I. INTRODUCTION

This essay began as a study of the attacks made by Critical legal scholars on law and economics. It soon evolved into a meditation on a seemingly very different topic. An account of this metamorphosis provides a suitable introduction to the themes of this essay.

Initially, I conducted a straightforward review of the Critical legal texts that contained analyses of law and economics. Superficially, the attacks closely paralleled critiques that have come both

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* Lear: Thou hast seen a farmer's dog bark at a beggar?
Gloucester: Ay, sir.

Lear: And the creature run from the cur? There thou mightst behold the great image of authority; a dog's obey'd in office.

W. SHAKESPEARE, KING LEAR, act IV, scene vi, at 154-159.

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I have benefitted from conversations with Paul Brest, Tom Heller, and Mark Kelman, as well as from comments from Jeff Perloff, Mitch Polinsky, and Bill Rogerson. Peter Katzenstein and Shula Marks provided insights into Gramsci and Habermas. Sylvia Law, Bill Nelson, and Roberta Romano read an early version of the essay; their comments have greatly clarified my thoughts. Larry Sager has read two drafts and endured countless conversations; his insights and criticisms have been invaluable. Responsibility for the remaining errors and the arguments offered is of course mine.

This work was begun while I was a fellow in residence at the Center for Advanced Study in the Behavioral Sciences for whose support, the support of the Andrew W. Mellon Foundation, and that of the New York University Law School Research Program, I am grateful.

from within the law and economics school\(^2\) and from more traditional legal schools outside law and economics\(^3\). These critiques consist largely of attacks on microeconomic theory and on welfare economics.

This first, conventional interpretation of the Critical Legal Studies' attacks was troubling. The conventional interpretation not only failed to account for the difference in tone between attacks emanating from Critical Legal Studies and those emanating from other camps, but it also failed to account for distinctive thematic paragraphs in the Critical papers.\(^4\) Perhaps these "extraneous" paragraphs could justify the sense that the difference in tone did not derive solely from a difference in the vehemence with which those in Critical Legal Studies objected to law and economics. In addition, because, at this superficial level, both the conventional and the Critical legal critiques were directed not at the law or at the legal theory embodied in law and economics, but at economics itself, my initial reading failed to bring into relief the factors distinguishing the various critiques with respect to legal theory. Both the law and economics scholars and the Critical legal scholars purport to specialize in law. I therefore sought to understand the disagreement between the two "schools" as a conflict between theories of law.

People frequently use the term "theory of law," or "legal theory," synonymously with "jurisprudence." This latter term, "jurisprudence," generally includes two types of inquiries: a conceptual one

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4. These paragraphs generally constitute the introduction and conclusion to the papers. *E.g.*, Kelman, *Choice*, *supra* note 1 at 796-97 (the final paragraph); Kennedy, *supra* note 1, at 388-89, 445 (penultimate paragraph of introduction and last paragraph of article).
and a normative one. The conceptual part of jurisprudence provides a theory of the nature of law. Its primary aim is to identify the "truth conditions" for legal propositions. This investigation includes elaborating the criteria for good legal argument. Subsidiary concerns analyze various "legal concepts" such as "rules" and "cause". Through this process, the legal philosopher implicitly distinguishes law from other social institutions and normative systems, such as religion and morals. The normative portion of jurisprudence provides a theory of what law ought to be. It thus encompasses broad concerns and perplexing problems in moral and political philosophy. What the law ought to be implicates questions of how the state ought to be organized and how governmental duties should be divided among political institutions as well as moral questions of what constitutes the right and the good. The shape of political structures depends upon the concept of the good that one thinks the state ought to embody and that individuals ought to practice in their daily lives. The relation between law and morals therefore has been central to jurisprudential debates of the last century.

I soon realized, however, that the conflict between law and economics and Critical Legal Studies did not lie solely, or even primarily, in these two parts of jurisprudence, conventionally defined. While Critical legal scholars, natural lawyers, and some law and economics theorists perceive widespread social injustice, only Critical legal scholars regard that injustice as irremediable absent dramatic changes in the social structure. This concern implicates a third aspect of legal theory, one frequently overlooked by conventional jurisprudence: A theory of law also includes a positive theory that explains how law functions in society. The differences between Critical Legal Studies and law and economics emerge most strongly in this area of legal theory. Thus, positive legal theory provides the structure of this essay. I shall contrast the positive theory contained in law and economics with that contained in Critical Legal Studies:

5. Ronald Dworkin uses the term "theory of law" in a manner similar to "jurisprudence" in the expansive sense above. For Dworkin a complete theory of law includes a conceptual part that defines what constitutes law and that analyzes its peculiar concepts and an evaluative part that offers theories of legislation, adjudication, and compliance. R. DWORKIN, TAKING RIGHTS SERIOUSLY at vii–ix (1978). Heller uses the term "jurisprudence" to denote any theory that identifies the correct outcome in every case. See Heller, supra note 1, at 187.


7. Legal theory is not quite identical to jurisprudence plus the sociology of law. The sociology of law encompasses the study of the legal profession as well as some aspects of how law functions in society.
Identifying the central focus of law and economics proved simpler than identifying that of Critical Legal Studies. First, while law and economics scholars seem "divided by a common methodology," critical legal scholars seem united only in shared antagonism. The economic method commits law and economics scholars to a particular view of the relation of law to behavior regardless of the other differences among the analysts. The shared antagonisms to traditional views of the law do not commit Critical legal theorists to any one alternative view. Critical legal theory, then, accommodates a much more diverse group of views. Second, neither law and economics nor Critical Legal Studies has explicitly discussed its theory of law as I understand what constitutes a theory of law. In each case, then, I have had to interpolate and surmise views for which I might be hard pressed to find direct textual evidence. This process of reconstruction has been made easier in the case of law and economics because that movement has been subjected to more criticism and because it has been constructive rather than destructive in its attacks on traditional doctrinal rationalization. Third, the Critical legal search for a theory of law leads back to a set of theories of society on which various Critical legal writers draw. I am less familiar with these theories than with those underlying law and economics.

Consequently, the discussion which follows truly merits the term "essay." I hope to provoke thought by offering theses more tentative and suggestive than conclusive and didactic. But even within the limited boundaries of this essay, the conviction with which I hold different positions varies. I am more certain of my characterization of law and economics than of Critical Legal Studies if only because, as a law and economics scholar, I know that at least one active writer in the field accepts the characterization advanced below. I do not know whether any Critical legal scholar will accept the characterization offered of that movement, a characterization that is less precise and more elusive than that of law and economics. While I reduce law and economics to a set of four claims and an underlying view of law, only the essay's title provides a concise description of Critical Legal Studies and that description is more metaphorical than analytical. As I understand the movement, Critical Legal Studies believes that law is deceptive, that law clothes power and interest in elaborate

8. I thank Winston Churchill to whom is attributed the statement: "England and America are separated by the bonds of a common language."
9. See notes 11-20 infra and accompanying text.
10. See notes 63-66 infra and accompanying text.
robes of legitimate authority. The development of this metaphor into an analytic framework, however, presents numerous opportunities for disagreement. I therefore expect everyone in Critical legal studies to object to at least a part of the particular elaboration I offer here, and some (I hope few) Critical legal scholars to object to the entire characterization. At a minimum, though, I hope the analysis serves two purposes. First, since it attempts to lay bare its assumptions, this essay ought to invite rebuttals and refinements which should identify where I have strayed from an accurate characterization of Critical Legal Studies. Second, this essay, whether it captures the essence of Critical legal theory or not, offers what I consider an interesting and provocative view of the law.

In Part II, I characterize law and economics. Part III examines some conventional objections to law and economics and contrasts them to the more fundamental objections raised by Critical Legal Studies to the theory of law underlying law and economics. Part IV briefly discusses the intellectual sources of Critical legal theory. In Part V, I first provide a more complex account of Critical social theory and its application to law. I then present some misgivings about the adequacy of this account of law. The conclusion both offers some suggestions as to what a theory of law should do and an appraisal of Critical Legal Studies.

