self-interest to operate for the benefit of the collective interest. See generally JACK HIRSCHLEIFER, PRICE THEORY AND APPLICATIONS 526-29 (2d ed. 1980).
98. For a good discussion of the “Chicago School of Political Economy” within eco-
thought which have influenced the development of Law and Economics have presented a variation on a neoclassical theme (i.e., there is not a sizeable literature on Marxian law and economics). Examples of these variations include the Public Choice or "Virginia School" of economic thought, that essentially uses many of the assumptions and principles discussed above to study non-market (e.g., government) decision-making. The Institutionalist School or "Wisconsin School" of economic thought stresses the role that economic institutions (e.g., technology) play in economic decision-making.

The preceding discussion makes it possible to consider both the middle and right-hand blocks of Figure 1 (Blocks 2 and 3 respectively) simultaneously. Before doing so, however, it is instructive to consider Block 2 wholistically. The essential idea here is that this translating medium can be analogized to an "analytical window" through which principles of economic analysis pass to reemerge as principles of law and economics. The analytical matter which makes up the window frame consists of areas of substantive law which exhibit certain market characteristics (i.e., explicit markets, implicit markets, and non-markets, see below).

Indeed, looking at the central block vertically, it is possible to continue the window analogy by dividing the analytical window into window panes. The vertical progression from window pane A to pane D roughly reflects the historical development of modern Law and Economics. Early Law and Economics, Pane A, involved the
analysis of substantive areas of law which dealt with explicit markets (e.g., antitrust). A second, and main period in Law and Economics, Pane B, involved the analysis of areas of law in which implicit markets were deemed to exist (e.g., common law).

Law and Economics as it is currently practiced by scholars, involves the simultaneous pursuit of at least five activities. First, as indicated by Pane C, there is an effort to extend the implicit market idea to seemingly non-market substantive areas of law (e.g., constitutional law). Second, as indicated by Pane D, the agenda of the Virginia School of economic thought (analysis of non-market decisions) is going forward. As indicated by the arrows pointing from Pane B to C and from Pane D to C, the Virginia and Chicago Schools of economic thought are in competition with respect to certain substantive areas of law (e.g., constitutional law). Some would argue, however, that there is little ideological competition here, since the Chicago School glorifies markets, and the Virginia School denigrates government intervention.

A third activity involves feeding new or different economic assumptions and principles into the entire analytical window (e.g., economic game theory). A fourth activity involves challenging aspects of the entire apparatus represented by Figure 1. This activity has been variously labelled the "Reformist" or "Post-Chicago" tradition, and is essentially a challenge to the hegemony of the Chicago and Virginia Schools of law and economics (e.g., an allegation that some of the assumptions and principles in the third block of Figure 1 reflect a conservative ideological bias). Finally,
there is some scholarly activity involved in updating some of the substantive legal areas in Pane A with modern economic, or Law and Economic theories and methods.113

In considering Blocks 2 and 3 simultaneously, because of space constraints, and for illustrative purposes only, I shall confine my attention to Pane B of Block 2. My main justification for doing so is that the economic analysis of the common law seems to form the backbone of the economic analysis of law as it is currently taught.114 I shall not discuss the assumptions and principles of Law and Economics which have emanated from Panes A, C, and D. Indeed, even my discussion of those assumptions and principles emanating from Pane B must, of necessity, be cursory and incomplete.

Of the many extant principles of L&Ec, there are two which I think effectively illustrate its nature. The first principle is the “Coase Theorem.” It is widely regarded as the principle which signalled the advent of the “new” (Chicago School) L&Ec in 1960.115 The Coase Theorem asserts that where the parties to a property dispute are able to cooperate (i.e., “transaction costs are zero”), then the nature of the legal rule (e.g., damages or injunction; referred to as “the initial assignment of property rights”) will have no effect in determining which party ultimately gets the use of the property.116 It should be clear that the Coase Theorem assumes the validity of economic assumptions such as the self-interest assumption discussed above (Block 1). Although having its origins in property law (Block 2), the Coase Theorem has been extended and applied well beyond that point, as well as critiqued extensively.117

A second illustrative L&Ec principle is one which might be labelled “the efficient common law principle.” This principle asserts

244-46 (discussing the possibility of synthesizing the public policy and public choice frameworks).

113. See generally CALVANI & SIEGFRIED, supra note 80 (providing an economic analysis of antitrust laws and their implementation).

114. The reader’s perusal of any of the introductory L&Ec books cited supra note 80, will support this contention. Invariably, the first few chapters discuss the economic analysis of the common law.

115. The Coase Theorem was set forth in R.H. Coase, The Problem of Social Cost, 3 J.L. & ECON. 1 (1960); see also POSNER, ECONOMIC ANALYSIS OF LAW, supra note 80, at 19.

116. See POSNER, ECONOMIC ANALYSIS OF LAW, supra note 80, at 7.

that common law rules have been evolving toward efficiency. The basic mechanism is that inefficient rules by virtue of their inefficiency, invite litigation of the rule until such time as the rule has become efficient, or has been eliminated.\textsuperscript{118} It is clear that this L&Ec principle assumes the validity of the economic efficiency principle (Block 1). In addition, this evolution of the common law principle, applies to the entire common law (Block 2). It also demonstrates the manner in which a L&Ec principle once created, can be subject to a feedback mechanism (e.g., critical analysis, empirical testing) which ultimately leads to a revision of the original principle.\textsuperscript{119}

Although the substance of L&Ec might be the subject of some controversy among lawyer-economists, the method of L&Ec tends to be less controversial, at least among this group. The reason is simple: the methodology of law and economics is essentially the methodology of economics. The methodology of the latter is the “scientific method.” Briefly, the scientific method’s central component is a theory which posits an explanation for a given phenomenon, and permits predictions regarding that phenomenon, which can be tested and verified.\textsuperscript{120}

There are two aspects of the modern scientific method which have had a noticeable impact on Law and Economics. First, the role of quantitative analytical methods in L&Ec is not to be denied.\textsuperscript{121} This is so because under the scientific method, a theory’s hypothesis, which states the manner in which the theory’s variables are related to one another (i.e., the hypothesis is the heart of the theory’s explanation), is most effectively stated in symbolic or quantitative terms. Second, the is/ought or positive/normative distinction has received much attention in L&Ec.\textsuperscript{122} Briefly, that distinction provides that the scientific method describes and explains what is, but provides no substitute for the value judgment involved in deciding what should be.\textsuperscript{123}

\textsuperscript{118} For a good introductory discussion of this theory, see POSNER, ECONOMIC ANALYSIS OF LAW, supra note 80, at 527, 529 n.2.

\textsuperscript{119} The controversy over the extent to which the common law is efficient (and the efficiency hypothesis valid), is by no means settled. One notable L&Ec scholar has been lead to observe that “Chicago school scholars have by no means proved their case” with respect to the efficiency-of-the-common-law thesis. Rose-Ackerman, supra note 86, at 239.

\textsuperscript{120} See LIPSEY ET AL., supra note 84, at 14-29; see also ARNOLD BRECHT, POLITICAL THEORY 27 (1959) (discussing theory of scientific method).

\textsuperscript{121} See COOTER & ULEN, supra note 80, at 8.

\textsuperscript{122} See LIPSEY ET AL., supra note 84, at 14-17; BRECHT, supra note 120, at 126-28.

\textsuperscript{123} See BRECHT, supra note 120, at 132-35.


D. Mainstream Legal Thought

To the extent that the preceding three jurisprudential movements are relatively recent phenomenae, it follows that there is a body of jurisprudential thought which preceded these three movements. Indeed that body of thought has not been supplanted by the movements described above. It is very much alive and well. Insofar as “mainstream legal thought” is by definition the mainstay of current legal education and legal practice, then, the discussion of it need not detain us very long here.

Relevant to the purposes of this Article are two instructive observations about mainstream legal thought. First, I am in agreement with Mensch’s observation that “One is hard pressed, as we enter the 1990s, to identify any perspective as ‘mainstream’ legal thought . . . .”124 This observation does not refute the reality, however, that the doctrinal analysis of legal rules is the bulk of the content of law reviews, casebooks, and legal treatises of today. Furthermore, these analyses are often buttressed with analyses of the relevant policies and competing interests.125 In short, a good case can be made for the proposition that mainstream legal thought primarily reflects the longstanding influence of classical legal thought (i.e., formalism or legal conceptualism) with some incorporation of the ideas of the anti-formalists developed over the past 100 years (e.g., legal positivists, legal realists).126

Second, although the conceptual categories of the classicals still form the substance of mainstream legal thought, it is possible to argue that the method of mainstream legal analysis has undergone a

124. See Mensch, supra note 70, at 32.
125. This is an instance in which “reader’s notice” works best. The reader can take “reader’s notice” of this fact through a casual inspection of any of the major law reviews or established law school casebooks such as GERALD GUNThER, CONSTITUTIONAL LAW (11th ed. 1985), or WILLIAM L. CARY & MELVIN A. EISENBERG, CORPORATIONS (6th ed. 1988).
126. See Mensch, supra note 70, at 23-26 for a definition of “classical legal thought.” See BRECHT, supra note 120, at 182-85 (providing a good, brief discussion of legal positivism). To understanding the longstanding influence of classical legal thought, one can consult any contracts casebook. E.g., E. ALLEN FARNsworth & WILLIAM F. YOUNG, CONTRACTS (3d ed. 1980) (showing that classical legal theories such as Williston’s offer-acceptance-consideration model of contract law are still alive and well. Even Parson’s contractual scheme still carries weight: in most contracts casebooks, Williston’s scheme is usually supplanted with a discussion of “unique” contracts (e.g., bailment, marriage, etc., which is the way Parsons analyzed contract law)); see also Mensch, supra note 70, at 17-19 (discussing Parsons and Williston).
more radical transformation. The influence of the "process theorists" (e.g., reasoned elaboration as a method of judicial decision-making) which partly gave rise to the Administrative Procedure Act, continues to be with us today. Moreover, and perhaps most significantly, the "law as interpretation" branch of mainstream legal thought has suggested that it is methodologically possible for a judge to ground her decisions in values. All that is required, is that she seek to identify and invoke the community's "shared values.

Having completed our whirlwind survey/refresher of the current and dominant jurisprudential movements, it is now possible to put that information to good use by considering what is hereafter labelled and defined as the "dialogic structure" of these movements.

II. THE DIALOGIC STRUCTURE OF JURISPRUDENTIAL THOUGHT IN THE LEGAL ACADEMY

A. A Primer on Communication Network Analysis

I define the dialogic structure of the jurisprudential movements discussed above, to be the way that legal scholars in these movements communicate with one another. What this definition requires of me, if I am at all prudent, is that I consult the work of those whose business it is to know something about communication: organizational communication theorists. Indeed a consultation of the literature of this young science, reveals that mine is an effort to conduct a "network analysis" of the communication which occurs among the jurisprudential movements. Accordingly, the remainder of Part A is devoted to providing a summary of the rudiments of network analysis. In Part B, this technology is applied to the study of communication among the jurisprudential movements.

1. Communication and the Anatomy of a Communication Network

Communication theorists define communication to be "that process by which messages are transmitted via certain channels from a
source to a receiver." A message qualifies as communication under this definition, even if it is transmittable via different or multiple channels (i.e., written, oral, telephonic). An arrangement of channels makes up a communication network (hereinafter "network"). Networks are classified according to various "patterns," some of which are discussed below. A network is also defined so that there is essentially one network per group (or clique). An arrangement of networks makes up a system. Network analysis is the analysis of communication flows in an organization for the purpose of determining the identity and attributes of networks, extra-networks, and systems within the organization.

132. Id. at 320.
134. See id. at 48.
135. William D. Richards, Jr., Network Analysis in Organizations, in Organizational Communication 595 (Sherry D. Ferguson & Stewart Ferguson eds., 2d ed. 1988) [collection of works hereinafter Organizational Communication].
136. See Lewis, supra note 133, at 54 (exhibit 3-5).
137. See Richards, supra note 135, at 595.
There are two aspects of networks that are of particular relevance to this Article. First, there is the nature of "nodes" (i.e., message senders and receivers) and second, the attributes of links (i.e., the connection between the nodes) within the network. The ensuing discussion focuses on the attributes of a single link. A discussion which focuses on the attributes of the collection of channels is necessarily a discussion of the attributes of the link—more on that below. Each of the two aspects of a network (i.e., nodes and links), will be discussed...
in turn. The theoretical discussion which follows, is supported by an array of truly impressive empirical work done by organizational communication scholars.\footnote{See, e.g., GOLDHABER & BARNETT, supra note 131.}

The term "node," in the theory of organizational communication, appears to be used exclusively as a reference to the individuals within the organization who send and receive messages.\footnote{See id. at 325; Richards, supra note 135, at 597-98.} Significantly, however, no theorists take the position that a node must be a reference to an individual, and only an individual.\footnote{Indeed, one can read Wigand to suggest that the individual is the node only when there is one group within the system: "A group is here understood as a system. In this context a system is defined as the number of nodes (system parts) and relations (reflective of interactions and interdependencies) observable between these nodes." Rolf T. Wigand, \textit{Communication Network Analysis: History and Overview}, in GOLDHABER & BARNETT, supra note 131, at 325.} Separately, there are three kinds of nodes that are identified in the theory of organizational communication: the "liaison," the "isolate," and the "gatekeeper."\footnote{Id. at 53.} Each of the three kinds of nodes is illustrated in Figure 2.

