Chapter Nineteen

Modern Critical Perspectives

19–01 In the last 40 years or so, a series of loosely-related critical approaches to law have developed, which have their roots in (among other places) the Civil Rights Movement, American legal realism and European social theory.

In many cases, the advocates placed under a single label—"critical legal studies", "feminist legal theory", or "critical race theory"—share only that (the label), and a certain distance on some matters from mainstream legal theory. The point is that on almost any substantive issue or question of methodology, there will be as much variation or disagreement within those groups as there will be between those groups and other theorists. Nonetheless, these are the categories by which these theories are known and characterised by others and, to a great extent, this is how the advocating theorists characterise their own work as well. This chapter will offer an overview of some of the themes identified with each of the three critical approaches to the law.

CRITICAL LEGAL STUDIES

19–02 The critical legal studies movement is the name given to a group of scholars who wrote about legal theory using ideas associated with Left politics and who tried to use law, legal education, or writings about the law to effect Left results.

Critical legal studies ("CLS"), as a self-defined group, became active in the late 1970s.[1] The vast majority of work done under that label had been by American scholars, but there have also been followers in other countries.[2] CLS as a movement received (and often courted) a great

[1] For a good summary of the rise and fall of CLS, see Neil Duxbury, *Patterns of American Jurisprudence* (Clarendon Press, Oxford, 1995), pp. 428–509.

[2] See, e.g. Peter Fitzpatrick and Alan Hunt, *Critical Legal Studies* (Blackwell, Oxford, 1987) (British CLS writers). On the way that British CLS varied from (and, in view of the article's author, improved upon) the American version, see Adam Thurschwell, "Critical

deal of controversy and opposition, culminating in the mid-1980s with strongly negative articles in the major media[3] and high-profile denials of tenure to CLS adherents at the Harvard Law School and elsewhere.[4] While today there are still a number of people who identify themselves with the CLS label, much of the movement's energy has been passed on to the related, but quite distinct, schools of thought, feminist legal theory and critical race theory (which will be discussed below).

Critical legal studies theorists saw themselves as extending and elaborating the more radical aspects of the American legal realist programme. Among the more common themes in CLS writing were the following: the political nature of law (the ideological biases inherent in apparently neutral concepts and analyses)—"law as ideology" (which also supported the slogan, "law is politics"),[5] the radical indeterminacy of the law,[6] the claim that law promotes the interests of the powerful and legitimates injustice,[7] and the argument that rights rhetoric works against the common good and against the interests of the groups the rights purport to protect.[8] Among other topics visited by adherents of CLS were the

Legal Studies", in John Protevi ed., *A Dictionary of Continental Philosophy* (Yale University Press, New Haven, 2006), pp. 112–114.

[3] See, e.g. Terry Eastland, "Radicals in the Law Schools", *Wall Street Journal*, January 10, 1986, p. 10; Louis Menand, "Radicalism for Yuppies", *The New Republic*, March 17, 1986, pp. 20–23; cf. Calvin Trillin, "A Reporter at Large: Harvard Law", *New Yorker*, March 26, 1984, pp. 53–83 (a somewhat more balanced report).

[4] Academics were effectively scared away from CLS, not only by the threat of denial of tenure once hired, but also by the more effective and ominous threat that schools would not hire them in the first place if they were suspected of affiliation with CLS. The trend towards "boycotting" CLS-connected academics was strengthened by an article by Paul Carrington, then Dean of the Duke Law School, who argued that people who advocated "nihilistic" views had no place teaching in a law school. Paul D. Carrington, "Of Law and the River", 34 *Journal of Legal Education* 222 (1984). For a view from within CLS, see Jerry Frug, "McCarthyism and Critical Legal Studies", 22 *Harvard Civil Rights-Civil Liberties Law Review* 665 at 676–701 (1987).

[5] See, e.g. Lewis Kornhauser, "The Great Image of Authority", 36 *Stanford Law Review* 349 at 371–387 (1984).

[6] See, e.g. Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology", 36 *Journal of Legal Education* 518 (1986).

[7] See, e.g. Douglas Hay, Peter Linebaugh, John Rule, E. P. Thompson and Cal Winslow, *Albion's Fatal Tree* (Penguin, Middlesex, England, 1975); Alan David Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine", 62 *Minnesota Law Review* 1049 (1978).

[8] See, e.g. Mark Tushnet, "An Essay on Rights", 62 *Texas Law Review* 1363 (1984). The CLS critique of rights provoked a sharp response defending rights by early critical race theorists. See, e.g. Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights", 22 *Harvard Civil Rights-Civil Liberties Law Review* 401 (1987). For a reply, see Duncan Kennedy, "The Critique of Rights in Critical Legal Studies", in Wendy Brown and Janet Halley eds., *Left Legalism/Left Critique* (Duke University Press, Durham, N.C., 2003), pp. 178–228, esp. pp. 213–220.

ideological implications of modern legal education,[9] criticisms of the law and economics movement,[10] and the uses of radical theory in rethinking radical legal practice.[11] CLS was also known for, and to some extent known by, its attempt to apply to law the ideas of Continental European literary theorists, social theorists and philosophers.[12] Obviously, these topics cannot be covered in detail in the short space available; I can only touch on some aspects of a few of them.

On the indeterminacy of law, CLS theorists offered a variety of views as to what they meant by "indeterminacy", what its causes allegedly are, and what consequences follow. James Boyle offered the following as a paraphrase of "the strongest version of the indeterminacy thesis ever put forward by anyone associated with CLS":

> "Nothing internal to language compels a particular result. In every case the judge *could* produce a wide range of decisions which were formally correct under the canons of legal reasoning. Of course, shared meanings, community expectations, professional customs and so on may make a particular decision seem inevitable (though that happens less than many people think). But even in those cases, it is not the words of the rule that produce the decision, but a bevy of factors whose most marked feature is that they are anything but universal, rational or objective. Legal rules are supposed not only to be determinate (after all, decisions based on race prejudice are perfectly determinate), but to produce determinacy through a particular method of interpretation. That method of interpretation alone, however, produces indeterminate results and it cannot be supplemented sufficiently to produce definite results without subverting its supposed qualities of objectivity and political and moral neutrality."[13]

To the extent that the legal materials do not determine the outcome of legal cases, basic "rule of law" values are undermined.[14]

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[9] See, e.g. Duncan Kennedy, "Legal Education as Training for Hierarchy", in *The Politics of Law* (revised ed., David Kairys ed., Pantheon, New York, 1990), pp. 38–58.

[10] See, e.g. Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, Cambridge, Mass., 1987), pp. 114–185.

[11] See, e.g. Peter Gabel and Paul Harris, "Building Power and Breaking Images: Critical Legal Theory and the Practice of Law", 11 *New York University Review of Law and Social Change* 369 (1982–1983).

[12] Among the thinkers most often discussed or cited are Jacques Derrida, Michel Foucault, Antonio Gramsci, Jürgen Habermas, Ludwig Wittgenstein, Karl Marx and Jacques Lacan.

[13] James Boyle, "Introduction", in James Boyle ed., *Critical Legal Studies* (New York University Press, New York, 1994), p. xx. For a distinctive restatement of the CLS indeterminacy view, see Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press, Cambridge, Mass., 1997). For some possible variations on an indeterminacy position, and critiques of such positions, see Lawrence B. Solum, "On the Indeterminacy Crisis: Critiquing Critical Dogma", 54 *University of Chicago Law Review* 462 (1987); Kenneth J. Kress, "Legal Indeterminacy", 77 *California Law Review* 283 (1989).

