

# HEINONLINE

Citation: 55 J. Legal Educ. 80 2005



Content downloaded/printed from  
HeinOnline (<http://heinonline.org>)  
Wed Feb 5 13:05:13 2014

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/cc/basicSearch.do?  
&operation=go&searchType=0  
&lastSearch=simple&all=on&titleOrStdNo=0022-2208](https://www.copyright.com/cc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0022-2208)

# A Dangerous Supplement

Daria Roithmayr

The supplement supplements. It adds only to replace.

—Jacques Derrida, *Of Grammatology*

I've reached that point in my teaching career where my age approaches twice that of the average student in my class. I find myself wondering, as time passes, how salient my own law school experiences and views of the world have remained for my students. Despite evidence to the contrary, I still think of myself as young and hip. And until recently I assumed that Duncan Kennedy's little red book, *Legal Education and the Reproduction of Hierarchy* (hereinafter, *Legal Education*), was still sufficiently young and hip to use in my critical race theory class.

But young and hip will become old and tired, over time. Last year I noticed a distinct shift in the nature of student commentary on the reading assignments. As part of the section of my course on legal theory that explores critical race theory, I assign significant parts of *Legal Education*. In particular, I assign the chapters on the ideological content of education and the politics of hierarchy, which provide accessible overviews of central CLS principles.<sup>1</sup> Last fall, on the day before the class met to discuss this reading, one of my students e-mailed me his reaction:

For Duncan Kennedy, the left was about Euro-Marxism, the evils of bureaucracy, and resisting the Vietnam War. For us, the left is about the war in Iraq, antiglobalization, and the evils of multinational corporations. Besides, we aren't learning about the determinacy of legal reasoning in our first-year classes anymore—these days we are learning law and economics. Can't you give us more up-to-date critical material?

When I learned that Duncan Kennedy was republishing the pamphlet, complete with a new foreword and commentaries, I was excited.<sup>2</sup> I assumed

**Daria Roithmayr** is an associate professor of law at the University of Illinois.

Thanks to Gary Peller, Duncan Kennedy, Mark Tushnet, Kim Grenshaw, Devon Carbado, Rich Ford, Anthony Farley, and Chantal Thomas for endless conversations about the nature and relevance of CLS to CRT and the rest of the world, and about the relationship between the ideological and the material. Thanks to Tom Ulen, Russell Korobkin, Ian Ayres, Omri Ben-Shahar, Laura Beny, and Lee Fennell for equally endless conversations about the nature and relevance of law and economics to critical theory, and for occasional assistance on the more difficult translations of law and economics. Thanks to a smaller subset of the above for comments on earlier drafts of this review. Any errors are, of course, my own.

1. Of course, students also respond well to Chapter 6, "Student Response to Hierarchy," for obvious reasons.
2. Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy: A Polemic Against the System (A Critical Edition)* (New York, 2004). Citations to the book are in parentheses in the text.

that this compilation would help me respond to my students' complaints. Although Kennedy told me that the volume would contain his little red book in its original form, I also anticipated that the additional material and commentaries would modernize and update the original brilliant arguments. Knowing how much Kennedy values his role as a mentor, I hoped that his work might become young and hip once again.

But after reading through the book, I must confess that I am disappointed. At the outset, I must note just how young and hip and (dare I say) even revolutionary I once found Kennedy's ideas when I first read them as a student. Like many reviewers of this volume, I am reminded again of how radical I found the notion that legal education actually served some social purpose other than training good lawyers. Even after twenty years, my own students still experience that central *aha!* moment when they hear for the first time that law schools sort and socialize students to train them for the hierarchies of the profession. And as a way to proceed through law school, Kennedy offers the student an opportunity to "think about law in a way that will allow one to enter into it, to criticize without utterly rejecting it, and to manipulate it without self-abandonment to *their* system of thinking and doing" (42).

Even as I recognize the continued relevance of *Legal Education* for students in this sense, however, I am quite struck by how static most of the volume seems. Of course, the frozen-in-time quality is to be expected because the volume is a reissue of the original book. Indeed, both my students and I have often chuckled over the references in the pamphlet to Fred Astaire, Richard Pryor, Betty Friedan, and the pretty antifeminist law student who threatens the wives of male law students. But even the added commentaries in the new volume seem to be throwbacks to an earlier era. A few of the authors seem stuck in a bit of a time warp, merely picking up where they left off twenty years ago.<sup>3</sup> Unfortunately, neither the commentaries nor Kennedy's additional input does much to update the arguments for contemporary times.