A liaison is a node which connects two or more groups (i.e., networks), thereby providing interconnectedness among the groups.\footnote{Id.} An isolate is, literally, an isolated node which neither receives messages from, nor sends messages to, other nodes.\footnote{Id.} A gatekeeper is the node within a network which receives messages from the liaison, and then decides whether or not to pass the messages along to the other nodes in the network.\footnote{Id.} The upside of the gatekeeper is that it can reduce information overload within the network. The downside, is that it can conceivably prevent the group from accomplishing its task by hoarding information.\footnote{See id.}

Turning now to a consideration of the attributes of a given link within a network, these attributes can be characterized along three dimensions. Specifically, the communication relationship which a link represents\footnote{That is, where a node is being used to refer to an individual, then the link between two nodes refers to the communication relationship between two individuals. Richards, supra note 135, at 598.} can be characterized according to its content, strength, or symmetricality.\footnote{Id. at 597.}
The content of the communication relationship might refer to three aspects of the organizational, or group task: production (i.e., communication about "getting the job done"\(^{149}\)), innovation (i.e., new ways of getting the job done), and maintenance (i.e., social and emotional matters regarding getting the job done). The strength of the relationship refers to any attempt to capture the magnitude of the relationship (e.g., frequency of communication).\(^{150}\)

It is the third link characteristic, symmetricality, that is most relevant to the purpose of this Article. As indicated in Figure 2, the basic theoretical distinction made, is one that distinguishes bi-directional or symmetrical flows of information (i.e., the arrow between nodes has two heads) in the communication relationship, from unidirectional ones (i.e., the arrow has one head). There are studies which have attempted to study *gradations* of symmetricality.\(^{151}\) This idea of gradations of symmetry can be expressed diagramatically by drawing two arrows between the nodes, and having the length of the arrows represent the communication relationship's degree of symmetricality.\(^{152}\)

2. Attributes of Networks and Patterns of Networks

As I previously suggested, a discussion which assesses the characteristics of many links within a network is necessarily a discussion of the attributes of that network.\(^{153}\) In discussions of the attributes of a network, a distinction is made between the structural attributes, versus the contextual attributes of that network. The former are the internal, context-independent attributes of the network.\(^{154}\) The contextual attributes of the network refer to the "connections . . . between various aspects . . . [of the network and] individual, organiza-

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149. *Id.*
150. *Id.*
152. The notion of representing symmetry in communication with two arrows is a notion which is part of transactional analysis, a psychological school of thought which analyzes human behavior as exchanges. *See Lewis, supra* note 133, at 29. My idea of expressing gradations of symmetry through the length of the arrows which represent the relationship, is an idea which is consistent with the practice of placing an entire network in a quadrant of a cartesian plane (i.e., a graph with x and y axes). *See generally Goldhaber & Barnett, supra* note 131, at 16.
153. *See supra* notes 137-44 and accompanying text.
154. *E.g.*, an "interlocking" network is one with a high "integrativeness" score—an individual in the network has friends who are friends of one another. *See Richards, supra* note 135, at 598.
tional, and social life."\textsuperscript{155} For example, some studies have attempted to establish a connection between an individual’s personality characteristics and their membership in interlocking, versus non-interlocking networks.\textsuperscript{156}

Any discussion of the attributes of a network, however, implicitly assumes the existence of a wholistic characterization of that network. These wholistic characterizations of networks are referred to as “network patterns.”\textsuperscript{157} These patterns are expressed graphically,\textsuperscript{158} with certain standard patterns bearing names that describe their pictorial representation (e.g., “circle,” “wheel,” “star”; see Figure 2).\textsuperscript{159} One of the benefits of defining a set of standard network patterns is that with such a definition, it becomes possible to provide a network taxonomy which classifies a given standard network according to the amount of an attribute it possesses (e.g., communication of information is fastest and morale is lowest in the wheel network).\textsuperscript{160} Such a taxonomy is of great value to an organization in the process of structuring its communication network.

In the discussion that follows, the network that will be pressed into service (i.e. because it is relevant to this Article) is the “star” or “All-Channel” network.\textsuperscript{161}

As is apparent from Figure 2, the essence of the All-Channel network is that there are links which connect each node to all other nodes. There are therefore no restrictions on node-to-node communication.\textsuperscript{162} The chief benefits of this network pattern are that organizational morale (to the extent that it depends on communication) is high, while the speed and accuracy of communication are also potentially high. The All-Channel network is also highly flexible. The chief cost of this network is that it is associated with leadership and organizational instability. Additionally, there is a potential for communication speed and accuracy within the network, to be slow and poor.\textsuperscript{163}

\begin{itemize}
\item \textsuperscript{155} \textit{Id.} at 600.
\item \textsuperscript{156} \textit{Id.} A “radial” network is the opposite of an interlocking network (i.e., it is one with a low integrativeness score).
\item \textsuperscript{157} \textit{Lewis, supra} note 133, at 52.
\item \textsuperscript{158} \textit{Goldhaber & Barnett, supra} note 131, at 329-33.
\item \textsuperscript{159} \textit{Lewis, supra} note 131, at 52.
\item \textsuperscript{160} \textit{Id.}
\item \textsuperscript{161} \textit{Id.} at 52-53.
\item \textsuperscript{162} \textit{Id.} at 52.
\item \textsuperscript{163} \textit{Id.} at 53.
\end{itemize}
1. The Basic Model, Organization, Network, and Nodes

The basic model of the dialogic structure of jurisprudential movements, which I have in mind, may now be apparent to the reader. Specifically, I propose that the All-Channel network pattern most accurately describes the structure of the communication that occurs among the various jurisprudential movements. As demonstrated in Figure 3, this basic model is made possible by focusing on the actual movements themselves, as the nodes within the network. These nodes, as well as the links between them, can be reified as needed (e.g., jurisprudential movements represented by scholars and links represented by scholarly articles).

My appropriation of the All-Channel network has necessitated more than a few assumptions. In what follows, I shall discuss these assumptions and other implications for further research suggested by the basic model. This will be done by discussing the structural components of network analysis in decreasing levels of analytical generality. The discussion in this portion of the Article is conducted at this level of detail in the hope that some will be motivated to challenge
and investigate some of my assumptions and assertions. Given the specific purposes of this Article however, the most critical aspect of the discussion which follows, will be the discussion of symmetricality in the links which I claim exists between the jurisprudential movements.

A discussion at the first analytical level, the organizational level, is required simply because my application of organizational communication theory necessarily presumes the existence of an organization. This presumption must now be confirmed. It is true that organizational theorists have posited numerous definitions of "organization." Most theorists are in agreement, however, that any definition of an organization must make reference to the three indispensable components of an organization: individuals, objectives, and structure (or "identifiable boundaries"). I propose that the relevant organization is the legal academy. The presence within the legal academy of the indispensable components discussed above will confirm its status as an organization.

The individuals who are members of the legal academy are called legal scholars and law teachers. It is clear that the labelling of this membership immediately suggests the nature of the objectives of the legal academy: the production of scholarship, and the instruction of pupils. These dual purposes follow rather easily from the dictionary definitions and histories of scholarship and the academy. I note in passing that scholarship is simply the "mental attainments of a scholar," who in turn defined as someone who does "authoritative research in some special field." Law is, of course, the special field here. Indeed, there is no indication that the law's present interdisciplinary orientation has irreparably injured the identity of the law as a distinct field.

166. I do not join here the debate regarding the proper mix of teaching and scholarship within the academy. See infra note 237 and accompanying text.
167. See, e.g., PAUL WESTMEYER, A HISTORY OF AMERICAN HIGHER EDUCATION (1985) (discussing the history of the academy noting that originally it was Plato's idea. The academy was then affiliated with the church, subsequently evolving to its present secular form. The academy, however, always involved teaching and the production of knowledge); see also FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY 7 (1963) (providing a definition of the word "academy").
168. See FUNK & WAGNALLS STANDARD COLLEGE DICTIONARY, supra note 166, at 1202 (providing definitions of "scholar" and "scholarship").
169. Authors who advocate increasing interdisciplinary dialogue between law and other
Regarding the structure of the organization (the "Legal Academy"), it is useful to consider that most basic distinction of all: the distinction between the formal and informal organizational structure. That the Academy should have a formal structure (i.e., a "formal system[] of responsibility and explicit delegation[] of duties . . .") is not subject to much dispute. The American Association of Law Schools ("AALS") has an explicitly delineated hierarchy which encompasses law schools and therefore law professors, as ultimate members.\(^1\)

It seems clear, however, that this Article is concerned with the informal organization of law professors. Informal organizations are defined as "the set of unauthorized behaviors which are routinized parts of the organizational culture of the [organization]."\(^2\) Stated differently, informal organizations are those organizations which are not part of the explicit hierarchy of the organization. If one accepts the proposition that the AALS is the relevant formal organization, then its recognition of the Conference on CLS and the American Association of L&E as "organizations related to legal education,"\(^3\) seems tantamount to an admission of their informality vis-a-vis the AALS. This of course is not to suggest that these informally related organizations are not themselves formal in their own structure.

Turning to the network level of the analysis then, it follows that the objective is one of modelling the communication that occurs among groups of legal scholars whose organizations are themselves informally related to the main organization, the AALS. There is very little reason to doubt that the informal communication that occurs disciplines seem to be of the opinion that the law can only benefit from this dialogue. See Minow, Law Turning Outward, supra note 40. But see Richard A. Posner, Decline of Law as an Autonomous Discipline: 1962-1987, 100 HARV. L. REV. 761 (1987) (arguing that lawyers should be trained without dialogue with other disciplines).

170. LEWIS, supra note 133, at 11.

171. The interested reader can peruse The AALS Directory of Law Teachers to get a sense for this hierarchy (e.g., president, president-elect, executive director etc.).

The statement in the text raises an interesting possibility for further research. Organizational theorists have proposed several classification schemes for organizations. For example, one might ask whether the AALS structure comports with Mintzberg's scheme of the five-part organization. See MULLINS, supra note 164, at 3. Alternatively, one might ask whether the power exercised by the AALS is consistent with the kind of commitment it seeks from its members. See AMITAI ETZIONI, A COMPARATIVE ANALYSIS OF COMPLEX ORGANIZATIONS ON POWER, INVOLVEMENT, AND THEIR CORRELATES (1975). It seems apparent that organizational theory is capable of informing the law in some yet to be discovered ways.

172. VASU ET AL., supra note 163, at 128.

173. THE AALS DIRECTORY OF LAW TEACHERS 3 (1990-91).
among scholars of the various movements is best characterized by the All-Channel network. This follows from an affirmative case (e.g., all scholars, regardless of their jurisprudential affiliation, are able to communicate with all other scholars through their publications). It also follows by process of elimination.  

A consideration of the attributes of this network of jurisprudential movements also raises some interesting possibilities. For example, from an internal standpoint, 175 it is likely that this network of jurisprudential movements has a high integrativeness score (i.e., many legal scholars in the various movements have friends who are friends of one another). This high score would lend support to the idea that the collection of jurisprudential movements operates as a network. Additionally, a study of the contextual attributes 176 of the network of jurisprudential movements raises a host of interesting questions. For example, a finding that legal scholars within the network had attitudes toward legal scholarship that were more similar than the attitudes of other lawyers or non-legal scholars, would further support the existence of a network of jurisprudential movements.

In considering the analysis at the level of the node, it is clear that I am assuming that an entire organization can be referred to as a single node within a broader network. There appear to be no theoretical prohibitions against this assumption. 177 My assumption that the separate jurisprudential movements constitute individual nodes is clearly premised on the further assumption that each of these movements has its own structure and communication network. There is some anecdotal evidence to support this subsidiary assumption (e.g., formal CLS and L&Ec organizations). I leave it to another day (or another author) to identify the formal/informal structure, and communication networks of the various individual jurisprudential movements.

174. For example, from Figure 2, a circle network would suggest that scholars are only able to communicate with certain other scholars; a wheel network would suggest that scholars must communicate via a central clearinghouse—neither situation presently exists, but the possibilities for further research are interesting. Such issues may include: why is it that the All-Channel network is the network which has evolved in this context? What would be the implications of enforcing an alternative network upon the academy? 175. See supra note 153 and accompanying text (arguing that the structural attributes of a network constitute the internal, context-independent attributes). 176. See supra note 154 and accompanying text. 177. Most organizational theorists recognize the individual as the unit of analysis, but appear to be skeptical as to what happens once the individual ceases to be the unit of analysis. See, e.g., VASU ET AL., supra note 163, at 2, 17 (noting that application of organizational communication theory necessarily presumes the existence of an organization).
It is important to note that my characterization of the jurisprudential movements as nodes within an All-Channel network does not foreclose the possibility of characterizing another jurisprudential movement as a "liaison" node, which facilitates communication among the separate jurisprudential movements. Indeed, to a certain extent, this Article and particularly the "veil" methodology that will be discussed shortly, represent an attempt to fulfill this liaison function.\(^{178}\)

2. Jurisprudential Links and Channels

The foregoing makes it possible to turn to a consideration of the "link" level of analysis. It should be apparent from the preceding discussion that there is a goodness-of-fit between the theory of organizational communication and the analysis of communication among jurisprudential scholars. This goodness-of-fit lends credibility to the theoretical conclusions which are possible from an analysis of the communication links which exist between the various jurisprudential movements.

As discussed earlier, the communication relationship which the link represents can be characterized according to its content, strength or symmetricality.\(^{179}\) Each of these characteristics will be considered in turn vis-à-vis the links which exist between the jurisprudential movements.

First, as the reader may recall, content refers to the production, innovation, or maintenance aspects of the job.\(^{180}\) Also recall that I referred to the "job" of the legal academy as one involving the production of scholarship.\(^{181}\) It does not necessarily follow, however, that the content of communication between jurisprudential movements focuses on the productivity of legal scholars. Stated differently, the content of communication (e.g., journal articles) from one jurisprudential movement to another, typically involves a discussion of the productivity of the receiver's scholarship on some topic, as that scholar-

\(^{178}\) It should be noted that the liaison node connects the "gatekeepers" of other networks. See, e.g., Lewis, supra note 133, at 54. I have assumed, therefore, that there are individuals or groups of individuals who perform some intellectual gatekeeping functions within the various jurisprudential movements.

\(^{179}\) See supra note 147 and accompanying text.

\(^{180}\) See supra note 148 and accompanying text.

\(^{181}\) See supra note 149 and accompanying text. I am focusing on the scholarly objectives of the legal academy, not because teaching is unimportant, but because the chief concern of this Article is the analysis of communication among legal scholars.
ship is perceived by the sender. Rarely does the communication focus on the productivity of the scholarly enterprise shared, or pursued by the two jurisprudential movements regarding the topic in question. Rarer still, does the communication reflect a focus on the productivity of the broader (substantive), scholarly enterprise other legal scholars pursue, irrespective of their jurisprudential affiliation.

The preceding observations regarding the communication’s focus on productivity seem to apply equally well to the communication’s focus on “innovation” and “maintenance” regarding the job. The network analysis of this portion of the Article makes it immediately apparent that the nature of the problem lies in the manner one chooses to define “the job.”

In the language of organizational theorists, there are internal and external organizational influences which induce the legal scholars of a particular jurisprudential movement to view their movement as an “isolate.” From that point of view, the relevant content of any communication must necessarily deal with the production, innovation, and maintenance of their jurisprudential movement. “The job” is thus one of advancing the scholarship of the particular jurisprudential movement.

That the isolate mentality applies to any communication means that it must also, and perhaps especially, apply to communication with other jurisprudential movements. To take an example, in discussing CLS, the relevant inquiry for a L&Ec scholar is: What does CLS mean from the point of view of L&Ec? A different result emerges, however, from the model presented in this Article. Network analysis offers a perspective which demonstrates the interrelationships which exist between and among the various jurisprudential movements. The ensuing redefinition of “the job” (i.e., production of legal scholarship, and not only a particular kind) leads our L&Ec scholar to query: In what sense do CLS and L&Ec agree and disagree on this particular topic? In what manner does CLS advance, or fail to advance the enterprise of legal scholarship?

What network analysis does not suggest is a jurisprudential mush which combines CLS, L&Ec, and Feminist Jurisprudence. The jurisprudential movements retain their separateness, and the content of their communication justifiably celebrates that separateness. However,

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182. I will only discuss some of these influences in my discussion of the veil of intellectual tolerance below. An exhaustive discussion of these influences is better left for another day.
network analysis does change the perspective from one which emphasizes separateness to one which emphasizes the whole and separateness within the whole. I emphasize the whole because the subject of this Article is communication between the jurisprudential movements. Indeed, there is little indication that the integrity of the various jurisprudential movements is being seriously challenged.

The second way in which a communication relationship can be characterized is by its strength. The strength (i.e., frequency) of communication between the jurisprudential movements is an example of a link characteristic that cannot be discussed in the abstract. Assume then, that a reasonable standard for judging the strength of communication between the jurisprudential movements is the strength of communication within the movements (e.g., the percentage of journal articles in which another jurisprudential movement is not the focus of discussion). From that perspective, communication between the jurisprudential movements is not infrequent. From the standpoint of network analysis, however, this result is probably as it should be. The observation in the previous paragraph about the separateness of jurisprudential movements within the whole of legal academe, suggests that there is no theoretical basis for expecting the communication between movements to be particularly frequent.