II. WHAT IS LAW AND ECONOMICS?

Every article in law and economics adheres, explicitly or implicitly, to one or more of four logically distinct theses:

Economic theory provides a good theory for predicting how people will behave under rules of law (the behavioral claim). A more emphatic form of this thesis asserts that economics provides the best available theory of behavior under law. The behavioral claim asserts, first, that legal rules affect individual behavior and, second, that economic theory explains how legal rules affect behavior. The economic theory of behavior under law treats rules of law like prices and legal actors like perfectly rational individuals. In deciding how to act, an individ-

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12. This statement oversimplifies a bit the behavioral claim. Legal rules not only affect the price of behavior but also fix endowments. These endowments, in turn, determine the
ual considers all personal costs and benefits of each possible action. Thus, a liability rule, which imposes costs on individuals for various actions, may be seen as setting the price for engaging in those activities. For example, the legal rules of negligence set (at least part of) the cost of driving carelessly. People "buy" carelessness by paying the "price" set in part by liability rules just as they buy oranges by paying the market price. The behavioral claim provides analysts with a theory that predicts the consequences legal rules will have in the world. Any normative criterion for choice among legal rules that chooses by reference to the consequences induced by the legal rule will rely on some theory of behavior under law.

The law ought to be efficient (the normative claim). The normative claim provides a criterion for choosing among legal rules: Choose one of those legal rules that induces "efficient" aggregate behavior. "Efficiency" has been defined variously as pareto optimality and as wealth maximization. With different definitions of efficiency, of course, a policymaker may identify different rules as efficient. Strictly speaking, the normative claim is not an economic claim because economic arguments are not sufficient to demonstrate the validity of a normative conclusion and because, conversely, normative arguments are not sufficient to demonstrate the validity of an economic theory. One must take premises from moral and political philosophy to argue that the law ought to be efficient. The normative claim nevertheless plays a central role in much of the law and economics literature. If one accepts both the behavioral claim and the normative claim, one can, within the framework of the existing legal system, identify which rule of law should be instituted to address a particular problem. The normative claim identifies efficient behavior as the criterion for choosing among rules; the behavioral claim permits one to identify which rules induce efficient behavior. Together, they allow one to resolve all legal disputes.

The (common) law is in fact efficient (the positive claim). This claim asserts that some set of legal rules in fact induces efficient behavior. Note that this claim merely requires that the law in fact induce effi-

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13. E.g., Kornhauser, supra note 2, at 592-95.
cient behavior, even if economic theory does not explain how the law induces such behavior. Ambiguities in the terms "efficient" and "common law" allow a variety of interpretations of the positive claim. As illustrated in the discussion of the normative claim,16 "efficient" might mean "pareto optimal" or "wealth-maximizing."17 "Common law" might refer to the law that prevailed at a particular time, for instance, nineteenth century negligence law or to the entire corpus of the common law. When imbued with this latter sense of "common law," the positive claim asserts that the common law legal rules always have been efficient. In this form, the positive claim explains a mass of cases and doctrine in a single, unified way. But it does not provide a basis for criticism of cases or doctrine. One should note that the positive claim, like the behavioral claim,18 cannot be established solely by reference to reported cases: One must examine how people actually behave.

The common law tends to select efficient rules, although not every rule will, at any given time, be efficient (the genetic claim). Alternatively stated, the laws that we have are the result of the individual, optimizing behavior of economic agents. Thus broadly stated, the genetic claim applies not only to the common law but also to constitutional, statutory, and administrative law; it encompasses both evolutionary theories of the common law19 and interest group theories of regulation and politics.20 An elaboration of the genetic claim, therefore, would provide a comprehensive economic theory of political institutions, a theory of how these institutions come to be and how they persist. Such a theory extends beyond the traditional research interests of legal academics.

Logically, one could hold any one of these four theses without adhering to any other one. Yet to determine what proposed or prevailing rules are in fact efficient or whether the law generally tends towards efficiency, one must examine the behavior that the law induces. Therefore, the normative, positive, and genetic claims must look to behavior in the world. Nevertheless, the relevant theory of behavior need not be an economic one. Consider, for example, the nor-

16. See Kornhauser, supra note 2, at 592-95.
17. See notes 13-14 supra and accompanying text.
18. See notes 11-12 supra and accompanying text.
motive claim. To evaluate whether a particular rule, such as the contributory negligence doctrine, is efficient, one must consider the behavior induced by this rule. To evaluate this behavior, one must ask economic questions, but one need not conclude that the behavior results from the actor's viewing the rule as a price and optimizing against that price (and other prices). The rule of law might have no effect at all on individuals; they might be unaware of it and might act out of habit or custom. Alternatively, they might strongly believe that one should obey the law, a belief which fortuitously dictates efficient behavior. Moreover, causing an accident may provoke enough shame to induce people always to take the appropriate amount of care. In sum, the rule of law might set a "price" in a very complicated fashion. Efficient results may follow from nonoptimizing behavior.

In fact, however, law and economics scholars universally adhere to the behavioral claim, albeit frequently unconsciously or tacitly. Moreover, this adherence, while not logically required, seems more than coincidental and demands some explanation. Perhaps people attracted to law and economics habitually analyze phenomena by reference to individual optimizing decisions and, out of habit, follow the same procedure in studying behavior under law. Perhaps people trained in economics have a comparative advantage in analyzing behavior this way; it is efficient for them to view behavior under law as economic behavior. Alternatively, the "coincidence" may result from some fundamental quality of language, of culture or of mind. Critical legal scholars to a greater extent than others, I think, view the coincidence of views as profound and important. Indeed, as discussed below, law and economics is, according to Critical legal theory, inextricably (if not necessarily) linked to other, noneconomic aspects of liberal culture.

This discussion suggests then that law and economics asserts that economic theory best explains behavior under the law. This behavioral claim is frequently conjoined to one or more of the other three claims in order to support conclusions concerning the substantive content of legal rules. In the next section, I shall argue that this frequent conjunction of claims does not constitute a significant flaw in economic analysis of law because challenges to the normative, positive, or genetic claim are neither fatal nor debilitating to the behavioral claim. Thus, such challenges do not threaten the vigor of law

21. See text accompanying notes 41-46 infra.
and economics. Rather, the significance of law and economics derives from the implications of the behavioral claim for widely held ideas about law, ideas which are the true subject of the Critical legal scholars’ attacks on law and economics.

III. THE CRITICISMS OF LAW AND ECONOMICS

At least since the publication in 1972 of *Economic Analysis of Law*, a large and diverse group of legal scholars have subjected law and economics to frequent and often scathing attacks. Criticisms have come from three distinct groups: (1) people working within law and economics who have criticized one or more of the four claims outlined in Part II (the internal critics); (2) legal scholars not writing within either the law and economics or Critical Legal Studies movement; and (3) those within the Critical legal studies movement.

Since attacks on the positive and genetic claims have come exclusively from internal critics, I shall not canvass these attacks here. After all, the internal critics have not sought to undermine the enterprise of law and economics; their attacks always have assumed that some core of law and economics would remain central to the study of law. The external critics have not always shared this generous view of the importance of law and economics to legal studies.

In this section, then, I shall briefly discuss attacks on the normative and behavioral claims. I do this only to uncover the factors which distinguish the Critical legal commentators (group 3) both from other external critics (group 2) and from law and economics writers (including group 1’s internal critics). This section, therefore, does not comprehensively survey or evaluate criticisms of law and economics.