Most remarkably, the republished volume seems to have taken only casual notice of two major developments in legal education: the rise of law and economics in the curriculum of many elite law schools, and the rise (and fall) of critical legal thought in the legal academy. The law school has changed quite a bit since 1983, as has the world. In 2005 the law student is as likely to learn torts via the methodology of law and economics and the Coase Theorem as by way of traditional black letter doctrine. The student is also likely to run into one or more critical scholars on most law school faculties—CLS-crits, race-crits, fem-crits, and queer theorists. But these critical scholars are likely to occupy a more marginalized position in the legal academy than they did ten or fifteen years ago.

3. Peter Gabel's brilliant contribution could easily have been taken whole cloth from his dialog with Duncan Kennedy in "Roll Over Beethoven" and his arguments in the equally brilliant article, "The Phenomenology of Rights Consciousness." Compare "The problem with the indeterminacy critique is that it leaves us each alone in our freedom—it does not want to come to grips with the nature of the alienation critique . . ." (163) with arguments about alienation and contradiction in Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 *Stan. L. Rev.* 1, 9, 29 (1984) and Peter Gabel, *The Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, 52 *Tex. L. Rev.* 1563 (1984).

In my view, both of these developments—the rise of law and economics and the relative fall of critical theory—can be linked to the more general shift toward market-oriented methodology and neoliberal analysis. As the U.S. leads the push for a globalized economy, legal education naturally has become the training ground for the hierarchies of the global market as well. It comes as quite a surprise that the republished volume seems to take relatively little notice of these events.

In the spirit of the dangerous supplement, then, this review essay focuses not on what is in Kennedy's book but on what is left out, and on the need for supplements, additions, and replacements. I suggest that Kennedy might have taken the opportunity to update the pamphlet to reflect the shift—in both legal education and the world at large—toward market-oriented methodology and neoliberal analysis.

More specifically, I advance two central arguments. In part I, I suggest that Kennedy might easily have provided an updated supplement to help law students respond to the rise of law and economics and neoliberal market analysis. Earlier CLS critiques of law and economics had used many of *Legal Education's* arguments about indeterminacy to target law and economics' emphasis on efficiency. Many of the post-Chicago school law and economics scholars are now confirming and refining the earlier CLS critique. Kennedy could easily have rehearsed an updated version of those arguments in the republished volume. In this section I sketch a version of that proposed supplement to help students resist and respond.

Likewise, in part II, I suggest that Kennedy could easily have supplemented *Legal Education* to reflect the role that critical theory itself might still play in response to the shift toward the market. To be sure, critical theorists remain relevant for many students. Critical scholars have provided some students with essential resources to organize resistance, particularly along identity lines and in connection with affirmative action. But in the wake of the shift toward the market, critical theory itself has become somewhat dated.<sup>4</sup> To remain relevant, at least for students these days, critical theorists must help to generate an updated response to the rise of law and economics and neoliberal analysis. To be sure, critical theorists are making efforts in that direction. In the last section of part II, I examine a newly developing effort by critical race theorists to engage with some of law and economics' central assumptions.

## I. Responding to the Rise of Law and Economics

### A. *The Old Distinction: Law Versus Policy*

In 1983, the year of the original pamphlet's publication, Kennedy set his sights (most appropriately) not on law and economics but on legal reasoning as it was taught at most law schools. More specifically, Kennedy focused on destabilizing the central distinction that forms the foundation of legal reasoning—the distinction between law and policy.

The intellectual core of the ideology is the distinction between law and policy. Teachers convince students that legal reasoning exists, and is different from

4. Kennedy argues that critical theory failed as much for organizational as for theoretical reasons (216–19).

policy analysis by bullying them into accepting as valid in particular cases arguments about legal correctness that are circular, question-begging, incoherent or so vague as to be meaningless. Sometimes these are just arguments from authority, with the validity of the authoritative premise put outside discussion by professorial fiat. Sometimes they are policy arguments . . . that are treated . . . as though they were rules . . . but that will be ignored in the next case when they would suggest that the decision was wrong. Sometimes they are exercises in formal logic that wouldn't stand up for a minute in a discussion between equals (34).

In this discussion Kennedy brilliantly explains how the structure of legal education helps create and reinforce the law-versus-policy distinction. Teachers separate the straight doctrinal cases (obeying or violating the legal rules) from the "cutting edge" cases (involving political value judgments). Likewise, the curriculum divides classes into first-year "legal" courses and upper-level "policy" courses (34–36).