Third, network analysis provides a useful theoretical framework for understanding the degree to which there is reciprocity in communication between the jurisprudential movements. In an ideal jurisprudential world, there would be complete symmetricality between and among the jurisprudential movements. Articles from one jurisprudential movement, directed toward the discussion of a topic within another jurisprudential movement, would be recognized, commented upon, agreed with in part, and disagreed with in part, incorporated, and the like. One might expect to see symposia and conferences on topics of interest to the jurisprudential movements, where exchanges and cross-jurisprudential instruction sessions could take place on a more formal basis.

That world is of course, not our world. Indeed, four observations can be made about the symmetricality of communication between the jurisprudential movements, and between the jurisprudential movements and mainstream legal thought. The first observation: The extent of the asymmetricality of communication is not uniform across jurisprudential movements. The jurisprudential network diagram in Figure 3 attempts to capture this reality. The length of the solid arrow between any two movements (or between mainstream thought and a move-
ment) reflects my conjecture as to the relative degree of symmetricality present in the communication relationship in question. The dashed arrow emanates from the movement which I perceive to be the initiator of communication.

Figure 3 illustrates that my ranking of communication relationships in terms of their symmetricality is as follows. Relationships ranked from most symmetrical to least symmetrical in movement to mainstream communication are: L&Ec-Mainstream; CLS-Mainstream; Feminism-Mainstream. Relationships ranked from most symmetrical to least symmetrical in movement to movement communication are: CLS-L&Ec; Feminism-CLS; Feminism-L&Ec. It should be clear from Figure 3 that I have assumed that my jurisprudential movement, L&Ec, and Mainstream Legal Thought, are the worst offenders in initiating (versus responding to) cross-jurisprudential communication—so much so that there are no dashed arrows originating from them. The preceding assumptions and rankings are based on a bit of armchair empiricism.  

My second observation (of the four observations about the asymmetricality of communication across jurisprudential movements) is that the reasons for the unevenness of that asymmetricality vary greatly. For example, part of the reason the L&Ec-Mainstream dialogue is more symmetrical than the CLS-Mainstream dialogue is because L&Ec is a movement that has been around longer than CLS. Yet part of the reason may also be the validity of the CLS "legitimation" critique: Much of L&Ec serves to legitimate the interests that are represented in Mainstream Legal Thought. Therefore, L&Ec and Mainstream scholars have much more to talk about. These issues are clearly the types of issues which could be addressed

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183. This empiricism is based on my personal knowledge of the literature of these movements, as well as the personal knowledge of colleagues who are members of these movements. Once again, the objective of the present Article is to propose the theory. A future article will communicate the results of empirical tests of these theories.

184. See supra notes 98-101 and accompanying text (discussing L&Ec's historical development).

185. See supra note 63 and accompanying text (discussing the "critiques," or subsidiary propositions, component of CLS).

186. There are at least two reasons why I insist on picking on L&Ec. First of all, it's a movement to which I belong. It is the same principle as telling a good ethnic joke about one's own ethnicity: I can pick on my movement if I want to. Second, and more to the point, L&Ec has not really initiated a lot of cross-jurisprudential dialogue. It has, however, been the focus of much communication. There is, therefore, much more in the way of L&Ec-directed material to draw upon.
by further research in legal meta-semiotics.

The third observation is that despite the fact that the asymmetricality of jurisprudential communication is unevenly distributed across communication relationships, the fact remains that on average, and across jurisprudential movements, the symmetricality of communication is a far cry from the idyllic world I painted three paragraphs ago. An inspection of Figure 3 leads one to correctly conclude that I am willing to attach a number to my assessment of "far cry." Specifically, in Figure 3, nowhere does the length of a solid arrow exceed fifty percent of the length of a dashed arrow. My empirical conjecture, therefore, is that there is no measure of symmetricality one could devise which would show that the response of any of the jurisprudential movements exceeds fifty percent of the communication that has been directed at that movement.

The fourth observation about the asymmetricality of jurisprudential communication, is that "when it's bad, it's very bad." Indeed, there are cases which have passed into the lore of our organizational culture. There have even been calls for some scholars to "leave the academy."187 Given the vital role that self-correction (i.e. criticism) plays in the life of any living organism (which the legal academy is), it is unfortunate indeed that much of this asymmetrically-motivated communication attitude has been directed toward the Critical Legal Studies movement.

All of this raises the inevitable and erudite question: so what? Why should symmetrical communication matter to the legal academy? Assuming that it does matter, what is it that prevents it from happening? We now turn to these, and other questions.

III. DIALOGUE AND THE MISSIONS OF THE UNIVERSITY/LEGAL ACADEMY

The essential argument that I will make in this portion of the Article is that full scholarly dialogue (i.e., "symmetrical communication") among the scholars of the various jurisprudential movements increases the likelihood that universities will be successful in fulfilling their missions. This argument requires that I discuss the mission of

187. See Paul D. Carrington, Of Law and the River, 34 J. LEGAL EDUC. 222, 227 (1984) (noting that some have "an ethical duty to depart the law school, perhaps to seek a place elsewhere in the academy"). But see Peter W. Martin et al., "Of Law and the River," and of Nihilism and Academic Freedom, 35 J. LEGAL EDUC. 1 (1985) (providing, inter alia, Professor Robert W. Gordon's response to Dean Carrington).
the university, the mission of the legal academy, and the extent to which those missions are commensurable. Assuming that they are, the next question is one of determining the precise manner in which dialogue among legal scholars makes the fulfillment of that mission possible.

A. The Mission of the University

In discussing the mission of the university, it seems reasonable to discuss: first, the original, or historical mission of the university; second, the manner in which that mission is perceived today; third, present challenges to that mission; and fourth, a “special mission” of the university that is relevant to the mission of the law school. The central point in this subsection is that the nature of the mission of the university requires a commitment to human creativity and problem-solving ability.

First, although it is true that historians of higher education are in agreement that Harvard College was the first American institution of higher education, it is also true that those historians are in agreement that Johns Hopkins was the first American university. The reason for this, is that Johns Hopkins was the first university to embrace the “German Model” of higher education, or the lehrfreheit. The idea underlying this model was that new knowledge was valuable for its own sake, irrespective of its contribution to everyday life.

The original mission and definition of the university (as opposed to other institutions of higher education), therefore, was deeply grounded in the production of new knowledge. Johns Hopkins was the first institution to require its faculty to produce new knowledge, and to publish their results. This educational model was copied by a number of American institutions of higher education, but most aggressively by The University of Chicago. The publication requirement at these various universities gave rise to the creation of several venues for this outpouring of scholarly research, as well as

190. Stephens & Roderick, supra note 188, at 189-90.
191. Westmeyer, supra note 187, at xii-xiii.
192. Id. at 90, 96.
193. See id. at 93, 95 (noting that The University of Chicago followed Johns Hopkins’ lead in its production and publication of new knowledge).
the establishment of a number of learned societies.\textsuperscript{194} It is no under-
statement to note that most American scholarly journals and learned
societies can only trace their origins to the past century.\textsuperscript{195}

Second, we can turn to the philosopher of higher education, or
perhaps, the educational psychologist,\textsuperscript{196} or modern historian of
higher education,\textsuperscript{197} to understand the present conception of the mis-
mission of the university. According to these philosophers, the "justifica-
tion"\textsuperscript{198} for higher education is either an "instrumental"\textsuperscript{199} (e.g.,
"political")\textsuperscript{200} one or a "non-instrumental (intrinsic)"\textsuperscript{201} one.

Under the non-instrumental, or epistemological justification, there
is something within the nature of knowledge and understanding that
serves as justification.\textsuperscript{202} This is, of course, the German Model dis-
ussed above (i.e., knowledge for its own sake). At least two char-
acteristics of the epistemological justification require emphasis. The
first is that it requires that the scholar have a commitment to, and
indeed, faith in the possibility of objective, "value-free" (e.g., non-
sentimental) truth.\textsuperscript{203} That is, the statement, "I want to know simply
because it's true" assumes that truth is possible. The second charac-
teristic of this justification is that it requires the scholar, in assessing
truth, to separate that which is contingent or "practical," from that
which is controlled, or "academic."\textsuperscript{204}

In contrast to the preceding epistemological or non-instrumental
justification, the instrumental or political justification for higher edu-
cation focuses not so much on knowledge for its own sake, but on
the uses to which knowledge can be put.\textsuperscript{205} Under the instrumental
justification, knowledge is necessary to allow for this prediction of

\begin{itemize}
\item \textsuperscript{194} Id. at 92, 95-97.
\item \textsuperscript{195} Id. at 96 (noting that prior to 1877 when Johns Hopkins began to produce scholarly
journals, America had no outlets for research publication).
\item \textsuperscript{196} See id. at 120-29 (discussing teaching models that are tied with either a philosophy
or a psychology).
\item \textsuperscript{197} See Higher Education into the 1990s: New Dimensions (Sir Christopher Ball &
Heather Eggins eds., 1989).
\item \textsuperscript{198} Cornel M. Hamm, Philosophical Issues in Education: An Introduction 166
(1989).
\item \textsuperscript{199} Id.
\item \textsuperscript{200} John S. Brubacher, On the Philosophy of Higher Education 12, 13 (1977).
\item \textsuperscript{201} Id. The non-instrumental justification has also been labelled the "epistemological"
justification. Id. at 12.
\item \textsuperscript{202} Hamm, supra note 197, at 12-18.
\item \textsuperscript{203} Brubacher, supra note 199, at 13.
\item \textsuperscript{204} Id.
\item \textsuperscript{205} Brubacher, supra note 199, at 13; Hamm, supra note 197, at 166.
\end{itemize}
and control over the natural and social order.\textsuperscript{206} Knowledge makes understanding possible, which in turn makes it possible for human beings to solve the problems of the natural and social order.\textsuperscript{207}

In comparing these two justifications for knowledge, it is apparent that the instrumental or political justification is more intellectually defensible. That is, a means justification is incomplete, since at some point one must implicitly or explicitly make a determination of, and place a value upon, the ends being pursued by the means.\textsuperscript{208} The intellectual superiority of the instrumental justification is only relative, however, since an exclusive focus on it can lead one to indifference to the means by which the pursuit of knowledge is made possible.\textsuperscript{209}

The third matter to be addressed concerns current challenges to, or controversies surrounding, the historical (i.e., epistemological) mission of the university. These challenges can be roughly organized around the following three questions regarding the epistemological and political philosophies of the university. To wit, must one choose between philosophies? If so, which philosophy should one choose and why? Having chosen, what standard will be applied in determining the extent to which the chosen philosophy is being pursued? I do not raise these questions here to join the respective debates which they have engendered. I raise these questions mainly to provide an organizational framework which I shall use shortly to make a point central to my case for more scholarly dialogue in the legal academy.

Let us pause briefly, however, to consider the nature of the controversies or challenges surrounding the three aforementioned questions. Under the first question, the issue is not whether a fundamental tension exists between the epistemological and political philosophies of the mission of the university. That is understood: The

\begin{itemize}
\item \textsuperscript{206} Hamm, supra note 197, at 19.
\item \textsuperscript{207} See Brubacher, supra note 199, at 13-14.
\item \textsuperscript{208} Hamm, supra note 197, at 167.
\item \textsuperscript{209} That is, under the “knowledge for knowledge’s sake” argument, one might be led to be indifferent as to the nature of the environment in which the pursuit of knowledge is made possible. As an example, one can point to the social indifference of the professoriat of the German universities during the reign of Adolf Hitler. See Hamm, supra note 197, at 59-75. I would argue, however, that such an indifference is fundamentally inconsistent with a commitment to the pursuit of knowledge for its own sake. As discussed in the body of the Article, such a commitment is an implicit commitment to truth. A genuine commitment to truth, however, is in turn a commitment to the existence of an environment in which the unencumbered existence of truth is allowed. This argument is similar to the “limits of tolerance” argument which I make in the body of the Article below.
\end{itemize}
epistemological philosophy has as desideratum a value-free knowledge, while for the political philosophy, knowledge has import if, and only if, it is directed toward some useful (valuable) end.\textsuperscript{210} Instead, the issue which divides scholars of higher education is whether the choice between the two philosophies must at all times be disjunctive,\textsuperscript{211} or whether there is a dimension along which the choice can be contingently made (e.g., epistemological philosophy applies better to the physical sciences).\textsuperscript{212}

Moving on to the second of the three questions discussed above, if one assumes that a choice must be made between philosophies, which should be chosen and why? Answers and arguments regarding this question abound. For example, those favoring an epistemological philosophy argue that government or industry-financed research must by definition lead to the development of timely (versus timeless) truth.\textsuperscript{213}

Others argue that a lack of a commitment to truth will lead to, and has led to, a class of contemporary scholars who are “hollow” individuals,\textsuperscript{214} or “tenured radicals” who are “corrupting . . . higher education.”\textsuperscript{215}

\textsuperscript{210} See Brubacher, supra note 199, at 16 (discussing the disharmony between the political and epistemological philosophies).

\textsuperscript{211} That is, we must choose for all time, or for the entire university, and as a matter of principle, that the mission of the university is epistemological or political. There are scholars who have made the choice between the epistemological and political philosophies and have thereby implicitly addressed the question of whether a choice between the philosophies needs to be made. See id. at 17.

\textsuperscript{212} See id.