[14] This is an issue taken seriously even by more centrist commentators about legal reasoning. See, e.g. Neil MacCormick, *Rhetoric and the Rule of Law* (Oxford University Press,

On legal history, CLS theorists sometimes pointed out the way that apparently neutral rules actually work to the benefit of the powerful. However, the more common theme was the contingency of legal rules and concepts: the way that the rules could have developed other than the way they actually did. Similarly, the argument goes, the legal rules and concepts as they now are should not be treated as natural or inevitable, but as contingent and subject to change.[15]

An example of CLS's critique of the apparent neutrality of legal concepts was the attack on the public/private distinction.[16] The argument runs roughly as follows: both within and outside the legal system, a great deal is made of the difference between matters which fall within the "public" realm (and thus are properly subject to significant government control) and matters within the "private" realm (a haven from government intrusion). However, coercion and oppression also occur in the "private" realm: in the family, in domestic violence and abuse, and in private economic ordering, where the economically powerful can set oppressive terms for the economically powerless. The distinction between public and private is thus undermined; the private realm is not a haven from the coercion of the public realm. It is the government's refusal to act to protect the weak in "private matters" (domestic relations, employment, and other contracts) that allows and legitimates the oppression that occurs. Also, critical legal studies theorists, like some of the legal realists, wanted to emphasise the extent to which the rules of private law were no more "natural" or "inevitable" (or "neutral") than the rules of public law, and no less a product of official policy.[17]

Another view influential within CLS was the idea of the "fundamental contradiction". The idea, introduced by Duncan Kennedy,[18] is that

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Oxford, 2005), pp. 12–16 (discussing the tensions between the "arguable character of law" and "rule of law" values).

[15] Among the best known CLS works on legal history are Morton Horwitz, *The Transformation of American Law 1780–1860* (Harvard University Press, Cambridge, Mass., 1977); Hay, Linebaugh, Rule, Thompson and Winslow, *Albion's Fatal Tree*; and Robert W. Gordon, "Critical Legal Histories", 36 *Stanford Law Review* 57 (1984); see also Robert W. Gordon, "'Critical Legal Histories Revisited': A Response", 37 *Law & Social Inquiry* 200 (2012).

[16] See, e.g. Frances Olsen, "The Family and the Market: A Study of Ideology and Legal Reform", 96 *Harvard Law Review* 1497 (1983); Morton Horwitz, "The History of the Public/Private Distinction", 130 *University of Pennsylvania Law Review* 1423 (1982). A good rebuttal to the realist/CLS attack on the public/private distinction can be found in Brian Leiter, "American Legal Realism", in Dennis Patterson ed., *A Companion to the Philosophy of Law and Legal Theory* (2nd ed., Wiley-Blackwell, Oxford, 2010), pp. 249–266, at p. 265.

[17] The legal realist articles on the subject include Robert Hale, "Coercion and Distribution in a Supposedly Non-Coercive State", 38 *Political Science Quarterly* 470 (1923); and Morris Cohen, "Property and Sovereignty", 13 *Cornell Law Quarterly* 8 (1927).

[18] Duncan Kennedy, "The Structure of Blackstone's Commentaries", 28 *Buffalo Law Review* 205 at 211–221 (1979). For brief but effective response, see Andrew Altman,

"relations with others are both necessary to and incompatible with our freedom",[19] and that this contradiction—separation and connection, individual and collective—pervades both our experiences of life and the legal rules and doctrines we create. Kennedy argued that liberal[20] legal theory denies the contradiction or purports to "mediate" it, but inevitably fails in the mediation. The argument additionally connects the contradiction with the legitimating function of law.[21] Kennedy, and some other CLS theorists, also offered related claims about the simultaneous and contradictory commitments law makes to altruism and individualism, and to rules and standards.[22]

It is hard to be more definitive about what CLS stood for, as the theorists who considered themselves part of the movement (or were considered part of the movement by others) did not all take the same position on issues. It is not merely that different theorists emphasised different issues, but that on many issues, e.g. the value of the "rule of law",[23] the value of rights rhetoric,[24] and whether law always serves the interests of the powerful—different CLS theorists would be on different sides.

As there has been a large number of writers within CLS presenting a variety of views on a wide range of topics, there has been a comparably wide array of critics and topics for criticism. A brief sample of citations is offered in a footnote.[25]

Critical Legal Studies: A Liberal Critique (Princeton University Press, Princeton, 1990), pp. 186–189.

[19] Kennedy, "The Structure of Blackstone's Commentaries", p. 213.

[20] In Left critical discussions, "liberal" often refers broadly to all conventional, individualist-based political theories and approaches, including a range of substantive views, from cultural conservatives and libertarian conservatives to the non-socialist, non-Communist Left ("liberals" and "progressives").

[21] Kennedy, "The Structure of Blackstone's Commentaries", pp. 213–221.

[22] See Duncan Kennedy, "Form and Substance in Private Law Adjudication", 89 *Harvard Law Review* 1685 (1976); Kelman, *A Guide to Critical Legal Studies*, pp. 15–63 ("Rules and Standards"). Another comparable argument is Roberto Unger's, that legal doctrine is indeterminate because it simultaneously contains antagonistic principles and counter-principles (like "freedom of contract" and fairness/community in contract law). See Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, Cambridge, Mass., 1986), pp. 57–75.

[23] See, e.g. Morton Horwitz, "The Rule of Law: An Unqualified Human Good?", 86 *Yale Law Journal* 561 (1977) (arguing against E.P Thompson's view that the rule of law is always an unqualified good).

[24] See, e.g. Tushnet, "An Essay on Rights"; Morton J. Horwitz, "Rights", 23 *Harvard Civil Rights–Civil Liberties Law Review* 393 (1988).

[25] See, e.g. Altman, *Critical Legal Studies: A Liberal Critique*; John Finnis, "On 'The Critical Legal Studies Movement'", 30 *American Journal of Jurisprudence* 21 (1985), reprinted in *Oxford Essays in Jurisprudence*, Third Series (J. Eekelaar and J. Bell eds., Clarendon Press, Oxford, 1987), pp. 145–165; Neil MacCormick, "Reconstruction after Deconstruction: A Response to CLS", 10 *Oxford Journal of Legal Studies* 539 (1990).

"OUTSIDER JURISPRUDENCE"

19–03 Two approaches to law, feminist legal theory and critical race theory, are sometimes considered together under the label "outsider jurisprudence",[26] because they can both be seen as emanating from the same core problem: the extent to which the law reflects the perspective of and the values of white males, and the resulting effects on citizens and on members of the legal profession who are not white males.[27]

The problem about bias can be summarised by the following, from a symposium on critical race theory:

> "Long ago, empowered actors and speakers enshrined their meanings, preferences, and views of the world into the common culture and language. Now their deliberation within that language, purporting always to be neutral and fair, inexorably produces results that reflect their interests."[28]

The question of difference can be taken in steps:

(1) Is the difference between the majority or powerful group and the minority or powerless group(s) simply a reflection of the years of oppression, or are the differences inherent?

