

# NEOLIBERALISM AND THE CRISIS OF LEGAL THEORY

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## I

### INTRODUCTION

In recent years, the legal academy has begun to tell itself the story of how and why legal theory was marginalized in the wake of critical legal studies and the theory debates of the 1970s and 1980s. Despite the volume of work written on the subject and the many anxieties expressed about the (im)possibility of critical legal theory's revival, the narratives of what led to this juncture are deeply conflicted. There is even debate about *what* precisely has been lost. Some argue that it is just the very visible, radical critical legal studies movement that has passed from the legal theory scene.<sup>1</sup> Others contend the leftist project more generally has run out of steam.<sup>2</sup> And still others assert that theory has been marginalized within the humanities and social sciences as well, making the disappearance of legal theory just one instance of this larger trend.<sup>3</sup>

What seems beyond dispute is that “legal theory is out.”<sup>4</sup> Comparing the current intellectual climate with the pervasive interest in theoretical approaches in the preceding decades, Duncan Kennedy remarks that “legal theory has lost the fairly central place it held in legal consciousness and legal discourse in the period from the late fifties up to the nineties . . . . It has been eclipsed, in a sense

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1. See, e.g., JAMES R. HACKNEY, *LEGAL INTELLECTUALS IN CONVERSATION: REFLECTIONS ON THE CONSTRUCTION OF CONTEMPORARY AMERICAN LEGAL THEORY* (2012) (In the introduction to his book of interviews with the seminal figures in legal theory, James Hackney contends that the critical tradition is alive and well and that it has merely moved beyond the abstract theory debates of the 1970s and 1980s and into a more pragmatic orientation that is less visible.); Mark Tushnet, *Critical Legal Theory (without modifiers) in the United States*, 13 J. POL. PHIL. 99, 107 (2005) (arguing that it is merely the spectacle of CLS that has disappeared and many critical scholars are still actively writing and teaching).

2. See, e.g., Peter Gabel, *Critical Legal Studies as Spiritual Practice*, 36 PEPP. L. REV. 515, 528 (2008) (“[I]nfluencing the dissipation of the movements themselves was the collapse of socialism and the Marxism that had supported it, which for 150 years provided the principal metaphor for the morally transcendent communal horizon against which the shortcomings of the present society had been measured.”); William H. Simon, *Fear and Loathing of Politics in the Legal Academy*, 51 J. LEGAL EDUC. 175, 179 (2001) (arguing that “things might have been different [if] there [had] been a strong liberal or left political movement open to alternative programmatic thinking”).

3. See, e.g., HACKNEY, *supra* note 1, at 111 (quoting Austin Sarat). Austin Sarat, one of the central figures in the Law and Society movement, states that legal theory's decline should be understood as part of the larger death of metatheory. *Id.*

4. *Id.* at 43 (quoting Duncan Kennedy).

even discredited.”<sup>5</sup> The theoretical conversations that defined those final decades of intellectual foment were driven largely by the “crits”<sup>6</sup>—an umbrella term that covers three distinct groups of scholars: critical legal studies (CLS) scholars, critical race theory (CRT) scholars,<sup>7</sup> and feminist legal theorists.<sup>8</sup> CLS emerged as a loosely defined movement of young leftist legal academics, educated at Harvard and Yale Law Schools in the late 1960s.<sup>9</sup> CRT and feminist legal theory emerged in the 1980s to address the notable gaps and biases regarding race and gender in both the dominant discourse and CLS.<sup>10</sup> These three critical movements challenged the law’s neutrality and critiqued the discourse within the legal academy: a form of left-of-center liberalism that professed faith in rights, equality, and the courts as mechanisms for progressive social change.<sup>11</sup> Though one can certainly debate the effectiveness or validity of these critiques, it is undeniable that they took aim at the heart of liberalism.<sup>12</sup> And yet, in recent years, scholarship that continues in these modes does not appear to have the same impact. The narratives accounting for this loss of vitality are as contradictory as they are ubiquitous—“victory through incorporation” exists alongside “failure to provide an alternative.” Each proposes that something has changed—the legal academy, the critical project, or the political climate—but all assume that legal liberalism is still the relevant paradigm.

However, neoliberalism, not liberalism, is now the dominant paradigm of legitimacy. And one cannot understand the narratives of decline, *nor the decline itself*, without first accounting for the rise of neoliberalism. Moreover, by not recognizing neoliberalism’s logic, critical legal scholars fail to challenge it and risk further implicating law and legal theory in neoliberalism’s legitimation.

Under neoliberalism, the measures and values of the market are used to index the success of the state and its citizens. Diverging from the constitutional

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5. *Id.*

6. This period also saw the emergence of the “law and \_\_\_” movements, including law and society, law and literature, law and psychology, and, of course, law and economics, all of which contributed to the robust intellectual climate.

7. CRT emerged in the mid-1980s as a critique of liberalism’s cautious approach to racial equality and its blind eye toward issues of institutional racism. CRT also aimed to expose the complicity of law in the continued subordination of racial minorities. Some of the more prominent scholars associated with the movement include: Richard Delgado, Jean Stefancic, Derrick Bell, Angela Harris, Cheryl Harris, Patricia Williams, and Kimberle Williams Krenshaw.

8. Feminist legal theory also emerged in the 1980s in part in response to the limits of equality advocacy in the fight against gender subordination. Prominent feminist legal scholars include: Janet Halley, Catharine MacKinnon, Katharine Bartlett, Mari Matsuda, and Martha Fineman.

9. The founding and central members of the movement are identified as Duncan Kennedy, David Trubek, Mark Tushnet, Mark Kelman, Karl Klare, Morton Horowitz, Peter Gabel, and Roberto Unger.

10. See NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 504–09 (1995) (describing the tensions and divergence in method among CLS, CRT, and feminist legal scholars).

11. HACKNEY, *supra* note 1, at 29 (Duncan Kennedy asserts that “[CLS] was not about fighting Nixon; it was about being against the people in legal academia and in the culture in general who are the dominant intellectual forces and were way to the left of Nixon. The idea is, the word is, radical.”).

12. See *infra* Part II.

ideal that state power derives from consent by and representation of the people, the state's authority is both founded on and progressively limited to its ability to guarantee proper conditions for economic activity and individual prosperity. Correspondingly, the democratic will of the people is cast as irrelevant to economic affairs and as harmful if mobilized to intervene in pursuit of social goals. As Margaret Thatcher declared, in perhaps the most famous articulation of neoliberal ideology, "There is no such thing as society."<sup>13</sup> The market-model of choice and efficiency is extended to the level of the individual. Market-inflected cost-benefit analysis figures all human pursuits as "conducted according to a calculus of utility, benefit, or satisfaction against a microeconomic grid of scarcity, supply and demand, and moral value-neutrality."<sup>14</sup>

In failing to recognize neoliberalism, the narratives of decline provide useful insights into understanding it. First, reading the narratives symptomatically illustrates just how deeply the logic of neoliberalism has penetrated the legal discourse. Second, it illustrates the consequences for critical legal theory of failing to identify the shift produced by neoliberalism. It also offers a way into an important conversation regarding the failure of legal discourse generally to address neoliberalism. And finally, examining these narratives forces one to recognize that neoliberalism is not strictly a conservative ideology, but a postpolitical discourse that progressive scholars also inhabit.<sup>15</sup>

This article proceeds in seven parts. Following the introduction, part II describes the crits' central critiques and their relationship to liberalism. Part III briefly recounts the narratives that the legal academy has constructed to explain (away) the marginalization of critical legal theory, showing how each provides a piece of the puzzle yet fails to fully account for the whole.

Part IV provides a more substantive definition of neoliberalism and uses the concept of hegemony to show how neoliberal thought has become simultaneously ubiquitous and largely invisible. Part V uses this understanding of neoliberalism to recast the narratives of decline, showing how each is symptomatic of neoliberalism's rationality. Part VI illustrates how the prescriptions for countering legal theory's marginalization fit within the logic of neoliberalism, undermining their power and relevancy. Part VII concludes with an argument about the need to develop a critique of neoliberalism internal to law and legal theory moving forward.

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13. Margaret Thatcher, Interview for *Woman's Own* (Sept. 23, 1987), available at <http://www.margaretthatcher.org/document/106689>.

14. Wendy Brown, *Neoliberalism and the End of Liberal Democracy*, in *EDGEWORK: CRITICAL ESSAYS ON KNOWLEDGE AND POLITICS* 37, 40 (2005).

15. Highlighting the postpolitical nature of neoliberalism's rationality, radical leftist scholars from Duncan Kennedy to Catharine MacKinnon advocate for law and economics as a methodology for the left. See HACKNEY, *supra* note 1, at 30, 140.

## II

## THE CRITS AND THE CRITIQUE OF LIBERALISM

The crits<sup>16</sup> took aim at “democratic liberalism” as a model of state power and critiqued, as its essential adjunct, “legal liberalism,” or faith in the ability of the law and the courts to at once transcend and discipline politics.<sup>17</sup> There were numerous critical veins running through the crits’ scholarship, each gaining theoretical traction by demystifying and directly challenging some central aspect of liberalism, but four dominated. CLS shared the first three veins in common with CRT and feminist legal scholarship. These included the indeterminacy critique, the refutation of the law–politics distinction, and the debunking of the myth of the autonomous legal subject. The final vein, an emphasis on class relations, material inequality, and Marxist theory, was largely unique to CLS.

In the first critical vein, the crits demonstrated that legal principles could be used to justify almost any outcome such that judges could not reach decisions based on legal doctrine alone; their scholarship illustrated this by using the same legal principles to arrive at different outcomes. The “indeterminacy critique,” as it was referred to, directly countered the liberal model of judicial reasoning according to which judges merely applied the law and precedent so as to arrive at a single incontrovertible answer.<sup>18</sup>

The second critical assertion—that “law is politics” and not a wholly separate realm or a truly distinct form of reasoning—likewise took aim at the inherent assumptions of liberalism. Liberal theory grounds the state’s legitimacy in democratic accountability and the ability of individuals to come together, as equals, to institute a collective vision of the common good. Insofar as liberalism also offers itself as “a government of laws, and not of men,”<sup>19</sup> it entails a model of legal, as well as political, legitimacy. Legal liberalism is the corresponding belief that the courts are the means by which the values of liberty, autonomy, and rights-based equality can be preserved when impinged by the political system.<sup>20</sup> Although democratic accountability is heralded as the legitimating force behind the Constitution itself, the courts’ legitimacy is established by other means: through their separation from politics. Legal liberalism thus places law above politics and culture. The crits rebuked the

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16. I use the term “crits” to demarcate the scholarship that was being done during the 1970s and 1980s in critical legal theory by CLS, CRT, and feminist legal scholars. I refer to legal scholars currently working in the critical vein simply as “critical legal scholars.” Likewise, I use “critical legal theory” to indicate the practice of critique more generally, not the historically specific moment of the crits.

17. See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 1–10 (1998) (defining legal liberalism in the wake of the Warren Court as centered around the belief that the courts were a primary and effective means of furthering progressive values of liberty and equality). See also *id.* at 85–86 (describing CLS scholars’ critique of legal liberalism and the rights discourse).

18. Pierre Schlag, *Critical Legal Studies*, in *THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY* 295, 296 (Stanley N. Katz ed., 2009).

19. *Marbury v. Madison*, 5 U.S. 137, 163 (1803).