\textsuperscript{213} Id. at 17-18. The author notes the view of R.M. Hutchins that:

\[ \text{Money is the root of academic evil: the university seems willing to sponsor almost any program proposed by external social institutions willing to pay for it . . . . \text{We deceive ourselves if we think that government and industry subsidize university research in a disinterested search for timeless, rather than timely, truth . . . .} \text{It is} \text{deplorable} \text{the way the state of the university seems externally conditioned by the state of the nation and the state of the nation by the university. To break this vicious circle, . . . a few strong institutions should deliberately defy the trend of events and run counter to them.} \text{Id.} \]


\textsuperscript{215} See Roger Kimball, Tenured Radicals: How Politics Has Corrupted Our Higher Education (1990) (providing an example in which Kimball condemns the “ideologically motivated assaults on the intellectual and moral substance of our culture.” Id. at xviii). For a brief criticism of Tenured Radicals, see Ralph S. Brown & Jordan E. Kurland, Aca-
In contrast, those favoring a political or instrumental philosophy of the mission of the university, are able to make many arguments, chief among them perhaps is the argument that the proof is in the pudding: The political philosophy predominates on many university campuses today.\textsuperscript{216} Examples of other arguments include the argument that it is a delusion to think of knowledge as being value-free since knowledge is the currency of power today and as such, value-laden.\textsuperscript{217} Others argue that to the extent that the knowledge produced by the university has an impact on society’s political decisions, government will have an interest in regulating the university.\textsuperscript{218} Under this scenario, voluntarily or involuntarily, the university is imbued with a political mission. Finally, still others argue that the university’s failure to recognize its political mission jeopardizes its survival: Society may remove its financial support for the university if it fails to accept responsibility for the knowledge it creates.\textsuperscript{219}

As noted above, a third question in a discussion of the challenges to the university’s mission involves determining the proper standards to be used in assessing the fulfillment of its mission. It seems to me, however, that determining the proper standard for assessing “excellence” in the university is inextrically intertwined with the question of determining the proper mission of the university. Once one has decided upon the proper mission of the university (e.g., creation of value-free knowledge), the method for assessing excellence logically follows (e.g., quantity and quality of research). Having said that, I should note that those who write on the question of excellence within the university seem to take for granted their own assertions of what constitutes the proper purpose of the university.\textsuperscript{220}

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demic Tenure and Academic Freedom, 53 LAW & CONTEMP. PROBS. 325, 330-31 (1990). Although it is true that authors like Kimball and Sykes have been characterized as being part of a movement of "neoconservatism," see Doris Y. Wilkinson, The American University and the Rhetoric of Neoconservatism, 20 CONTEMP. SOC. 550 (1991), I think it is incorrect to suggest that a particular ideology is more committed to a particular philosophy of the mission of the university. For example, it is quite clear from the work of Kimball that he is committed to the use of the university as a transmitter of values which are consistent with the status quo (i.e., an instrumental philosophy of the university). What is often assumed to exist, but is usually missing from many arguments based on the status quo, is an analysis of the relationship between “the truth” and the status quo (i.e., an epistemological philosophy of the university).
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\begin{flushleft}
216. BRUBACHER, supra note 199, at 18.
217. See id. at 19.
218. Id.
219. Id.
220. See ALLAN BLOOM, THE CLOSING OF THE AMERICAN MIND: HOW HIGHER EDUCA-
\end{flushleft}
A point of this Article, which follows from the preceding discussion of philosophies of the mission of the university, is that the qualities of human creativity and problem-solving ability are indispensable to the fulfillment of that mission, however one chooses to define it. That is, if one assumes the validity of the epistemological mission of the university, then it is clear that creativity is indispensable to that mission, to the extent that the generation of new knowledge from nothing is unambiguously an expression of human creativity. Problem-solving is critical to the generation of new knowledge since new knowledge may result from finding the solution to an analytical problem. Similarly, assuming the validity of the political mission of the university, at a minimum, creativity and problem-solving skills are called upon to identify the various uses for knowledge and to match and fit various technologies to those uses.

Shortly, I shall discuss the mission of the legal academy and its relationship to the mission of the university. I shall also discuss the importance of creativity and problem-solving skills to the mission of the legal academy. First, however, I must briefly address the fourth matter within my discussion of the philosophy of the mission of the university.

Under this fourth matter, the “special mission” of the university to which I have previously referred, is a reference to the recent and small but growing literature on the “university as church.”

A synopsis of the arguments follow. I shall make use of these arguments both when I make the case for the need for further dialogue within the legal academy, as well as when I propose reasons for the dearth of such dialogue.

It is an historical fact that the university was once an extension of the church. Universities began to separate themselves from the
church in the ninth century.\textsuperscript{223} By the end of the nineteenth century, the university had begun to criticize the church.\textsuperscript{224} The “university as church” theory merely asserts that as of the present, the university has usurped many of the functions once performed by the church.\textsuperscript{225} Consistent with the political philosophy of the mission of the university, some take the argument a step further. They argue that the university has a moral responsibility to function as a church since the knowledge that the university has created has rendered many social institutions, like the church, obsolete.\textsuperscript{226} Others, however, point to the fact that the university has not fully supplanted the church.\textsuperscript{227}

Regardless of the outcome of the preceding debate, there is very little question about the extent to which the university functions as a church or synagogue in contemporary society. For example, today the university addresses questions about “[human] nature, the universe, and our destiny in historical time, about good and evil and how to differentiate between them, and about truth itself and how to distinguish it from error.”\textsuperscript{228} In an earlier time, such questions and their answers would have been within the exclusive domain of the church. Also, as was probably exclusively true of the church in an earlier time, the university exerts a moral influence on young people since many of them come to the university to “find themselves.”\textsuperscript{229} Finally, one might argue that in exerting the preceding, and other moral influences, the university, like the church, operates as part of the “conscience” of society.\textsuperscript{230}

The critical aspect of the “university as church” theory, for purposes of this Article, is that it makes possible two conclusions regarding the clergy of this secular church. First, as the “high priest of truth”\textsuperscript{231} within the university, the scholar comes to embody a very high, and perhaps the highest degree of faith in the promise of revealed truth through scholarly investigation.\textsuperscript{232} Second, the issue of ecumenism is just as alive in the university, as secular church, as it is in the formal church. Indeed considering the university as a whole, it

\begin{thebibliography}{9}
\bibitem{223} \textit{Westmeyer, supra} note 166, at xi.
\bibitem{224} \textit{Brubacher, supra} note 199, at 117.
\bibitem{225} \textit{Id.} at 117-18.
\bibitem{226} See \textit{id.} at 117.
\bibitem{227} \textit{Id.} at 123.
\bibitem{228} \textit{Id.} at 118.
\bibitem{229} \textit{Id.} at 121-22.
\bibitem{230} \textit{Id.} at 123.
\bibitem{231} \textit{Id.} at 119.
\bibitem{232} \textit{Id.}
\end{thebibliography}
can be argued that it has experienced greater success than the church has in promoting an ecumenism of views. Yet there are aspects of the university (i.e., the legal academy) in which the ecumenical norm is not as celebrated. The latter observation is, of course, equivalent to the observation in Part II that there is a lack of symmetrical communication between and among the jurisprudential movements in the legal academy. Once again, the reasons for this asymmetry in communication or anti-ecumenism, will be discussed in Part IV below.

B. The Mission of the Law School

As previously discussed, a central requirement for the fulfillment of the mission of the university, be that mission an epistemological or political one, is that individuals possess creativity and problem-solving skills. Relying on research conducted by scholars in the psychology of creativity, I shall argue that within the group context, it is the exchange of diverse ideas (i.e., dialogue) that allows for the optimal exercise of creativity and problem-solving skills by individuals. In this section of the Article, the question is: Are the missions of the law school so different from the mission of the university as to deny the importance of creativity/problem-solving and consequently, dialogue?

From the standpoint of the philosophy of education, the answer to the preceding question appears to be no. Indeed, within the philosophy of education, the debate over the role of professional schools is a debate which sets in sharp relief the distinction between the epistemological and the political philosophies of the mission of the university. Those of the epistemological persuasion emphasize that the professional schools are too practical or non-intellectual to be affiliated with a university. Those of the political persuasion emphasize that a professional school is an indispensable reality check for an institution that is inextricably intertwined with, yet intellectually removed from the social order.

The point here is that both the epistemological and political philosophers seem to have assumed that the mission of the law school is ultimately a political or practical one (i.e., providing individuals

233. Id. at 121.
236. See BRUBACHER, supra note 199, at 23.
with the knowledge and skills necessary for solving a client's legal problems). Debates about the place of the law school within the university then, do little to alter the conclusion that scholars within the law school must possess and exercise creativity and problem-solving skills. Today, I do not join this debate of how the law school does, or should fit within the university.

A similar conclusion about the importance of creativity and problem-solving skills in the legal academy follows from the analysis conducted by those who have studied the mission of the law school per se, without explicit regard to the two dominant philosophies of the mission of the university. For example, some have argued that the pursuit of the "prestige image" by many law schools is incompatible with the reality of "multiple public constituencies with substantially differing needs for legal services." Indeed, "multiple programs of legal education ... [are needed] to meet those needs with professional competence and at an affordable cost."

Under this "multiple law schools" scenario, creativity and problem-solving skills are necessary at two levels. First, they are necessary at the theoretical or jurisprudential level, since we have to determine what the law is before we are able to teach it and the skills attendant to practicing it. Second, at the level of skills, I need not now join the debate regarding the proper mix between theory and practice in the legal academy, but simply note that we legal academics must possess creativity and problem-solving skills if we are to effectively teach and generate creativity and problem-solving skills.

This Article has focused on creativity and problem-solving, and therefore, dialogue at the jurisprudential or theoretical level. In so doing, I do not mean to slight the dialogue at the level of skills, or for that matter, the dialogue as to the proper mix between theory and skills. In fact, it is my hope that further jurisprudential dialogue

237. Id. at 24.
239. Id.
240. For an example of an interesting position on this debate, consider the position of Van Alstyne, Jr. et al. who state:

Solutions to arrive at professional skills competence upon law school graduation are admittedly difficult to find. That difficulty, however, should not suppress public exposure of the problem. Legal education, in pursuit of the Prestige Image, is still concerned with the sole production of the generalist lawyer whose skills and competence to deliver legal services is highly questionable for any constituency even if constituency cost is disregarded. A law school should not be merely an additional
will stimulate further discourse in these other arenas.

In sum, I suggest that an argument that the mission of the school consists primarily of the development of practical skills, is an argument that is implicitly in favor of the political, as opposed to the epistemological philosophy of the mission of the law school. Accordingly, the basic framework which recognizes that there are two possible missions for the law school, the epistemological and political, is a framework which remains intact. For example, no one has yet convincingly argued that the mission of the law school is to provide a sinecure somewhere for its faculty (i.e., in which case the precise nature of the substance taught, the existence of creativity, problem-solving and dialogue, would all be irrelevant).

Therefore, since it is true that the basic missions of the law school are to produce knowledge for its own sake, and/or knowledge which is useful to society, the argument for creativity, problem-solving, and consequently dialogue in the academy, remains intact. This argument, however, assumes the existence of a nexus between dialogue and the existence of creativity and problem-solving skills. It is to a discussion of this nexus that we now turn.

C. Dialogue, Creativity, and the Mission of the Legal Academy

The logical structure of the argument which I posit is as follows: dialogue is critical to creativity/problem-solving, and creativity/problem-solving is critical to the mission of the legal academy, ergo, dialogue is critical to the mission of the legal academy. This portion of the Article is committed to addressing the nexus between dialogue and creativity/problem-solving. However, it will be useful to pause now to briefly consider in greater detail the nexus between creativity/problem-solving, and the mission of the legal academy.

Creativity may be said to involve the generation of new ideas within the context of a heuristic as opposed to an algorithmic philosophy department operating in a law building and dominated by educators who are misinformed as to what lawyers do, further unaware of public needs for legal services or, in the alternative, have some awareness of both but take a "public be damned" attitude.

VAN ALSTYNE, JR. ET AL., supra note 137, at 79.

My sense is that Van Alstyne, Jr. et al. are responding to what they perceive to be the "total emphasis on theory" within the legal academy. Id. Their intention does not appear to be one of replacing a theory orthodoxy with a skills orthodoxy. For other work on the present state of law schools as viewed from a historical perspective, see ROBERT STEVENS, LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850s TO THE 1980s (1983).

241. ARTHUR B. VANGUNDY, MANAGING GROUP CREATIVITY: A MODULAR APPROACH
mic task.\textsuperscript{242} An algorithmic task is one in which the path to the goal of the task is clear.\textsuperscript{243} One need merely follow the delineated path. A heuristic task is one which does not possess an algorithm. Often, creativity involves defining the nature of the problem and the boundaries, goals, and algorithm(s) for the task.\textsuperscript{244}

From the preceding definitions, it is clear that there is a significant overlap between problem-solving and creativity. Where there is little novelty involved in identifying a given problem and there is a preexisting algorithm for the problem, then problem-solving will be primarily algorithmic. Otherwise, problem-solving will be heuristic. It should also be noted that all heuristic tasks will involve the generation of ideas in response to a problem. The problem may be a theoretical or obscure one, far removed from the realities of daily life. There is, however, no \textit{a priori} reason why the problem's lack of utility should in any way diminish the creativity involved in addressing it. Yes, there are degrees of creativity. I have merely suggested that the immediate, practical usefulness of ideas may not be an accurate, or for that matter, legitimate means of assessing such degrees.

I hope that the nexus between creativity/problem-solving, and the mission of the legal academy, is now clear to the reader. In one sense, if one perceives the mission of the academy to be purely an epistemological one (i.e., the generation of new knowledge), then creativity is a critical trait to be possessed by legal scholars. If the legal academy's mission is a political one (i.e., generating immediately useful knowledge), then problem-solving skills is a critical trait to be possessed by legal scholars.

In another sense, however, creativity is more indispensable to the mission of the academy than problem-solving. It is in this sense that I argue that the joint jurisprudential enterprise of the legal academy involves, at a minimum, the nurturing and perpetuation of the creativity of its legal scholars. Indeed, one must be creative to define the problem and propose the algorithm which will later be followed by others. For the remainder of this Article, therefore, I shall make reference to the creativity of legal scholars. Once again, my focus on the creativity of legal scholars within the various jurisprudential movements discussed in Part I above should not be interpreted as a disparage-

\textsuperscript{20} \textit{PROBLEM SOLVING}, 6, 166 (1984).
\textsuperscript{243} Id.
\textsuperscript{244} See id.
ment of the creativity of scholars who exclusively develop or instruct legal skills or who are not otherwise part of any particular jurisprudential movement.

On then to the question of the nature of the nexus which exists between scholarly dialogue and creativity. The thesis which I shall advance here is that we legal academics, in our scholarly practices, engage in a more formalized version of a technique of group creativity known as “brainwriting.” The tacit essence of brainwriting, like all techniques of group creativity, is that there is an exchange of individual and independently generated ideas among the members of the group. In short, there is dialogue. I contend that we, as legal academics, have failed to fully avail ourselves of the group creativity which is possible through the use of the brainwriting technique. There has been insufficient dialogue within the group which is the legal academy, because the focus has been mainly on sub-groups and not the group. This thesis will be developed in greater detail below.

Scholars in the psychology of creativity agree that there are three basic approaches to improving group creativity: brainstorming, brainwriting, and combination brainstorming-brainwriting. I shall discuss only the first two techniques. Brainstorming refers to the generation of ideas within a group, orally. There are at least nine different brainstorming techniques. All of them are “structured” techniques, which can be characterized by the fact that there is an established procedure for generating ideas. The original brainstorming technique, or “classical brainstorming” developed by Osborn in 1938, is such a structured brainstorming technique. For example, a significant procedural component of classical brainstorming is the participants’ deferred judgment of ideas. In contrast to struc-

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245. See VANGUNDY, supra note 240, at 16-17, 169; see also AMABILE, supra note 241, at 190-93 (discussing several creativity-training programs); CARLE M. MOORE, GROUP TECHNIQUES FOR IDEA BUILDING 9 (1987) (discussing “four techniques that can be utilized by groups of people to manage complexity; that is, to generate, develop, and select between ideas”).

246. There appear to be only two combination brainstorming-brainwriting techniques, VANGUNDY, supra note 240, at 169, 185-86. In the body of the Article, I wish only to differentiate between brainstorming and brainwriting techniques. Therefore, the combination techniques do not need to be discussed.

247. Id. note 241, at 16.

248. Id. at 169.

249. Id. at 16.


251. VANGUNDY, supra note 240, at 16.
tered techniques, "unstructured" brainstorming techniques have no established procedures of participation.252

Brainwriting techniques differ from brainstorming, in that the ideas generated using brainwriting are communicated in writing.253 There are presently at least four brainwriting techniques.254 These techniques, as well as brainwriting techniques in general, can be characterized as nominal or interacting techniques.255 In nominal brainwriting groups, the group is one in name only, since ideas are generated individually.256 However, the group ultimately does come together to discuss all of the individually generated ideas. By contrast, in interacting brainwriting, there is no group discussion of ideas. Instead, individuals are encouraged to improve upon their ideas once they have been exposed to the ideas of the other members of the group.257

Among legal scholars, the formal process of writing articles which are in turn read and discussed by other legal scholars appears to be a formalized version of the brainwriting technique of group creativity. It could even be argued that brainstorming of sorts takes place when ideas are discussed in symposia and faculty colloquia.