Kennedy does a masterful job of explaining why the law-versus-policy distinction cannot hold. Appropriately, he concedes that there is a distinct set of legal rules as well as a distinct body of lawyer's knowledge about how to use those rules to generate a particular outcome—how to spot gaps, conflicts, and ambiguities in rules; how to choose between broad and narrow holdings; how to generate pro and con policy arguments; how to choose between precedents A and B (36).

But, as Kennedy points out, those rules and argumentative techniques never generate a correct "legal solution" that can be distinguished from the correct ethical or political solution (36). In and of themselves, legal rules are indeterminate. Using formal rules and argumentative techniques, legal thought can generate equally plausible justifications for almost any result (39). Ethical and political discourse, and not legal rules, determines whether a judge will choose precedent A over B, will choose whether to overrule precedent or adhere to it, will or will not fill in gaps, conflicts, and ambiguities with legislative history or policy (36–37).

According to Kennedy, this is indeterminacy with a tilt. The law school's illusory distinction between law and policy helps to promote the center-liberal program of limited reform of the market economy and pro forma gestures toward race and sex equality. "[L]aw school teaching makes the choice of hierarchy and domination . . . look as though it flows from legal reasoning rather than from politics and economics," and presents the reformist program of regulation as "more policy oriented, and therefore less fundamental" (37).

Twenty years after Kennedy's first publication, law school teachers no longer disguise the idea that hierarchy and domination flow directly from economics. At a growing number of law schools, law and economics has become a key component of case analysis in the first-year curriculum.<sup>5</sup> The

5. Although law and economics got off to a relatively slow start, the movement has extended its reach quite widely over the last few years. For an excellent detailed summary of the rise of law and economics in all its many incarnations (Chicago school, post-Chicago school, New Haven school, institutionalist, game theorist, etc.), see Neil Duxbury, *Patterns of American Jurisprudence* 301–419 (New York, 1995).

next section discusses how the central distinction in law teaching has shifted from law versus policy to efficiency versus distribution.

### *B. The New Distinction: Efficiency Versus Distribution*

According to law teachers of an earlier generation, one of the chief virtues of legal reasoning was that it was scientific. Legal reasoning dictated an objective “legal” outcome without recourse to political, social, or economic value judgments. These days, many law teachers now have supplemented (or in some cases replaced) the science of legal reasoning with the science of economics.<sup>6</sup> Students in first-year classes learn contracts or torts law not as exercises in applying legal rules but as outcomes of efficiency analysis.<sup>7</sup>

The “science” of economics promises to make legal reasoning even more objective than it ostensibly was. Indeed, Mark Kelman describes law and economics as an attempt to resuscitate legal reasoning from the legal academic crisis of postrealists who have been taught that legal rules are nothing but policy-oriented decisions. Under law and economics, the scientific domain of legal reasoning has been recaptured as the domain of objective economic reasoning to achieve efficiency, while the domain of politics has now been separated out as the subjective, value-driven domain of distribution.<sup>8</sup>

Just as with legal reasoning, however, the scientific nature of efficiency analysis requires that law teachers distinguish between efficiency and distribution. In fact, the notion that efficiency and equity are separable is so important that it constitutes a theorem in microeconomics: the Second Fundamental Theorem of Welfare Economics, which holds that in competitive markets, efficiency and equity are separable.<sup>9</sup> More specifically, the theorem shows that even if the initial allocation of entitlements is inconsistent with society’s preferences about distribution, a fully competitive market can both maximize social welfare and then separately maximize society’s distributional concerns if there is a nondistorting system for making transfers.

Scholars offer various arguments in support of this distinction. For some legal economists like Richard Posner, efficiency remains separate from distribution because economics has relatively little to say about value-driven issues

6. See Thomas Ulen, *The Unexpected Guest: Law and Economics, Law and Other Cognate Disciplines, and the Future of Legal Education*, 79 *Chi.-Kent L. Rev.* 403, 415 (2004) (arguing that economics brings scientific objectivity to legal reasoning).
7. In most contracts and torts classes, teachers make some reference to law and economics principles to justify particular decisions. Few torts scholars (or students, for that matter) are unfamiliar with the Coase Theorem as a way of explaining how the law allocates tort liabilities in nuisance cases. According to Tom Ulen, “the notion of efficient breach of contract is not used simply by law and economics scholars; it has become an organizing notion for all contract scholars.” See *id.* at 426.
8. See *A Guide to Critical Legal Studies* 125 (Cambridge, Mass., 1987).
9. See Russell Korobkin & Thomas Ulen, *Efficiency and Equity: What Can Be Gained by Combining Coase and Rawls?* 73 *Wash. L. Rev.* 329, 331 n.7, 342 (1998).