20. See KALMAN, *supra* note 17, at 2.

embrace of these ideas as apologias for the status quo and argued that these ideas were complicit in masking the deep injustices created through law. They illustrated that law was political in the sense that it was neither neutral nor objective, but instead embodied a particular set of beliefs and furthered a particular set of interests—white, male, heteronormative, ruling-class values—that actually perpetuated the subordination of other groups in society.<sup>21</sup> It is precisely through law’s claims of neutrality and autonomous choice, the critics argued, that racial and gendered hierarchies are maintained. One of the critics’ most powerful critiques, therefore, was to assert the materialism that the liberal discourse elided. They exposed the distance between formal and substantive equality, and the degree to which legal formalism and the rights discourse papered over and perpetuated these forms of subordination.<sup>22</sup>

Relatedly, the third critical vein of critic scholarship challenged the legal discourse’s claims of universality, including the figure of the autonomous, rational legal subject.<sup>23</sup> Liberal subjects, the critics argued, are determined by structures outside of their control. They are divided, gendered, sexualized, and racialized, and understand and experience the law as such.<sup>24</sup>

Finally, CLS in particular foregrounded law’s role in the creation and maintenance of class inequality and, in so doing, took up the legacy of Robert Hale and the more radical legal realists to illustrate that economic relations of power were not only maintained but also created by the law.<sup>25</sup> From Hale, CLS took the idea that every private right should be viewed as entailing a corresponding deprivation and therefore constituting a public regulation as much as any legislative act of taxation or redistribution.<sup>26</sup>

### III

#### NARRATIVES OF THE DECLINE OF LEGAL THEORY

Accounts of legal theory’s apparent decline are varied and contradictory. They differ not only over whether critical legal theory “won” or “lost” but also over whether the dissipation of its more radical elements is something to be grateful for or the source of its decline. In this part, I briefly sketch four of the more prominent narratives, illustrating why each appears to be incomplete.

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21. Schlag, *supra* note 18, at 296–98.

22. See, e.g., Alan Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Review*, 62 MINN L. REV. 1049 (1978).

23. See, e.g., Duncan Kennedy, *The Stakes of Law, or Hale and Foucault*, 15 LEGAL STUD. F. 327 (1991).

24. See Jack M. Balkin, *Understanding Legal Understanding: The Legal Subject and the Problem of Legal Coherence*, 103 YALE L.J. 105 (1993–94); James Boyle, *Is Subjectivity Possible?: The Postmodern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991) (highlighting the need to problematize the subjective experience of law).

25. See generally Kennedy, *supra* note 23.

26. Schlag, *supra* note 18, at 297.

### A. We Won, Or, Victory Through Incorporation

One account is a story of triumph: success and institutionalization stole the momentum away from the political and intellectual struggles embodied by the crits.<sup>27</sup> This narrative of success is a particularly common articulation of the fate of what Mark Tushnet terms “Critical Legal Theory without modifiers,” a phrase he employs to exclude critical race and feminist scholars.<sup>28</sup> According to Tushnet, the critical insights of CLS have been rendered less visible as a distinct form of scholarship because they have been embraced by the legal academy at large.<sup>29</sup> He argues that nostalgia for the earlier, more radical iterations of these critical projects is misguided because the muted forms they now take are closer to CLS’s true message.<sup>30</sup> The inflammatory rhetoric of the earlier moment was mere strategy for attracting attention to a critical approach formerly wholly outside the mainstream.<sup>31</sup> In the wake of institutional victory, the crits have been able to do away with this stratagem and still retain the true goals of these projects.

Tushnet’s narrative at first appears credible. With the notable exception of the more radical conservative theories, some degree of indeterminacy in law is indeed widely accepted as self-evident.<sup>32</sup> Therefore, he is right to claim that law is no longer thought of as something wholly separate from politics. Most contemporary legal theories recognize politics as influencing legal outcomes within a zone of discretion created by the law itself (although debates persist over the precise size of the gap for such discretion left by texts and precedent).

In light of this change, the victory narrative seems like a plausible explanation, but it leaves one with an uncomfortable question: if the crits “won,” why does that victory feel so hollow?

If one delves deeper into Tushnet’s particular claims of victory, it becomes readily apparent just how hollow this supposed “victory” is. Tushnet begins his

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27. See, e.g., Tushnet, *supra* note 1; Peter Goodrich, *Sleeping with the Enemy: An Essay on the Politics of Critical Legal Studies in America*, 68 N.Y.U. L. REV. 389, 390–92 (1993) (Asserting a distinct and more pessimistic narrative about the effects of “success,” Goodrich argues that CLS appeared and subsequently disappeared as “the fashionable pedagogy of an institutional elite or high clergy, concerned not so much with a culture of the Left as with the preservation and reproduction of its own institutional place and status.”).

28. Tushnet, *supra* note 1, at 107. In essence, “critical legal theory without modifiers” is just the school of thought I have designated as CLS.

29. *Id.* at 100.

30. Tushnet all but apologizes for the radicalness of CLS’s claims, stating that they were “[o]verstated, I suspect, to get people’s attention and dislodge them from [their] nervous complacency.” *Id.* at 105 n.23.

31. *Id.* See also Louis Michael Siedman, *Critical Constitutionalism Now*, 75 FORDHAM L. REV. 575, 591 (2006) (“Critical constitutionalism in the twentieth century was often marked by a kind of brash in-your-faceism . . . [which] was perhaps necessary to shake up a sleepy constitutional establishment. In any event, whether because we are all older and wiser, or whether because the situation has changed, this rhetoric does not seem necessary now.”).

32. See generally Joseph William Singer, *Legal Realism Now*, 76 CAL. L. REV. 465 (1988) (highlighting the extent to which almost all major schools of thought in the legal academy accept the limits of formalism).

argument with the claim that the CLS principle “law is politics” has been accepted, only to subsequently qualify that it has been accepted in a “scaled-back” form, and then ultimately to retreat to the position that the commonly held belief that “courts and legislatures mix arguments of principle and arguments of policy in somewhat different proportions” is “not inconsistent with the critical legal theorists’ early formulations.”<sup>33</sup> The absence of explicit inconsistency is hardly a powerful claim of incorporation.

Furthermore, to claim victory for the crits based on the incorporation of the indeterminacy critique is to reduce CLS to legal realism—and not to the radical realism of Felix Cohen and Robert Hale, but to the broad legal realism that also includes law and economics and other theoretical movements toward which CLS originally positioned itself in opposition. Only the first of these forms of legal realism focuses on law’s role as an instrument of class power. Notably, in crafting this narrative of success and incorporation, Tushnet does not mention CLS’s focus on class and material inequality, despite its prominence among the scholars “without modifiers.”<sup>34</sup> He has to skirt the issue in order to maintain his claim of incorporation.

This tendency to conflate CLS’s project with legal realism in a way that eschews the critique of class relations is not Tushnet’s alone; claims of victory for critical legal theory are frequently tied to the oft-quoted mantra “we are all legal realists now.” Meanwhile, class has completely fallen out of the theoretical conversation. Although critical race theory and feminist legal scholarship continue to foreground issues of race and gender within legal scholarship, issues of class are not incorporated in the theoretical discourse but relegated to the clinics in the form of “poverty law.” This signifies a dominant understanding that poverty is a problem to be addressed through policy and advocacy, not through structural changes in legal thought. Therefore, to see CLS as “winning” requires thinking about CLS’s projects only formally while ignoring that the substance of these projects has not been taken up. In light of this limitation on any claim of victory, it is perhaps unsurprising that the most common narrative of what happened to the crits is a story of failure.

## B. Failure, Or, Mired In Nihilism

In direct contradiction to Tushnet’s story of success and incorporation is the more prominent narrative of failure. The crits’ failure is accounted for at three levels of generality in the narratives of decline: at the level of CLS, at the level of theory *as such*, and at the level of the leftist political imaginary (both inside and outside the legal academy).<sup>35</sup> At each level, the critical legal project is

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33. Tushnet, *supra* note 1, at 107.

34. *See generally id.*

35. One can see all three levels of this analysis in Philip Bobbitt’s recent characterization of the fate of CLS:

[CLS] began as a Marxist movement just when Marxist regimes were being dismantled, wall by wall, barbed wire and all, in revulsion by those very persons they claimed to serve . . . . CLS

characterized as unable to escape the negative mode of critique to offer a generative alternative.

The narrowest articulation asserts that CLS disappeared because of its ultimately sterile commitment to a negative mode of critique.<sup>36</sup> Its disappearance was inevitable according to some because critical legal scholarship simply did not, and arguably could not, provide an answer to the question, “What would you put in its place?”<sup>37</sup> And so the story goes, the legal academy eventually tired of CLS’s relentless critique of liberalism’s contradictions and power relations.

At the next level of generality, the decline is characterized as disillusionment, not with legal theory specifically, but with theory *as such* to provide alternatives. In other words, the decline of legal theory is seen as another casualty of the more general death of metatheory in the postmodern era.<sup>38</sup> Unlike earlier iterations of the radical legal tradition, the crits did not ground their critiques in a systematizing alternative vision of law.<sup>39</sup> Even the critical project itself sought to undermine the idea that the solution would be found through theory—that it might lie just beyond the next hermeneutic bend. Poststructuralist theory, in which many of the crits’ projects were grounded, could not make any sort of claim without immediately undercutting it through critique, and so it ultimately descended into (un)critical nihilism.<sup>40</sup>

At the most general level, this entrenchment in negativity is seen as bound up with a historical crisis of the leftist political imaginary at the end of the twentieth century. After the fall of communism, the story goes, the left was incapable of imagining an alternative to the model of democratic market-

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then attempted to transform itself through dalliances with existentialism, decisionism, structuralism, and eventually postmodernism, chasing the avant garde and arriving only to find its new partner was already passé.

Philip C. Bobbitt, *Age of Consent*, 123 YALE L.J. 2334, 2356 (2014).

36. HACKNEY, *supra* note 1, at 231 (interviewing Jules Coleman) (Legal philosopher Jules Coleman remarks, “Critical legal studies died because nihilism only takes you so far. You have to have something that you stand for as opposed to all the things that you stand against.”).

37. Richard Michael Fischl, *The Question that Killed Critical Legal Studies*, 17 LAW & SOC. INQUIRY 779, 780 (1992).

38. HACKNEY, *supra* note 1, at 111 (interviewing Austin Sarat) (Austin Sarat states that in explaining the decline “you can generalize beyond the legal academy. It’s the death of meta-theory. It’s the exhaustion of meta-theory. There are no more Foucaults and Derridas, who everybody’s reading, everybody’s thinking about.”).

39. Adam Gearey, *Anxiety and Affirmation: Critical Legal Studies and the Critical “Tradition(s)”*, 31 N.Y.U. REV. L. & SOC. CHANGE 585, 592–93 (2006) (CLS was philosophically rooted in the works of Nietzsche, Freud, Foucault, Derrida, Lacan, and Levinas, none of which grounded a totalizing alternative vision for law offered at an earlier moment by the Marxist and existentialist traditions.).

40. Paul Carrington famously claimed critical legal scholars “had an ethical duty” to take their nihilistic scholarship and “depart the law school.” Kalman, *supra* note 17, at 121. *See also* Paul D. Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (“The professionalism and intellectual courage of lawyers . . . cannot abide . . . the embrace of nihilism . . . Teaching cynicism may, and perhaps probably does, result in the learning of the skills of corruption: bribery and intimidation. In an honest effort to proclaim a need for revolution, nihilist teachers are more likely to train crooks than radicals.”).

capitalism that had been the object of the crits' critique.<sup>41</sup> This inability to imagine an alternative—experienced by the left as a cessation of progress and as an inability to escape the realities of the present moment—is oftentimes referred to as the “end of history.”<sup>42</sup>

The confluence of these layers of negativity admittedly makes it easy to dismiss the crits as victims of postmodern and leftist disillusionment. However, one could argue that the crits did, in fact, offer alternatives.<sup>43</sup> But even setting that aside, one should hesitate before accepting this narrative of failure as conclusive. Is the legal academy really prepared to accept that critical insights about the legal structure “lack significance and are just not meaningful if [they] don't propose some means of escape from those underlying structures?”<sup>44</sup>

One should challenge the idea that offering a normative alternative is the goal and measure of legal theory (and of CLS in particular).<sup>45</sup> The demand for an alternative can be seen as part of the devaluation of the critical project and part of the paradigm that the crits were attempting to subvert.<sup>46</sup> Moreover, there is an inherent absurdity to the premise that, in order to critique the current paradigm (i.e., liberalism or law), one has to be able to provide an alternative to law or liberalism itself.