I contend that we, as legal academics, do not fully benefit from the creativity afforded by these brainwriting and brainstorming techniques. Unlike the practice of conventional brainwriting or brainstorming, whether or not we exchange ideas is dependent upon the source of the idea. Stated differently, the relevant group for the exchange of ideas is often the particular jurisprudential movement to which a legal scholar happens to belong. Very rarely is the relevant group the collection of jurisprudential movements, as that collection is represented by the legal academy. Three necessary points of clarification follow.

First, I am not suggesting that all legal scholars should always have all of the jurisprudential movements as their frame of reference. I am suggesting, however, that the unreflective pursuit of the opposite extreme, one in which a legal scholar’s only frame of reference is that scholar’s particular jurisprudential movement, unnecessarily limits our individual and collective creativity. True, my argument taken to the limit could be used to justify increased dialogue between the legal

252. Id.
253. Id.
254. Id. at 169.
255. Id. at 16.
256. Id.
257. Id. at 16-17.
academy and other segments of the university. That debate cannot be addressed here since it raises questions about the efficiency of creativity (e.g., learning the substance and method of other disciplines) that are outside the scope of this Article.

Second, notice that the separateness of the jurisprudential movements is critical to the normative argument which I am making. What makes brainstorming and brainwriting useful is the fact that new ideas, as well as the critique of submitted ideas, originate from different sources. Heterogeneity is cherished. Thus, the jurisprudential movements can each make their creative contributions to the legal academy while still maintaining and developing their integrity and separateness.

Third, my comments do not imply that creativity is an intellectual holy grail. Clearly, it is possible to imagine many circumstances in which creativity is not desirable (e.g., standard surgical procedure). The point, however, is that the mission of the legal academy presents a context in which creativity is an indispensable characteristic. Maximizing its quantum is therefore an imperative within that context. As suggested by methods within the psychology of creativity, the exchange of ideas among the various jurisprudential movements (i.e., dialogue) is more likely to lead to an increase in creativity than the absence of such an exchange.

I have made the affirmative case for increased dialogue in the legal academy by emphasizing the promise of increased creativity which would result. This increased creativity would allow the legal academy, and ultimately the university, to fulfill its mission. Other possible reasons for increased dialogue among the jurisprudential movements in the legal academy include the improved understanding among scholars, which might in turn diminish the incidence and psychic costs of ideologically-motivated confrontations (e.g., tenure decisions). Such a predicted outcome comports well with the findings of the new clinical field of Transactional Psychophysiology, a field which focuses on the medicinal and therapeutic value of human dialogue.258

And what if the "university as church" theory is correct? If so, the high reaches of the academy are no place for the faint-hearted or the morally irresponsible. Dialogue, and the willingness to engage in it with those of opposing viewpoints, comes to embody many of the

qualities that morally legitimate the scholarly "calling." A willingness to tolerate a seeming cacophony of "truths" becomes in many ways the *sine qua non* of our scholarly endeavor. It becomes a trait we willingly teach to those willing to learn.

In view of the foregoing then, the following questions still remain: What are the barriers to achieving dialogue among scholars in the various jurisprudential movements? How can those barriers be overcome? Part IV addresses these questions.

IV. THE ABSENCE OF DIALOGUE AND THE VEIL OF INTELLECTUAL TOLERANCE

I submit that there are at least seven reasons259 for the absence of symmetrical communication (i.e., dialogue) between and among the scholars of the various jurisprudential movements. These seven reasons are as follows: (1) ignorance, (2) misinformation, (3) misunderstanding, (4) indifference or apathy, (5) intolerance, (6) a socialization of debate, and (7) a culture of otherness. My thesis is that the absence of dialogue among scholars of different jurisprudential movements results from a mixture of these seven reasons. The problem arises in that, within this mixture of reasons, only the first four reasons are easily soluble. Indeed, it is the last three reasons, and particularly the fifth reason, which provide the critical mass, which in turn renders this mixture of reasons insoluble.

In the remainder of this introduction, I shall discuss each of these seven reasons briefly. First (ignorance), scholars of different movements will not engage in dialogue with one another when they are unaware of either the existence, or dimensions, of alternative jurisprudential movements. Second (misinformation), neither will this dialogue occur where there is some belief held by a scholar about an...
alternative movement which is based on partial or inaccurate information, and which by its nature inhibits the occurrence of dialogue.\textsuperscript{260} Third (misunderstanding), dialogue is also less likely to occur where critical information about an alternative movement, though accurate, has been misconstrued by a scholar. Fourth (apathy), where a scholar lacks even the most \textit{de minimis} motivation to look beyond her own jurisprudential movement, dialogue is also less likely to occur.\textsuperscript{261}

These first four reasons for the lack of dialogue can be addressed by some of the currently available conventional measures. For example, joint meetings between and among the formal jurisprudential groups, symposia which reflect the influence of the various jurisprudential movements, and scholarly papers jointly authored by scholars of various movements all are measures which would serve to increase dialogue by attenuating the reasons discussed in the preceding paragraph. The application of these measures, however, would require that some scholars take the initiative. Reasons five, six, and seven suggest why none have taken this initiative.

The fifth reason for the absence of dialogue, intolerance, refers to a state in which an individual is bound to dogma. The term dogma is being used here as a psychological term of art and will be explained further below. Suffice it to say, however, that I am using the term to refer to an inflexibility permitting little, or certainly no dramatic, deviation from one’s present scholarly position. Dialogue with scholars of alternative positions is a pointless exercise since there is little possibility that such dialogue will lead one to deviate from one’s present position.

The sixth reason, the socialization of debate, is a reference to the central component of the socialization of advocacy which exists because of our legal training and experience. In contrast to dialogue, the objective of debate is to present and defend one’s position. Symmetrical communication, the exchange of views, and the modification of

\textsuperscript{260} A good example of this is, of course, the debate over the extent to which CLS is necessarily nihilistic. If one is completely persuaded that CLS either is, or will lead to nihilism, then in a world in which order is valued, it makes little sense to dialogue with CLS scholars. The basis for that persuasion is the critical issue here. If one’s persuasion is based on inaccurate or impartial information, then dialogue becomes possible once superior information is received. Dialogue is less likely however, where the basis of this persuasion reflects reasons five, six, or seven discussed in the first paragraph of the introduction above.

\textsuperscript{261} Once again, I am assuming that the reasons for this lack of motivation are innocuous ones (e.g., the high costs involved in learning the language of an alternative jurisprudential movement), as opposed to the less innocuous reasons represented by reasons five, six, and seven discussed in the introduction to this section.
one's own position in favor of an alternative position, are all behaviors fundamentally inconsistent with the defense of one's position. I am not proposing that dialogue should supplant debate in the legal academy. The problem is that even when dialogue is warranted,\textsuperscript{262} our professional socialization engenders debate as the threshold and global behavior.

The seventh reason for the absence of dialogue, a culture of otherness, involves a construction of "them," an alternative jurisprudential movement, which minimizes or eliminates the need to engage in dialogue. In a sense, it could be argued that this culture of otherness is celebrated in the socialization of advocacy (e.g., the "plaintiff" opposes the "defendant"). As taught by the psychology of intergroup behavior, the construction of "them" is achieved through the use of stereotypes and caricatures.\textsuperscript{263} "They" are also defined, however, by suppressing efforts to see the broader "we" which might include "them." Dialogue is simply an inappropriate activity to engage in with "them," since "they" are different from "us." Dialogue, or at least meaningful dialogue, is possible only among "ourselves."

Each of the foregoing reasons for the absence of scholarly dialogue could be the subject of a separate volume. Here, I shall focus on the reason I count most critical: intolerance. In Part A, I discuss the nature of this intolerance as well as my reasons for naming it the dominant barrier to scholarly dialogue. In Part B, I present a psychological technique for generating further scholarly dialogue.

\textbf{A. The Technology of Intolerance}

For purposes of this Article, I propose\textsuperscript{264} that there are two basic approaches to the technology of intolerance:\textsuperscript{265} the philosophical

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\textsuperscript{262} It is not my objective to propose a general model of all of the specific instances in the legal academy in which dialogue, instead of debate will be warranted, and vice versa. My main objective here is to argue that because of the bias toward debate, there is an imbalance between the incidence of dialogue and debate. The "veil of intellectual tolerance" technique which I propose below is available for scholars (especially those who have intellectual membership in alternative or competing jurisprudential movements) who choose to engage in, and reap the benefits of greater dialogue.

\textsuperscript{263} Fred L. Casmir, Stereotypes and Schemata, in Communication, Culture and Organizational Processes 48, 53-58, 63-66 (William B. Gudykunst et al. eds., 1985).

\textsuperscript{264} Despite the importance of the subject of tolerance, I am unaware of the existence of a single source which treats the subject from a multidisciplinary perspective. Given the multidisciplinary nature of this Article, my conjecture about the two approaches to intolerance is necessary to advance the purposes of the Article.

\textsuperscript{265} I use the term intolerance as opposed to tolerance, not so much for the sake of

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approach and the psychological approach. My reference to a philosophical approach is an attempt to highlight the fact that originally, the subject of tolerance fell within the domain of philosophers. Specifically, philosophical discussions of the subjects of political and religious intolerance have a long-standing history. Insights from the philosophical approach to intolerance are relevant to my later discussion of the limits and relative importance of tolerance. The philosophical approach to intolerance will be discussed in greater detail there.

In contrast to the philosophical approaches to intolerance, the psychological approach has historical origins as recent as 1941. This approach relies primarily on the scientific method, as opposed to the argumentative method of the philosophical approach. Furthermore, the emphasis is not so much on conducting an analysis of the intolerant society, but on conducting an analysis of the intolerant individual who forms the basis of that intolerant society. It is to a consideration of this psychological approach that we now turn.

In discussing the psychological approach to intolerance, I shall first make some prefatory comments, then I shall present the relevant theoretical framework, followed by an attempt to apply that framework to the legal academy. Finally, I will address some questions raised by my use of the psychological approach to intolerance.

1. Prefatory Comments

I will make three prefatory comments. First, in proposing that intolerance is the basis for the lack of dialogue amongst legal scholars, I have entered within the domain of the branch of psychology known as personality theory. In particular, in focusing on the pessimism, but for the sake of realism. It is the absence of tolerance which has motivated and captured the imagination of scholars. The literature on tolerance would probably not be as abundant as it is today were there an abundance of tolerance in the human soul and in human society.

266. See infra note 328 and accompanying text.
267. See generally id.
268. I have selected this date because it is the year in which Eric Fromm’s Escape From Freedom was published. Like many early psychological studies of intolerance, Fromm’s study was motivated by the German authoritarianism which sparked World War II. See Ronald C. Dillehay, Authoritarianism, in DIMENSIONS OF PERSONALITY 86 (Harvey London & John E. Exner, Jr. eds., 1978) [collection of works hereinafter DIMENSIONS OF PERSONALITY]. I have read, but have been unable to locate a source which indicates that German authoritarianism has been the focus of much study by German psychologists and psychiatrists during, and prior to World War II.
269. This is clear mainly by process of elimination. That is, no other branch of psychol-
sonality trait of intolerance as my unit of analysis (i.e., as opposed to focusing solely on its behavioral manifestations), 270 I am making use of the "Trait Theory" 271 version of personality theory. 272

This decision to use Trait Theory is not made lightly. Indeed, there are at least twenty different personality theories which can be divided into four categories: 273 These four categories in turn, reflect different answers to the fundamental question addressed by personality theory: are human beings constructed by, or do they construct their reality? 274 Part of the challenge for modern personality theory is understanding why the answer to the prior question is probably: yes. If one concedes the legitimacy of this answer, the next challenge becomes one of determining which personality theory best describes the situation at hand. 275

Trait theory is a theory which assumes that the individual constructs reality. 276 It seems appropriate to assume that legal academics can construct their own reality, because otherwise, the endeavor of seeking greater dialogue is of no value. The extent to which we legal academics choose to be, and exhibit intolerance (i.e., the trait) towards alternative jurisprudential theories is a matter that is largely within our domain.

My second prefatory comment is that the word "tolerance" is not at all the term of art in Trait Theory. 277 Indeed, of the many per-
sonality traits which have been studied by psychologists, there are two which are most relevant to the condition of intolerance: "authoritarianism" and "dogmatism." The term "authoritarian" was apparently coined by Fromm in his attempt to explain European fascism, to represent someone who idealizes "authority combined with fear and submission to it in a relationship of exploitation from above." The monumental work on the topic, however, building on the work of Erich Fromm and others, was the experimental study of American authoritarianism completed by Adorno and his colleagues in 1950.

Rokeach developed his model of "general authoritarianism" or "dogmatism" in response to the justified criticism that Adorno's model of authoritarianism focused almost exclusively on conservative or right-wing authoritarianism. Under the Rokeach model, it is the structure, and not the substance of the belief system which is relevant. It is true that scholarly work on the Adorno model of authoritarianism has continued unabated since his time. It is also true that my analysis of intolerance within the legal academy could be conducted within the confines of the authoritarianism model. To the extent however, that my criticism is directed at the structure book entitled The Tolerant Personality, which summarized the results of an empirical study of racial prejudice in Indianapolis. By 1964 however, both ADORNO ET AL., infra note 280, and Rokeach, infra, had published their work on authoritarianism and dogmatism—work incorporated by Martin in his book. The term toleration, therefore, never established itself in psychology as the term of art. It should be noted that Rokeach at least, seems to have equated "general authoritarianism" with "general intolerance," MILTON ROKEACH, THE OPEN AND CLOSED MIND: INVESTIGATIONS INTO THE NATURE OF BELIEF SYSTEMS AND PERSONALITY SYSTEMS 4-5 (1960). The term toleration remains the term of art in philosophy and philosophy-related disciplines (e.g., political science). See also infra note 333 and accompanying text.

278. A good sampling of these traits, along with a summary of some of the current research regarding those traits, can be found in DIMENSIONS OF PERSONALITY, supra note 267.
279. Dillehay, supra note 267, at 86.
281. Summaries of that criticism can be found in ALTEMEYER, supra note 271.
282. See ROKEACH, supra note 276, at 31-36. For summaries of the research on dogmatism, see Howard J. Ehrlich, Dogmatism, in DIMENSIONS OF PERSONALITY, supra note 267, at 129-64. I should point out that the study of beliefs (i.e., the nature of beliefs forms the basis for Rokeach's model), has taken on a life of its own since the time of Rokeach's model. See infra part IV.A.2 (discussing this point further).
283. For good summaries of the literature on authoritarianism, see FRED I. GREENSTEIN & MICHAEL LERNER, A SOURCE BOOK FOR THE STUDY OF PERSONALITY AND POLITICS (1971); HANDBOOK OF PERSONALITY: THEORY AND RESEARCH (Lawrence A. Pervin ed., 1990); Dillehay, supra note 267.
284. For an example of a recent effort to expand and make more global the authoritarianism model, see WILLIAM P. KREML, THE ANTI-AUTHORITARIAN PERSONALITY (1977).
of all thought within the legal academy, regardless of its ideological content, it seems appropriate to rely on Rokeach’s model of dogmatism.