(2) If there are inherent differences, how (if at all) should the law reflect or respond to these differences?

It is more common in feminist legal theory than in critical race theory to find writers who suggest that there *are* inherent differences between the powerful and the powerless: here, that women are different from men, and should be treated differently.

Among the problems that are common to feminist legal theory and critical race theory are those that develop from the fact that the attempt to create equality, justice, and reform in or through the legal system occurs against a societal background in which inequality, discrimination, and oppression are still common, if no longer as pervasive as they once

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[26] See Mari Matsuda, "Public Response to Racist Speech: Considering the Victim's Story", 87 *Michigan Law Review* 2320 at 2323 and n. 15 (1989); Mary Coombs, "Outsider Scholarship: The Law Review Stories", 63 *University of Colorado Law Review* 683 at 683–684 (1992).

[27] See Scott Brewer, "Introduction: Choosing Sides in the Racial Critiques Debate", 103 *Harvard Law Review* 1844 at 1850–1851 (1990) ("Moral Visions of Racial Distinctiveness"); Scott Brewer, "Pragmatism, Oppression, and the Flight to Substance", 63 *Southern California Law Review* 1753 (1990); see generally Martha Minow, *Making All the Difference* (Cornell University Press, Ithaca, New York, 1990).

[28] Richard Delgado and Jean Stefancic, "Hateful Speech, Loving Communities: Why Our Notion of 'A Just Balance' Changes So Slowly", 82 *California Law Review* 851 at 861 (1994).

were. This leads to standard types of dilemmas in proposing reform: is it better to enforce a regime of strict facial neutrality, which might have the effect of merely reinforcing existing social inequalities; or is it better to advocate forms of special treatment, which might help in the short-term, but could have the long-term effect of reinforcing the view that the group receiving the special treatment is weak or inferior?

Finally, one might note that feminist legal theory and critical race theory, as well as critical legal studies, are all directly concerned about justice in a way that most of the other approaches to law discussed in this book are not.[29] The argument in all three approaches is basically that the law is unjust because it is systematically distorted or biased (towards men, whites, and/or the rich and powerful). However, while the arguments in these areas are often couched in terms of fairness and justice, a full theory of justice or of "the Good" is rarely articulated.

A way in which feminist legal theory and critical race theory differ from most other approaches to law (including critical legal studies) is the regular focus on proposals for reforms, ways of changing the law through legislation or judicial action, which would remove what were perceived to be injustices in the legal system or in society. One example that will be discussed in some detail later is a feminist proposal to change the legal treatment of sexually explicit material. This greater focus on reforming the law also indicates further connections with the American legal realists, some of whom had worked hard to reform the law in line with their ideas about how the law should operate.[30]

FEMINIST LEGAL THEORY

19–04 Feminist analyses have offered important critiques in a variety of contexts, from broad political analyses to cultural theories to analyses specific to particular academic disciplines. Though certain themes are common to most of what carries the label "feminist"—in particular, a belief that either theory or practice has been distorted towards the perspective or the interests of men—there is a great deal of variety, even within a single discipline, among those writers who call themselves "feminists", and feminist legal theory is no exception. However, to the extent that one can speak of these writers (and these texts) as a group, their impact has been significant in the United States, and is growing in other countries.[31]

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[29] I am grateful to Jack Balkin for pointing this out.

[30] See, e.g. Zipporah Wiseman, "The Limits of Vision: Karl Llewellyn and the Merchant Rules", 100 *Harvard Law Review* 465 (1987) (on the connection between realist thought and the Uniform Commercial Code).

[31] One sympathetic critic wrote: "To a growing extent, a jurisprudence with very little to add about the concerns and innovations of feminism will not have very much interest-

As discussed earlier, part of feminist legal theory is the analysis of the extent to which the legal system reflects and reinforces a male perspective, and part is (the related) analysis of how women's differences from men should or should not be reflected in legal rules, legal institutions and legal education.

Regarding the first aspect, Patricia Smith has argued that what feminist legal theories have in common is an opposition to the patriarchal ideas that dominate society in general, and (relevant to feminist legal theory) the legal system in particular.[32] The differences among feminist legal theorists are then seen as reflecting differences in emphasis or perspective in describing the many aspects and effects of patriarchy, differences regarding on which problems to focus, and differences in strategy for overcoming the problem of patriarchy (for example, those who believe in moderate reforms as against those who believe that only radical restructuring of society will suffice).[33]

As to the second aspect, one could argue that what is common to feminist legal theories is that they are divergent responses to the inherent or socially constructed differences between men and women, responses regarding what these differences should mean about the way we think about law. One feminist response to difference is:

(1) *There are* intrinsic differences between men and women;

(2) Society and law are organised around a male standard and a male norm, a situation which works in the short-term and the long-term against the interests of women; and (therefore)

(3) Society and law should be reformed to remove that bias, and to reflect women's experiences as well as men's.

The differences between men and women which are emphasised include differences in values, ways of seeing the world, responding to other people,[34] responding to problems, ways of speaking,[35] and so on. This view has been associated generally with the work of Carol Gilligan; within legal theory, the foremost proponent is probably Robin West

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ing to add, period." Matthew H. Kramer, *Critical Legal Theory and the Challenge of Feminism* (Rowman & Littlefield, London, 1995), p. 265.

[32] Patricia Smith, "Feminist Jurisprudence", in Dennis Patterson ed., *A Companion to the Philosophy of Law and Legal Theory* (2nd ed., Wiley-Blackwell, Oxford, 2010), pp. 290–298, at pp. 294–296.

[33] Smith, "Feminist Jurisprudence", at 307–308.

[34] Carol Gilligan's work in some ways exemplifies all three. See Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (rev. ed., Harvard University Press, Cambridge, Mass., 1993).

[35] See, e.g. Deborah Tannen, *You Just Don't Understand* (William Morrow, New York, 1990).

(1954–).[36] The argument is that alongside the traditional and conventional approach to morality (the "ethic of justice"), which emphasises individual rights, autonomy, and abstraction, there is a separate type of moral thought, associated primarily (though not exclusively) with women.[37] This alternative "ethic of care" emphasises connection, interdependence, and care-giving.

A second feminist response to difference is that there are no (significant) inherent differences between men and women, and that any aspect of the law which assumes the contrary should be changed. This position often includes the view that what differences appear among men and women are peripheral, or are the effects of contingent social or cultural forces.

A third approach, closely identified with the work of Catharine MacKinnon (1946–), argues that most of the differences there may *appear* to be between men and women are the result of the domination and exploitation of women by men.[38] Women were not allowed to work in high-status or high-paying areas, but, over time, women adapted to these restrictions by, among other things, arguing for the value of what they *were* allowed to do (e.g. the value of the care-giving professions, the artistic value of quilts, etc.). Women may be more likely to negotiate, to try to work things out, rather than battle in "winner take all" contests, but that is because they have learned that they would be likely to lose such contests, where society has given all the power to men, and has encouraged the oppression of women. Similarly, women may value caring and nurturing, but that is because these are the values that society (that is, men) have valued *in them*. Women are encouraged to be good mothers and nurses: they are not encouraged to be good litigators and politicians.[39]

MacKinnon has also been one of a number of feminists to criticise the way that an equality perspective tends to work for the interests of men: "Why should anyone have to be like white men to get what they have, given that white men do not have to be like anyone except each other

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[36] See, e.g. Robin West, *Caring for Justice* (New York University Press, New York, 1997).