like fairness or equity.<sup>10</sup> For other scholars like Louis Kaplow and Steven Shavell, although economics has much to say about distribution and equity, distribution is kept separate from efficiency for procedural reasons. In their view, efficiency should be kept separate from distribution because redistribution is more effectively accomplished through tax and transfer mechanisms than by adjusting legal rules.<sup>11</sup> They argue that adjusting legal rules to effect redistribution produces too many distortions in other places. This separation produces a particular legal division of labor: judges can maximize the size of the pie first (via efficiency analysis), and legislatures and administrative agencies can efficiently redistribute the slices later via tax and transfer programs.<sup>12</sup>

### C. The CLS Critique

As a number of CLS scholars have pointed out, however, the distinction between distribution and efficiency is as indeterminate as the distinction between law and policy. Distribution cannot be separated from efficiency because decision makers cannot determine whether a legal rule is efficient without first specifying an initial distribution of entitlements among disputants. Put differently, it is not possible to separate the question of how to maximize the size of the pie (via efficiency) from how one allocates the pie in the first instance.<sup>13</sup> The assessment of whether a legal rule is efficient already defers to and depends very much on the initial distribution of entitlements.

This is true for several reasons. First, offer and asking prices (which measure a party's value based on her willingness to pay) will depend on who is originally assigned the entitlement in dispute.<sup>14</sup> Most people are more in-

10. As Daniel Farber explains, economics says little about fairness because Pareto efficient outcomes (which essentially give everyone a veto) are relatively rare, and Kaldor-Hicks efficient outcomes ignore equity entirely (assuming that winners would be willing to pay losers even if they do not in fact). See *What If Anything Can Economics Say About Equity?* 101 Mich. L. Rev. 1791, 1794-95 (2003) (describing Posner's argument that economics is irrelevant to equity).
11. Tax and transfer programs are more efficient, so the argument goes, because those programs are based explicitly on income, while legal rules affect only small subsections of the population that may or may not be correlated with income or wealth. Redistribution through legal rules is also unpredictable; for example, corporate defendants may pass on their liability costs in the form of increased prices to the consumers. In addition, high transaction costs typically accompany redistribution via legal rules (attorneys' fees may take up a significant portion of the transaction. Finally, adjusting legal rules may contribute to inefficiency by distorting work and other sorts of incentives; if you know that you may benefit from some windfall in the adjustment of a legal rule in your favor, or be burdened by an award, you may not work as hard. See Robert Cooter & Tom Ulen, *Law and Economics* 9 (Reading, Mass., 2000). See also Korobkin & Ulen, *supra* note 9, at 345.
12. See Richard Posner, *Economic Analysis of Law*, 6th ed., 532-34 (New York, 2003).
13. Lee Anne Fennell surveys the many legal economists who use maximizing the size of and distributing the slices of the pie. See *Poverty in Valuation*, n.8 (unpublished draft, on file with author).
14. See Kelman, *supra* note 8, at 145-49 (describing offer-asking gap). See also Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 Stan. L. Rev. 387, 401-10 (1981) [hereinafter *Cost-Benefit Analysis*]; Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies*, in *The New Palgrave Dictionary of Economics and the Law*, ed. Peter Newman, 465, 470 (New York, 1998). Kennedy rehearses this critique of law and economics, along with a number of others discussed in this paper.

vested in keeping current entitlements than in potential entitlements, for a variety of psychological reasons.<sup>15</sup> As a result, people who already have entitlements will pay more to retain an entitlement than they will to purchase the entitlement. For example, someone might turn down a \$50 offer for her television set, although she would have paid no higher than \$50 to go out and purchase the same set.<sup>16</sup> Legal economists have not come up with a way to address the offer-asking gap that does not build in the relationship between initial entitlement and individual value.<sup>17</sup> Thus, it is impossible to determine which rule to adopt or how to allocate entitlements efficiently without deferring to the current set of rules or allocations of entitlements.<sup>18</sup>

Second, when the analyst takes into account not only the entitlement distributions of the direct participants but also those of third parties who are affected by the transaction, then initial distribution even more significantly determines the outcome of any efficiency analysis.<sup>19</sup> Thus, the distinction between efficiency and distribution is as problematic as the distinction between law and policy in conventional legal reasoning. Just as the outcome of legal reasoning defers to and depends on policy analysis, setting the initial entitlement or the initial distribution of income determines the efficiency analysis. For that reason, distribution and efficiency cannot be understood as distinct or independent of each other.