My third prefatory comment regards the distinction between an attitude and the personality trait of dogmatism. This distinction serves as a useful segue into a discussion of the Rokeach framework. The distinction will also be critical in understanding the purpose of Part B of this section.

Since Rokeach’s model of dogmatism is premised on a model of the nature of beliefs, it is useful to focus on the distinction between attitudes and beliefs. That distinction is: while a belief is what “links an object to so some attribute,” an “attitude refers to a person’s favorable or unfavorable evaluation of [that] object . . . .” An attitude then, is either positive or negative, or exists along a “bipolar affective dimension,” reflecting the net effect of several beliefs about a given object. Note then, that an attitude focuses on an object, while a belief mediates between an object and an attribute. “Objects” and “attributes” refer to “any discriminable aspect of [an] individual’s world.” There are, of course, more complex formulations of the distinction between beliefs and attitudes, some of which discuss the relevance of behavior to the distinction. The preceding summary, however, presents the gist of the story.

2. A Psycho-Theoretical Framework of Intolerance

With the preceding in mind, it is now possible to turn to a consideration of the relevant theoretical framework. That framework is, in essence, the psychological analysis of beliefs since, under Rokeach’s analysis, intolerance or dogmatism is equivalent to a “closed system of beliefs” (to be defined shortly). Although there are many aspects to the psychological analysis of beliefs, there are essentially five aspects which are relevant to my discussion in this Article: the definition of beliefs, types of beliefs, characteristics of beliefs, formation of

285. MARTIN FISHBEIN & ICEK AZEN, BELIEF, ATTITUDE, INTENTION, AND BEHAVIOR: AN INTRODUCTION TO THEORY AND RESEARCH 12 (1975). Note that these are not the words of Rokeach. This statement comes from two prominent scholars in the psychology of attitudes who are in a sense building on the work of Rokeach.

286. Id.

287. Id. at 13.

288. Id. at 12.

289. See id. at 13-18 (designing a brilliant conceptual framework of the relationships which exist amongst beliefs, attitudes, intentions, and behavior).
beliefs, and a special type of belief—the closed belief system. To the extent necessary, I will interject observations from the modern psychological analysis of beliefs into my discussion of the original model by Rokeach.

The first aspect of the psychological analysis of beliefs, the definition of beliefs, was partly addressed above (i.e., a belief mediates between an object and an attribute). The definition provided above, however, is the more modern psychological definition. Rokeach, in his original work, defined a "belief system" as consisting of "all the beliefs, sets, expectancies, or hypotheses, conscious and unconscious, that a person at a given time accepts as true of the world he lives in." A "disbelief system" was defined as consisting of a "series of subsystems . . . [of] the disbeliefs, sets, expectancies, conscious and unconscious, that . . . a person at a given time rejects as false."

To the extent that Rokeach used the term belief without providing a psychological definition, it seems clear that Rokeach's concern was with an individual's system of beliefs. He used the term "system" to emphasize that there were relationships, not necessarily logical ones, among beliefs. The precise nature of those relationships will be discussed further below. Suffice it to note here that under Rokeach's analysis, the categorization of beliefs (e.g., political, religious) conveyed "an illusion of logical construction which the mind does not possess." Rokeach's definition of beliefs is therefore compatible with the modern definition to the extent that the former merely reflects a difference in emphasis.

In considering the second aspect of the psychological analysis of beliefs, types of beliefs, it appears that beliefs have been classified by

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290. ROKEACH, supra note 278, at 33.
291. Id.
292. Id.
293. Id. at 35.
294. Thus, . . . we commit the 'logical error' when we speak psychologically of a person's political or religious belief systems. It would be more correct to say that a person's belief-disbelief system is really a political-religious-philosophic-scientific-et cetera system. We mean it to include each and every belief and disbelief of every sort the person may have built up about the physical and social universe he lives in.

Id.

294. Rokeach's notion of "disbeliefs" does not appear to have survived in the literature. Perhaps this is because under the modern definition of beliefs it is possible to argue that a disbelief is simply a belief in which the attribute associated with the object in question is a negative instead of a positive attribute.
social psychologists on at least two grounds: the basis for, and the importance of, the belief. There are three possible bases for a belief. First, for a "descriptive belief," the link or association which is thought to exist between the object and the attribute is established through direct observation. Second, for an inferential belief, that link is established on the basis of some preexisting link between the object and another attribute. Third, for an informational belief, the link between the object and the source is established because the source claiming the existence of the link is accepted.

In discussing the importance of particular beliefs to the individual, Rokeach has argued that it is possible to distinguish "three layers [of beliefs] organized along a central-peripheral dimension . . . ." Beliefs in the central region, or "primitive beliefs," are those dealing with the nature of the physical world, the self, and the "generalized other." The total belief system emerges from these primitive beliefs (e.g., belief in the existence of gravity). Beliefs in the intermediate region are those beliefs that are based on "[a]uthorities . . . [who are the] intermediaries to whom we turn for information to supplement what we can obtain for ourselves." Intermediate region beliefs are beliefs about the nature of authority. In contrast to primitive beliefs, for Rokeach, the issue with intermediate region beliefs is their form and not their substance. For example, individuals who rely on opposing authorities absolutely would have beliefs that were similar in form but different in substance.

Finally, peripheral beliefs refer to the "thousands" of beliefs that are "derived from authority." Although Rokeach's discussion of these beliefs is a complex one, the simplest example of these beliefs is the "party-line" belief: a belief which one possesses because

295. The precise language used by Fishbein is that there are "three different processes [which] underlie belief formation." FISHBEIN & AJZEN, supra note 284, at 134.
296. Id.
297. Id.
298. Id.
299. ROKEACH, supra note 276, at 39.
300. Id. at 40.
301. Id. at 42.
302. Id.
303. Id. at 44.
304. Id. at 45.
305. Id.
306. Id. at 47.
307. Id. at 40.
of some instruction from some authority figure.\textsuperscript{308} It should be clear that there is a conceptual overlap, albeit an incomplete one, between Rokeach’s belief taxonomy\textsuperscript{309} and the more modern one discussed above (e.g., many primitive beliefs will be descriptive beliefs but not vice versa). I shall apply both taxonomies further below since each highlights a different dimension of the psychological analysis of beliefs.

The third aspect of the psychological analysis of beliefs has to do with the relevant characteristics of beliefs. Rokeach postulated that beliefs could be “isolated” and systems could be “differentiated.” Beliefs are isolated when there is some logical connection between or among them which is ignored or denied by the individual.\textsuperscript{310} The “differentiation” of a belief system or disbelief subsystem, refers to the number of beliefs or disbeliefs held within the system or subsystem.\textsuperscript{311} In addition to Rokeach’s characteristics, the more modern study of beliefs often refers to the following belief characteristics. “Strength” of belief refers to the magnitude of an individual’s subjective probability estimate of the association between an object and an attribute.\textsuperscript{312} “Salient” beliefs are the most critical out of the many beliefs held about an object.\textsuperscript{313} “Congruence” refers to the degree of similarity of the beliefs held by different individuals (e.g., primitiveness of belief).\textsuperscript{314}

A fourth aspect of the psychological analysis of beliefs, concerns a special type of belief system: the closed belief system. An individual with a closed belief system was said to be dogmatic. A closed belief system has the following characteristics. First, the magnitude, extent, or intensity of rejection of disbelief systems is very high.

\textsuperscript{308} Id. at 49.

\textsuperscript{309} It should be noted that Rokeach modified his belief taxonomy slightly in a 1968 piece. See generally Ehrlich, supra note 281, at 133-34. The modifications, although significant in their own right, are not particularly relevant to the objective of this Article.

\textsuperscript{310} ROKEACH, supra note 276, at 36. Rokeach postulated various ways in which this could be achieved (e.g., outright denial of contradictory facts).

\textsuperscript{311} Id. at 37-39.

\textsuperscript{312} FISHBEIN & AJZEN, supra note 285, at 12. This subjective probability idea seems equivalent to Rokeach’s notion that beliefs and disbeliefs fall along a continuum of acceptance and rejection. See Ehrlich, supra note 281, at 131.

\textsuperscript{313} FISHBEIN & AJZEN, supra note 284, at 218. The basic idea here is that since it has been empirically established that the human mind can only attend to five to nine items of information at any point in time, it seems to follow that at any point in time, the large number of beliefs about a given object are often reduced to a small number of salient beliefs about that object.

\textsuperscript{314} Ehrlich, supra note 281, at 157-58.
Stated in terms of more modern terminology, the subjective probability of the association between an object and a negative attribute is very high. Second, beliefs are isolated. Third, beliefs and disbeliefs are isolated, meaning that any logical connection which might exist between and among beliefs and disbeliefs is denied. Fourth, belief systems are more differentiated than disbelief systems. Fifth, disbelief systems are not very differentiated. An "open" belief system has characteristics which are opposite to the preceding characteristics (e.g., rejection of disbeliefs is low).  

In view of the preceding characteristics and definition of a closed belief system, it is useful to pause to consider why it is that a belief system might be closed. Such a consideration begins by noting that a belief system simultaneously fulfills two conflicting purposes. The first purpose is that of providing a "cognitive framework to know and to understand ... aspects of reality." The second purpose is to "ward off threatening aspects of reality" and provide a "defense against anxiety" (i.e., fear about the future). A closed belief system results when the second purpose predominates. Consistent with this theory, it is empirically true that the dogmatism scores of experimental subjects correlate well with their anxiety scores.

The suggestion that the two preceding purposes are conflicting ones should not obscure the observation that they are purposes being simultaneously fulfilled by the belief system. So that, for example, a closed belief system "can distort the world and narrow it down to whatever extent necessary [to combat anxiety and threats against reality], but at the same time preserve the illusion of understanding it. And if the closed or dogmatic mind is extremely resistant to change, it may be so not only because it allays anxiety but also because it satisfies the need to know." I will have more to say about the change of beliefs in my discussion of the Veil of Intellectual Tolerance.

The preceding framework regarding the psychology of beliefs makes it possible to move on now to the third aspect of this discussion: the application of this technology to the system of beliefs within the legal academy.

315. Id.
316. ROKEACH, supra note 277, at 67.
317. Id. at 364.
318. Id. at 68.
3. Applications to the Legal Academy

Indeed, it should be clear that the preceding analysis of beliefs applies easily to the analysis of the jurisprudential movements discussed in Part I of this Article. First there is little issue that these movements are composed of beliefs. For example, a CLS scholar who makes use of the "Entrenchment Critique,"319 seeks to demonstrate the manner in which a legal object (e.g., the legal academy) is linked to an attribute (i.e., the perpetuation and legitimation of the interests of those who are already entrenched).

Second, that the jurisprudential movements should involve belief systems is hopefully clear from the various internal structures of the movements which I have identified in Part I above.320 Related to this, it should be possible to see that many of the propositions which I have identified as the substance of the individual movements form part of the primitive beliefs of the particular movement (e.g., the use of economic analysis as a translating medium in Law and Economics).

The closed nature of the belief systems which the three jurisprudential movements represent is something that I find to be self-evident. Because of space limitations, only illustrations of Rokeach's characteristics of a closed system are possible here. Considering the first characteristic, for example, if one considers CLS to represent the disbelief of many of the beliefs of L&Ec it is easy to confirm that the rejection of disbeliefs is very high.321 As for the second characteristic, the isolated nature of some jurisprudential beliefs is illustrated by the refusal of many CLS scholars to see the logical connection between the nature/substance of their critiques and the jurisprudential movements which will replace the present movements critiqued.

The third characteristic of a closed belief system is demonstrated in L&Ec's unwillingness to see the connection between the belief that the common law is efficient and the disbelief of the CLS critique that L&Ec legitimates the status quo. As for the fourth and fifth characteristics of a closed belief system, a casual inspection of the discussion in Part I should convince the reader that there are precious few "dis-

319. See supra note 63 and accompanying text.
320. E.g., the themes and sub-themes of Feminist Jurisprudence, the six distinct recurring criticisms of CLS, etc.
321. The interested reader can consult Richard A. Posner, The Problems of Jurisprudence (1990), to see the manner in which a prominent L&Ec scholar rejects CLS.
beliefs" associated with the jurisprudential movements discussed. For example, Feminist Jurisprudence scholars do not devote much time discovering the manner in which the law exalts women.

As the final aspect of this discussion, there are two observations I wish to make. First, I hope it is relatively clear now why I think that intolerance is the most important of my seven reasons for the absence of dialogue among legal scholars. The analysis of intolerance or dogmatism allows us to focus on the fundamental variables affecting the extent of dialogue: the nature and structure of beliefs held by individuals. Further, although each of the other six reasons I suggested have independent significance, it should be clear that each of them coalesces in varying degrees around the analysis of intolerance.

My second observation: my claim regarding intolerance has been that its existence is one of the major impediments to the achievement of dialogue amongst legal scholars. It is a well-established empirical reality that individuals with open belief systems are more likely to engage in dialogue then those with closed belief systems. It does not necessarily follow then that the diminution of intolerance would automatically lead to the achievement of optimal dialogue. It bears repeating that the other six reasons I have suggested continue to play an important role in explaining the absence of scholarly dialogue. The "Veil" technique, which I shall introduce below, will attempt to address these reasons as well as the problem of intolerance.

B. The Unique Intolerance of Lawyers

One of the main arguments that I have made thus far, is that a decrease in dogma (i.e., increase in tolerance) in the legal academy can lead to benefits for the entire academy (e.g., increased creativity). This argument implicitly assumes that the level of dogma within the legal academy is one that is within manageable proportions. Stated differently, the question is: Are there reasons to believe that lawyers/law professors are irretrievably dogmatic? The answer, in brief, is that there is no evidence to that effect. Therefore, the "Veil" technique which will be presented below as a method of attenuating dogmatism retains its utility.

To be sure, there is some, albeit scant, evidence of lawyer dog-
matism. For example, in his famous book *The Personality of Lawyers*, Weyrauch observes: "It is true that many non-American lawyers seem to prefer dogmatic approaches similar to those found in the local bar in the United States . . . ."324 Further, Weyrauch observes, "a first step" in neutralizing "prejudices and parochialism in the legal profession . . . is to create an awareness among lawyers, regardless of nationality, of the crucial impact of predispositions and subjective factors on social processes, including law."325

Although I am in full agreement with much of the preceding observations by Weyrauch, I am forced nonetheless to question the empirical validity of his observations for at least one reason. Specifically, for reasons of expediency, his study was of German lawyers.326 This fact brings the cultural transferability of his study into question. Yet even if that problem could be resolved, the problem of determining the relative dogmatism of lawyers and law professors would remain.