[37] See Gilligan, *In a Different Voice*; but see Sara Jaffee and Janet Shibley Hyde, "Gender Differences in Moral Orientation: A Meta-Analysis", 126 *Psychology Bulletin* 703 (2000) (questioning the empirical claim that the ethic of care is associated with women).

[38] See, e.g. Catharine A. MacKinnon, *Feminism Unmodified* (Harvard University Press, Cambridge, Mass., 1987), pp. 32–45 ("Difference and Dominance: On Sex Discrimination").

[39] MacKinnon's "dominance theory" echoes the ideas of Friedrich Nietzsche (1844–1900) regarding "master morality" and "slave morality". According to Nietzsche, if one is a strong person or part of a strong group, one is more likely to value strength, activity, and victory. If one is a weak person or part of a weak group, one will more likely develop a moral view that victory, strength, and wealth are all suspect, that the meek will inherit the earth, and that humility and subservience are the greatest virtues. See, e.g. Friedrich Nietzsche, *On the Genealogy of Morality* (K. Ansell-Pearson ed., Cambridge University Press, Cambridge, 1994), First Essay (1887).

to have it?"[40] It is not a coincidence, MacKinnon has argued, that the greatest areas of gender subordination have occurred where there is no male equivalent, no male "standard": pregnancy, abortion, rape, etc.[41]

Feminist approaches and perspectives have been applied to a wide variety of topics and issues. Among these are abortion rights,[42] rape law,[43] sexual harassment,[44] surrogate motherhood,[45] pregnancy and maternity leave,[46] and (perhaps most controversially) pornography.[47] Though the arguments necessarily vary from article to article and from author to author, the most common theme is that the current law or current approach in these areas exemplifies a male bias and/or works to the detriment of women as a group.

I will briefly discuss one of the better known topics within feminist legal theory, the MacKinnon-Dworkin proposed legislation on sexually explicit material, to give some sense of the complexity and difficulty of the issues raised.[48] For MacKinnon, male domination and exploitation of women in sexual matters is central to sexism and patriarchy. She wrote: "Pornography, in the feminist view, is a form of forced sex, a practice of sexual politics, an institution of gender inequality".[49] The argument is that what is at the core of (the vast majority of) pornographic material is a portrayal of women as subordinate to men, and women as enjoying their subordinate position.[50] Pornography thus has effects that raise issues separate from the traditional view that it should be restricted because it is "immoral" (immoral because sexually explicit). Under the MacKinnon/Dworkin view, pornography works to silence women by

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[40] Catharine MacKinnon, "Reflections on Sex Equality Under Law", 100 *Yale Law Journal* 1281 at 1287 (1991).

[41] See MacKinnon, "Reflections on Sex Equality Under Law", at 1297.

[42] See, e.g. MacKinnon *Feminism Unmodified*, pp. 93–102; Anita Allen, "The Proposed Equal Protection Fix for Abortion Law: Reflections on Citizenship, Gender, and the Constitution", 18 *Harvard Journal of Law and Public Policy* 419 (1995).

[43] See, e.g. Panel Discussion, "Men, Women and Rape", 63 *Fordham Law Review* 125 (1994); Susan Estrich, *Real Rape* (Harvard University Press, Cambridge, Mass., 1987).

[44] See, e.g. Catharine MacKinnon, *Sexual Harassment of Working Women* (Yale University Press, New Haven, 1979).

[45] See, e.g. Martha Field, "Surrogacy Contracts: Gestational and Traditional: The Argument for Nonenforcement", 31 *Washburn Law Review* 3 (1991).

[46] See, e.g. Minow, *Making All the Difference*, pp. 56–60; Herma Hill Kay "Equality and Difference: The Case of Pregnancy", 1 *Berkeley Women's Law Journal* 1 (1985).

[47] See, e.g. MacKinnon, *Feminism Unmodified*, pp. 127–213; see also Nicola Lacey, "Theory into Practice? Pornography and the Public/Private Dichotomy", 20 *Journal of Law and Society* 93 (1993).

[48] I make no claim that this topic is representative of the issues raised by feminist theorists; I do not think any issue would be. The issues raised within feminist legal theory are so broad in range and have such different contours that any search for a "representative" issue would be doomed to failure.

[49] MacKinnon, *Feminism Unmodified*, p. 148.

[50] See, e.g. MacKinnon, *Feminism Unmodified*, pp. 148, 160, 172.

reinforcing the subordination of women and the perception by men that women enjoy that subordination.[51]

MacKinnon (working with Andrea Dworkin) drafted a model civil rights ordinance to offer civil recourse for harms connected to sexually explicit materials that display (and thus encourage) extreme sexual inequality.[52] Under the ordinance, anyone who had suffered directly or indirectly because of pornography[53] could sue for damages. This model ordinance was proposed (in slightly different forms) in a number of American cities and passed in one, but a court declared it void on free speech grounds.[54]

In the MacKinnon-Dworkin proposal, "pornography" was defined as the "graphic sexually explicit subordination of women" through pictures or words which portray women as enjoying humiliation, pain, or being the victims of rape or other violence." (The constitutional ground for invalidating the ordinance was that the government was not allowed to distinguish on the basis of viewpoint; thus, a statute that subjects to civil liability sexually explicit material that implies that women enjoy their subordinate position, but not similar material that portrays women as not enjoying such treatment, was considered an improper government intrusion on freedom of expression.[55])

One sympathetic commentator summarised MacKinnon's analysis as follows, placing the anti-pornography proposal into a context of a more general feminist analysis:

"MacKinnon argues that men expropriate women's sexuality, that pornography increases the sexual appeal of the subordination of women, and that the subordination of women creates what we perceive and experience as gender differences. She argues that pornography is central to women's subordination, that it makes

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[51] See, e.g. MacKinnon, *Feminism Unmodified*, pp. 146–213.

[52] MacKinnon and Dworkin (no relation to Ronald Dworkin of Ch. 7) are also well-known for their views on heterosexual sex in general, though these views are often misunderstood or mis-characterised. For a subtle summary and analysis of MacKinnon's views on the matter, see Frances Olsen, "Feminist Theory in Grand Style", 89 *Columbia Law Review* 1147 at 1154–1160 (1989).

[53] Among the categories of injuries listed were "coercion into pornography", "forcing pornography on a person", "assault or physical attack due to pornography", and "defamation through pornography".

[54] See Cynthia Grant Bowman, Laura A. Rosenbury, Deborah Tuerkheimer, and Kimberly A. Yuracko, *Feminist Jurisprudence: Taking Women Seriously* (4th ed., West Publishing, St. Paul, 2011), pp. 383–392. Portions of MacKinnon and Dworkin's "Model Ordinance" are reprinted on pp. 383–386 of that text. For a sympathetic overview of the testimony and the political manoeuvring when the ordinance was being considered, see Paul Brest and Ann Vandenberg, "Politics, Feminism, and the Constitution: The Anti-Pornography Movement in Minneapolis", 39 *Stanford Law Review* 607 (1987).