Internal and external critics have attacked the normative claim on largely the same grounds. These grounds may be sorted into three types: (1) a claim that the law should and does value other principles in addition to (or exclusive of) efficiency; (2) a claim that the efficiency criterion cannot be used consistently to set all property rights

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23. See note 2 supra.
24. See note 3 supra.
25. See note 1 supra.
simultaneously; and (3) a claim that the difference between the asking price (the price at which the owner of a good would agree to sell it) and the offering price (the price at which someone who wanted the good would be willing to pay for it) fatally undermines the normative use of the efficiency criterion. If the Critical legal scholars attacks on the normative claim are at all distinctive as a group, they are so because they emphasize the third claim, but debate over this third claim has widely appeared in the welfare economics literature and has not shaken the faith of anyone adhering to law and economics.

Indeed, the attacks on the normative claim, despite their number and their fury, have had little impact on the enterprise of law and economics. How can we explain both the vehemence of the attacks and their failure?

For many reasons, the normative claim is an inviting target. First, strong arguments suggest that it is wrong. Second, many of the arguments against the normative claim not only do not lie in economic theory but also do not require in-depth familiarity with economic analysis. Objections to the normative claim are grounded in moral and political thought: One must discuss value judgments. Third, the passing of judgment and the weighing of values are tasks integral to traditional legal scholarship; they are also tasks which economists have explicitly eschewed (though they may make such judgments implicitly) and with which they feel uncomfortable. Attacks on the normative claim confront economists on terrain where they move awkwardly if at all. Fourth, extravagant assertions of the reach of the normative claim in particular and of law and economics in general have encouraged the battering of an easy mark.

Despite its vulnerability, however, the normative claim is not central to the enterprise of law and economics. Thus, some of the bewilderment felt by law and economics scholars over the vehemence and volume of the attacks on their work stems from their attitude that the normative claim is peripheral to their "real" concerns. A successful attack on law and economics requires a frontal assault on the behavioral claim.

The only systematic assault on the behavioral claim derives from

28. E.g., C. Fried, supra note 3, at 93-94.
29. E.g., Kelman, Coase, supra note 1.
Mark Kelman has attacked the behavioral claim on three grounds. First, he contends that, contrary to the standard economic assumptions, preferences are endogenous to the process of choice. One's preferences evolve with the consumption pattern one chooses. Second, Kelman interprets the discrepancy between the offer and the asking price as a refutation of behavioral premises of economics. Third, he believes that economic theory, if accepted by an individual, induces him to behave in accordance with it. Thus, economic theory predicts the behavior of those who believe it because it is self-fulfilling; it will not, however, reveal much about the behavior of noneconomists.

These arguments have not had the persuasive force for which Kelman might have hoped. First, the problem of the endogenicity of preferences has long concerned economists and been the subject of some recent research. This research both establishes the complexity and difficulties of the problem and offers some hope that it can be resolved within economics. Moreover, the endogenicity of preferences does not negate the usefulness of the neoclassical assumption of fixed preferences within certain bounds. That culture or economic structures may determine the preferences that individuals have does not imply that preferences are not fixed for most short term or medium-term horizons. Capitalism may have shaped the preferences that each of us has in some profound way, but it seems unlikely that even a dramatic shift in social organization would instantaneously (or even within the course of a single generation) dramatically alter individual preferences. After all, one suspects that preference formation is a very complex process mediated by many different parts of the social structure.

Consider, as an example, the problem of advertising. It hardly...
seems significant, nor obviously correct, that advertising shapes my preferences among brands of a commodity. That one drinks Pepsi rather than Coke because advertising changed one's preferences seems unimportant. Moreover, though one argues that advertising distorts the choice between colas and fruit juices (or between unhealthy and healthy drinks), one need not believe that advertising changes peoples' preferences. People may have clear preferences regarding what they desire in a beverage, but advertising may misinform them as to the qualities that specific beverages have. This argument is not meant to deny that advertising affects preferences; I only wish to suggest that it does so in some complicated and perhaps only supplementary fashion. Advertising may reinforce images people have of themselves and ideas of how one should spend one's time or live one's life, but these images and beliefs are formed and maintained by many other social structures.

Second, most economists regard the offer/asking price problem as a minor anomaly with which economics will eventually cope. After all, the offer/asking price problem arises not at a theoretical level but at a level of application. For any initial allocation of endowments, one can, in theory, calculate the resulting allocations of goods and services and the resulting distribution of utilities. Thus, in theory, one could tell whether particular allocations of endowments were pareto comparable to one another and whether any were pareto optimal. These comparisons are not dependent on the offer price equaling the asking price. The third claim, that a belief in neoclassical theory induces behavior in accordance with it, is not acceptable to most economists because it derives from a conception of social theory, to be discussed in part IV, alien to that in which neoclassicists work.

Kelman's arguments also have failed to convince many lawyers interested in law and economics, lawyers who lack the commitment to and sophistication about economics that professional economists presumably have. These lawyers, I think, accept the fact that economics does not predict economic events with breathtaking accuracy. Further, they have reason to believe that application of economics to the legal context presents special difficulties because they perceive that the neoclassical assumptions regarding preferences and rational-

37. The offer/asking problem is primarily a reflection of the wealth effect. Kelman has asserted that a nonwealth-dependent offer/asking divergence occurs. See Kelman, Coase, supra note 1, at 690-91. In either case, distributions of utilities are theoretically incalculable.
ity are not always met. Yet these lawyers still adhere to the behavioral claim. This adherence derives from beliefs that lawyers hold about law, not about economics. These beliefs about law are not subverted by Kelman’s arguments which apply to economics generally.

The behavioral claim is secure in large part because the dominant strain in American jurisprudence requires some theory of behavior under law, and the economic theory of legal behavior is the only systematic theory available. Almost all American legal scholars, judges, and lawyers hold an instrumental view of the law. The instrumentality of the law lies at the center of the debate among law and economics, Critical Legal Studies, and rights-based theories of law. Crudely, instrumentalism means that we adopt legal rules to promote some goal, whether it be efficiency, racial equality, or economic equality. A legal rule is good if it promotes the goal and bad if it fails.

This crude definition of instrumentalism, however, does not adequately distinguish the competing conceptions of the social role of law embedded in these three schools of legal thought. In this essay, then, I use the term in a somewhat more precise and, perhaps, special sense. Instrumentalism, for purposes of this essay, implies that some person or group of persons consciously selects legal rules to channel the behavior of others. When using this definition, one must be precise about the meaning of “conscious selection.” Clearly, a ruling elite agreeing on a particular legal rule to achieve a specific result constitutes “conscious selection.” Agreement reached by negotiation in the context of a democratic system would also constitute conscious selection. If, however, legislators pursued goals set by institutional, educational, or cultural tradition, the rules they enacted would not be “instrumental,” their purpose not having been consciously chosen. One must also be clear about the meaning of “channelling behavior.” Even a judge or legislator who believes (in accordance with the principles of natural law) that the law’s sole function is to achieve

38. In family law, for instance, parental concern for a child or spite for and envy of an ex-spouse introduce interdependencies among preferences that may result in nonconvex preferences. Neoclassical theory requires convex preferences for its equilibrium and welfare results. Spite or envy may also cause people to act “irrationally.” Here “rational behavior” is defined by the individual’s own “long-run preferences,” as opposed to those induced by the (possibly) transient emotion of spite or envy.

justice between litigating parties will acknowledge that the law "channels" some behavior. The law induces the parties in front of the court to resolve their dispute. One party must pay damages to another or must refrain from some specific activity. Under an instrumental conception of the law, a legal rule has a much broader impact on behavior. It influences the conduct not only of the parties before the court but also the conduct of all others similarly situated. Legal instrumentalism therefore views the law as a tool for organizing society in the manner the body politic chooses.