### C. Specialization Or Balkanization?

CLS was the first of the critical fields to emerge, but it was followed closely by the splintering off of CRT and feminist legal theory. This differentiation into three distinct fields has been given two distinct valences by scholars narrating the crits' decline. The negative valence, which I term the “balkanization narrative,” focuses on the primary rupture between CLS, CRT, and feminist legal theory as destroying the critical mass necessary for a viable leftist critical movement to continue. The positive valence, which I term the “specialization narrative,” asserts that the division of the critical projects into subdisciplines

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41. Joanne Conaghan, *The Left: In Memoriam?*, N.Y.U. REV. L. & SOC. CHANGE 455, 455 (2007) (“It is popular nowadays to view the left as a hangover from a bygone era, a politics that collapsed along with the Berlin wall and that, like Humpty Dumpty, can never be put together again.”).

42. “End of history” is a characterization popularized by neoconservative political scientist Francis Fukuyama who argued that liberal democracy was the end point of human history, and that even though other forms of society would persist, after the fall of communism they could no longer maintain “their ideological pretensions of representing different and higher forms of human society.” FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992). This insight about the apparent closing of the historical horizon after the fall of communism was also taken seriously on the left, especially in the Marxist tradition. See generally Perry Anderson, *The Ends of History, in A ZONE OF ENGAGEMENT* (1992).

43. See Robert W. Gordon, *American Law Through English Eyes: A Century of Nightmares and Noble Dreams*, 84 GEO. L.J. 2215, 2240–41 (1996) (pushing back against the familiar critique that CLS failed to provide concrete constructive alternatives, using the work of Duncan Kennedy and William Simon to support this claim but also listing the work of many others).

44. Fischl, *supra* note 37, at 800.

45. *Id.*

46. *Id.* at 802 (“[T]he question itself presupposes virtually every assumption about law and legal scholarship that [CLS was] attempting to bring to the surface and to call into question.”).

and their movement into doctrinal areas of law has merely given the illusion of decline while actually representing a proliferation of theory.

### 1. Balkanization

CRT and feminist legal theory developed in part as a reaction to the silences regarding race and gender in the supposed radical legal discourse of CLS.<sup>47</sup> According to the balkanization narrative, the internal divisions and interpersonal hostilities among CLS scholars, feminist theorists, and critical race scholars led to infighting and ultimately to the destruction of the only hope for a viable legal left.<sup>48</sup> Fueling this narrative was the spectacle of some of the early conflicts and divisions that played out at conferences and between the pages of prominent law journals.<sup>49</sup>

This balkanization narrative does not explain the full extent of the perceived decline. If the introduction of CRT and feminist legal theory is what killed CLS, why do CRT and feminist scholars also lament the declining relevance of their theoretical projects? In contrast to CLS, critical race and feminist legal scholars still have an institutional presence in the legal academy, albeit a narrowly circumscribed one, with most law schools incorporating race and gender classes into their curriculums. Despite this institutional incorporation, scholars in these fields claim that there has been a “brain drain” over the last twenty years.<sup>50</sup> For instance, Janet Halley, a prominent feminist legal scholar, remarks in her book (in which she advocates “taking a break from feminism”) that “women complain to [her] that academic feminism has lost its zing [and that many of the] key intellectual figures in feminism have decamped to other endeavors.”<sup>51</sup> Furthermore, Richard Posner, despite working in law and economics (the school of thought that emerged whole, and arguably triumphant, from this era), also identified this sense that legal theory generally has lost its vibrancy.<sup>52</sup> Therefore, these divisions among the crits clearly do not account for the whole

47. DUXBURY, *supra* note 10, at 504–09. According to many accounts of this rupture, including Duxbury’s, CRT’s split centered on disagreement with CLS’s rights critique and the desire for scholars of color to hold onto the legacy of civil rights movement. Richard Delgado, a prominent CRT theorist, commented that the average CLS scholar “has little use for rights . . . [r]arely is he the victim of coercion, revilement or contempt.” *Id.* at 505 (citing Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301, 305–06 (1987)).

48. Admittedly, this balkanization narrative is more often focused on the fate of CLS than legal theory generally or even critical legal theory.

49. For example, “[t]he 1995 conference on CLS and class at Georgetown (jointly sponsored by Georgetown and American) ended with various walkouts, over disputes between CLS and Critical Race Theory.” ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* 115 n.33 (2011). There was also a public and acrimonious dispute between Mark Tushnet and Gary Peller in the pages of the *Georgetown Law Review*. See Mark Tushnet, *The Degradation of Constitutional Discourse*, 81 GEO. L.J. 251 (1992) (offering a critique of identity-based scholarship); Gary Peller, *The Discourse of Constitutional Degradation*, 81 GEO. L.J. 313 (1992) (defending identity-based scholarship); Mark Tushnet, *Reply*, 81 GEO. L.J. 343 (1992) (criticizing the defense).

50. JANET HALLEY, *SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM* 340 (2006).

51. *Id.*

52. HACKNEY, *supra* note 1, at 60.

story.

## 2. Specialization

The positive valence of the differentiation narrative asserts that, although legal theory appears to have receded, the theoretical projects have simply particularized by moving into doctrinal scholarship and various theoretical subfields. Accordingly, those that perceive a decline are merely mistaking the death of “grand” legal theory for the death of legal theory more generally; the decline of legal theory as a stand-alone discipline does not entail the decreased relevance of theoretical methods to legal scholarship. On the contrary, this specialization narrative contends that theory is more relevant now than it was during its highly visible period because it is being brought directly into conversation with discussions of legal doctrine and therefore not subject to the charge of being “merely academic” exercise.<sup>53</sup> In essence, critical scholars may have “decamped,” but they took their theories with them.

James Hackney Jr. offers a characteristic example of this narrative in the introduction to a recent collection of interviews he conducted with the central figures in legal theory about the current state of the field.<sup>54</sup> Hackney asserts that the proliferation of fields has indeed undermined the lively debates of the 1970s and 1980s, but only insofar as theoretical conversations have become self-contained as each subfield is now equipped with its own journals, conferences, and internal debates (not confronted with and perhaps not even aware of the theoretical debates internal to another subfield).<sup>55</sup> He argues that metatheories necessarily conflicted and confronted one another because they were all laying claim to the same theoretical terrain. Now each theoretical enterprise merely concerns itself with its own clearly defined terrain and none is claiming transcendent status. Hackney, therefore, attributes the perception of theory’s decline to a lack of interchange now that each theoretical subfield has found its niche.<sup>56</sup>

Beyond the evolution of subfields, Hackney argues that this lack of debate can be further explained by the fact that theoretical projects have become internal to doctrinal areas of law (which were traditionally viewed as separate from legal theory in the legal academy). Hackney describes the current status of legal theory as “like a toolkit” available within doctrinal areas of law, as opposed to constituting a separate jurisprudential conversation.<sup>57</sup> In this account, the crits have just concretized and particularized their scholarship by developing praxis as opposed to totalizing theories—their theoretical debates are now internal to their doctrinal area but all the more forceful and relevant because of it.

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53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 44.

Hackney's account is appealing, but it begs the question of how to define critical legal theory itself. Are these subfields and only-as-applied iterations really a preservation of the critical legal project? Or are they something else entirely? Duncan Kennedy takes up Hackney's metaphor of the "toolkit" to respond. The transformation of theories into "tools," Kennedy argues, indicates that once vibrant and generative theoretical debates have been reduced to reified forms that can be invoked instrumentally—divorced from their context and nuance.<sup>58</sup> Extending Hackney's metaphor, Kennedy adds sardonically that in today's legal academy "it's not necessary to be particularly proficient with any of the tools."<sup>59</sup>

#### D. Legal Theory Lost Its Way

For others, the decline of legal theory is less a question of legal theory having won or lost than it is of it having lost its way.<sup>60</sup> These scholars, many of whom were allied with the crits, argue for an internal cause of decline: the critical legal projects evolved in such a way that they lost their radical or normative edge and, as a result, fail to meaningfully challenge the status quo. For example, Robin West contends that critical legal scholars, due to an overzealous and exclusionary preoccupation with the theories of Michel Foucault, became too focused on the critique of the "identity-based" and "left-centrist" projects and regrettably deemphasized state power.<sup>61</sup> Most damning in West's opinion is that this Foucauldian preoccupation precluded legal scholars from making moral claims, and consequently critical legal scholarship has failed to challenge the dominant modes of power.<sup>62</sup> In direct contrast to Tushnet's claim that the radical rhetoric fell away to reveal the true stakes and nature of the crits' project, West argues that it is precisely because critical legal theory abandoned its radical and utopic orientation that it lost its vitality.<sup>63</sup> Peter Gabel echoes West's concerns, indicting CLS for having "lost track of [its] spiritual and moral foundation."<sup>64</sup>

On one level, I agree: critical legal scholarship *has* lost its way—schools of thought and theoretical movements that once appeared vibrant no longer do. The error, however, was not in deviating from the clearly radical path, as West claims, but in continuing to stay on the same path as the world around critical legal theory changed.

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58. *Id.*

59. *Id.*

60. *See, e.g.*, Gabel, *supra* note 2, at 528 ("CLS 'stopped,' or perhaps 'paused,' about fifteen years ago because it lost track of this spiritual and moral foundation.").

61. ROBIN WEST, *NORMATIVE JURISPRUDENCE: AN INTRODUCTION* 116–17 (2011).

62. *Id.* at 165 ("Foucault's broad claim regarding the omnipresence of power is what eventually emasculated the moral critique.")

63. *Id.* at 154–56.

64. Gabel, *supra* note 2, at 528.

## IV

## NEOLIBERALISM AND HEGEMONY

The change that legal theory failed to recognize was the rise of neoliberalism.<sup>65</sup> The rule of law under neoliberalism is not designed to allow individuals to enact a collective vision of society; rather, it is first and foremost designed to enable individuals to plan their actions according to market logic.<sup>66</sup> In this part, I offer a brief definition of neoliberalism, highlighting the ways in which it redefines legal legitimacy and other concepts central to political liberalism and the legal discourse. I then argue that neoliberalism is now hegemonic—it is not one theoretical account among many but, like liberalism before it, a set of principles and modes of governance so ingrained as to constitute the common sense of the age.

## A. Defining Neoliberalism

## 1. Historical Instantiation

Neoliberalism is perhaps most readily associated with its historic emergence in the policy platforms of Margaret Thatcher and Ronald Reagan, and with the subsequent iteration of market fundamentalism known as the “Washington Consensus.”<sup>67</sup> These regimes focused their political platforms on deregulation, the creation of stable and well-protected private-law systems, and the dismantling of the welfare state—shifting the primary role of government from public law to private law.<sup>68</sup>

This shift is particularly evident in the law and development context. In

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65. See Daria Roithmayr, *A Dangerous Supplement*, 55 J. LEGAL EDUC. 80 (2005) (observing that critical legal scholars have failed to account for the rise of law and economics and the ways in which the legal discourse has changed in a globalized world).