[55] *American Booksellers Assoc. Inc. v Hudnut*, 771 F.2d 323 (7th Cir. 1985), affirmed mem., 475 U.S. 1001 (1986).

the subordination of women sexy and constantly reinforces and eroticizes the domination-subordination dynamic. The point of regulating pornography is not to make life a little less pleasant, but it is a step toward a fundamental transformation of the relations between men and women."[56]

It is important to note that on this issue, as on many of the more controversial topics, there have been feminist theorists on both sides of the issue: in the present case, opposing the MacKinnon-Dworkin proposal, and related restrictions on sexually-explicit speech, as well as supporting such restrictions.[57] Those opposing the restrictions on pornography offer a variety of arguments, including the claims that pornography helps to undermine conventional sexual morality which oppresses or confines women; that any government regulation would inevitably affect "good" or "liberating" pornography as much if not more than "bad" or "oppressive" pornography; and that some women enjoy creating or "consuming" pornography, even types of pornography that quite expressly show women enjoying pain or subordination (such as sado-masochistic pornography).[58]

Some of the debate for and against proposals like MacKinnon/Dworkin's turned on questions about autonomy and "false consciousness".[59] To the argument by some women that they actually enjoy making or reading the type of sexually explicit material that the MacKinnon/Dworkin ordinance would restrict, a common response is that these women's perceptions of enjoyment are themselves the product of the pervasively oppressive society in which they were brought up (the argument being that women, like slaves generations earlier, find what pleasure they can, and what meaning they can, within their situations, and may even convince themselves that they have chosen their path voluntarily).[60] About here is where one enters troubled and troubling areas.

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[56] Olsen, "Feminist Theory in Grand Style", p. 1160 (footnote and page references omitted). The feminism criticism of pornography, that it is not "mere speech", but helps to create or constitute a social reality which subordinates women, parallels the analysis critical race theorists offer regarding "hate speech". See Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw, *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* (Westview Press, Boulder, Colo., 1993).

[57] For views opposing restrictions on sexually explicit speech, see, e.g. Varda Burstyn ed., *Women Against Censorship* (Douglas & McIntyre, Ltd., Vancouver, 1985); Wendy McElroy, *XXX: A Woman's Right to Pornography* (St. Martin's Press, New York, 1995).

[58] These arguments are elaborated in the texts cited in the previous footnote.

[59] "False consciousness" is "[a]n inability to see things, especially social relations and relations of exploitation, as they really are." Blackburn, *The Oxford Dictionary of Philosophy*, 2nd ed., p. 130.

[60] See, e.g. MacKinnon, *Feminism Unmodified*, pp. 218–219; Catherine MacKinnon, *Towards a Feminist Theory of the State* (Harvard University Press, Cambridge, Mass., 1989), pp. 148–154.

As to the possibility of "false consciousness", on one hand, most of us recognise the experience, from ourselves and from others we know well, where a person seems convinced (for some reason) that something was what she wanted or was in her best interests, when it really was not. We see the effects of advertisers, politicians, religious leaders and others trying (and sometimes succeeding) to convince us what we "should" want. (If the process of trying to create new perceptions of need and desire never succeeded, then people would have long ago stopped spending the vast amount of time and money devoted to just such projects.)

On the other hand, the picture of there being a "real me" somewhere beneath all the selves that have been imposed by societal pressures (whether commercial, religious, political or otherwise), is not entirely convincing.[61] And even if in principle one could distinguish between the "real" self and its "real" interests and desires on one hand, and the brainwashed person of day-to-day life on the other, how is this determination to be made and (perhaps more importantly) who is to make it?

CRITICAL RACE THEORY

19–05 By most accounts, critical race theory developed as a break-away movement from critical legal studies in the late 1980s.[62] A number of scholars from minority racial and ethnic groups were dissatisfied with CLS, largely for two reasons: (1) they thought that CLS's views of society understated the role of race and racism; and (2) they believed that the CLS critique of rights underestimated the value of rights to oppressed groups.[63]

As with all the previous topics in this part (American legal realism, law and economics, critical legal studies and feminist legal theory), it is hard to speak about critical race theory in general, as it is a label that has been accepted by or applied to a wide variety of theorists and analyses.

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[61] Questioning the unity or solidity of the "self" is a theme commonly found among "postmodernist" writers, an approach discussed in Ch. 22.

[62] Angela Harris describes the "first annual Workshop on Critical Race Theory" as having occurred in July 1989 in Madison, Wisconsin. Angela P. Harris, "Foreword: The Jurisprudence of Reconstruction", 82 *California Law Review* 741 at 741 (1994). There is another plausible characterisation of a movement's history: that critical race theory had its roots in the 1970s, as theorists began to consider what had and had not been accomplished by the American Civil Rights Movement. See, e.g. Richard Delgado and Jean Stefancic, "Critical Race Theory: An Annotated Bibliography", 79 *Virginia Law Review* 461 at 461 (1993); Matsuda, Lawrence, Delgado and Crenshaw, *Words That Wound*, p. 3.

[63] See Patricia J. Williams, "Alchemical Notes: Reconstructing Ideals From Deconstructed Rights", 22 *Harvard Civil Rights-Civil Liberties Law Review* 401 (1987).

With that disclaimer in mind, there are some things that seem to apply to much of the area.[64] Critical race theory can be understood as having a number of major themes. The first theme is racism: the claim that racism is pervasive in society, and that it can be uncovered in many allegedly neutral concepts, procedures and analytical approaches.[65] The second theme is that law—even (or perhaps especially) when it purports to be neutral, and even when it attempts to serve the interest of minorities[66]—works to sustain or increase racial subordination. A third theme that is common, though arguably not pervasive, in critical race theory is that persons from minority ethnic groups (or at least those who have suffered because of their identity as a member of one of those groups) have distinctive views, perceptions, and experiences which are not properly recognised in mainstream or conventional discussions (whether these discussions occur in courtrooms, law school classrooms, law review articles, or newspaper reports).[67]

As regards the first theme, critical race theorists often try to show how pervasive racism affects law and legal scholarship both in areas where race is near the surface,[68] and in areas where race would not, to most observers, immediately seem salient.[69] Some theorists have also considered the extent to which racial equality is no longer a realistic goal,[70] or,

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[64] In their annotated bibliography of critical race theory (cited in the n. 62), Richard Delgado and Jean Stefancic list 10 "themes" as common to or distinctive of critical race theory. A somewhat different listing of six "defining elements" of critical race theory is given in Matsuda, Lawrence, Delgado and Crenshaw, *Words That Wound*, pp. 6–7. The portrait of critical race theory offered in the text will cover some of the same ground, but necessarily in a somewhat abbreviated way.

[65] See, e.g. Harris, "Foreword: The Jurisprudence of Reconstruction", pp. 770–771. This is connected with the interesting idea of "unconscious racism". See Charles R. Lawrence III, "The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism", 39 *Stanford Law Review* 317 (1987); see also Charles Lawrence III, "Unconscious Racism Revisited: Reflections on the Impact and Origins of the Id, the Ego, and Equal Protection", 40 *Connecticut Law Review* 931–977 (2008). For a critical response to the idea of unconscious racism, see Amy L. Wax, "The Discriminating Mind: Define It, Prove It", 40 *Connecticut Law Review* 979 (2008).

[66] See Derrick A. Bell, Jr., "Racial Remediation: An Historical Perspective on Current Conditions", 52 *Notre Dame Law Review* 5 (1976); Alan David Freeman, "Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine", 62 *Minnesota Law Review* 1049 (1978).