Legal instrumentalism thus buttresses the behavioral claim in several ways. First, just as legitimate goals legitimate the law and the particular legal rules designed to achieve such goals, instrumentalism legitimates the use of a behavioral theory. Second, a behavioral theory is necessary in order to accept instrumentalism. One cannot offer a "policy" argument for or against a legal rule unless one predicts what consequences the rule will have on behavior. Currently, the analyst must choose between two methods of prediction: guesses that are off-hand and intuitive or guesses that are informed by the discipline of economic theory. Economic theory may not be a perfect, or even a near-perfect, predictor, but it does better than unaided intuitions. Finally, and most significant, the naive instrumentalism that has characterized Anglo-American jurisprudence, at least since Bentham, implicitly adopted a behavioral theory akin to economics: Bentham thought that both tort and criminal laws coerced people into adopting or foregoing specific behaviors. Austin's legal positivism rested on a concept of the law as a command issued generally. Implicitly, he assumed that those who received the command obeyed it. Law and economics, therefore, completes Bentham's jurisprudence by adding a positive theory of behavior to Bentham's utilitarian concept of law.

This argument suggests three distinct ways to undermine the behavioral claim: (1) develop a better, noneconomic theory of behavior under law; (2) undermine the instrumental view of law on which support for the behavioral claim rests; or (3) show the "illegitimacy" of every goal (including efficiency) that the law seeks to further. Critical legal commentary evinces a motivation to discredit every aspect of law and economics. This motivation transforms writings that would otherwise be conventional critiques of the normative claim, or

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41. H.L.A. HART, supra note 6, at 18-25.
of economics in Kelman's case, into precisely the triple-pronged attack on the behavioral claim described above.

Of the Critical legal critics of law and economics, Tom Heller has best understood that the conflict between the two movements stems from their fundamentally divergent visions of law. To Heller, "[L]aw-and-economics ought [to] be understood not simply as a tool of analysis but as a jurisprudence which is responsive to a variety of difficulties which were perceived in earlier formulations of liberal theories of the state and law." Hence, the different vision of law and society held by law and economics scholars rather than the technical premises of the economic arguments provokes their intense disagreement with Critical legal theory.

Heller claims that law and economics functions jurisprudentially because it conforms to other dominant concepts within liberal culture. His idea of conformity is not one of logical necessity; rather, he contends that something in language, society, or culture links ideas and concepts in a manner perhaps similar to that which connects the behavioral, normative, positive, and genetic claims of law and economics outlined in part II. Specifically, Heller identifies four tenets of liberal thought that theorists used to legitimate the processes and contents of legal decisionmaking: (1) individual preference satisfaction is the sole normative justification for state decisions; (2) costs of production ought to be distributed in proportion to the use of the goods; (3) property may only be transferred if the person losing the property right is compensated appropriately; and (4) positive argument justifies decisions while normative argument does not.

These four premises explain the focus of the Critical legal attacks on law and economics. Preference endogeneity and the offer/asking price problem become central because liberal legal theory requires, in Heller's view, fixed preferences and a clear procedure for determining the amount of compensation an aggrieved property owner should receive. These four tenets of liberal thought do not, I think, carry us the entire distance between law and economics and Critical legal theory. For Heller's criteria reflect only normative and conceptual parts of a legal theory and not its positive part. Yet part of the

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42. Heller, supra note 1, at 184.
43. Id. at 185-86.
44. See notes 11-21 supra and accompanying text.
45. Heller, supra note 1, at 190.
46. Heller's first three criteria are normative ones, identifying what the legal rule should be. His last criterion offers a standard for identifying "good" legal arguments and hence is "conceptual" as discussed in text accompanying notes 5-6.
claim made by Critical Legal Studies asserts that the implementation of these norms and standards of argument produces unjust results in the world. Indeed, Critical legal theory primarily argues that we must focus on the actual injustice of the legal institutions. Understanding the social functions of law and how law accomplishes these social functions is therefore a central goal of the Critical Legal Studies movement.

The tone of Critical legal attacks on law and economics differs from the tone of other attacks, but those in law and economics have wrongly perceived the difference to be simply a matter of vehemence. In fact, the tones differ because the attacks differ. Critical legal theorists believe that law and economics represents an inaccurate vision of law and its role in society. To the Critical legal scholar, law is the great image of authority, an image both distorted by and distorting of an authority neither wholly legitimate nor completely impregnable. To evaluate the Critical legal vision, we must first understand the theory that justifies it.

IV. WHAT IS CRITICAL LEGAL STUDIES?

Both the diversity of views among members of the Critical Legal Studies movement and the largely destructive nature of their writings thus far forestall a neat characterization of the Critical legal program. Thus I cannot list, as I did for law and economics, a small number of theses commonly presented by Critical legal scholars. Rather, I shall note a number of differences in approach to the study of law that distinguish Critical Legal Studies not only from law and economics and traditional doctrinal analysis but also from the third major contemporary intellectual movement in legal studies, the individual rights movement.47

47. For examples of rights-based theories, see R. DWORKIN, supra note 5, at 81-130; C. FRIED, supra note 3.

This essay does not discuss the third major contemporary approach to legal studies. Rights-based theories of law contend that the “correct” rules of law are those that reflect some political theory. Under a natural law version of a rights-based theory, the appropriate political theory would be the one underlying a just society. In a theory like that of Dworkin, rights derive from the political theory that best harmonizes the legal history of the polity in consideration; in hard cases judges elaborate this theory in accordance with their own conception of the just society. See R. DWORKIN, supra note 5, at 81-130. Rights-based theorists have not generally articulated a positive part to their theory of law; they have not asked how law functions in society. Thus, the conflict between rights-based theorists and Critical Legal Studies has focused on whether law embodies a conception of a just society.

Crudely, Critical legal theorists might attack rights-based theories in any of three ways. First, Critical Legal Studies might contend that there is no true political morality, either in
First, Critical legal scholars regard law primarily as a social institution rather than primarily as a normative study. To study law as a social institution focuses attention on what roles law plays in society, how it fulfills those roles, and how it interacts with other social institutions. By contrast, the normative study of law first considers law as a deontological system; it thus seeks to understand what "logical" relations exist among the obligations imposed by the law on individuals and how these legal obligations correspond to moral and other types of obligations. Second, and conventionally less significant, the normative study evaluates legal institutions, which implicitly requires investigation of how institutions actually function. The difference between the study of law as a social institution and the study of law as a normative system requires much elaboration because the difference is subtle and depends on the more or less explicit intention of those who regard themselves as engaged in studying one or the other system. In actual practice, people shift uneasily and unconsciously between the two modes.

In "traditional" legal studies—in which I include law and economics, the current rights-based movement, and standard doctrinal analysis—the predominant intellectual concern has been with the normative structure of legal systems and not with their relation to the rest of the society. In pursuing this concern, traditional jurisprudence moved from the study of the concept of law to the study of obligation. Legal positivism may have separated law from morals, but it still treated law as a deontological system of norms. Kelsen demonstrates this view most dramatically, but even H.L.A. Hart, who ultimately grounds the concept of law in the social behavior that defines the rule of recognition, emphasizes legal norms, which he contrasts with moral norms. Similarly, legal scholars have generally referred to moral or political philosophy for guidance or assistance in resolving various legal dilemmas. As I shall argue below, this

the natural law or in the Dworkian sense, to which the law may resort for guidance. Second, rights-based theories might fail because the process of adjudication and lawmaking could not possibly produce results that conformed to the appropriate political morality. Third, Critical legal theory might argue that law is nothing but politics and has no distinctive character at all.

An elaboration of the criticisms outlined above would require another paper which would offer detailed discussion of the meaning of the three attacks.

Conversations with Ronald Dworkin stimulated my interest in this side of the controversy and clarified my thoughts on it.

48. Heller, supra note 1, at 200.
practice contrasts sharply with the reliance of Critical Legal Studies on epistemology for assistance in its attacks on conventional legal theory.