66. David Trubek & Alvaro Santos, *Introduction: The Third Moment in Law and Development Theory and the Emergence of a New Critical Practice*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 1* (David M. Trubek & Alvaro Santos eds., 2006) (arguing that the rule of law is no longer just an instrument of development, but is now seen as constitutive of development and thus an end in itself). See also F.A. HAYEK, *THE ROAD TO SERFDOM 75–76* (Routledge Classics, 2001).

67. See David Harvey, *Neoliberalism as Creative Destruction*, 610 ANNALS AM. ACAD. POL. & SOC. SCI. 22 (2007) (offering detailed and insightful account of neoliberalism’s historic emergence under Reagan and Thatcher). Regarding the Washington Consensus, see John Williamson, *What Washington Means by Policy Reform*, in *LATIN AMERICAN READJUSTMENT: HOW MUCH HAS HAPPENED? 5–20* (John Williamson ed., 1989). Williamson, an economist, coined the term “Washington Consensus” in an article describing the economic policies routinely prescribed by Washington to set Latin American countries’ “houses in order” in the wake of the Latin American debt crisis. *Id.* at 7. The consensus Williamson describes is between the “political Washington” of Congress and the White House, and the “‘technocratic Washington’ of international financial institutions, the economic agencies of the US government, the Federal Reserve Board, and think tanks.” The ten policy instruments Williamson identifies as routinely prescribed include: deregulation, austerity measures, privatization, and trade policy. *Id.* at 7–18.

68. David Kennedy, *The ‘Rule of Law,’ Political Choices, and Development Common Sense*, in *THE NEW LAW AND ECONOMIC DEVELOPMENT: A CRITICAL APPRAISAL 95*, 138 (David M. Trubek & Alvaro Santos eds., 2006).

contradistinction to political liberalism, the development focus under neoliberalism is “less legislative positivism and sovereignty than private rights and neoformalism about the limits of public law.”<sup>69</sup> For example, during the postwar liberal consensus, law was seen as “subordinate to social purposes—implementing, fulfilling, and accomplishing the objectives of the society, rather than expressing a priori limits or historic commitments to be respected or purposes of its own to be achieved.”<sup>70</sup> But with the advent of the Washington Consensus, law was relegated to well-defined tasks—the creation of stable and well-protected property rights, enforcement of private contracts, and limitation of the arbitrary exercise of government power—enabling a particular ideal of entrepreneurial liberty, not visions of society.<sup>71</sup>

It is also important to note that the emergence of neoliberalism is historically intertwined with the processes of globalization.<sup>72</sup> The increased flow of global capital and the lowering of barriers to trade and communication are material changes inextricable from many of the ideological developments surrounding the role of the nation-state examined in this article.<sup>73</sup>

## 2. As A Political Rationality

Neoliberalism as a political rationality, not a historical development, is what is of particular importance for understanding the decline of legal theory.<sup>74</sup> Neoliberalism is more principled and totalizing than a mere policy platform, but it is also not reducible to a set of philosophical ideas; it is embodied in the mode

69. *Id.*

70. Kennedy, *supra* note 68, at 102. See also David M. Trubek & Marc Galanter, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062, 1073 (1974) (“[Development under liberalism] offered more than increased rationality and material satisfaction; it also promised greater equality, enhanced freedom, and fuller participation.”) (footnotes omitted).

71. Kennedy, *supra* note 68, at 128–37.

72. Stuart Hall, et al., *After Neoliberalism: Analysing the Present*, 53 SOUNDINGS 8, 10 (2013) (“The particular global character of neoliberalism was part of its initiating armoury—for instance through the Washington Consensus from the 1980s onwards—and it is also an element of its historical specificity.”) Unfortunately, globalization, a contested concept in its own right, is beyond the scope of this article. However, it too needs to be incorporated into the theoretical conversation; legal theory has not fully accounted for the more concrete changes brought about by this paradigm shift either. See generally Ralf Michaels, *Globalisation and Law: Law Beyond the State*, in LAW AND SOCIAL THEORY 287–303 (Reza Banakar & Max Travers eds., 2013) (illustrating that globalization has not been sufficiently accounted for or incorporated into legal thought and examining possible reasons for its exclusion).

73. In particular there is a changing role for the nation-state in the globalized world. For example, in relation to transnational corporations, if the primary responsibility of the sovereign is to preserve market stability and growth, its ability to exert power against a corporation is limited by the potential harm to the economy if that corporation leaves to find in pursuit of a more favorable regulatory environment.

74. A “political rationality” refers to the discursive logic that legitimates exercises of power—it structures the common language of policy debates as well as limits the field of possible government action. It extends beyond the traditional concept of the state and focuses instead on Michel Foucault’s concept of “governmentality,” which encompasses a much broader understanding of the relationship between thought and the exercise of power.

of governance. It is a set of principles that have been so incorporated into the experience of the world that the dominant discourse no longer sees them as points of contention. As I argue below, this is what it means to recognize neoliberalism as hegemonic: it has become the common sense of the current moment, and as a result, many of its assumptions have been rendered invisible in the literature.

Although neoliberalism has only attained hegemonic status in the last thirty years, the foundational tenets of its current iteration grow out of the much earlier work of Friedrich Hayek. I engage with Hayek's work directly for two reasons. First, Hayek remains one of the strongest and most cogent defenders of neoliberal rationality.<sup>75</sup> Second, Hayek lays out explicitly what has become implicit or assumed in the current discourse. Silences occur insofar as any paradigm becomes hegemonic and constitutes the common sense of an era. Looking at the current discourse in light of Hayek's work will therefore render its underlying rationale visible.<sup>76</sup>

*a. Circumscribed role for the state—Hayek's view of the cosmos.* In founding the neoliberal thought collective, Hayek and the other members of the Mont Pelerin Society did not intend to revive classical economic liberalism unchanged. For one, under neoliberalism the government has an active role in supporting the market and correcting market failures, diverging from the government's role in classical laissez-faire economics. Neoliberalism is also distinct insofar as it portrays both the market and rational economic behavior as requiring the law and "the dissemination of social norms designed to facilitate competition, free trade, and rational economic action on the part of every member and institution of society" to function properly.<sup>77</sup> To fully understand these differences, one must begin with Hayek's vision of civil society and the state.

In *Law, Legislation, and Liberty*, Hayek describes civil society and the market as "spontaneous orders" (or cosmos) to indicate that, despite being products of human action, they are not the product of human design.<sup>78</sup> The complexity of these systems, he argues, is beyond the capacity of human

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75. PHILLIP MIROWSKI & DIETER PLEHWE, *THE ROAD FROM MONT PELERIN: THE MAKING OF THE NEOLIBERAL THOUGHT COLLECTIVE* 158 (2009) (describing Hayek's role in founding both the Chicago School and the Mont Pelerin Society).

76. Conaghan, *supra* note 41, at 465 ("The neoliberal guru Friedrich Hayek began writing in the 1940s and 1950s, developing the theoretical ideas that were eventually to form the basis of neoliberalism—ideas that were widely regarded as wholly unacceptable in the political environment of post-war Keynesian welfarism.") (footnotes omitted); see also Susan George, *A Short History of Neoliberalism: Twenty Years of Elite Economics and Emerging Opportunities for Structural Change*, in *GLOBAL FINANCE: NEW THINKING ON REGULATING SPECULATIVE CAPITAL MARKETS* 27, 27 (2000).

77. Brown, *supra* note 14, at 41. See also STUART HALL, *THE HARD ROAD TO RENEWAL: THATCHERISM AND THE CRISIS OF THE LEFT* (1988) (a remarkable account of the extent to which Margaret Thatcher appropriated culture and society as a political battleground).

78. F.A. HAYEK, *LAW, LEGISLATION, AND LIBERTY*, VOL. 1: RULES & ORDER 38 (University of Chicago Press, 1981) [hereinafter HAYEK, *LAW, LEGISLATION, AND LIBERTY*, VOL. 1].

knowledge, such that one cannot know the impact of attempts to intervene or change a spontaneous order.<sup>79</sup> Thus, the market should be seen as a highly interdependent and balanced ecology that even well-intentioned, seemingly benign projects can harmfully disrupt. Consequently, Hayek argues, government should never intervene directly in the logic of the market because it can “never be aware of all the costs of achieving particular results by such interference.”<sup>80</sup> Implicit in this formulation is the idea that even noneconomic social programs may have economic consequences that cannot be known *ex ante*, and so Hayek concludes, it “is not in our power to build a desirable society by simply putting together the particular elements that by themselves appear desirable.”<sup>81</sup> And, with that, the Hayekian model refutes not the desirability of pursuing loftier social goals, but the *possibility* of pursuing that common good effectively, especially with regard to material inequality. According to this theory, the role of law and its goals must remain formal—never substantive. Governmental pursuit of substantive ideals, even if widely shared, leads to market inefficiencies and other unintended consequences. Hayek famously cautioned, “the sources of many of the most harmful agents in this world are often not evil men but highminded idealists.”<sup>82</sup>

In Hayek’s framework, therefore, the law is subordinated to the market.<sup>83</sup> Law builds the architecture for the market but does so responsively to this naturally occurring order. Or, to put it another way, government makes the legal framework but not as it pleases. Under neoliberalism the central question for national policy to determine is “which government actions support[] and which impede[] market activity, and to prioritize and order market supporting initiatives in the most effective way.”<sup>84</sup>

Hayek’s metaphor of civil society as a factory illustrates law’s subordinate role in his theory very clearly. In this passage, he emphasizes the importance of law, stating that its coercive function makes law more than just another part of the factory’s machinery; it establishes law as a condition for the preservation (and optimization) of that order.<sup>85</sup> However, in extending this metaphor, he analogizes the proper role of the state not to the managers in the factory (as one

79. *Id.* at 51 (The limits of human knowledge, Hayek argues, are even more pronounced when diffused among members of a government structure).

80. *Id.* at 57.

81. *Id.* at 56 (“From the insight that the benefits of civilization rest on the use of more knowledge than can be used in any deliberately concerted effort, it follows that it is not in our power to build a desirable society by simply putting together the particular elements that by themselves appear desirable.”).

82. *Id.* at 70.

83. This provides Hayek’s definition of the rule of law: “Stripped of all technicalities [the Rule of Law] means that government in all its actions is bound by rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive powers in given circumstances, and to plan one’s individual affairs on the basis of this knowledge.” HAYEK, *supra* note 66, at 75–76 (citing A.V. Dicey’s THE LAW OF THE CONSTITUTION).

84. Kennedy, *supra* note 68, at 132.

85. HAYEK, LAW, LEGISLATION, AND LIBERTY, VOL. 1, *supra* note 78, at 47–48.

might expect), but to the maintenance workers, stating, government's role, like the maintenance worker's, does not entail production of any particular goods or services for the citizens. The role of law is "rather to see that the mechanism which regulates the production of those goods and services is kept in working order."<sup>86</sup>

*b. Legitimacy and dedemocratization.* The neoliberal framework, premised on the impossibility of enacting a collective substantive vision, clearly cannot ground the state's legitimacy in democratic authority and pursuit of the common good the way liberalism does. The state's legitimacy, therefore, is "based upon its ability to create conditions for *individual* flourishing."<sup>87</sup> The government's role regarding the market is not always to stay its hand, in contrast to the model in classical economic liberalism. The metric for measuring the sovereign becomes the degree to which the sovereign successfully fulfills this role of not interfering until such a time as the market dictates state intervention is necessary to preserve individual liberty.