[67] See, e.g. Matsuda, Lawrence, Delgado and Crenshaw, *Words That Wound*, p. 6.

[68] See, e.g. Kimberlé Crenshaw, "Race Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law", 101 *Harvard Law Review* 1331 (1988); Lani Guinier, "The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success", 89 *Michigan Law Review* 1077 (1991).

[69] See, e.g. Patricia J. Williams, "Fetal Fictions: An Exploration of Property Archetypes in Racial and Gendered Contexts", 42 *Florida Law Review* 81 (1990); Stephen Carter, "When Victims Happen to Be Black", 97 *Yale Law Journal* 420 (1988).

[70] See Derrick Bell, "Racial Realism", 27 *Connecticut Law Review* 363 (1992).

at least, the extent to which minorities should focus on means other than the courts or the law to attain their objectives.[71]

One natural focus of critical race scholarship has been affirmative action (also sometimes known as "positive discrimination" or "reverse discrimination"),[72] favouring candidates for positions on the basis of their membership in a minority racial or ethnic group.[73] While many critical race theorists have sought to defend and legitimate such policies, other writers have offered a more ambivalent response.[74] The topic of affirmative action brings together aspects of the first theme of critical race theory—the pervasiveness of racism within society (which can serve both as a justification for such policies, and an explanation why many such policies, in their current form, may end up doing more harm than good)—with aspects from the third theme—the distinctive and valuable input that minority workers, professionals and academics can bring to their work and classroom settings (one of the justifications offered for affirmative action policies).

Regarding the question of identity, part of the argument is that group identity and experience are so central a part of who we are and so strongly affect how we perceive the world that it is important that there be a variety of perspectives, so that all aspects of a situation are properly seen, and the view of the majority or dominant group is not mistaken for objectivity or universality.[75] While this is sometimes presented as part of a grand "post-modern" theory,[76] it need not be. The claim need be no more ambitious or controversial than that those who have experienced racial discrimination all of their lives may have a perspective or insights on discrimination that those who are part of the majority would not have. One critical race theorist, Milner Ball, described the articles of his critical race theory colleagues as, among other things, "teach[ing] us about the felt effects of law and therefore something about its nature: on

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[71] See Girardeau A. Spann, *Race Against the Court* (New York University Press, New York, 1993); Richard Delgado, "Rodrigo's Ninth Chronicle: Race, Legal Instrumentalism, and the Rule of Law", 143 *University of Pennsylvania Law Review* 379 (1994).

[72] On affirmative action generally, see, e.g. Robert K. Fullinwinder, "Affirmative Action", in Edward N. Zalta ed., *Stanford Encyclopedia of Philosophy*, *http://plato.stanford.edu/entries/affirmative-action/* (2018).

[73] Affirmative action policies also often favour women over men, and there is some indication that women (not members of minority groups) have been the primary beneficiary of affirmative action in the United States.

[74] See, e.g. Derrick Bell, "Xerces and the Affirmative Action Mystique", 57 *George Washington Law Review* 1595 (1989); Richard Delgado, "Affirmative Action as a Majoritarian Device: Or, Do You Really Want to be a Role Model", 89 *Michigan Law Review* 1222 (1991); Mari Matsuda, "Affirmative Action and Legal Knowledge: Planting Seeds in Plowed-Up Ground", 11 *Harvard Women's Law Journal* 1 (1988).

[75] See, e.g. Drucilla Cornell, "Loyalty and the Limits of Kantian Impartiality", 107 *Harvard Law Review* 2081 (1994).

[76] On postmodernism, see Ch. 22.

being an object of property, on being hurt by constitutionally protected speech, on being a minority member of a white law faculty."[77]

Relative to mainstream thought, the claims of critical race theorists vary from what would be perceived as helpful and unsurprising to what would be perceived as radical, divisive, or improbable. The unsurprising side of the spectrum would include what has already been mentioned, the claim that members of oppressed minority groups experience the law differently from the way it is experienced by privileged members of the majority, and on that basis have distinctive ideas and perspectives to offer. By "experience the law", I mean the dealings with aspects of the legal systems people (other than lawyers and judges) have on a day-to-day basis. For members of minority groups, this may mean bullying or distrust by police officers, or daily moments of discrimination or humiliation by members of the majority (actions which may be illegal, but for which, as a practical matter, there is no remedy within the system).[78]

Along similar, relatively uncontroversial lines, critical race theorists have argued that since members of minority groups experience life differently from members of a majority, it is valuable to have racial and ethnic diversity in law school classrooms, law school faculties, the police force, the judiciary, government and so on, for that diversity will tend to bring a healthy diversity of views and ideas. One commentator summarised the argument as follows: "Just as the servant knows more than the master, those 'on the bottom' of American society see more than those at the top."[79] As noted earlier, this is part of a standard argument for affirmative action (positive discrimination).

The more controversial claims (some of which are just radical re-workings of more accepted positions) would include the view that there are certain truths that are accessible to members of minority groups which are simply not accessible to members of the majority.[80] One critical race theorist wrote:

"Minority perspectives make explicit the need for fundamental change in the ways we think and construct knowledge . . . Distinguishing the consciousness of

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[77] Milner Ball, "The Legal Academy and Minority Scholars", 103 *Harvard Law Review* 1855 at 1859 (1990) (footnote omitted).

[78] For judicial recognition of the importance of considering the perspective of the victim, see, e.g. *Lynch v Donnelly*, 465 U.S. 668 at 688–694 (1984) (O'Connor, J., concurring) (on the importance of considering the perspective of religious minorities in considering whether a government action constituted an endorsement of (the majority) religion); *Ellison v Brady*, 924 F.2d 872 at 878–879 (9th Cir. 1991) (applying "the perspective of the victim", a "reasonable woman" test, in evaluating a claim of sexual harassment).

[79] See Harris, "Foreword: The Jurisprudence of Reconstruction", p. 769 (footnote omitted).

[80] E.g. Mari Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations", 22 *Harvard Civil Rights-Civil Liberties Law Review* 323 at 326, 346 (1987) ("the victims of racial oppression have distinct normative insights"; "Those who are oppressed in the present world can speak most eloquently of a better one").

racial minorities requires acknowledgment of the feelings and intangible modes of perception unique to those who have historically been socially, structurally, and intellectually marginalized in the United States."[81]

An equally controversial conclusion, based on more moderate premises, is that certain subjects can only be properly or fully discussed by members of particular groups, e.g. only members of minority racial and ethnic groups should or can discuss the legal and moral aspects of racism.[82]

Beyond these main strands, one might also locate two other themes that are relatively prominent within critical race theory[83]: first, the problem of "intersectionality"—how different affiliations and different oppressions (e.g. race and gender) can interact[84]; and second, an emphasis on the perspective of the poor and marginalised.[85]

Along with the substantive strands to critical race theory, one can also note that the writings in this movement are often stylistically distinctive. The use of "narrative" or a "storytelling" approach in academic writings, though by no means exclusive to critical race theory,[86] is quite common within the movement's writings.[87] There are at least two alternative purposes for using storytelling in the place of more conventional normative scholarship.[88] First, a rich narrative can help people from the majority community to begin to understand what it is like to experience the legal system as a member of a minority community[89]; secondly, stories and fables can be used to undermine oversimplified views about human motivation.[90] One might wonder about the claims a *fictional* story or

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[81] Robin Barnes, "Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship", 103 *Harvard Law Review* 1864 at 1864 (1990) (footnote omitted).