The traditional emphasis on law as normative theory manifests itself in other ways as well. For instance, the discussion of law and economics has largely been confined to the normative claim. The emphasis on the normative claim stems naturally from the traditional view that legal studies should identify the values that the law implements rather than examine the mechanism through which law affects behavior. Everyone debated what the law ought to be while quietly adhering to legal instrumentalism. The adherence to instrumentalism, which is, as argued above, central to law and economics, has largely been implicit in traditional legal studies.

Furthermore, the materials used to study law have insured that it remain a predominantly normative endeavor. One cannot understand much of how law affects general social behavior if one restricts one's attention to case law and statutes. Statutes, regulations, and case holdings report what obligations people have; they do not systematically report how people actually behaved under the rules. Cases, the dominant form of data used in law classes and in legal scholarship, also report arguments for the obligations finally imposed, but these arguments are not empirical. Trials do not generally develop information about the general patterns of behavior induced by a legal rule, and courts have very little access to such information.

The attempt to predict how courts will decide is, of course, an empirical study and manifests a view of law as a social science. To the extent that traditional legal studies thus aspires to study law as a social institution, its focus on cases narrows significantly the potential scope of the enterprise. Such an approach does not place law within the wider social context or necessarily lead one beyond the contents of cases.

Critical legal theory ostensibly seeks to view law as simply one aspect of a larger social structure. In practice, Critical legal theory does not look beyond the case law any more than traditional legal theory has done. Moreover, while Critical legal theory does not

51. See notes 11-21 supra and accompanying text.
52. Critical legal studies reads the cases to extract the ideology embedded in the law. It is the argument of part V, section B that articulating the ideology is inadequate, particularly as Critical legal theory seeks to regard law as part of a more comprehensive social structure. To understand law, we shall have to look beyond the casebooks to actual behavior.
seek to discover from the cases what values the law ought to implement, it does search for the values expressed by the law. Thus, the difference between traditional and Critical Legal Studies might appear to be minimal. If one accepts, as Critical legal scholars argue, that traditional legal studies is embedded in a particular liberal theory of society and the state, then one might conclude that Critical legal theory constitutes a nonliberal branch of traditional legal theory.

The distinction between Critical and traditional legal scholarship derives, at the very least, from the radically different theory of society on which Critical legal theory relies. Critical legal scholars borrow from continental philosophers and social theorists, whose influence has both substantive and methodological consequences. Substantively, Critical legal theory, inspired by such philosophers as Habermas and Foucault, sees society as fundamentally oppressive. Furthermore, the "instrument" of oppression is complex, comprised at least as much of "ideology" as "behavioral controls." Liberal social theory, on the other hand, while it may be critical of particular institutions or practices, is more pragmatic and behaviorist. To illustrate the difference between the two schools, the term "reformist" captures the liberal attitude while the term "revolutionary" captures the Critical legal attitude.

Methodologically, the reliance on a different tradition of social theory implies that Critical Legal Studies has adopted a different concept of social structures in general and legal structures in particu-

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53. Critical legal theorists draw on a wide range of continental philosophers who differ greatly among themselves. I detect five influences: (a) the Frankfurt School of Sociology, now represented by J. Habermas, Knowledge and Human Interests (1971); J. Habermas, Legitimation Crisis (1975); (b) the writings of Michel Foucault, in M. Foucault, Discipline and Punish: The Birth of the Prison (1971), M. Foucault, Madness and Civilization: A History of Insanity in the Age of Reason (1965), and M. Foucault, The Order of Things: An Archaeology of the Human Sciences (1971); (c) structuralists, such as Lévi-Strauss; (d) A. Gramsci, Selections from the Prison Notebooks (1971); (e) the phenomenologists, such as Husserl, Heidegger, and Merleau-Ponty, and (f) hermeneutists, such as Gadamer and Ricoeur.

The rival tradition is largely that of British empiricism starting with Bacon, flourishing with J. Locke, An Essay Concerning Human Understanding (1st ed. 1690), and D. Hume, Treatise on Human Nature (1st ed. 1748), and then infused by logical positivism, e.g., A.J. Ayer, Language, Truth, and Logic (2d ed. 1936), to stay with British philosophers.


55. For criticism and exposition of Foucault's work, see H. Dreyfus & P. Rabinow, Michel Foucault: Beyond Structuralism and Hermeneutics (1982).
lar. While the continental schools differ greatly among themselves, they agree in their criticisms of Anglo-American philosophy of social science. Writers such as Foucault and Habermas suggest, contrary to the views of the positivist school, that social theory requires a different methodology than natural science. To understand society, a theory must explain not only external phenomena but also the conscious acts of humans, in particular the acts that generate the social theory in question. This reflexiveness itself demands methods not required in the natural sciences. While structuralism does not necessarily share the view that the method of social science differs radically from that of natural science, it shares the perception that theories do not explain social reality so much as constitute it. Noncritical social the-

56. See notes 45-53 supra.

57. Structuralism refers to a family of approaches to the study of language and other social phenomena. Most structuralists assert that one cannot study human activity from outside the activity itself; consequently one must choose some internal perspective from which to examine the phenomena. Moreover, the objects observed are not defined by "essences" that exist independent of each other and the viewer but instead the objects are defined by their relations to one another.

The seminal structuralist work is F. De Saussure, A Course in General Linguistics (C. Bally & A. Sechechaye eds. 1966). Language still provides the most natural context in which to understand structuralism. Consider, for example, noises. Every noise is a possible element of a language structure, but only morphemes, those sounds we recognize as words, constitute actual elements in the structure. These morphemes are only defined by the relations among themselves. So, "tete" is noise without significance in English but with significance in French while "head" has significance in English but not in French. In addition, we recognize many different noises as representing the same morpheme. The noise I make to say "pet" probably differs from the noise you make to say "pet," but we both recognize the word. "Pet" is distinguished by its relation to other noises that each of us makes; for example, "pet" differs from "bet," "pit," "put," "pot," and "pat." J. Culler, Ferdinand De Saussure 8-50 (1976).

The structures of language extend to syntax and semantics. Words for color are meaningless in isolation. That which we identify as "brown" depends on what we define as "red," "tan," "green," and more generally as "not brown." Indeed, different languages might divide up the world of color differently. More generally, different languages create different conceptual schemes, a phenomenon that creates difficulties for translators. Id. at 16-18.

Structuralism is ahistorical. While language changes over time, structuralism can only tell us about the language we have at any given moment. Change in language exists outside the system and is typically explained causally. Structuralist explanation is not causal but axiomatic. A structuralist theory of language identifies the relations that linguistic elements have to one another and the rules for combining those elements. Id. at 19-41.

ories mistake contingent, social facts for necessary ones. We are captives of the world our theories create.

I do not wish here to enter the complex debate about the philosophy of social science and the competing continental and Anglo-American views therein. Rather, I shall restrict myself to discussing how Critical social theory alters the study and conception of law. The most significant alteration stems from the concept of "ideology" that Critical legal theory has adopted from continental social theory. I defer discussion of that central notion until part V. Here I consider only the Critical social theorist's view of the role of law in society and his description of the nature of a legal theory, not his account of the social mechanisms through which the law carries out its functions.

Thus far, I have characterized Critical Legal Studies only by its adherence to a theory of society distinct from the theory of society to which traditional theorists loosely adhere. Critical legal theory, however, differs from traditional views of the law in at least two other respects. First, Critical legal scholars do not believe that the law furthers the goals that legal actors consciously seek to advance. Second, they deny that the law primarily affects behavior through changing the incentives or prices that individuals face.