This model of legitimacy is not only a deviation from the ideal of democratic authority but is actively hostile to the intervention of democratic will in certain areas. Governance by majority rule is seen as a potential threat to individual rights and constitutional liberties. Democracy is viewed as a luxury, only possible under conditions of relative affluence coupled with a strong middle-class presence to guarantee political stability.<sup>88</sup> What can be left to democratic politics is therefore limited, and an ever-increasing number of areas are seen as the exclusive province of private individuals or the technocratic administrative state.<sup>89</sup>

*c. No society, just individuals—no demos, just an aggregate.* The shift from the collective to the individual as the unit of governance entails a shift from a representative democracy to an aggregate one. To again quote Margaret Thatcher, "There is no such thing as society."<sup>90</sup> The subject that Thatcher envisioned for Britain is an entrepreneur capable of making her own way, and a consumer who rationally chooses among a set of options, not a citizen who joins with other citizens to pursue a vision of society. This is in accordance with Hayek's theory: The individual is capable of pursuing only her own interests because the limits of human knowledge are such that she cannot take the interests of others into account. If everyone pursues their own interests, the

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86. *Id.* at 47.

87. WILLIAM N. ESKRIDGE & JOHN A. FERREJOHN, *A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION* 149 (2006) (describing this change as a slide into the "consumerist constitution").

88. Harvey, *supra* note 67, at 66.

89. Kanishka Jayasuriya, *Globalization, Sovereignty, and the Rule of Law: From Political to Economic Constitutionalism?* 8 *CONSTELLATIONS* 442, 453–54 (2001) (Neoliberal constitutionalism seeks to put "certain market regulatory institutions beyond the reach of transitory political majorities . . . developing a politics of anti-politics.").

90. Thatcher, *supra* note 13.

story goes, the market will function efficiently (not be distorted) and will result in a just allocation.<sup>91</sup> Competition is the central virtue, and solidarity among individuals is a sign of weakness and a manipulation of that virtuous form.<sup>92</sup>

The role of the state vis-à-vis the individual is likewise recast. With this neoliberal conception of the subject comes the assumption that the subject alone bears responsibility for the consequences of her actions. In this culture of personal responsibility, the subject's "moral autonomy is measured by [her] capacity for 'self-care'—the ability to provide for [her] own needs and service [her] own ambitions."<sup>93</sup> The neoliberal model of choice does not recognize the material constraints that limit an individual's choices because those constraints are seen as merely the product of her previous choices. The government is limited to enabling people access to the markets such that they can use their own skills and abilities to pursue their own interests. The state is not responsible if individuals do not properly respond to the market's incentive structures, but it is responsible for the pernicious consequences of sheltering individuals from the market's disciplinary effects.<sup>94</sup> President Reagan, accordingly, decried social welfare as a program "enacted in the name of compassion that degrade[s] the moral worth of work, encourage[s] family break-ups, and drive[s] entire communities into a bleak and heartless dependency."<sup>95</sup>

## B. Neoliberal Hegemony

Given that the historic rise of neoliberalism (conceived as a series of policies and political projects) coincided directly with the halcyon days of critical legal theory in the 1970s and 1980s, how can I contend that it also explains the loss of the crits' vitality in subsequent decades? The answer is through an understanding of hegemony.<sup>96</sup> It is not the particular instantiations of neoliberal thought that critical legal theory has failed to apprehend and address,<sup>97</sup> but rather, its hegemonic nature. With a few notable exceptions,<sup>98</sup> the critique of

91. See, e.g., RICHARD POSNER, *ECONOMICS OF JUSTICE* 60–72 (1981).

92. PHILIP MIROWSKI, *NEVER LET A SERIOUS CRISIS GO TO WASTE* 92 (2013).

93. Brown, *supra* note 14, at 42.

94. Margaret Thatcher once declared, "Economics are the method; the object is to change the heart and soul." Interview for *Sunday Times*, *Mrs. Thatcher: The First Two Years* (May 1, 1981), available at <http://www.margaretthatcher.org/document/104475>.

95. Ronald Reagan, State of the Union Address (Feb. 4, 1986), available at <http://www.presidency.ucsb.edu/ws/?pid=36646>.

96. During the Reagan–Thatcher era, neoliberalism was the dominant paradigm but was not yet hegemonic. Stuart Hall, *Authoritarian Populism: A Reply to Jessop et al.*, 151 *NEW LEFT REVIEW* 115, 120 (1985) [hereinafter Hall, *Authoritarian Populism*.]

97. For example, CLS offered an incisive critique of law and economics, exposing much of the logic I am describing: See, e.g., Mark Kelman, *Choice and Utility*, 1979 *WIS. L. REV.* 769 (1979); Mark Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 *S. CAL. L. REV.* 669 (1978–79); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711 (1979).

98. Bernard Harcourt, Martha McCluskey, and a number of scholars working in comparative law and law and development are among these exceptions in the American legal academy.

neoliberalism as a political rationality has been excluded from the legal academy generally, despite its prominence in related fields such as political and critical theory.

Hegemony is most concisely defined as constituting the “common sense” of an age.<sup>99</sup> A paradigm’s status as common sense indicates more than its ubiquity—it indicates a particular form of power:

You cannot learn, through common sense, how things are: you can only discover where they fit into the existing scheme of things. In this way, its very taken-for-grantedness is what establishes it as a medium in which its own premises and presuppositions are being rendered invisible by its apparent transparency.<sup>100</sup>

Not every successful or even dominant paradigm attains such widespread acceptance as to constitute the ground on which most political conversations from both the left and the right stand, but this is precisely what it means to say that a paradigm has become “hegemonic.”<sup>101</sup> No longer merely a theory or even an ideology, its ideas become inseparable from a set of actions, institutions, and a mode of governance.<sup>102</sup> Hegemony’s power works through consent, not persuasion; it does not entail rejection of an alternative on principle, but an assumption of the impossibility of an alternative. Furthermore, in the realm of ideas, it is as much, if not more, about what one cannot say—what is not legible or “rational”—than openly articulated “ideological” claims. It entails the cleansing of the public discourse of certain claims. For instance, “Thatcherism made it part of the common sense that you *can’t* calculate common interest.”<sup>103</sup>

Hegemony functions not only through internalized common sense but also through a “scholastic program” (a set of principles advanced by a sector of intellectuals).<sup>104</sup> Although neoliberal rationality should not be reduced to or conflated with the theory of law and economics, the latter’s meteoric rise and proliferation within the legal academy are undeniably symptomatic of neoliberalism’s dominance, as well as an instrument of its dissemination. Therefore, law and economics provides insight into the functioning of this

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99. This understanding of cultural hegemony is rooted in the work of Antonio Gramsci and Stuart Hall, *Authoritarian Populism*, *supra* note 96. See also Edward Greer, *Antonio Gramsci and “Legal Hegemony,”* in *THE POLITICS OF LAW* 304–09 (David Kairys ed., 1st ed. 1982).

100. Stuart Hall, *Culture, the Media, and the Ideological Effect*, in *MASS COMMUNICATION AND SOCIETY* 315, 326 (James Curran et al. eds., 1979).

101. I do not mean to imply absolute closure. Hegemony is always at least to some degree contested and contestable—the hegemonic paradigm always contains contradictions and resistances within it.

102. The concept of hegemony refuses the distinction of the realm of ideas and the material relations undergirding those ideas. Therefore, although due to my focus on the discourses surrounding legal theory’s decline, I am foregrounding the political-ideological dimension of hegemony, in accordance with Antonio Gramsci’s articulation of the concept, and Stuart Hall’s further elaboration of it, I believe firmly in the historical and materialist aspects of hegemony: “[hegemony is] impossible to conceptualize or achieve without ‘the decisive nucleus of economic activity.’” Hall, *supra* note 96, at 120. And so this story of neoliberalism’s hegemonic rise is incomplete without an account of the process of economic globalization; however, it is beyond the scope of this discursive project.

103. Stuart Hall & Doreen Massey, *Interpreting the Crisis*, in *THE NEOLIBERAL CRISIS* 55, 59 (Jonathan Rutherford & Sally Davison eds., 2012).

104. CARL BOGGS, *GRAMSCI’S MARXISM* 39 (1976).

scholastic program. For one, it is important to recognize the nexus of money and prestige in the legal academy undergirding law and economics' ascent, because to elide the two reinforces "a liberal convention of awkward silence about the political economy of legal theory."<sup>105</sup> The most obvious example is the Olin Foundation, which had a profound role in bringing the law and economics movement into elite law schools.<sup>106</sup>

However, as important as the law and economics movement has been to the championing of neoliberal ideology, the more profound effects of neoliberalism in the academy have occurred in those areas that are not immediately recognized as law and economics scholarship. In those areas this rationality has huge but unrecognized and therefore uncontested influence.<sup>107</sup> Neoliberalism's power, therefore, is at least partially derived from its invisibility.

On one level, neoliberalism's hegemony is the premise for my project: legal theory has failed to recognize a hegemonic shift—it has failed to historicize its project and recognize that the dominant legal paradigm has changed. But on another level, *hegemony itself* is what legal theory has missed, treating instantiations of neoliberal rationality as distinct theories or models. Failure to recognize hegemony on this level means neglecting to put the pieces together to reveal the larger logic, and a failure to see the depth of its entrenchment. Critical legal scholars may have offered incisive critiques of law and economics as a theory, but they failed to recognize some of its tenets as organizing much more of our world and inherent in a far broader swath of legal scholarship than law and economics.

## V

### LEGAL THEORY THROUGH THE LENS OF NEOLIBERALISM: A SYMPTOMATOLOGY

Viewing the narratives of decline in light of neoliberalism allows one to reconcile their contradictions—to see each narrative as true on its own terms and yet incomplete for understanding the fate of critical legal theory. In this

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105. Martha T. McCluskey, *Thinking With Wolves: Left Legal Theory After the Right's Rise*, 54 BUFF. L. REV. 1191, 1229 (2006).

106. *Id.* at 1215 ("By the end of the twentieth century, the Olin Foundation, under William E. Simon's leadership, had made an 'investment' of around \$50 million in 'law-and-economics' scholarship." (citing WILLIAM E. SIMON, *A TIME FOR REFLECTION: AN AUTOBIOGRAPHY* 272 (2004)). See also *id.* at 1215–22 (describing the more aggressive strategies of conservative foundations as compared to their liberal or left-leaning counterparts); STEPHEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* 103, 182–91 (2008) (detailing the role of the Olin Foundation in the rise of law and economics and the founding of George Mason Law School as a specialized law school for law and economics research).

107. Michael D. Murray, *After the Great Recession: Law and Economics' Topics of Invention and Arrangement & Tropes of Style*, 58 LOY. L. REV. 897, 919 (2012). See also Michael D. Murray, *The Great Recession and the Rhetorical Canons of Law and Economics*, 58 LOY. L. REV. 615, 619 ("The fact that law and economics is persuasive beyond the confirmed members of the discipline is supported by modern history: critics and supporters alike agree that law and economics has established itself as the dominant and most influential contemporary mode of analysis among American legal scholars.").

part, I argue that each narrative should be understood as a symptom of neoliberalism's rise. To read the narratives symptomatically means to take each of them as offering a descriptive insight but to not accept any of them as identifying the fundamental cause of legal theory's decline. I proceed in order through the narratives to illustrate the ways in which each reflects, without explicitly recognizing and accounting for, neoliberalism's logic.<sup>108</sup> In short, I will read these narratives of decline as constituting a symptomatology.