As another example, one might look to the "trait-factor" approach to career counseling in occupational psychology. That approach seeks to match the traits required for an occupation, to the personality traits of the individual.327 Based on the traits listed for the lawyering profession, one might be led to conclude that it is an occupation that is relatively more dogmatic than other occupations.328 There are at least two problems here. First, the traits listed for the lawyering profession assume the validity of someone’s definition of what it is that (some, most, all?) lawyers do. Indeed, at least one study of the personalities of lawyers who have actually experienced "life success," lists "openness and spontaneity" (i.e., not dogmatism) as one of their personality traits.329 Secondly, the trait-factor approach has come under attack from other occupational psychologists for, among other reasons,330 its failure to recognize the "multi-

325. Id. at 284.
326. Id. at 24-25.
328. See generally KENNETH E. CARLISLE, ANALYZING JOBS AND TASKS (1986).
330. See supra note 327 (discussing and criticizing the trait-factor approach in the occupational psychology books listed therein).
potential" nature of individuals within the work arena.\textsuperscript{331}

Thus, it is not at all clear that one can successfully indict the
dogmatism of lawyers and law professors as being dogmatism that is
uniquely beyond the pale. It would seem then that increasing the
level of creativity within the legal academy is completely possible.

C. The Limits of Tolerance

Of course it is conceivable that the level of tolerance within the
legal academy is at its optimal level. That is, those who seem to be
taking a position that appears to be one of intolerance are presumably
correct in doing so. This is because the object of their intolerance
has, by its own actions, placed itself beyond the limits of tolerance.
Since I am willing to accept the legitimacy of the preceding argu-
ment, the issue becomes one of providing a statement of the limits of
tolerance where such a statement is consistent with the nature of
tolerance. If tolerance within the legal academy is at its optimal level,
then the discussion in this Article may have relevance for the future,
but certainly not the present legal academy. Stated differently, if the
intolerance within the legal academy is a justifiable intolerance, then
it may be inappropriate to seek the attenuation of that intolerance for
any reason, including the promise of possibly increased dialogue.

In discussing the proper or justifiable limits of tolerance, it
seems appropriate to focus on the work of scholars who have studied
the (non-psychological) technology of tolerance. In focusing on that
work, two observations are in order. First, scholars of tolerance have
focused chiefly on religious and political tolerance.\textsuperscript{332} Below, I will
try to make use of the discussion of the former type of tolerance. As
for the latter, I wish to make it clear that I do not join the debate
over political tolerance, its relationship to "liberalism,"\textsuperscript{333} imbalances
of power etc.\textsuperscript{334} Second, I shall, however, be making use of ideas

\begin{enumerate}
\item \textsuperscript{331} See Ronald H. Fredrickson, \textit{Career Information} 42-47 (1982).
\item \textsuperscript{332} Some useful books discussing mainly religious tolerance or its history include:
Henry Kamen, \textit{The Rise of Tolerance} (1967); Gustav Mensching, \textit{Tolerance and
Truth in Religion} (1955). For books discussing the philosophy of, or political
tolerance, see John L. Sullivan, \textit{Political Tolerance and American Democracy} (1982); John L.
Sullivan, \textit{Political Tolerance in Context} (1985); the law and tolerance: \textit{Aspects of
Toleration} (John Horton & Susan Mendus eds., 1985); Lee C. Bollinger, \textit{The Toleration
Society} (1986); Louis de Raeymaeker, \textit{Truth and Freedom} (1954); Glenn Tinder,
\item \textsuperscript{333} See, e.g., Susan Mendus, \textit{Toleration and the Limits of Liberalism} (1989).
\item \textsuperscript{334} See, e.g., Preston King, \textit{Toleration} (1976).
\end{enumerate}
developed by scholars of political intolerance.

Having said that, it seems to me that at least two limits of tolerance can be identified. Identification of the first limit proceeds by recognizing that "ideational toleration" (i.e., the toleration of ideas) is fundamentally the type of toleration which is under discussion here. I have formulated the label "intellectual tolerance" in part to build upon the notion of "ideational tolerance." The distinction between ideational and intellectual tolerance is reflected in the nature of this first limit.

In particular, we need not be tolerant of all ideas. More specifically, we need not be tolerant of ideas which are intellectually indefensible to merge the psychological and non-psychological technology of tolerance. I have not suggested that we should be intolerant of ideas that challenge our most primitive of beliefs merely because the beliefs being challenged are primitive ones. What I have suggested is that we need not tolerate ideas that are without cogent, reasoned explanations. A visceral idea suggesting that we kill all law professors is an example of just such an idea.

Although this first limit might seem to be innocuous enough, it should be clear that it is not innocuous, by simple virtue of its implied prescription. The implied prescription of this first limit is that we should be tolerant of ideas which are intellectually defensible even when we are morally opposed to those ideas. Under my scheme then, there is no "paradox of toleration . . . which involves explaining how the tolerator might think it good to tolerate that which is morally wrong." This is because under my scheme, intolerance which is based on morality alone is never justifiable. Although it is not within the precise purpose of this Article to discuss the usefulness of tolerance apart from its usefulness for the legal academy, because the preceding implied prescription is so glaring, I shall discuss some justifications for it only briefly.

First, I do not share the moral skeptic's belief that there are no God-given truths. My argument is a different and ultimately (armchair) empirical one. Specifically, the historical record of intolerance-

335. Id. at 118.
336. King claims to prefer the label "ideational toleration" over "intellectual tolerance" because the latter "may evoke hierarchical images which are of no relevance here." Id. at 118-19. As I point out in the text, I find the distinction (or hierarchy) between ideas and intellectually grounded ideas, a useful one.
337. MENDUS, supra note 332, at 20.
338. For a discussion of moral skepticism, see id. at 76.
based human atrocities committed in the name of an intolerance based solely or mostly on morality such as, the crusades, burning “witches” at the stake, etc., is an impressive one. My position then is that there are indeed God-given truths, but our method of discovering those truths is seriously flawed. Based on the examples just cited, the historical record has taught us that the unanalytical assertion that moral truth is truth does not make it so. To consider the complement of the argument, my guess would be that many of the “moral victories” one might point to in history were based at bottom on the intellectual decimation of the intellectual foundation of the “immoral” position (e.g., if all men are indeed created equal, how can slavery be intellectually justified?).

Second, a prescription that intolerance not be based solely, or mostly on morality is justified on the grounds that such a prescription frees us from the crutches and shackles of “morality.” It frees us to consider and confront our different constellations of biases, prejudices, superstitions, fantasies, and intellectual indefensabilities which masquerade under the guise of our different moralities.

Third, a prescription against thoroughly morality-based intolerance seeks to protect us all against the unique and vehement absolutism which seems to be part and parcel of that brand of intolerance. Although there are probably many reasons why such protection might be desirable, perhaps the most potent reason is that the very absence of such absolutism makes the discovery of truth possible. The proposition that the discovery of truth becomes possible only in the presence and with the toleration of error is a proposition that is at least as old as Augustine and as new as the modern philosophers of science.339 In the final analysis therefore, we may ultimately discover that there is only one God-given truth. Truth.

Assuming that the ideas under consideration fall within this first limit of tolerance (i.e., intellectual positions exist and are supported with reasoned arguments), it is possible to imagine a second limit of tolerance to which one might subject these ideas. This limit builds on the work of scholars of religious tolerance and is a limit of substance and not of process (i.e., like the first “presence of reason” limit discussed above). Specifically, in his work on religious tolerance, Gustav Mensching has argued that “[t]he limits of intolerance, however, are intolerance.”340 Although this statement captures the essence of my

339. See KING, supra note 333, at 130.
340. See MENSCHING, supra note 331, at 168.
second limit to tolerance, I would modify Mensching's statement slightly.

Under my formulation, I would be intolerant of ideas where those ideas have a manifest and reasonable likelihood of having a collective impact of destroying tolerance in the institution in question. I offer my formulation as one which is more specific or less overbroad. The problem with Mensching's formulation is that there is much that one could refuse to tolerate for the sake of tolerance. My formulation is situationally specific simply because the conditions under which tolerance would be destroyed would vary from situation (i.e., "institution") to situation. Finally, it should be noted that in my discussion of the first and second limit to toleration, I do not seek to join the debate over whether toleration is a good in and of itself. 341 I have only to assume that toleration is useful for the legal academy if it is to achieve its purposes.

The preceding discussion of what I see as the two limits of tolerance can be applied to the legal academy in the following manner. Regarding the first limit to tolerance, the mere fact that the proponents of all three jurisprudential movements are intelligent, articulate scholars from some of the most outstanding universities in the land lends support to the proposition that there is little danger that any of the movements might be deemed to be intellectually indefensible. Regarding the second limit to tolerance, the fact that I am able to write and publish the present Article is indisputable proof that tolerance is in absolutely no danger of being decimated. In short, there seems to be no reason to fear that we are approaching the limits of tolerance in the legal academy. It seems a hard case to make then that intolerance within the academy is justified because we are approaching the limits of tolerance. Accordingly, in the section that follows, I shall propose a technique for increasing the level of tolerance (and hopefully dialogue) within the academy.

V. THE VEIL OF INTELLECTUAL TOLERANCE

A. Psycho-Theoretical Aspects of Increasing Dialogue

The dialogue-increasing technique which I shall propose is a rule-based framework wherein those who elect to temporarily "step behind the veil of intellectual tolerance," thereby agree to be bound

341. See KING, supra note 333, at 10.
by the rules which are operative behind the veil. Some of the rules which are operative behind the veil (e.g., listening\textsuperscript{342}) represent direct attempts to increase dialogue amongst jurisprudential scholars.\textsuperscript{343} These rules are truly in the spirit of legal meta-semiotics to the extent that they represent the thoughts of communication scholars as to the optimal ways of increasing communication. These optimal ways are being applied to the dialogue of those who themselves analyze legal dialogue.

Other rules, and the idea of the veil itself, could be said to represent indirect attempts at increasing dialogue (e.g., by changing the beliefs held by legal scholars toward other jurisprudential movements). In this subsection, I would like to discuss very briefly the supervening psycho-theoretical methods of behavioral change which inform the use of the veil technique as a method of directly and indirectly increasing dialogue. These psycho-theoretical methods, in their order of relevance to this Article, are: “Cognitive Behavior Modification,” “Self-Management Methods,” “Modelling,” “Behavior Modification,” and “Aversive Therapy.”

The essence of Cognitive Behavior Modification (“CBM”) is that it focuses on intervening in the individual’s “cognitive experience (e.g., beliefs . . . ).”\textsuperscript{344} This is done by encouraging individuals to “notice [their] behavioral pattern[s]” and “interrupt[ing] the automaticity of their acts . . . .”\textsuperscript{345} There is a focus on becoming aware of the beliefs which influence the appraisal and processing of events.\textsuperscript{346} There is also a focus on experimenting with new behaviors,\textsuperscript{347} and presumably with new antecedent beliefs.

The CBM methodology has informed the nature of this Article in every respect. For example, part of my motivation in providing the jurisprudential summary of Part I, was to discuss the jurisprudential movements in as neutral and comparable a setting as possible, thereby increasing the reader’s awareness of alternative belief systems. Fur-

\textsuperscript{342} See, e.g., LEWIS, supra note 133, at 151 (illustrating some of the work on listening that has been done by communication scholars).

\textsuperscript{343} In a sense, these rules could be said to address many (if not all) of the reasons for insufficient dialogue discussed in Part IV of this Article, with the exception of reason number five (intolerance).


\textsuperscript{345} Id. at 349.

\textsuperscript{346} Id.

\textsuperscript{347} Id.
thermore, the veil technique provides a method by which a given scholar can check the automaticity of her responses to these jurisprudential movements and if desired, experiment with a movement which is not her own. Although it is empirically true that the "closed" or "open" nature of belief systems is established in childhood, it is also empirically true that the nature of belief systems can be changed. The latter is an abiding premise of this Article, as well as the CBM method. We legal scholars need not be prisoners of our belief systems.

"Self-Management Methods" of behavioral change emphasize the importance of the individual's responsibility in bringing about behavioral change. These methods represent a shift away from the passive involvement, to the active involvement of the individual in bringing about change. One of the more popular methods of self-management is the psychological contract. "The psychological contract is a written statement that outlines specific actions that the [individual] has agreed to execute and establishes consequences for fulfillment and nonfulfillment of the agreement." The Veil of Intellectual Tolerance represents a psychological contract of sorts, to the extent that the individual who chooses to step behind the Veil has agreed to be bound by the rules stipulated.

"Modeling" is the third method of behavioral change which is implicit in my suggestion of the Veil technique. Modeling refers "to the process of observational learning in which the behavior of an individual or group—the model—acts as a stimulus for similar thoughts, attitudes, or behaviors on the part of another individual who observes the model's performance." My use of this method is tricky. In one sense, I am setting up a model legal scholar who knows precisely when to step behind the Veil of Intellectual Tolerance, and when he does so, he abides precisely by all of the rules of the Veil. In another sense, after I have suggested the rules of the Veil, I shall attempt to demonstrate the manner in which they can be used. In so doing, I do not mean to propose myself as a model.

Methods of behavior modification, or "operant methods" 

349. See Fishbein & Ajzen, supra note 284, at 387.
351. Id. at 308.
353. See Paul Karoly & Anne Harris, Operant Methods, in Helping People Change,
associated with the work of the late B. F. Skinner, are also implicit in the Veil technique I shall propose below. The basic message of "operant conditioning," is that the frequency of "operant behavior" (i.e., behavior freely emitted which has a common functional effect on the environment), can be increased through "reinforcement." Positive reinforcement adds something while negative reinforcement terminates or avoids a consequence to increase the frequency of a behavior. The anticipated positive reinforcement from the use of the Veil is that it will improve the dialogue among, and ultimately the creativity of, legal scholars. The anticipated negative reinforcement is that some of the consequences which attend the presence of insufficient dialogue (e.g., ideologically motivated tenure decisions) can be partially avoided through use of the Veil.

Finally, it could be argued that a mild form of "aversion therapy" is implicit in the nature of the Veil technique. The basic message of aversive therapy is that "aversive experiences serve to deter the future occurrence of . . . behavior." My assumption is that tolerance is perceived to be a positive personality trait in this society. A possible aversive scenario is one where a scholar openly or covertly refused an invitation to step behind the Veil of Intellectual Tolerance. The "punishment" in that setting would come in the form of the recognition of the intolerance of that individual by that individual and her peers. Such recognition would ideally result in the increased use of the Veil by this individual. Of course it would be ideal if such an aversive therapy did not have to be used at all. For, in the limit, it is conceivable that the Veil itself might become simply another dogma, thereby undermining the very "de-dogmatizing" objective of the Veil technique.

supra note 343, at 111.


355. Karoly & Harris, supra note 352, at 111. The term operant conditioning, is used to "emphasize the active nature of the organism; that it must operate on the environment in order to change that environment to its own advantage." Id. The effect of the behavior on the environment is ultimately the issue: "[D]isruptive classroom behavior and volunteering a correct answer can be indistinguishable operants as defined by their functional effects, if the teacher responds to both behaviors with attention." Id.

356. Id. at 114-15.

357. Jack Sandler, Aversive Methods, in HELPING PEOPLE CHANGE, supra note 343, at 191.
B. Rules Behind the Veil of Intellectual Tolerance

Three threshold comments are in order. First, one of the things that I attempt to address with the Veil of Intellectual Tolerance is the question of how a legal scholar might go about being more tolerant of alternative jurisprudential movements. It should be apparent, however, that the question of when it is appropriate to be tolerant is an equally pressing question. It is a question that has been recognized, but remains unaddressed by scholars of tolerance.358 I shall make no attempt to answer the question at the level of general theory. In the present context, however, the question becomes: When is it appropriate for legal scholars to step behind the Veil of Intellectual Tolerance?