[82] A position criticised in Randall Kennedy, "Racial Critiques of Legal Academia", 102 *Harvard Law Review* 1745 at 1778–1787 (1989).

[83] I am grateful to Alex M. Johnson, Jr., for pointing out the importance of these themes within critical race theory.

[84] See, e.g. Angela P. Harris, "Race and Essentialism in Feminist Legal Theory", 42 *Stanford Law Review* 581 (1990).

[85] Matsuda, "Looking to the Bottom: Critical Legal Studies and Reparations".

[86] See, e.g. William N. Eskridge, Jr., "Gaylegal Narratives", 46 *Stanford Law Review* 607 (1994); Kathryn Abrams, "Hearing the Call of Stories", 79 *California Law Review* 971 (1991).

[87] See, e.g. Delgado and Stefancic, "Critical Race Theory: An Annotated Bibliography", p. 462; Richard Delgado, "Legal Storytelling: Storytelling for Oppositionists and Others: A Plea for Narrative", 87 *Michigan Law Review* 2411 (1989). Narrative has also been important in feminist legal theory for roughly the same reasons it is central to critical race theory. See, e.g. Martha Fineman and Nancy Thomadsen eds., *At the Boundaries of Law* (Routledge, New York, 1991), pp. 1–58 ("Perspectives from the Personal").

[88] Harris, "Foreword: The Jurisprudence of Reconstruction", pp. 755–757.

[89] Some of the best examples of such uses of narrative are in Patricia J. Williams, *The Alchemy of Race and Rights* (Harvard University Press, Cambridge, Mass., 1991).

[90] Among the other claims made for "narrative" are that it "serves to create and confirm identity, both individual and collective", and that it helps to "speak to" our emotions

fable might have on our view of the world. First, even though fictional, stories can help us learn the perspective and experiences of people whose like we might never get to know in our sheltered daily lives. Secondly, a fictional story or fable will convince us to the extent that it "rings true"; thus, whether our view of the world is affected by William Golding's *Lord of the Flies* or Derrick Bell's *And We Are Not Saved* depends on whether we believe that the characters in those "fables" are acting as real people would in the situations described.[91]

The argument against narrative scholarship is that it can encourage or cover up a lack of rigour about facts, correlation, or causation, and that narrative, while encouraging empathy, often does so in a one-sided manner (e.g. if it shows the plight of the tenant, it may fail to show the perspective of the landlord).[92] In response, some proponents of narrative within critical race theory, who see it as part of a broader challenge to conventional ideas of knowledge, scholarship and merit, see complaints that narrative scholarship falls short by conventional criteria as "miss[ing] the point."[93]

The nature of critical race theory is such that it is unsurprising that a growing number of narrower community-based or group-based claims are developing from within critical race theory or in analogy to it: among these are "critical latino/a theory" (also known as "LatCrit theory") and "queer theory".[94] If one's way of perceiving the world is formed in large

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and spiritual feelings as well as our rationality. Harris, "Foreword: The Jurisprudence of Reconstruction", pp. 780–781 (footnote omitted).

[91] See William Golding, *Lord of the Flies* (Perigee, New York, 1954); Derrick Bell, *And We Are Not Saved: The Elusive Quest for Racial Justice* (Basic Books, New York, 1987).

[92] See Daniel A. Farber and Suzanna Sherry, "Telling Stories Out of School: An Essay on Legal Narratives", 45 *Stanford Law Review* 807 (1993); Richard A. Posner, *Overcoming Law* (Harvard University Press, Cambridge, Mass., 1995), pp. 368–384 (reviewing Williams, *The Alchemy of Race and Rights)*; David A. Hyman, "Lies, Damned Lies, and Narrative", 73 *Indiana Law Journal* 797 (1998).

[93] Derrick A. Bell, "Who's Afraid of Critical Race Theory", 1995 *University of Illinois Law Review* 893 at 907–910.

[94] For LatCrit theory, see, e.g. Symposium: "LatCrit Theory: Latinas/os and the Law", 85 *California Law Review* 1087–1686 (1997), 10 *La Raza Law Journal* 1–600 (1997); see also Richard Delgado and Jean Stefancic eds., *The Latino Condition: A Critical Reader* (New York University Press, New York, 1998). For one account of how and why "LatCrit" theory broke off of Critical Race Theory, see Francisco Valdes, "Theorizing 'OutCrit' Theories: Coalition Method and Comparative Jurisprudential Experience—RaceCrits, QueerCrits and LatCrits", 53 *University of Miami Law Review* 1265 (1999). For "queer theory", see, e.g. Francisco Valdes, "Queers, Sissies, Dykes, and Tomboys: Deconstructing the Conflation of 'Sex,' 'Gender,' and 'Sexual Orientation' in Euro-American Law and Society", 83 *California Law Review* 3 (1995); William N. Eskridge, Jr., *Gaylaw: Challenging the Apartheid of the Closet* (Harvard University Press, Cambridge, Mass., 1999). There are numerous other efforts towards group-based or community-based claims: see, e.g. Robert S. Chang, "Toward an Asian American Legal Scholarship: Critical Race Theory, Post-Structuralism, and Narrative Space", 81 *California Law Review* 1244 (1993).

part by the culture and community in which one grew up and the type of discrimination one has faced, it seems logical to conclude not only that minorities perceive the world differently from the majority group, but also that (e.g.) Latinos and Asian-Americans perceive the world differently from African-Americans, and one can keep pushing the point. Chicanos (Mexican-Americans) can argue (and have argued) that their experiences and culture are distinctly different from other Latinos, and similarly for Americans of West Indian descent in contrast to other "African-Americans". The argument can also be made that women within these groups experience life distinctly different from men,[95] and homosexuals and bisexuals different from heterosexuals (and that homosexuals who are also members of ethnic minorities experience life different from white homosexuals[96]). The question remains, and becomes more urgent with each further fragmentation: are these differences "essential"—does everyone within the stated group have, and have necessarily, the same perspective and the same characteristics[97]; and is it possible, with sufficient dialogue and explanation, for persons of one group to understand the views and values of those of another group?

A related complication, both with critical race theory and with many of its related identity-based theories, is that the boundaries of these approaches often becomes blurred. Frequently there is no agreed methodology, and all that connects the members of these schools of thought is membership in an oppressed group, combined with a focus on issues affecting that group. However, that description may cover many writers who do not consider themselves part of the school in question.[98]

OTHER CRITICAL APPROACHES

There are a variety of other critical approaches to law, for example: **19–06**

(1) The application of sociology to law, known variously as "socio-legal studies", "law and society", and "law in context", has a long history of offering empirically grounded critiques of current laws and legal

[95] See, e.g. Adrien Katherine Wing ed., *Critical Race Feminism: A Reader* (New York University Press, New York, 1997); Adrien Katherine Wing ed., *Global Critical Race Feminism: An International Reader* (New York University Press, New York, 2000).

[96] See, e.g. Darren Lenard Hutchinson, "Out Yet Unseen: A Racial Critique of Gay and Lesbian Legal Theory and Political Discourse", 29 *Connecticut Law Review* 561 (1997).