### A. Re-evaluating "Victory"

The victory narrative focuses on the incorporation of three of the crits' primary critiques into contemporary mainstream accounts: (1) the indeterminacy critique, (2) the refutation of the law-politics distinction, and (3) the critique of the legal subject and other universal principles in liberal theory. These were the three sites where the crits found traction with respect to legal liberalism. Part III addressed the compatibility of the indeterminacy critique with law and economics.<sup>109</sup> Therefore, this part focuses on the commensurability of the other two critiques with neoliberalism's logic. However, under neoliberalism, the rules of the game have changed, and these critiques, once radical, are no longer truly oppositional.<sup>110</sup> Thus, the shift from liberalism to neoliberalism explains why these critiques could be folded into mainstream accounts without threatening the law's legitimacy, and also why the crits' supposed "victory" feels so hollow.

#### 1. New Legitimacy and the Law-Politics Distinction

A new model of legal legitimacy under neoliberalism provides insight into why the dissolution of the law-politics distinction and the critique of the legal subject could be folded into the contemporary dominant discourse without problem or questions when under the liberal paradigm they constituted a form of radical critique. In short, by altering the very terms of the law's legitimacy this paradigm shift cuts the legs out from under the critique of the law-politics distinction and neuters the once incisive critique of the myth of the autonomous liberal subject.

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108. Constructing a symptomatology from these narratives exposes, among other things, that neoliberalism is not a reality that critical legal theory has already recognized and accounted for, as one might be inclined to believe. That the crits offered critiques that exposed and challenged what I have identified as neoliberal rationality in specific law and economics theories or models is not equal to the kind of recognition and reckoning I am advocating. The narratives of decline show that critical legal scholars today are not seeing the whole picture even when they effectively critique the logic in circumscribed ways.

109. See *supra* notes 32–34 and accompanying text. See also Eric Engle, *The Fake Revolution: Understanding Legal Realism*, 47 WASHBURN L. REV. 653, 666 (2008) (describing law and economics as taming of the radical potential of the crits' indeterminacy critique "as an instrumentality of the very capitalism, which it had only recently, if briefly, questioned").

110. For a general discussion of the confluence of Hayek's theories and CLS's critiques written by a law and economics scholar see Linda A. Schwartzstein, *Austrian Economics and the Current Debate between Critical Legal Studies and Law and Economics*, 20 HOFSTRA L. REV. 1105 (1992).

Under liberalism, the freedom, rationality, and participation of the autonomous citizen-subject in the democratic process were the grounds of the state's democratic legitimacy.<sup>111</sup> Each time the state actively intervened on behalf of capital, for example, there was potential for a "legitimation crisis"—law's claims of neutrality were undermined as it was shown to be serving interests other than those sanctioned by the governed.<sup>112</sup> Under the neoliberal paradigm, in contrast, the state's intervention on behalf of capital is no longer an exploitable moment for critique: "[Independence from social and economic powers] is the criterion for legitimacy that neoliberalism overcomes by casting the state as an extension of the market . . . or a form of the market."<sup>113</sup> Market growth is the precondition of individual flourishing and the state *should* intervene on behalf of capital to preserve this liberty of its subjects. Therefore, law is not something that stands above politics, responsive only to the democratic process; it is something that can be used tactically in service of political or economic interests so long as it preserves the market and the liberty of its subjects.

Critique of liberalism's myth of the whole, rational, and politically engaged subject is likewise less salient because the authority of the state is no longer grounded in democratic authority but in its duty to enable this particular model of entrepreneurial liberty.<sup>114</sup> Although antidemocratic in a theoretical sense because the government wields authority not expressly granted to it by the people, this vision of government is generally accepted by the populace at large.<sup>115</sup>

The extent to which that state cares for or responds to its subjects has also

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111. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 53 (C.B. Macpherson ed., 1980) ("And thus that, which begins and actually constitutes any political society, is nothing but the consent of any number of freeman capable of a majority to unite and incorporate into such a society.")

112. Brown, *supra* note 14, at 143 n.6.

113. *Id.*

114. The economy is the top issue cited by voters in determining how they cast their ballots, followed closely by unemployment. See Jeffrey M. Jones, *Economy is Paramount Issue to U.S. Voters*, GALLUP (Feb. 29, 2012), <http://www.gallup.com/poll/153029/economy-paramount-issue-voters.aspx> (In the 2012 presidential election, more than nine out of ten voters reported that the economy was "extremely important" or "very important" to their vote).

115. Two recent studies illustrate the extent that the mindset regarding inequality has shifted and the neoliberal suspicion of big government has taken hold. A recent poll conducted by Bloomberg found that although Americans almost two to one (64 to 33 percent) say that the United States no longer offers everyone the equal chance to get ahead (the social mobility that has for so long be core of the so-called "American dream"), 44 percent of Americans still think it would be better for the market to be allowed operate freely than to have the government intervene *even if that means the gap gets wider*. See David J. Lynch, *Americans Say Dream Fading as Income Gap Hurts Chances*, BLOOMBERG (Dec. 11, 2013, 12:00 AM), <http://www.bloomberg.com/news/2013-12-11/americans-say-dream-fading-as-income-gap-hurts-chances.html>. This faith in the market in spite of its consequences is part and parcel of neoliberal rationality. A recent Gallup poll paints an even starker picture of the acceptance of neoliberal premises by members of both political parties. The poll indicates that 72 percent of Americans believe "big government" is the greatest threat to country in the future, the highest percentage ever recorded by a significant margin. Jeffrey M. Jones, *Record High in U.S. Say Big Government Greatest Threat*, GALLUP, (Dec. 18, 2013), <http://www.gallup.com/poll/166535/record-high-say-big-government-greatest-threat.aspx>.

been displaced as a central metric for measuring its efficacy or legitimacy. In the shift from the nation-state to the market-state, the question is no longer one of whether the government improves the welfare of the people, but is instead “whether [the government’s] policies improve and expand the opportunities offered to the public.”<sup>116</sup> Illustrating that the state is not improving the welfare of its subjects is no longer destabilizing because responsibility has been shifted down to the individual.

Exposing the distance between liberal ideals and current realities (the materialist critique) has lost some of its force because neoliberalism has redefined these ideals in such a way as to give the illusion of achievement. The concept of equality is a clear example: liberalism did not have a means to explain the gap between formal equality and substantive equality and therefore could be called into question on those grounds (as the crits did very effectively).<sup>117</sup> Neoliberalism, by contrast, has an answer; it *redefines* equality as equal choice (or equal amounts of entrepreneurial liberty) and places any failures in that arena firmly with the individual. One’s choices are restricted by one’s own merit and by one’s prior choices, not by systemic or structural inequalities. Because neoliberalism redefines such liberal concepts, as opposed to jettisoning them, there is an illusion of continuity: if neoliberalism openly disavowed the importance of the ideal then it would register as a break. Instead, neoliberalism redefines all other values in terms of liberty, which obfuscates this change, making many believe it in fact preserves these liberal values when it meets its own criteria.

That class falls out of the victory narrative is also symptomatic of the shift in logic that makes material inequalities not the product of law but of individual choices. If material inequality is the product of individual choices and talents, law is no longer responsible for addressing the resulting inequalities. Furthermore, according to Hayek’s theory, the state is not capable of successfully intervening in the economic realm even if the market’s allocations are unjust.

## 2. Multiculturalism and the Critique of Universals

The current “multiculturalism” of the legal academy is sometimes held up as another victory for critical legal scholarship: “The legal academy has been transformed, with a strong ideology of liberal centrism displaced by an almost equally strong pluralist ideology that tolerates a range of ideas wide enough to encompass those that would have been called critical legal studies at an earlier point.”<sup>118</sup> Much of the leftist critique in the second half of the twentieth century was indeed focused on debunking the illusion of universal values, revealing how claims to universality furthered the values of the dominant race, class, or

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116. Brown, *supra* note 14, at 222.

117. See David Kairys, *Introduction*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (David Kairys ed., 3d ed. 1998).

118. Tushnet, *supra* note 1, at 111.

gender. Neoliberalism's abandonment of these claims to universality, and even more so its embrace of their impossibility, provides insight into why these critiques no longer have the force they once did.

The refutation of universal values is a premise shared between the critical legal project and neoliberalism.<sup>119</sup> Hayek's vision of the neoliberal state is explicitly premised on the impossibility of enacting a monolithic set of shared social values; he draws his distinction between the market state and the collectivist state precisely along these lines. The market state has the virtue of not needing to appeal to transcendent values, Hayek argues, whereas collectivist frameworks presuppose "the existence of a complete ethical code in which all the different human values are allotted their due place."<sup>120</sup> The neoliberal state invokes a pluralist society in which each group can pursue its own values and interests, which are then merely aggregated. This is particularly appealing in the age of identify politics and the recognition of difference. More than not requiring it, neoliberalism capitalizes on our experience of the impossibility of value consensus. Thus, the legal academy's multiculturalism can be as a symptom of neoliberalism's rationality.

#### B. "There Is No Alternative": Rethinking The Failure Narrative

Failure to provide an alternative, one of the central indictments of the crits, reflects both a formal and substantive element of neoliberal hegemony: the absence of any alternative. As an initial matter, the inability to offer an alternative is a formal aspect of neoliberal hegemony insofar as hegemony functions as common sense, denying the possibility of another logic. But the absence of an alternative is a substantive premise of neoliberalism as well. Margaret Thatcher even coined the slogan: TINA ("there is no alternative").<sup>121</sup> Furthermore, in Hayek's theory, limits on societal knowledge, combined with the delicate ecology of the spontaneous order of society and the market, make ambitions to seek out an alternative not only futile but also potentially destructive. The crits failed to offer an alternative to capitalist democracy, but they did so precisely at this "end of history" moment when the possibility of an alternative itself is being denied, and from which it is easier to imagine the end of the world than the end of market capitalism.<sup>122</sup>

This assumption that there is no alternative to the democratic market-state

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119. See Jodi Melamed, *The Spirit of Neoliberalism: From Racial Liberalism to Neoliberal Multiculturalism*, in 24 SOCIAL TEXT 4, 3–8 (Winter 2006).

120. HAYEK, *supra* note 66, at 60.

121. The original source of the slogan was Herbert Spencer's *Social Statics*, notably mentioned in Holmes's vitriolic dissent in *Lochner v. New York*. See *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting) (In refusing the majority's assertion that freedom of contract was a fundamental liberty, he declared, "The Fourteenth Amendment does not enact Mr. Herbert Spencer's *Social Statics*.").

122. FREDRIC JAMESON, *THE SEEDS OF TIME* xii (1996) ("It seems to be easier for us today to imagine the thoroughgoing deterioration of the earth and of nature than the breakdown of late capitalism.").

gives rise to the demand that legal scholarship work *within* the given framework as opposed to attempting to challenge or think outside of it. The instrumentalist demand for legal scholarship to be “useful” can therefore also be seen as symptomatic of neoliberal hegemony. This demand is not only directed toward the critics but throughout the legal academy, as legal academics eschew theory, reflexivity, and critique in favor of applied and technocratic projects that function *within* the system.<sup>123</sup> “The message of neoliberalism is one that values applied knowledge over theoretical or doctrinal knowledge—‘know how’ over ‘know what’... Critical and theoretical knowledge of all kinds has been contracted in favor of vocationalism.”<sup>124</sup> Instrumental forms of legal scholarship are more successful within the academic market, especially as the academy is pressured to focus more on supporting the legal profession at large.<sup>125</sup>

Identifying this relationship between instrumentalism and neoliberalism also provides insight into why the specialization narrative is symptomatic. Hackney’s “toolkit” metaphor puts a positive valence on the characterization of theories as instruments. The abandonment of legal theory as its own field in favor of concrete applications of theory fits neatly within neoliberalism’s logic that value only comes from working within the current framework.