As noted above, most lawyers in the United States, as legal instrumentalists, believe that laws should promote some desired conduct in the real world. Such a view is particularly consonant with utilitarianism and legal positivism; it is also consistent with many theories of natural law that want the law to promote the values determined by natural law. Legal instrumentalism consists of two claims: (1) that the law furthers the goals which legal actors con-

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58. The philosophy of social science addresses a variety of interrelated topics. Specific topics include: (1) reductionism (can social science be reduced to statements in psychology or biology?); (2) holism (can every social phenomenon be explained solely in terms of the actions of individuals and their relations to one another, or are some phenomena "emergent"?); (3) rationality (what does it mean for someone to act rationally?); (4) methodological unity (does any difference in kind exist between the methods of the natural and social sciences?); and (5) the fact/value distinction (can one have a value-free social study?).

Many Anglo-American social scientists adopt positions of individualism, methodological unity, and value-free ideals. Continental schools tend to be nonreductionist and holistic; they also reject both the fact/value distinction and the idea of methodological unity. These latter two claims are related because continental schools deny the fact/value distinction for reasons stemming from the special character of inquiry demanded by the social studies. Human consciousness creates the social world, a world made up of facts and values as termed by the empiricists. The most fundamental difference, of course, is the epistemological one: the contention that the method of the social sciences is inherently different from the method of natural science.

59. See notes 39-40 supra and accompanying text.
sciously seek to advance and (2) that economic theory can explain individual behavior under law. Critical legal scholars, however, deny both that judges intend the actual effects of their decisions and that law primarily affects behavior through changing the incentives or prices that actors face. Thus, Critical Legal Studies is at odds with such noninstrumentalists as Charles Fried, who believes that the law ought to do justice between the parties without regard to the impact of particular outcomes on future conduct in general. Critical Legal Studies, on the other hand, accepts the view that the primary significance of law derives from its oppressive effects but denies that these effects are the conscious by-products of lawmakers or those seeking to influence lawmakers.

As noted in Part III, whether a view is instrumental or not depends on what constitutes "conscious" selection of rules of law. The law is not instrumental simply because judges seek to advance some goal. The goal judges seek to further may not, despite their good intentions, in fact be advanced by their decisions. Also, judges may not be aware of their own motives and thus may pursue hidden agendas, or they may not be aware of the mechanisms through which law acts in society and, therefore, may produce additional unintended effects. For example, a judge, because he does not appreciate the impact on nonparties' lives of a decision denying a tort recovery, might not perceive a particular outcome to be "oppressive" though it may in fact be so. In another example, the judge might create a legal doctrine, such as private property, because he believes it will achieve productive efficiency by creating the proper incentive (personal enjoyment of any product from one's property) when in fact high production results from an ideological mechanism (a liberal individualist view of the world). Thus, the law may convey and influence values. A theory that proclaims causal power for the law does not require that conspiracy exist but rather asserts that the processes that produce law are complex in much the same way that markets are. In markets, people act individually and for private reasons. Each wants something (riches or unlimited pleasure), but the market produces something (prices and quantities) that no one in particular wants. In 18th century terms, "private vices lead to public

60. See notes 39-41 supra and accompanying text.
61. C. FRIED, supra note 3, at 61, 161. Although even when doing justice, the law channels the behavior of the parties before the court, it is not in this way fulfilling an instrumental role in the wider sense. See notes 39-40 supra and accompanying text. Therefore, I classify Fried as a noninstrumentalist.
62. See notes 39-40 supra and accompanying text.
virtue.” The market aggregates individual actions into complicated outcomes outside the control of any single individual or group of individuals. Legal processes also aggregate legal behaviors into an expression not necessarily within the conscious control of any group, though the ideology may in fact serve the interests of a particular group. Of course, to the extent that Critical social theories do not subscribe to the methodological requirement that all explanations of social phenomena be reduced to the behavior of individuals, Critical legal theory can more easily adhere both to law’s causal efficacy and to law’s actual noninstrumentality.63

Critical legal explanations of legal doctrine and legal institutions implicitly contain a theory of behavior under law. To understand this theory of behavior requires understanding the key concept within it: the concept of ideology.

V. A Critical Theory of Law

A. Law as Ideology

The concept of ideology lies at the heart of Critical legal theory, but several factors prevent a clear understanding of the term and its use in Critical legal theory. First, social theorists have used “ideology” in many distinct ways. Second, ordinary usage has further confused the meaning of the term. Third, Critical legal theorists have not all used the term identically. Nor have they clearly distinguished the senses in which they use “ideology” from the general usages of social theory and ordinary language. Finally, the concept as used by Critical Legal Studies is complex and not easily grasped even when articulated clearly.

Critical legal theory’s concept of ideology may be related in two different ways to the concept of ideology used variously in the continental tradition of social theory. First, Critical legal theory might work directly with a concept of ideology developed by one particular school of continental social theory, or, second, it might have developed its own concept of ideology consistent with the general tradition but at odds with particular versions offered by others. While this latter endeavor is clearly the more ambitious intellectually, the former should not be understated. Such a well-developed social theory

63. That is, one can consistently and simultaneously espouse both methodological individualism and a radical view of ideology which is not a conspiracy theory. Thus, this argument in the text, to some extent, assimilates the Critical legal position with a view consistent with liberal positions.
as that of the Frankfurt School has not offered sustained or interesting analyses of law. Simply providing such an account within the parameters of Habermas' theory of society would be a significant accomplishment.

In this part I attempt two tasks: to clarify the concept of ideology as used by Critical Legal Studies and to discuss how this concept applies to the study of law. I shall explain the concept of ideology by focusing on Habermas' account of the concept. Not everyone in Critical legal theory would accept this vision of ideology, but Critical legal theorists have not offered well-developed, competing theories. Since the broad outlines of any competing theory will conform to the boundaries of Habermas' theory, the discussion below should at least partially illuminate even those Critical legal theorists who disagree with Habermas. In this account of Habermas' view of ideology, I have benefitted greatly from a brief but brilliantly lucid book by Raymond Geuss.\textsuperscript{6} Most of what I have to say about ideology per se (as opposed to legal ideology or the application of the idea of ideology to legal studies) derives from Geuss. Those seriously interested in understanding Critical Legal Studies would do well to read his book.

To clarify how the concept of ideology applies to the study of law, this part begins by explicating the relationship of ideology to several other key terms in Critical legal theory—legitimation, hegemony, and false consciousness. From this perspective, the concerns of Critical legal theory closely parallel the concerns of liberal political philosophy, as manifest in the attempts of scholars in both schools to elaborate the concept of consent.

1. The concept of ideology.

Generally, ideology refers descriptively to the set of beliefs, norms, attitudes, and concepts held by an individual or widely held within a group of individuals. This use of ideology is purely descriptive; it neither judges nor criticizes the beliefs held. Critical legal scholars do not use "ideology" in a purely descriptive sense. "Ideology" is pejorative; it is something to see through and discard.

We condemn beliefs, norms, attitudes, and concepts for various reasons. Critical legal theorists condemn legal ideology not because it is morally wrong or instrumentally inappropriate (inappropriate in the sense that it impedes the achievement of agreed upon goals), but

because it is false. To explain the concept of ideology as "false consciousness" requires that we understand how an ideology can be false.

One might have a false consciousness for two reasons: One might misperceive one's interests or one might misperceive the world in which one acts. Consider, first, misperceptions of the world. Again, the misperception might be of two types—informational and epistemic. The former, which is the simpler type, arises when the individual has insufficient or inaccurate information by which to judge the truth of his beliefs. Many Critical judgments of foreign policy, the government may assert, are false because the critics do not possess sufficient information about the situation in the foreign country. Many approving judgments of foreign policy may be false for the same reason. It is difficult to understand why uninformed views of foreign policy represent "false consciousness." Even when the government intentionally restricts the flow of information, an individual's view may consequently be false, but it is not necessarily ideological or unreasonable. One may attribute the defect in the opinion entirely to a cause exogenous to the individual. The opinion is the best she can form, given the available information.