[97] For an important and influential criticism from critical race theory on the apparent essentialism of some feminist writing, see Angela P. Harris, "Race and Essentialism in Feminist Legal Theory", 42 *Stanford Law Review* 581 (1990).

[98] For example, Frank Wu, who wrote an excellent book on issues regarding racism against Asian-Americans, *Yellow: Race in America Beyond Black and White* (Basic Books, New York, 2002), is frequently described as being (or "accused" of being) a critical race theorist, but he does not describe himself as part of that school.

practices, and suggestions for change.[99] While sociology aims to be descriptive and morally neutral, many of those who identify with this approach have "progressive" or radical views, and so these movements have often been thought of as more "critical" than scientific.[100]

(2) Theories grounded on the work of Jürgen Habermas (1929–), and his work on generating moral and political values from the objective or the norm of an "ideal speech situation."[101]

(3) Marxist legal theory and Postmodern legal theory, which are discussed in Ch. 22.

Suggested Further Reading

19–07 CRITICAL LEGAL STUDIES

James Boyle ed., *Critical Legal Studies* (New York University Press, New York, 1994).

Critical Legal Studies Symposium, 36 *Stanford Law Review* 1–674 (1984) (a wide-ranging collection, which includes articles on the history of CLS and articles critical of CLS, as well as pieces explaining or applying CLS ideas).

Douglas Hay, Peter Linebaugh, John G. Rule, E. P. Thompson and Cal Winslow, *Albion's Fatal Tree* (Penguin, Middlesex, 1975).

Alan Hunt, "The Theory of Critical Legal Studies", 6 *Oxford Journal of Legal Studies* 1 (1986).

David Kairys ed., *The Politics of Law* (3rd ed., Pantheon, New York, 1998) (contributors include Duncan Kennedy, Robert Gordon, Morton Horwitz, Mark Kelman, Peter Gabel and Frances Olsen).

Mark Kelman, *A Guide to Critical Legal Studies* (Harvard University Press, Cambridge, Mass., 1987).

Duncan Kennedy, *A Critique of Adjudication (fin de siècle)* (Harvard University Press, Cambridge, Mass., 1997).

Roberto Mangabeira Unger, *The Critical Legal Studies Movement* (Harvard University Press, Cambridge, Mass., 1986).

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[99] See, e.g., Richard L. Abel ed., *The Law & Society Reader* (New York University Press, New York, 1995); Austin Sarat ed., *The Blackwell Companion to Law and Society* (Blackwell, Oxford, 2004); Stewart Macaulay, Lawrence M. Friedman and Elizabeth Mertz eds., *Law In Action: A Socio-Legal Reader* (Foundation Press, New York, 2007).

[100] See, e.g. Roger Cotterrell, "Subverting Orthodoxy, Making Law Central: A View of Sociolegal Studies", 29 *Journal of Law and Society* 632 (2002).

[101] See, e.g. Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg, trans., MIT Press, Cambridge, Mass., 1996); Michel Rosenfeld and Andrew Arato eds., *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, Berkeley, 1998).

FEMINIST LEGAL THEORY

Katharine T. Bartlett and Rosanne Kennedy eds., *Feminist Legal Theory: Readings in Law and Gender* (Westview Press, Boulder, Colo., 1991).

Nancy E. Dowd and Michelle S. Jacobs eds., *Feminist Legal Theory: An Anti-Essentialist Reader* (New York University Press, New York, 2003).

Martha Fineman and Nancy Thomadsen, eds., *At the Boundaries of Law: Feminism and Legal Theory* (Routledge, New York, 1991).

Carol Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (rev. ed., Harvard University Press, Cambridge, Mass., 1993).

Christine Littleton, "Feminist Jurisprudence: The Difference Method Makes", 41 *Stanford Law Review* 751 (1989).

Catharine MacKinnon, *Feminism Unmodified* (Harvard University Press, Cambridge, Mass., 1987).

Patricia Smith, "Feminist Jurisprudence and the Nature of Law", in *A Companion to the Philosophy of Law and Legal Theory* (2nd ed., Dennis Patterson ed., Blackwell, Oxford, 2010), pp. 290–298.

Patricia Smith ed., *Feminist Jurisprudence* (Oxford University Press, Oxford, 1993).

D. Kelly Weisberg ed., *Feminist Legal Theory: Foundations* (Temple University Press, Philadelphia, 1993).

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Derrick Bell, *And We Are Not Saved* (Basic Books, New York, 1987).

Devon W. Carbado, "Critical What What," 45 *Connecticut Law Review* 1593 (2011).

Kimberlé Williams Crenshaw, "Twenty Years of Critical Race Theory: Looking Back to Move Forward", 43 *Connecticut Law Review* 1253 (2011)

Kimberlé Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas eds., *Critical Race Theory: The Key Writings That Formed the Movement* (The New Press, New York, 1995).

Richard Delgado, "The Imperial Scholar: Reflections on a Review of Civil Rights Literature", 132 *University of Pennsylvania Law Review* 561 (1984).

Richard Delgado ed., *Critical Race Theory: The Cutting Edge* (Temple University Press, Philadelphia, 1995) (containing 50 articles on a wide range of topics from many different authors).

Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (3rd ed., New York University Press, New York, 2017).

Richard Delgado and Jean Stefancic eds., *The Latino/a Condition: A Critical Reader* (New York University Press, New York, 1998).

Daniel A. Farber and Suzanna Sherry, *Beyond All Reason: The Radical Assault on Truth in American Law* (Oxford University Press, New York, 1997).

Randall Kennedy, "Racial Critiques of Legal Academia", 102 *Harvard Law Review* 1745 (1989).

Daria Roithmayr, *Reproducing Racism: How Everyday Choices Lock In White Advantage* (New York University Press, New York, 2014).

Girardeau A. Spann, *Race Against the Court: The Supreme Court and Minorities in Contemporary America* (New York University Press, New York, 1993).

Symposium: Critical Race Theory, 82 *California Law Review* 741–1125 (1994).
Francisco Valdes, Jerome McCristal Culp and Angela P. Harris eds., *Crossroads, Directions, and a New Critical Race Theory* (Temple University Press, Philadelphia, 2002).
Patricia J. Williams, *The Alchemy of Race and Rights* (Harvard University Press, Cambridge, Mass., 1991).
Wing, Adrien K., "Is There a Future for Critical Race Theory?", 66(1) *Journal of Legal Education* 44 (2016).

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Richard L. Abel ed., *The Law & Society Reader* (New York University Press, New York, 1995).
Roger Cotterrell, *The Sociology of Law: An Introduction* (2nd ed., Butterworths, London, 1992).
Paul W. Kahn, *The Cultural Study of Law: Reconstructing Legal Scholarship* (University of Chicago Press, 1999).
Niklas Luhmann, *Law as a Social System* (Kalus A. Ziegart trans., Fatima Kastner, Richard Nobles, David Schiff and Rosamund Ziegert eds., Oxford University Press, Oxford, 2004).
Richard Nobles and David Schiff, *A Sociology of Jurisprudence* (Hart Publishing, Oxford, 2006).
Michel Rosenfeld and Andrew Arato eds., *Habermas on Law and Democracy: Critical Exchanges* (University of California Press, Berkeley, 1998).