### C. Putting The Pieces Back Together: The Contingency Of The Identity–Class Opposition

The balkanization narrative asserts that materialist and class politics were abandoned in favor of identity projects through the rise of CRT and feminist legal theory.<sup>126</sup> In so doing, this narrative assumes a fundamental antagonism between materialist-distributive concerns and identity politics. This binary is again symptomatic of neoliberal thought. The critics did break apart into theoretical subfields along these lines; but the antagonism between projects of redistribution (class) and recognition (identity) is historically contingent. The perceived incompatibility is premised on a separation of the cultural from the economic at the heart of neoliberalism; prior to the rise of neoliberalism materialist and identity politics were seen as fully compatible.

A conception of identity divorced from materiality is compatible with, if not constituent of, neoliberal logic. Under neoliberalism there is an emerging “rhetorical commitment to diversity, and to a narrow, formal, non-redistributive form of ‘equality’ politics for the new millennium.”<sup>127</sup> However, it does not

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123. Margaret Thornton, *The New Knowledge Economy and the Transformation of the Law Discipline*, 19 INT’L J. OF THE LEGAL PROFESSION 265, 273 (2012).

124. *Id.*

125. See, e.g., Adam Liptak, *The Lackluster Reviews that Lawyers Love to Hate*, NY TIMES (Oct. 21, 2013), <http://www.nytimes.com/2013/10/22/us/law-scholarships-lackluster-reviews.html>; David Segal, *What They Don’t Teach Law Students: Lawyering*, NY TIMES (Nov. 19, 2011), <http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html>.

126. See *supra* notes 47–49 and accompanying text.

127. LISA DUGGAN, TWILIGHT OF EQUALITY?: NEOLIBERALISM, CULTURAL POLITICS, AND THE ATTACK ON DEMOCRACY 44 (2003).

follow that all identity claims or claims of recognition are inherently compatible with neoliberalism and therefore necessarily complicit in its logic. Nancy Fraser argues that although the conflict between the two is not a natural or necessary relation.<sup>128</sup> She argues that the solution is not to abandon identity claims because certain forms of “recognition” are truly emancipatory and because culture is a necessary terrain of struggle. “[R]ecognition” can retain and integrate the materialist issues of redistribution.<sup>129</sup>

That said, currently, identity is eclipsing the materialist conversation. Insofar as the identity discourses enable people to identify themselves as socially progressive but fiscally conservative, they reinforce the neoliberal construction that these are in fact distinct realms—that the social can be divorced from the economic. This is the position the Court has taken, and the legal academy has followed suit. An examination of the equal protection doctrine illustrates this point.

The legacy of the Warren Court has been taken up in the popular consciousness and, more importantly, in the legal academy as being about the protection of “insular minorities” or identity groups.<sup>130</sup> However, in focusing on this debate, legal scholars have not preserved the Warren Court’s concept of protection.<sup>131</sup> “[T]oday in modern America, inequality is discussed as the natural byproduct of the differing interests, talents, and education that individuals bring to that mysterious thing political economists and neo-classical economists alike refer to as the ‘market.’”<sup>132</sup> Even in terms of affirmative action or welfare, the focus is on enabling the traditionally excluded group’s participation *in the market*. How did society go from a moment in which even the Supreme Court appeared to be laying the groundwork for the poor to be considered a suspect class to one in which the poor are excluded not only from the equal protection doctrine, but from legal theory discourse as well? Materialism may have fallen out of the Court’s equal protection analysis, but that is not a justification for legal scholarship to accept its exclusion. The legal academy is participating in the ideology of erasure insofar as the academy has accepted and reinforces that disparate impact and other materially inflected concepts of equal protection are

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128. Nancy Fraser, *Rethinking Recognition*, NEW LEFT REVIEW 108–09 (2000). Fraser identifies a proliferation of “recognition claims” and the displacement of redistribution claims in the face of neoliberalism’s rhetorical assault, the end of socialism, and doubts about even the possibility of state-Keynesian social democracy in the face of globalization. *Id.* at 108.

129. *Id.*

130. See generally Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown*, 117 HARV. L. REV. 1470 (2004). In recent years, leftist legal scholars have fought to preserve and even expand the equal protection of identity-based minorities under an antisubordination rubric as opposed to a colorblind rubric.

131. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (carefully illustrating that the rejection of material considerations in favor of a focus on the intention to discriminate was not necessarily the path laid out by the Warren Court).

132. Athena Mutua, *Introducing Class Crits: From Class Blindness to a Critical Legal Analysis of Economic Inequality*, 56 BUFF. L. REV. 859, 861 (2008).

“off the wall.”<sup>133</sup>

## VI

### RECOVERING LEGAL THEORY’S RELEVANCE?

The lens of neoliberalism not only allows one to see how these narratives fit together to reveal a larger rationality but also to understand why the solutions they propose fail to challenge or even escape that rationality. I address the three most prominent prescriptions being offered by critical legal scholars today: (1) a pragmatic turn to politics, (2) a return to more explicit normative and moral claims, and (3) acceptance in recognition that the decline is merely an ebb in the regular cycles of theory.

#### A. Prescription: More Politics

The most common prescription for recovering legal theory’s vibrancy is a greater participation in politics—scholars should eschew descriptive projects, especially those that might be used to bolster the conservative argument on an issue or in a case, as well as those critiques that appear purely academic, in favor of projects intended to influence the courts in progressive ways.<sup>134</sup> One can certainly understand why this is a tempting prescription in light of the success of explicitly conservative legal theory and methods<sup>135</sup> and concern that left-leaning legal academics have not taken up this charge.<sup>136</sup> However, this demand for political engagement has unintended consequences: It legitimizes the current frameworks. As the Roberts Court further embraces neoliberal principles, persuading the Court means functioning within neoliberal logic and is therefore counterproductive for the revitalization of critical legal theory.

Moreover, this political prescription tends to produce a reified notion of

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133. Jack M. Balkin, “*Wrong on the Day It Was Decided*”: *Lochner and Constitutional Historicism*, 85 B.U. L. REV. 677, 679 (2005) (“[C]onventions determining what is a good or bad legal argument about the Constitution, what is a plausible legal claim, and what is ‘off-the-wall’ change over time in response to changing social, political, and historical conditions”).

134. See, e.g., Siedman, *supra* note 31, at 588–92 (advocating for current critical legal scholars to form political alliances with rule-of-law liberals and conservatives against creeping authoritarianism); Richard Delgado, *Crossroads and Blind Alleys: A Critical Examination of Recent Writing About Race*, 82 TEX. L. REV. 121 (2003) (book review) (urging CRT to turn away from high theory and discourse about racial justice to focus on strategies for harnessing and redirecting the material interests of those who benefit from white privilege).

135. McCluskey, *supra* note 105, at 1194 (“An explosion of visionary legal theory challenging a century of non-conservative law reform has helped drive the right-wing’s political success.”). See generally TELES, *supra* note 106 (describing in detail the rise of the conservative legal movement, starting in the 1970s through present day).

136. See Simon, *supra* note 2, at 181 (arguing that “the cost of the antipolitical impulse in the liberal academy has been the diminution in the intellectual resources available for nonconservative politics”); see also Robert C. Post & Reva B. Siegel, *Democratic Constitutionalism*, in THE CONSTITUTION IN 2020 33 (Jack M. Balkin & Reva B. Siegel eds., 2009) (arguing the left has much to learn from the right in this regard: “The recent conservative mobilization teaches that authority flows to those who can relate the Constitution’s fundamental commitments to the beliefs and concerns that animate the American people and who can identify those modes of argument that this vision its most powerful legal form.”).

what counts as politics, limiting the political as well as intellectual potential of theoretical projects. For example, in the wake of the of the Court's incremental move toward recognition of same-sex marriage in *United States v. Windsor*,<sup>137</sup> many progressive legal scholars have written on the subject hoping to nudge the Court toward full recognition. But in light of Nancy Fraser's work, one should ask just what kind of recognition that would be—whether it would displace materialist claims or reify forms of identity.<sup>138</sup> Full recognition of same-sex marriage is a destination toward which the Court is already heading and an area where the public discourse has largely already arrived. Emphasizing this area also participates in the ideology of erasure, leading many to believe that the current Court is making progressive interventions because it is progressive on identity and cultural issues, even though *Windsor* was handed down in a term in which the Court retrenched on significant materialist issues and embodied a number of blatantly neoliberal positions.<sup>139</sup>

Even if not writing for the Court, a legal scholar's attempt to be useful to those in the profession who share her political goals risks constraining the legal profession and its own professional and disciplinary norms.<sup>140</sup> In this way, the focus on concrete political effects helps foster legal thought's "considerable capacity for resisting self-reflection and analysis,"<sup>141</sup> which has only become more pronounced in the face of the neoliberalization of the academy as instrumental knowledge is increasingly privileged. When attempting to counter hegemony, what one needs to do is disrupt the legible—to expand the contours of what is considered political—not to accept the narrowly circumscribed zone of politics neoliberalism demarcates. Therefore, it is crucial not to judge critical legal scholarship according to whether its political impact is immediate or even known, and thus a turn to politics is not the remedy for legal theory's marginalization.

## B. Prescription: More Normativity

Some scholars recognize the danger of embracing a reified notion of politics

137. 133 S. Ct. 2675 (2013).

138. See *supra* notes 128–29 and accompanying text.

139. See, e.g., *Am. Express v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), in which the Court held that the "effective vindication" exception does not guarantee the right to class arbitrations even if the case would be prohibitively expensive for a single party to pursue, such as in antitrust cases. According to Scalia's opinion for the majority, access to the courts only has to be *hypothetically* possible: "the fact that it is not worth the expense involved in *proving* a statutory remedy does not constitute the elimination of the *right to pursue* that remedy." *Id.* at 2311. In the Court's reasoning in *Italian Colors*, we see the neoliberal model of choice insofar as it refuses to account for the ways material realities and inequalities constrain choice; see Erwin Chemerinsky, *Justice for Big Business*, NY TIMES (July 1, 2013), <http://www.nytimes.com/2013/07/02/opinion/justice-for-big-business.html> ("[I]n the final two weeks of [the term in which *Windsor* was handed down], the Court ruled in favor of big business and closed the courthouse doors to employees, consumers, and small businesses seeking remedy for serious injuries.").

140. Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening*, 97 GEO. L.J. 803, 813 (2009).

141. Fischl, *supra* note 37, at 783.

that unwittingly reaffirms the status quo, and instead champion assertions of substantive morality to counteract the cold logics of pragmatism and efficiency.<sup>142</sup> This proposed solution advocates a return to more substantive ideals of justice and equality. Although it may be true that change will ultimately require wresting these liberal and democratic ideals from neoliberalism and refilling their hollowed-out forms, this approach entails a number of pitfalls.

The first is simply the inevitable question regarding moral claims: Whose morality is to be asserted? This question has created crisis on the left before, even producing some of the schisms among the crits recounted above. Neoliberalism does not have to contend with this issue—it foregrounds its formal nature and holds itself out as not needing to create a universal morality or set of values. More importantly, it claims to provide a structure in which one can keep one’s own substantive morals. Therefore, neoliberalism’s logic cannot be countered by moral claims without first disrupting its illusion of amorality.