The misperception of the world, however, may also arise from what Geuss terms "an epistemic mistake." For instance, one might mistake a normative judgment for a factual judgment or a social and contingent phenomenon for a natural and necessary one. In these two related instances of epistemic error, the individual fails to apply the appropriate criteria in evaluating the statement or phenomenon. This failure has an important consequence: The individual will accept as objective or inevitable something that might be subjective or avoidable. She is deceived in a fundamental way. If people believe that the social structure they inhabit is natural and necessary, rather than social and contingent, they will, perforce, accept it; if they think the world cannot be changed, they will not act to change it. Similarly, one can revise his normative assessment of a social situation, but he must accept factual information. This second way of misperceiving the world allows both falsity and deception. It underlies many of the Critical legal attacks on law and economics and traditional legal doctrine. Heller and Kennedy's insistence that legal/economic analysis masquerades as value neutral scientific analysis derives its force from this view of ideology.

66. Heller, supra note 1, at 193-98; Kennedy, supra note 1, at 388, 444-45.
The second type of misperception, a mistake of one’s interests, is more complicated. It rests on the presumption that an individual has true interests that may be unknown to him. While liberal political theory has long distinguished between an individual’s interests and his wants or preferences, such a distinction is alien to economics, and hence to law and economics. Economists posit that the individual knows his preferences; even liberal political theorists presume that the individual knows his own interests. Common experience, however, suggests instances in which interests and preferences diverge and in which the individual pursuing his preferences might be unaware of his own true interests. To use Geuss’ example:

To speak of an agent’s ‘interests’ is to speak of the way that agent’s particular desires could be rationally integrated into a coherent ‘good life.’ Alcoholics can be said to have an ‘interest’ in giving up drink even if they don’t recognize it because we know that health (and in extreme cases, life itself) is central to their conception of the ‘good life’ and that excessive drinking cannot be integrated into such a life.

An individual may be unaware of his own interests, but this fact does not explain how ideology deceives him. He might be unaware of his own interests because he lacks sufficient factual information or actually has false information, but the remedy for this deception lies in simply correcting or providing the true information. Such a procedure is completely acceptable to the economist or lawyer/economist. Critical theory suggests that an individual’s beliefs may be false because of the manner in which the individual came to hold those beliefs. The analogy is to psychoanalysis, in which a person, who at first does not understand his motivation for acting in a particular way, learns to see his true motivation and thus becomes able to act differently. The idea that the genesis of a belief could make it false is hard to comprehend because the origin of a belief does not generally bear on its truth. In psychoanalysis one searches for motivations which are not only unacknowledged but also unacceptable. Again, Geuss provides an illuminating example:

A prime example of the genetic approach . . . is Nietzsche’s criticism of Christianity. This criticism is ‘genetic’ because it appeals to a purported fact about the ‘origin’ of Christianity—that Christianity arises from hatred, envy, resentment, and feelings of weakness and inadequacy. To say that Christianity ‘arises’ out of hatred and envy is presumably not to make a historical statement

68. R. Geuss, supra note 54, at 47-48.
but to make a general statement about the typical motivation of Christians. How do we know that these motives are ‘unacceptable’? . . . It is sufficient . . . that the Christian cannot acknowledge hatred as an acceptable motive for beliefs, preferences, and attitudes. Since it is a central doctrine of Christianity that agents ought to be motivated by love, and not by hatred, resentment, envy, etc., Christianity itself gives the standard of ‘acceptability’ for motives in the light of which it is criticized. If Nietzsche’s account of its ‘origins’ is correct, Christianity ‘requires’ of its adherents that they not recognize their own motives for adhering to it.69

This example, by a Critical theorist, closely parallels the form Critical legal arguments against law and economics or against traditional doctrinal justifications take. Heller, Kelman, and Kennedy strive to show that economic analysis of law is internally inconsistent in a fashion akin to the internal inconsistency Nietzsche’s Christian suffers. More generally, ideology disguises one’s motivations from oneself and thereby permits action that one might otherwise eschew as against one’s own true interests or beliefs about the world. In the genetic false consciousness conception, ideology leads an individual to act against his interests because he misunderstands his motives, just as in the epistemic conception, ideology leads an individual to act contrary to his interests because he misconceives the nature of the world and the likely consequences of his acts. Thus, the concept of ideology provides a starting place for a noneconomic theory of behavior under law.

2. Legitimation, hegemony, and consent.

Liberal political theory and Critical theory both seek to understand what legitimates particular social structures. While the two enterprises differ—liberal theory wants to determine the normative criteria which make a form of government legitimate while Critical theory tries to elaborate the social structures that insure that citizens accept the government (whether it is normatively legitimate or not)—the endeavor to understand consent resembles the endeavor to understand legitimation.

Crudely, an individual might consent to some social arrangement because it is in his interest to do so. Acceptance may be in the individual’s interest because the social structure actively (or on the whole) promotes his interest and well-being. Alternatively, acceptance may be in the individual’s interest because objection will subject him to adverse consequences. Some of these adverse

69. Id. at 43-44.
consequences might be called coercive, and hence we would not term his obedience consensual. For instance, someone who obeys laws under threat of torture is not said to consent to the legal structure. Still, people may tolerate manifestly unjust social arrangements without being threatened with torture and without accepting the social arrangement. An individual might prefer overall a more equitable social structure but be unable unilaterally to bring about such a structure; given her options, she "consents" to the extant social structure, but she would prefer a more egalitarian one. In none of these three forms of consent, active, coercive, or instrumental, does legitimation or hegemony come into play.

"Hegemony" is Gramsci’s term for the noncoercive control of oppressed classes in society by means of nongovernmental structures and activities. Critical legal scholars, however, apply the term to legal structures as well because legal ideology extracts “consent” in a manner similar to Gramsci’s hegemonic structures.

Legitimation and hegemony do operate when consent derives from false consciousness. An individual might accept a social structure if she believed that that structure were inevitable or necessary. If her belief were false, the result of ideological delusion, then the ideology served to legitimate the social structure and her relationship with the law could be characterized as one of hegemony.

3. Law as ideology.

Legal ideology refers either to the beliefs that individuals hold about law or to the set of beliefs, ideas, and values embodied in the legal institutions and legal materials (cases, regulations, and statutes) of a particular society. Critical legal methodology, which relies on legal texts and commentary as its source material, suggests that the latter description of ideology, ideas embodied in legal materials, is the one that Critical legal writers intend. The former description is less likely insofar as Critical Legal Studies makes little attempt to

70. Akerlof, The Economics of Caste and of the Rat Race and Other Woeful Tales, 90 Q.J. ECON. 599 (1976), provides a provocative economic model of caste structure in which no one approves of caste, but each person acting individually finds it in her own interest to adhere to caste rules.


conduct surveys in order to study the ideas individuals actually hold about law. While texts may be evidence of the beliefs an individual holds, legal texts can provide evidence only about the ideas judges, legislators, and legal scholars hold, unless we have a more complex theory of how people other than the writers themselves come to hold the ideas expressed in legal materials.

Someone referring to the ideology embodied in the law might intend to convey three different notions. He might mean that the law simply expresses a particular set of beliefs without necessarily influencing or otherwise altering individual behavior or beliefs. According to this view, values expressed in the law have no causal impact on the rest of the social structure. Second, while legal ideology might have causal efficacy as well as being expressive, it might not directly affect ordinary citizens ("nonlegal" actors). Rather, legal ideology may simply identify a set of legitimate arguments and reasons that legal institutions and legal actors may use to justify their actions. This set of arguments and reasons may determine the outcome of some, though not necessarily all, disputes. To the extent the mode of argument constrains the actions of legal actors, it may affect the actions of everyone, for every person may consider the constrained legal actions in choosing his own acts. A third view holds that legal ideology might affect "nonlegal" actors directly. It might, as will be suggested below, alter the preferences or desires of individuals, or it might change their available choices in particular ways.