#### *D. Behavioral Law and Economics "Critique"*

Recent literature from within the law and economics movement has repeated and developed the early CLS argument about how offer and asking prices depend on initial allocation. Drawing on literature from behavioral psychology, Russell Korobkin and a number of other behavioral legal economists have described the effect on legal analysis of behavioral phenomena that make individual value and preference dependent on initial entitlements: the status quo bias (the tendency to prefer the present state of the world to alternative states); the endowment effect (the tendency to value more highly those goods or entitlements that one already possesses); and the related offer-asking gap (the tendency for people who own entitlements or goods to demand a higher price to sell than they would pay to acquire).<sup>20</sup>

15. See Mark Kelman, *Consumption Theory, Production Theory and Ideology in the Coase Theorem*, 52 S. Cal. L. Rev. 669, 678–95 (1979).

16. See Kelman, *supra* note 8, at 147.

17. See Kennedy, *Cost-Benefit Analysis*, *supra* note 14, at 408.

18. See Kelman, *supra* note 8, at 142.

19. See *id.*

20. See Russell Korobkin, *The Status Quo Bias and Contract Default Rules*, 83 Cornell L. Rev. 605 (1998); Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 Nw. U. L. Rev. 1227 (2003); Herbert J. Hovenkamp, *Legal Policy and the Endowment Effect*, 20 J. Legal Stud. 225 (1991). See also Cass Sunstein, *Free Markets and Social Justice* (New York, 1997); William A. Fischel, *The Offer-Ask Disparity and Just Compensation for Takings: A Constitutional Perspective*, 15 Int'l Rev. L. & Econ. 187 (1995). Although most of these authors mention the CLS critique, none of them frames the offer-asking gap as a serious challenge to the coherence of efficiency analysis.



Likewise, a number of other critics of law and economics (from within the genre) have pointed out how efficiency analysis defers to and depends on initial allocations. Most recently, Daniel Farber makes the point with regard to the use of social-welfare functions. In Farber's view, such analysis (favored by Kaplow and Shavell) cannot generate outcomes without making some initial assumptions about distribution that are prior to efficiency.<sup>21</sup> According to Farber, efficiency defers to and depends on distributional concerns, for three reasons. First, policymakers cannot determine an efficient outcome without first choosing a "social-welfare function"—the formula that permits an analyst to aggregate individual utilities in order to compare the efficiency of a legal rule. One potential social-welfare function simply adds individual utilities as a sum to arrive at the aggregate value. But analysts could choose to use another function that is more sensitive to equity concerns for the worse-off members of society. Thus, the efficiency analysis depends directly on deciding preliminary value-driven questions about distribution.<sup>22</sup>

Second, if analysts are to avoid unilaterally choosing the social-welfare function, some fair procedure must be adopted to permit society to choose which social-welfare function it prefers. But if efficiency and distribution are to be kept separate, this procedure cannot be chosen on the basis of efficiency. Third, the definition of social utility is itself indeterminate. Analysts face the same difficulties in choosing how to define social utility as they face in choosing the right function. According to Farber, efficiency can be of no help in determining how to define social utility, if social utility is to determine efficiency.<sup>23</sup>

Scholars like Korobkin and Farber confirm what CLS theorists like Kelman and Kennedy were arguing all along in the 1980s—that the concept of efficiency inevitably defers to and depends on questions of distribution that efficiency pretends to exclude. As both sets of scholars point out, efficiency is no more scientifically objective than legal reasoning, and for the same reasons: neither legal reasoning nor economic efficiency can be separated from value judgments about the way the world should operate. The dangerous supplement always reenters. Here Kennedy misses an opportunity to reprise the CLS critique and to highlight the link between that critique and his *Legal Education* critique.

## II. The Role of Critical Theory in the Modern Legal Academy

In choosing to republish his volume in its original form, Kennedy also pays relatively little attention to the impact that critical theory has had on legal education, or on its potential value for future students in the struggle to resist market-driven analysis. Although the commentary by Angela Harris and Donna Maeda addresses this subject at length, their essay does not reflect that critical

21. Kaplow and Shavell define an outcome as efficient if it promotes the highest social utility. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare* 24–27 (Cambridge, Mass., 2002).

22. See Farber, *supra* note 10, at 1801–04 (arguing that the choice of social welfare function determines the outcome).

23. See *id.*

race theory is in crisis, increasingly marginalized in a curriculum taken over by economic methodology. Accordingly, this section supplements the republished volume, in part by surveying the recent efforts of a few critical race theorists (including Harris herself) who engage more directly with law and economics and neoliberal analysis.