It is consistent with the ideal of a Veil of Intellectual Tolerance to say that my answer to the foregoing question is at best tentative and certainly non-exhaustive. Specifically, a quantum of dogmatism is clearly necessary for the purpose of defining and maintaining the boundaries of the various jurisprudential movements. It would seem suitable, however, for legal scholars to occasionally step behind the Veil when they are traversing these jurisprudential boundaries. These occasions particularly present themselves when the beliefs being challenged are the primitive beliefs of the jurisprudential movement in question.359

My second threshold comment is that the similarity of my veil terminology to Rawls’s veil terminology is not accidental. My purpose is not to join the ideological debate over his prescriptions for social justice. However, his technique of proposing a fictional veil which the members of a society might step behind in deciding the appropriate rules of social justice is a useful one.360 Of course the context of the veil I propose is different from the context of Rawls’s veil.361 Further, I extend his technique by proposing explicit rules which are operative behind the Veil of Intellectual Tolerance. Finally,

358. KING, supra note 333, at 142.
359. See supra notes 319-43 and accompanying text.
360. See generally JOHN RAWLS, A THEORY OF JUSTICE (1971). Rawls has argued that it is the welfare of the least advantaged member of society which should be of greatest importance to the members of that society.
361. I suppose at some level, one might look for relationships between tolerance and social justice. That is necessarily a topic for another day. A point that I have tried to stress in this Article is that the structure, and not necessarily the substance, of thought within the legal academy is not completely consistent with the academy’s objective of creativity.
individuals (not necessarily all of society) can step behind the Veil of Intellectual Tolerance as needed.

My final threshold comment is that I have devised a rule-based framework not because it is my intention to fight scholarly dogmatism with dogmatism, but because as legal scholars a rule-based system is something of a comfort zone for most, if not all of us. Having said all of this, I offer herewith a non-exhaustive list of seven Rules of Personal Style and two Rules of Substance which are operative behind the Veil of Intellectual Tolerance. In agreeing to step behind the Veil for however limited a period of time, an individual agrees to be bound by these rules. *I simply cannot emphasize enough that I am not offering myself up as a model or paragon of the fulfillment or the embodiment of the following Rules.*

### Rules of Personal Style

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
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<tbody>
<tr>
<td>1.</td>
<td>Moral Neutrality (lose the superiority)</td>
</tr>
<tr>
<td>2.</td>
<td>Personality (divorce ego from belief)</td>
</tr>
<tr>
<td>3.</td>
<td>Non-Advocacy (held belief need not be advocated belief)</td>
</tr>
<tr>
<td>4.</td>
<td>Empathy (step into shoes of belief proponent)</td>
</tr>
<tr>
<td>5.</td>
<td>Intellectual History (this belief was once radical)</td>
</tr>
<tr>
<td>6.</td>
<td>Listening (withhold judgment)</td>
</tr>
<tr>
<td>7.</td>
<td>Civility (treat non-believers like co-believers)</td>
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### Rules of Substance

<table>
<thead>
<tr>
<th>Rule</th>
<th>Description</th>
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<tbody>
<tr>
<td>1.</td>
<td>Synergy (be informed of insights from non-believers)</td>
</tr>
<tr>
<td>2.</td>
<td>Incorporation (incorporate critique of non-believers)</td>
</tr>
</tbody>
</table>

**TABLE 1: RULES BEHIND THE VEIL OF INTELLECTUAL TOLERANCE**

The Rules of Personal Style apply to the individual’s approach toward any beliefs held or communication received while the individual is behind the Veil. The Rules of Substance apply to the interaction of substantive jurisprudential ideas when those ideas are consid-
The application of the Rules of Substance is most effective when preceded or accompanied by the Rules of Style, but they need not be. The whole point is to try to prevent style from standing in the way of substance. Additionally, it is the situation that determines which rules of the Veil need to be applied. Although it is conceivable that all of the rules might apply in a given instance, that need not be the case for all instances.

The First Rule of Personal Style is the Rule of Moral Neutrality. In agreeing to be bound by this Rule, the legal scholar agrees not to be bound by attitudes, beliefs and behaviors of moral or ethical superiority. Also under this Rule, the scholar agrees to recognize and not deny the extent of his or her messianic ambitions. The scholar also agrees to recognize that there have been, and will be, very few messiahs in the history of humankind, a proposition which diminishes severely the probability that he or she will be the next messiah. Under this Rule, the scholar recognizes that since it is the fortuity of his or her birth (i.e., into a particular race, class, religion etc.) that is the chief determinant of his or her belief system and vision of the utopic world, it is illogical to assume that the accident of birth, standing alone, provides the basis for the (moral or other) superiority of his or her present belief system.

The Second Rule of Personal Style is the Rule of Personality. Under this Rule, the scholar agrees to divorce the “I” from the “believe.” By this rejection of ego-involvement in beliefs, the scholar further agrees to reject the proposition that “it is right because I believe it.” The scholar agrees to recognize and confront his fear that his belief system might be false, or at a minimum, inappropriate as judged by some relevant and important standard. The scholar agrees to recognize and not deny, but restrain his or her emotional and automatic rejection of the beliefs of others. The scholar agrees to laugh at his or her own beliefs as the occasion arises.

The Third Rule of Personal Style is the Rule of Non-Advocacy. Under this Rule, the scholar agrees to recognize that the mere possession of a belief is not a sufficient basis for its advocacy. Regarding the advocacy of his or her beliefs, the scholar agrees to avoid “party-line” or “groupthink,” and to pose tentative arguments to the extent possible. The scholar agrees to pursue and value the objectives of intellectual balance, not extremism; intellectual collaboration, communication and possibly compromise. The scholar agrees to give serious consideration to the propositions that there is probably no single intellectual position that can continuously corner the market for truth.
and that perpetual criticism may very well be the price of truth.

Unlike the first three Rules of Personal Style under which the scholar focuses chiefly on his or her own behavior regarding personal beliefs, under the next four Rules, the scholar focuses on behavior directed towards the beliefs of others. Accordingly, the Fourth Rule of Personal Style is the Rule of Empathy. Under this Rule, the scholar agrees to attempt, to the extent possible, to step into the shoes of the propounder of an alternative belief which is under consideration. The scholar agrees to attempt to discover, or at a minimum imagine and consider, what it is about the background or personal history of the belief propounder that compels her to propound the alternative belief.

The Fifth Rule of Personal Style is the Rule of Intellectual History. Under this Rule, if the scholar’s belief is an established one, the scholar agrees to remember the time when his or her beliefs were considered “radical.” The scholar agrees to consider newer, alternative beliefs in a manner consistent with this remembrance. If the scholar’s belief is a newer one, the scholar agrees to imagine a future time when his or her beliefs will be “established” beliefs. The scholar agrees to consider older established beliefs in a manner consistent with this vision.

The Sixth Rule of Personal Style is the Rule of Listening. Under this Rule, the scholar agrees to literally listen (or read) to the alternative beliefs of scholars, and to withhold judgment while doing so. The scholar agrees, to the extent possible, to sympathetically consider all (alternative) belief-relevant facts and evidence whether tendered explicitly or not. The scholar agrees to reevaluate an alternative belief as new facts and evidence come to light.

The Seventh Rule of Personal Style is the Rule of Civility. Under this Rule, the scholar agrees to treat the member of an alternative belief system with the same civility, kindness and mutual respect extended to a member of his or her belief system.

There are two Rules of Substance that apply behind the Veil of Intellectual Tolerance. Under the Rule of Synergy, an attempt is made to inform the partial analysis of one jurisprudential movement with the insights afforded by the more comprehensive analysis conducted by another jurisprudential movement. Under the Rule of Incorporation, to the extent possible, the critiques of one jurisprudential movement by other movements are considered, addressed and incorporated into the analysis of the critiqued movement.
C. Application: The Rule of Synergy

In favor of brevity, in this section I shall illustrate an application of the Rule of Synergy. My purpose here is to demonstrate very briefly, the applicability of the Rule of Synergy behind the Veil of Intellectual Tolerance. Of course this analysis is incomplete, a mere outline of a possible future. I shall demonstrate the manner in which Law and Economics might benefit from the insights of Critical Legal Studies and Feminist Jurisprudence. A more complete analysis would demonstrate the benefits of full dialogue or reciprocal communication (i.e., how the movements could benefit from one another’s insights).

What then do judges do? As previously discussed, the L&Ec model of judicial behavior is somewhat underdeveloped. For example, in his famous Law and Economics treatise, Judge Richard Posner briefly entertains some speculations as to what it is that a judge might “maximize.”

In view of the underdeveloped nature of L&Ec in this area, it is conceivable that L&Ec might learn much from the work of CLS and Feminist Jurisprudence scholars. Consider for example the work of CLS scholar Duncan Kennedy on the “critical phenomenology of judging.” In this very important article, Kennedy argues that judges use the law to “back up their statement of a preference for an outcome . . . .” Having said that, Kennedy proceeds to recognize that there are indeed some constraints which operate upon the judge’s behavior. For example, Kennedy recognizes the constraints imposed by promises made to “some diffuse public,” sanctions from the judge’s “community,” fear of reversal by a higher court, and the desire to influence other and future cases.

Law and Economics could also learn lessons from feminist jurisprudence about what it is that judges do. Although there do not ap-

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362. Judge Posner explains:
The economist assumes that judges, like other people, seek to maximize a utility function that includes both monetary and nonmonetary elements . . . .
   . . . .
   . . . The principal explanation for judicial behavior must lie elsewhere than in pecuniary or political factors. One possibility that is consistent with the normal assumptions of economic analysis is that judges seek to impose their personal preferences and values on society.

POSNER, supra note 80, at 505-06.

363. Kennedy, supra note 77, at 527.

364. Id. at 527-28.
pear to be available analyses that are as comprehensive as the analysis conducted by Kennedy, there are some that support the proposition that the ideology of female subordination is alive and well in the male-dominated judiciary. For example, Tong points out that in woman-battering cases, judges frequently trivialize the offense by giving lenient sentences or by openly sympathizing with the husband in such cases.365

An application of the Rule of Synergy would involve learning the lessons of CLS and Feminist Jurisprudence. Law and Economics could seek to do so by seeking an alternative economic model of judging. Consider for example an agency cost model of the judicial function.366 Agency costs can be liberally defined as the costs which arise because the interests of the agent diverge from those of the principal (e.g., the cost to the principal of monitoring the agent).367 It is common to view judges as controllers of the level of agency costs to the extent that they have the power to limit the divergence between the interests of agents and principals (e.g., Rule 11 sanctions might control the extent of the divergence between the interests of the attorney and the client).368

The lessons of the CLS and Feminist jurisprudential view of judging seem to be that judges can themselves be the sources of agency costs. For example, applying Kennedy’s view of the judicial function, if one defines the “public” as the principal and the judge as the agent, it is clear that there is a divergence of interests between the interests of principal and agent. To the extent that the judge will seek to decide cases in a manner consistent with personally desirable outcomes, agency costs will arise in connection with that divergence of interest. Similarly with Tong’s formulation of judging, agency costs will arise to the extent that the judge’s interests are aligned with some sense of male identity as opposed to being aligned with the interests of the public as the relevant principal.

Indeed, L&E might benefit greatly from the insights made possible by CLS and Feminist Jurisprudence. For example, based partly on those insights one might posit that independently of a judge’s

367. There are three kinds of agency costs: monitoring costs, bonding costs, and residual loss. See id. at 129-30.
368. Id. at 135.
status as controller or source of agency costs, the types of agency costs controlled or generated can be characterized as "business agency costs" (i.e., agency costs resulting from the agent's failure to perform tasks which have been either implicitly or explicitly but in any case unambiguously defined) or "nonbusiness agency costs."369

It is the interaction of these two agency-cost-related dimensions that makes it possible to understand and make predictions370 as to when it is that a judge will behave as a politician. For example, one might anticipate that a judge would be least political when she is engaged in the control of business agency costs (e.g., a judge imposes sanctions on an attorney who has made no effort to represent the interests of his client).371

It is conceivable that such a synergistic approach to the economic analysis of the judicial function would do more than help economics. It could open a dialogue amongst CLS, Feminist Jurisprudence and L&Ec legal scholars about the nature of judging. Such a dialogue might generate creative approaches to the analysis of judging. This creativity is everywhere and always a central aspect of the joint jurisprudential enterprise of the jurisprudential movements. These creative approaches would be beneficial whether one were committed to the pursuit of truth or the pursuit of solutions to the problems that attend

369. That is, these are costs the existence of which are speculative because the nature of the task is ambiguous. The ambiguity in turn is present because the identity of the principal is uncertain. See id. at 140.

370. Yes, I am taking the standard logical positivistic position that one of the functions served by theory is that of making conditional if-then predictions. Logical positivism continues to have a strong hold on economic thought, and therefore on law and economic thought. By so doing, I do not mean to suggest that it is economics (and by implication logical positivism) that must be the language of the joint enterprise. For an unapologetic argument that the new "common language" of various legal scholars should be based in law and economics, see BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW 41-44 (1984). For an introduction to logical positivism and its role within the philosophy of science, see BECHTEL, supra note 3. For a discussion of the importance and success of logical positivism in economic thought, see H.L. BHATIA, HISTORY OF ECONOMIC THOUGHT (4th ed. 1985); JOHN M. FERGUSON, LANDMARKS OF ECONOMIC THOUGHT (1950); JÖRG NIEHANS, A HISTORICAL OVERVIEW OF ECONOMIC THEORY: CLASSIC CONTRIBUTIONS, 1720-1980 (1988); THE HISTORY OF ECONOMIC THOUGHT (Mark Blaug ed., 1990). For a discussion of the importance and appropriateness of the scientific method in law itself (as opposed to the economic analysis of law), see Steven J. Burton, Correspondence: Judge Posner's Jurisprudence of Skepticism, 87 MICH. L. REV. 710 (1988).

371. The attorney is the agent. The client is the principal. There is little ambiguity here. Presumably, the attorney has failed to adequately represent his client because his interests diverge from hers. Whatever costs attend that divergence can be termed agency costs. By imposing sanctions, the judge is able to temper this divergence of agent-principal interests, and consequently the level of agency costs.
the judicial function.

CONCLUSION

The story that has been told in this Article is a relatively simple one. Motivated by the question: "What do judges do?" I have suggested that we legal scholars who belong to the various jurisprudential movements do not talk with one another as much as we ought to. Consequently, our creativity suffers. Whether one chooses to define our mission as one of seeking truth for its own sake, or truth that is useful to society, it is clear that creativity is crucial in either instance. We therefore need to talk to one another more often. So why don't we? There are many answers to that question. One of the most powerful answers, however, is that we are afraid. We also like the comforting feeling of thinking that we understand the world. Talking to other legal scholars who do not think very much like us, might and probably would diminish this feeling (i.e., increase our anxiety level). In this Article, I have proposed a technique that I think can be useful in getting those of us who do not think alike to talk to one another.

In order to tell the story more accurately, the simple story outlined above has been shrouded in the techno-speak of the experts of human talk. Yet the essential message is a simple one. We don't talk. We ought not talk about our beliefs simply because we are prisoners of them. I think we need to reach past those limits and talk.