The ineffectiveness of the progressive critique of law and economics, based in claims of distributive justice and moral imperative, provides a clear example of how the neoliberal discourse can capture normative claims. The work of Martha McCluskey, one of the few legal scholars writing about neoliberalism in the domestic context over the last ten years, highlights the extent to which the “distributive justice” critique, which argues against the privileging of efficiency over equality and redistribution, fails to challenge the underlying logic.<sup>143</sup>

McCluskey illustrates how critics of law and economics who critique the approach’s inattention to redistribution have already ceded the central point, by arguing within the conventional views that “efficiency is about expanding the societal pie [and] redistribution [is] about dividing it.”<sup>144</sup> “Neoliberalism’s disadvantage is not, as most critics worry, its inattention to redistribution, but to the contrary, its very obsession with redistribution as a distinctly seductive yet treacherous policy separate from efficiency.”<sup>145</sup> In order to challenge this rationality, she explains, one cannot “misconstrue neoliberalism as a project to promote individual freedom and value-neutral economics at the expense of social responsibility and community morality.”<sup>146</sup> One must instead recognize that neoliberalism has *redefined* social responsibility and community morality. Therefore, one must refuse the false dichotomy between the economic and cultural spheres (a division that allows the neoliberal discourse to displace

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142. See, e.g., Gabel, *supra* note 2, at 532 (claiming “if CLS would embrace the moral and spiritual agenda [he proposes], it would instantly revitalize itself.”); WEST, *supra* note 61.

143. See generally Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783 (2003).

144. *Id.* at 787. Members of CLS did, and some still do, offer precisely the critiques that McCluskey is advocating however they fail to connect them up to the legal discourse more generally. And CLS scholars are the ones more than any of the other crits that have been marginalized, relegated to the clinics, etc.

145. *Id.* at 787–88.

146. *Id.* at 798.

cultural concerns to a moment after the economic concerns have been dealt with). Merely asserting the falsity of this separation is not sufficient. Neoliberalism has real effects in the world that strengthen its ideological claims.<sup>147</sup> Therefore, it is not a struggle that can take place solely on the terrain of discourse or ideology.

Like neoliberalism generally, law and economics does not hold itself out as infallible or as an embodiment of social ideals, but instead as the best society can do. It functions precisely on the logic that there is no alternative. Like Hayek's theory, "[l]aw and [e]conomics is full of stories about how liberal rights and regulation designed to advance equality victimize the all-powerful market, undermining its promised rewards."<sup>148</sup> In light of this, it is a mistake to see neoliberalism as disavowing moral principles in favor of economic ones; it instead folds them into one another: "[T]he Law and Economics movement is rooted in the moral ideal of the market as the social realization of individual liberty and popular democracy."<sup>149</sup> Neoliberalism's approach presents itself not only as efficient, but also as just. Legal scholars need to recognize neoliberalism's focus on the market is not only a form of morality, but also a powerful one. They cannot assume that in a battle of moralities the substantive communitarian ideal will win.<sup>150</sup>

Furthermore, the neoliberal framework, through its reconfiguration of the subject as an entrepreneur, justifies material inequalities—in contrast to liberalism's mere blindness to them. Consequently, merely asserting the existence of material inequalities does not immediately undermine neoliberalism's claims. Far from the engaged citizen who actively produces the *polis* in liberal theory, the neoliberal subject is a rational, calculating, and independent entity "whose moral autonomy is measured by [her] capacity for 'self-care'—the ability to provide for [her] own needs and service [her] own ambitions."<sup>151</sup> The subject's morality is not in relation to principles or ideals, but is "a matter of rational deliberation about costs, benefits, and consequences."<sup>152</sup>

If efficiency is the morality of our time, the poor are cast not only as "undeserving" but also as morally bankrupt. Therefore, efficiency replaces not only political morality, but also all other forms of value. Therefore, critics are right that other forms of value have been crowded out; but the logic is deeper than they seem to realize. It goes beyond the scope of what is being done in the

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147. Bernard E. Harcourt, *Fantasies and Illusions: On Liberty, Order, Free Markets*, 33 CARDOZO L. REV. 2413, 2422 (2011) ("[The 'errors' of law and economics] are not mere mistakes that can easily be corrected. The belief in free markets has produced a significant redistribution of wealth in society").

148. McCluskey, *supra* note 105, at 1267.

149. Gabel, *supra* note 2, at 529.

150. Harcourt, *supra* note 147, at 2426 (quoting DAVID HARVEY, A BRIEF HISTORY OF NEOLIBERALISM 5 (2005)) ("Concepts of dignity and individual freedom are powerful and appealing in their own right. Such ideals empowered the dissident movements in eastern Europe and the Soviet Union before the end of the Cold War as well as the students in Tiananmen Square.").

151. Brown, *supra* note 14, at 42.

152. *Id.*

legal academy. It is a logic that organizes our time and therefore must be countered differently.

More normativity is not the answer to legal theory's marginalization because neoliberalism's logic can accommodate even radically contradictory moralities under its claims of moral pluralism. Ethical claims of justice and community may need to be made, but one must first recognize that countering hegemony is harder than merely articulating an alternative; hegemony must be disrupted first. Disrupting neoliberalism's logic thus entails not only recognizing that neoliberalism has a morality, but also taking that morality seriously.

### C. Prescription: Acceptance

The final response of legal theorists to their field's marginalization is to dismiss it as merely the regular ebb and flow of theory's prominence.<sup>153</sup> Putting it in terms of Thomas Kuhn's theory of paradigm shifts, the contemporary moment is just the "normal science" of the paradigm brought about by the crits' revolutionary moment in the 1970s and 1980s.<sup>154</sup> The vitality, this narrative contends, will return when a competing paradigm emerges.

There are several problems with this perspective on the decline. First, it entails an error in logic insofar as it takes an external perspective. Legal theory does not inevitably rise and fall but only according to the work being produced; or, to put it another way, this descriptive account of theory's ebb can be a self-fulfilling prophecy insofar as it decreases scholars' motivation to pursue and receptivity toward theoretical projects. Second, legal scholars cannot be content with normal science when it has the kinds of consequences for democracy and economic inequality that neoliberal hegemony does. The Court is currently entrenching these principles at an unprecedented rate in areas of free speech, equal protection, and antitrust to name a few.<sup>155</sup>

At first, such acceptance appears to be what Janet Halley is advocating in "taking a break from feminism,"<sup>156</sup> but upon closer inspection it is not. Halley is cautioning against the left's nostalgia—concluding that operating under the banner of feminism and a preoccupation with "reviving" feminism looks backward instead of forward.<sup>157</sup> Critical legal scholarship instead needs to be "self-critical" and to recognize that "how we make and apply legal theory arises out of the circumstances in which we recognize problems and articulate solutions."<sup>158</sup> Theory must arise from engagement with the current

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153. Schlag, *supra* note 140 (claiming academic excitement comes in waves).

154. HACKNEY, *supra* note 1, at 16.

155. Jedediah Purdy, *Neoliberal Constitutionalism: Lochnerism for a New Economy*, 77 LAW & CONTEMP. PROBS., no. 4, 2014 at 195; Zephyr Teachout, *Neoliberal Political Law*, 77 LAW & CONTEMP. PROBS., no. 4, 2014 at 215.

156. See generally HALLEY, *supra* note 50.

157. See *id.*

158. See, e.g., Jack Balkin, *Critical Legal Theory Today*, in ON PHILOSOPHY IN AMERICAN LAW 64, 68 (Francis J. Mootz, III ed., 2008) (Balkin continues, "A critical theory of law must recognize how different aspects of law—and of a critical theory of law itself—become newly salient or refigured in

circumstances. Acceptance cannot be the solution; legal theory must produce the momentum to move forward.

## VII

### CONCLUSION: WHERE WE GO FROM HERE

The way forward cannot entail a return to reified notions of theory any more than by a return to reified notions of politics. Critical legal scholars should not attempt to revitalize previous critical movements but, instead, reinvigorate the practice of critique within the legal academy.

#### A. Why Critique

Naming neoliberalism is necessary in order to counteract it. Without explicit identification, there can be no truly oppositional position. It also makes legible connections that would otherwise go unseen, as was the case with scholars writing about the decline. But there must also be a step beyond naming: critique.

Critique means taking neoliberal rationality seriously. The approach must not be dismissive, merely pointing out neoliberalism's inconsistencies, but instead must recognize that neoliberal rationality is inherently appealing. One cannot merely indict efficiency as contrary to more substantive values, but one also must recognize that efficiency is inextricably tied to beliefs about liberty, dignity, and individual choice, as well as corresponding beliefs about the capacities and limits of the state to effectuate change. No one is arguing that neoliberalism is the best of all possible worlds; in fact, its power comes precisely from abandoning such a claim. In recognizing its hegemonic status, legal scholars can understand the critical task as being more than just demystification. Neoliberal does not paper over inequalities after all; it justifies them.

Ultimately, critique should function as a means of opening the conversation in ways that go beyond the picture of law painted by the Roberts Court—to refuse to allow the legal academy to be merely mimetic of a Court that is clearly embracing a neoliberal vision. Critique provides a means of thinking about law as not limited by what the markets can tolerate; it is the means through which one can discover a form of resistance that goes beyond nostalgia for the liberal welfare state. And finally, critique is simply a means of asserting that things can be different than they are in a world that constantly insists that there is no alternative.

#### B. Why It Is Law's Problem

One might wonder why, if the critique of neoliberalism is vibrant in other fields (particularly political theory), is it necessary that this critique exist within

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different circumstances, and how the seemingly timeless verities of one historical period are conditioned by the assumptions and expectations of that time.”).

the legal academy? The answer is that political theory, critical theory, and even the globalization discourse approach law from the external perspective. Even within the legal academy, the only really sustained neoliberal critique has been in the area of law and development—likewise often embodying an external perspective. And yet, the legal academy and the profession are both premised on the idea that law cannot be understood fully from the outside. For, one external critiques tend to address law only in the global sense and do not account for specific doctrinal developments.

To say that neoliberal critique is legal theory's task is not to say that it should be done only at a high level of abstraction. The articles in this volume are precisely the kind of scholarship that needs to be done: concrete projects that recognize the effects that neoliberal rationality has in various doctrinal and theoretical areas.

But more than just being ideally situated to take on this task, neoliberalism is law's problem because the law (and the legal academy, by extension) is complicit in its legitimation. Although based in economics, neoliberalism's framework is disseminated and legitimated by the legal discourse: "Law, rather than economics, has become the rhetorical domain for identifying market failures and transactional costs, and attending to their elimination, for weighing and balancing institutional prerogatives, for assessing the proportionality and necessity of regulatory initiatives."<sup>159</sup> Furthermore, the law serves a legitimating function insofar as it hides the politics of the market's logic as merely background rules.<sup>160</sup> "Legal determinations present themselves as operations of logic, policy analysis, procedural necessity, economic insight, or constitutional commitment."<sup>161</sup>

Ultimately, critical legal scholarship is still attempting to challenge a legal discourse that no longer exists. It is attempting to derive political agency from liberalism's inconsistencies, but the paradigm of legitimacy for the law has changed. Although the language may have stayed consistent, the structures are rationalized anew. Thus far, neoliberal logic has been largely impervious, even in the face of financial crisis when its contradictions were laid bare.<sup>162</sup> Any viable critique must help to explain this resilience—and to understand law's role in it.

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159. Kennedy, *supra* note 68, at 161.

160. Bobbitt, *supra* note 35, at 2382 ("As we enter the Age of Consent, the era of a new, already emerging constitutional order that puts the maximization of individual choice at the pinnacle of public policy, it would be well to appreciate the structuring role for choice that American law has always provided.").

161. Kennedy, *supra* note 68, at 163 (offering the example of whether or not a living wage is normal or abnormal regulatory imposition when framed in legal terms as "obscur[ing] the sense in which these issues present mutually exclusive political choices").

162. Hall, et al., *supra* note 72, at 19 ("[T]he shape of the crisis remains 'economic'. . . . There is no serious crisis of ideas."); see also MIROWSKI, *supra* note 92.