*A. Harris and Maeda: Critical Theory and the Progressive Perspective*

As a preliminary note, one wonders why Kennedy's republished volume minimizes the impact of critical theory on legal education. To be sure, Kennedy chronicles the rise and fall of CLS, but in very short order and only at the end of the book (204–07). In addition, he mentions critical feminist theory and critical race theory, but again, at the very end of the volume, and even then, only in the context of attempting to explain the death of critical legal studies as an intellectual movement (219).

In contrast, Harris and Maeda's commentary does a better job of updating and acknowledging the important impact of critical theory on the modern student (168). These authors demonstrate that, with the aid of modern critical theory, law students have begun to fashion a new, "progressive" approach to legal education and to legal hierarchy.

Interestingly, Harris and Maeda argue that this progressive perspective differs from the stance Kennedy adopts in *Legal Education*. First, the progressive perspective adopts a more post-Marxist, more diffuse notion of power than does Kennedy (173). For progressives, power comes in many different identity-related forms (e.g., racism, homophobia) that are interconnected with each other, rather than in one totalizing hierarchical structure that crosses identity lines (173). Second, the progressive perspective envisions legal hierarchy as only one form of subordination that connects to these other, more identity-based forms of subordination. Likewise, resistance to legal hierarchy is one "small aspect of a larger project of collective resistance" to these other forms of subordination (173).

Third, the progressive perspective adopts a more ambivalent approach to the project of legal reform—using the system while distrusting it at the same time, walking a "tricky line between engagement in legal reform and condemnation of its ability to co-opt struggle."<sup>24</sup> Finally, progressives focus much more on creating community organizations along identity lines, and coalitions of those organizations for broad, identity-based campaigns (e.g., the campaign for racial justice) (174–76). Progressives are relatively less interested in single-issue groups like Kennedy's law school study group designed to resist hierarchy in legal education (174).

According to Harris and Maeda, the more recent incarnations of critical theory (race, feminist, queer, LatCrit) offer a new set of intellectual and political resources to make this progressive stance possible. In particular, critical race and feminist theory offer alternative accounts of the structure of power (e.g., interlocking) and of various forms of subordination and resis-

24. See *id.*

tance, to inform the progressive stance (173). These accounts help students give voice to, and organize around, their own experiences of identity-based subordination. Though Harris and Maeda don't say so explicitly, their account of community organizing at Boalt Hall also reflects that critical theorists on law school faculties can provide a source of guidance, aid, and comfort to students who seek to resist these various forms of oppression.

Unfortunately, this description of critical theory seems a bit dated as well, or at the very least incomplete. Although Harris and Maeda demonstrate critical theory's continued relevance for some students on identity-based issues like affirmative action, critical race theory's focus on identity politics has lost much of its relative influence in the legal academy. Some scholars on the left have argued that critical theory is no longer relevant because it has failed to focus more on material issues like racialized poverty or neoliberalism at the global level.<sup>25</sup> Other scholars within critical race theory likewise have suggested that CRT should engage with law and economics on issues that connect race and legal or institutional constraints on behavior.<sup>26</sup> The following discussion explores recent attempts by critical race theorists to move the intellectual program in a direction that responds to these claims.

### *B. A Critical Theory Supplement*

Like *Legal Education*, critical race theory needs to be supplemented to keep it relevant (or make it more relevant) for the modern law student, especially for the student dealing with a law and economics first-year curriculum. Fortunately, recent developments indicate that critical theorists are rising to that particular challenge. Some critical scholars are using critical race theory arguments to critique law and economics principles. Conversely, other scholars are using law and economics principles to support CRT arguments. Both groups are more directly taking on questions about institutional constraint, economic behavior, and market efficiency.

For example, recent work by Emma Coleman Jordan and Angela Harris has focused on the potential for critical race theory to serve as the foundation for a serious critique of central law and economics principles. Jordan and Harris recently published a set of foundational materials with which to generate a broad-based critique of law and economics. Drawing from critical theory accounts of racism, sexism, and heterosexism, this set of materials takes law and economics to task for failing to respond to evidence of persistent inequality.

In particular, the book suggests that the free market rationales behind law and economics do not account for (or respond to) preexisting distributional

25. See, e.g., Richard Delgado, *Crossroad and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 *Tex. L. Rev.* 121 (2002); Richard Delgado, *Two Ways to Think About Race: Reflections on the Id, the Ego and Other Reformist Theories of Equal Protection*, 89 *Geo. L.J.* 2279 (2001). For a response, see Kevin Johnson, *Roll Over Beethoven: A Critical Examination of Recent Writing About Race*, 82 *Tex. L. Rev.* 717 (2004) (arguing that Delgado is unfairly harsh in his critique).

26. See Devon Carbado & Mitu Gulati, *The Law and Economics of Critical Race Theory*, 112 *Yale L.J.* 1757 (2003).

disparities along the lines of race, gender, language, national origin, and sexual orientation. More specifically, the authors include extensive empirical evidence of persistent inequity, to challenge the standard economic theory that natural market processes will work to eliminate discrimination.<sup>27</sup>

In contrast to Jordan and Harris, a small number of critical race theorists are appropriating law and economics principles to support CRT arguments about the role of law in reproducing racial subordination. For example, Devon Carbado and Mitu Gulati have applied law and economics ideas about rational incentives to the problem of workplace discrimination, to understand how law facilitates racial assimilation. Carbado and Gulati argue that employers in certain industries may discriminate because those employers have a rational institutional incentive to screen prospective employees for homogeneity. Because demographically similar employees are more likely to create a group norm of trust and loyalty, employers have an economic motive to hire employees who resemble each other so that they will work well together.<sup>28</sup>

Even the firm that hires nonwhites under the pressure of antidiscrimination law has an incentive to hire assimilated nonwhites. More specifically, because employers want to promote group trust and loyalty, the firm has an incentive to hire those nonwhites who are the most assimilated to white cultural norms—the “but-for” minority. In turn, nonwhites have an incentive to assimilate, to counter the racial stereotypes that make an employee less likely to be hired. Carbado and Gulati conclude that antidiscrimination law both permits demographically similar hiring and facilitates institutional pressures toward nonwhite assimilation to white cultural norms.<sup>29</sup>

Other critical theorists use law and economics principles more subversively to advance CRT critiques of standard market analysis. In my own work, I have used the concept of locked-in market monopoly to support the notion of institutional racism, and to challenge the notion that market forces will naturally eliminate discrimination. Drawing from recent law and economics work on market lock-in, I have developed the “lock-in model of racial inequality” to describe the way in which institutional processes can perpetuate racial inequality, even in the absence of intentional discrimination.<sup>30</sup>

The lock-in model compares persistent racial disparity to persistent market monopoly power that continues long after the original anticompetitive conduct has ceased. According to market lock-in theory, if a firm engages in anticompetitive conduct early enough in the formation of the industry, that conduct gives the firm an early advantage over its competitors. This early-mover advantage, in certain circumstances, can become self-reinforcing over time, and ultimately may become so large that other competitors find it

27. In addition to these identity-based critiques of law and economics, Jordan and Harris include the CLS critiques described earlier. See Emma Coleman Jordan & Angela Harris, *Economic Justice: Race, Gender, Identity and Economics* (New York, 2005).

28. See Carbado & Gulati, *supra* note 26, at 1759, 1962, 1789–90.

29. See *id.* at 1792, 1790.

30. See Daria Roithmayr, *Locked in Inequality: The Persistence of Discrimination*, 9 *Mich. J. Race & L.* 31 (2003).

impossible to catch up.<sup>31</sup> When that happens, economists say that the early-mover advantage has now become “locked in.”

Just as a monopoly can become institutionally self-reinforcing over time, so too can a racial monopoly reproduce itself over time via institutional processes. During the days of Jim Crow and slavery, whites acted anticompetitively to exclude nonwhites. In so doing, they thereby gained an unfair early-mover monopoly advantage in access to opportunities and resources like wealth, education, housing, and employment, among others.<sup>32</sup>

These initial early-mover advantages may now have become self-reinforcing, primarily because of the link between early material advantage and future success via school financing and access to informal job networks.<sup>33</sup> For example, because the (white) rich get richer in neighborhoods with good schools and good job networks, nonwhites are relatively less able to move into more expensive white neighborhoods. Racial disparities may now have become locked in permanently, in the absence of any radical institutional restructuring to dismantle the self-reinforcing advantage.

For the law student, the arguments from critical race theory and the CLS critique together can offer a powerful response to the law and economics market-driven analysis. These arguments demonstrate, first, that assessments about efficiency cannot theoretically be separated from the initial allocation of entitlements and wealth; and second, that racial disparities in entitlement allocation are persistent and institutionally self-reinforcing. In essence, the critics prove that efficiency analysis does not produce a random, unidentifiable hodgepodge of potential losers, but rather is structured to favor white interests and disfavor the interests of people of color.<sup>34</sup> Because initial allocations favor whites, and because individuals prefer to hold on to what they’ve got, efficiency analysis privileges white interests.

\* \* \* \* \*

A reader of this review might object that it overemphasizes the importance of law and economics, and denies the importance of Kennedy’s original contribution in the context in which it was originally published. Kennedy did not set out to write a critique of law and economics when he wrote *Legal Education and the Reproduction of Hierarchy* back in 1983, and perhaps it is unfair to have expected him to focus on that critique in his republication. The point

31. See, e.g., Michael L. Katz & Carl Shapiro, Network Externalities, Competition, and Compatibility, 75 Am. Econ. Rev. 424 (1985); W. Brian Arthur, Increasing Returns and the New World of Business, 74 Harv. Bus. Rev. 100 (1996); Mark Lemley & David McGowan, Legal Implications of Network Economic Effects, 86 Cal. L. Rev. 479 (1998).
32. For a brief discussion of racial cartels, see Robert Cooter, Market Affirmative Action, 31 San Diego L. Rev. 133, 150 (1994) (“Just as producers collude to fix prices and obtain monopoly profits, so [racial cartels] collude to obtain the advantages of a monopoly control over markets.”).
33. See Daria Roithmayr, Barriers to Entry: A Market Lock-In Model of Discrimination (or “Hijacking Law and Economics for Critical Race Theory Purposes”), 86 Va. L. Rev. 727 (2000); see also Roithmayr, *supra* note 30, at 31; Daria Roithmayr, Locked in Segregation, 12 Va. J. Soc. Pol’y & L. 197, 224–31.
34. See Kelman, *supra* note 8, at 121.

of republishing the original together with commentaries was, one might argue, to focus on the continuing value of Kennedy's original points about legal education for today's student.

The point is both well-taken and true. Without a doubt, the central and more general argument—that legal education reproduces the hierarchies of profession and society—transcends the dated generational references or the lack of law and economics response. Kennedy's original argument echoes the timeless argument of Louis Althusser, who writes that education constitutes the dominant "ideological state apparatus" for reproducing and legitimizing capitalist ideology. According to Althusser, education divides individuals into different classes and ejects them at various points with certain kinds of training for the roles that they are to occupy in society.<sup>35</sup> Likewise, Kennedy's little red book alerts students to the way in which their training is really about socializing them to accept the hierarchies between judge and lawyer and client, between big firm and small, corporate firm and real estate, firm and solo practitioner, high salary and low.

But Althusser's observations also alert us to the notion that changes in legal education can signal important changes in the larger social world, for which legal education serves as a training ground. What does it mean for the wider society that law and economics has become such a well-accepted, well-integrated part of the legal curriculum and legal scholarship? No doubt, the focus on the ideology of the market in law and economics reflects the corresponding shift in focus that characterizes globalization and privatization.

Of course, in calling on Kennedy to assist students with a theoretical response, I am not so naive as to think that it is simply a matter of coming up with the right theoretical arguments. As Mark Kelman pointed out back in 1987, it has mattered little that legal economists like Richard Posner have gotten the theory or even the economics wrong in law and economics. What matters far more is that legal economists, in their insistence on separating efficiency from equity, have gotten the underlying world view completely right. The contemporary world view now really is "the social theory of economics, of a coherent liberal individualism that sees society as fundamentally successful when it responds to the will of individuals, and mediates the conflicts between individuals simply by making everyone pay his way."<sup>36</sup> Even more so now than in 1983, most people seem to think that markets and efficiency are the answer (or that "There Is No Alternative") and that questions about equity need not be answered when making decisions about market efficiency.

And yet the larger world view is not monolithic. New social movements at a global and national level are forming around privatization and the dominance of the market. Critical theory should provide law students (some of whom are already participating in those larger movements) with the theoretical tools to

35. Ideology and Ideological State Apparatuses, in *Lenin and Philosophy and Other Essays* 127 (London, 2001).

36. See Kelman, *supra* note 8, at 118.

question both law and economics and the dominant world view. Perhaps just as important, from the perspective of transgressive performance,<sup>37</sup> students need to be able to *say something* in class when their torts teacher justifies an award in favor of the polluter with the notion that the holding efficiently allocates entitlements to the parties who value them most highly. Students need to be able to claim power for themselves by debunking the mystical quality that economics brings to the process of legal reasoning. Critical theorists need to help students resist the unchecked movement of the market into the classroom, if for no other reason than that.

To be sure, the republication of *Legal Education* might not have been the right opportunity to provide such assistance, and Kennedy might not be the right person from whom to demand those tools. If the republication is not the right time, place, and person, then perhaps the time has come for someone else to supplement (to add to, to replace) *Legal Education and the Reproduction of Hierarchy*, and to write another little red book.

37. Duncan Kennedy writes about the importance of transgressive performance in destabilizing institutional structures that reproduce hierarchy. *A Critique of Adjudication: Fin de Siècle* 312 (Cambridge, Mass., 1997).