Critical Legal Studies uses "legal ideology" in this third sense of not only expressing values but also directly (if incompletely) shaping the "ideologies" of individuals. I cannot adduce direct evidence that supports my claim that Critical Legal Studies holds this last view, but several factors are suggestive. First, many in Critical Legal Studies believe that the law functions to "legitimate" social arrangements. Critical legal scholars may concede that legitimation occurs only for legal analysts or for lawyer/economists, but Critical legal theorists appear to believe that hegemony (or, perhaps, in liberal terms, consent) enthralls one and all. Second, Kelman's criticisms of the Coase theorem suggest that legal ideology influences a wider audience than one composed of legal actors:

Neo-classical economists feign an apolitical value neutrality: they purport simply to explain how people can best attain any set of values. But the discipline's basic building block method . . . is anything but apolitical. It is a method that could only be invented and adhered to by apologists, those whose interest was in reassuring us all of the benificence [sic] of whatever order happens to emerge
from the interplay of market forces, regardless of the nature of the society in which that market functions.\textsuperscript{73}

Third, if legal ideology did not affect behavior, it would be difficult to understand why everyone is so upset about it. Indeed, the Critical legal purpose in unmasking the ideology of the law is to free us from that ideology. If we understood how we are bound, we could untie ourselves. Then, we would no longer accept the contingent as the inevitable. Fourth, the view that legal ideology constrains only legal actors brings the Critical legal theorists closer to the conventional critics of law and economics.\textsuperscript{74} We can interpret the Critical legal attacks on law and economics in two ways. These attacks might primarily claim that economic analysis of law promotes ideology, or they might claim that law generally promotes ideology. To assert that economic analysis of law serves an ideological function implies that only legal actors—legal academics, judges, and possibly lawyers—are directly affected by the ideology. But this would not be such a radical position. Many conventional critics of law and economics similarly contend that using economics to arrive at decisions will lead people to the wrong answer. For example, one such critic has written, “I shall point out biases and inconsistencies in Posner’s economic methodology and will argue that welfare economics as currently used by legal writers provides an ideological, and frequently objectionable, basis for policy guidance.”\textsuperscript{75} For Critical legal theory to qualify as a radical intellectual movement, it would have to express a more radical vision of ideology. Only the assertion that legal ideology directly affects all individuals, legal and nonlegal actors alike, introduces a concept of ideology incompatible with conventional legal ideas.

From this “direct effect” view of legal ideology two distinct behavioral theories of law follow. The simpler alternative modifies slightly the economic theory of behavior under law. People respond optimally to their environment in light of their known self-interests. Ideology distorts their knowledge of their own self-interests and consequently leads people to act contrary to their “true” interests. Under this view, individuals, as rational maximizers in the economic sense, must first pierce or dispel the distortions created by ideology in order to act appropriately. The primary task of Critical legal theory,

\textsuperscript{73} Kelman, \textit{Choice}, \textit{supra} note 1, at 796–97.

\textsuperscript{74} For a discussion of the taxonomy of legal critics, see notes 1–4 \textit{supra} and accompanying text.

\textsuperscript{75} Baker, \textit{supra} note 3, at 4 (footnotes omitted).
then, is to reveal to people their true interests. The second theory of behavior rests on a more complex account of psychology. According to this theory, a model of simple preferences is inadequate to explain human behavior and human consciousness: Individuals manifest conflicting preferences, beliefs, interests, and values, all of which interact in complicated ways. This psychology explains our everyday manner of speaking. When a person does something apparently contrary to her own self-interest, it might be that she misunderstood her self-interest. Occasionally, however, we agree that she understood what was best for her but chose to ignore her self-interest and to act altruistically, evilly, or just capriciously. Under this view, ideology may instill not only false preferences but also false values. Ideology may simply alter the manner in which people decide whether their interests or their values dominate their decisionmaking.

Even without resolving the question of which interpretation correctly describes the Critical legal position, either behavioral theory, coupled with the Critical legal view that legal institutions are the result of unconscious social processes rather than conscious planning, departs significantly from the traditional understanding of how law functions in society and how we should judge that function. Various empirical questions also emerge; the difficulties they present to Critical legal theory are addressed in section B.

B. Problems of the Critical Theory of Law

Critical legal theory suffers from three major gaps in its argument. First, it does not identify how the law manages to serve its ideological function. It simply asserts that the law is in fact ideological, without explaining how particular individuals come to adhere to the legal ideology. Second, Critical legal theory must confront the complex nature of law. The law does more than simply propagate or maintain ideology. It may also physically coerce people; the convicted criminal fears not legal ideology but prison bars. Third, it must differentiate law from other ideological phenomena such as morals, religion, literature, and fine arts. Each of these pursuits shapes individual consciousness in at least as fundamental a fashion as the law. Does the law simply supplement other ideology-carrying institutions? Or does it contribute some unique aspect or facet to the ideological structures of society? In this section, I comment briefly on each of these problematic areas.
1. The propagation of legal ideology.

Critical Legal Studies must articulate how the law actually performs its ideological function. One must identify whose consciousness the law actually affects and through what institutions or practices. One can understand how legal ideology would permeate the consciousness of lawyers and judges, because these people not only deal with the expressions of legal ideology—statutes, regulations, opinions, briefs—on a daily basis but also are educated in a particular way and share common professional practices. It is less obvious how legal ideology can affect the consciousness of the ordinary person. Most people know little law. They do not read statutes, regulations, or judicial opinions. They may read newspaper reports of Supreme Court opinions, but these may do little more than state the holdings. When individuals confront the law, they do not confront its ideology as conceived by Critical Legal Studies. Rather, they confront the law as a ritual or as a nightmare, as a tangle of administrative mazes or interminable judicial proceedings, as symbolic and theatrical passings of judgment.76 The critiques of law and economics provide an example of Critical Legal Studies’ difficulty in understanding how ideology is propagated. Heller, Kelman, and Kennedy fail to identify precisely who is deceived by the ideology of law and economics, although legal/economic scholars frequently appear to be unconsciously in the grip of ideology.77 Given that law and economics strongly influences legal decisionmakers,78 however, lawyers and judges may be the carriers of legal ideology to the populace at large. Presumably, the misperceptions of judges and lawyers lead to biases in the decisional rulings, which then affect behavior in the usual ways. The following discussion describes how the ideology of those in the legal profession affects the behavior of the population at large; it does not explain how the ideas manifested and manipulated in legal opinions come to be adopted by the population at large.

Ascertaining legal ideology from legal documents presents at least one difficulty in understanding how legal ideology is propagated. Since the legal text itself remains the same, any differing ideological effects it has across class, race, sex, or occupational lines must derive

77. See Kelman, Coase, supra note 1, at 677; Kennedy, supra note 1, at 318.
78. For example, The Law and Economics Center at Emory runs seminars in economics for both lawyers and judges.
from the differing perspectives from which individuals perceived the
text. Critical legal theory, then, must argue either that legal ideology
does not have different effects on people from different races and
classes or that the different effects result from social positions that the
individuals occupy. Yet a more plausible explanation of the differing
effects of legal ideology across social groups would be that the groups
differ in their experience of the law. Poor urban blacks confront the
criminal justice system in a dramatically different way than upper
middle class whites encounter the legal system.9

Attention to the contexts in which most people encounter the
law, therefore, might reveal what legal ideology people adopt, how it
varies from the ideology expressed in the law, and how it varies
across social groups. Individuals encountering the law as jurors re-
ceive the odd impression that trials constitute the foundation of the
criminal justice system, when in fact criminal cases rarely go to trial.
Admittedly, jurors receive instructions on the law that mirror closely
ideas embedded in judicial opinions. But, because relatively few peo-
ple ever serve as jurors and because jury instructions are relatively
brief, unemotional, and difficult for the average citizen to apprehend
fully, the ideology such instructions transmit is quite limited in con-
tent and effect. The occasions on which most individuals commonly
encounter the law—traffic court, probate court, divorce court, police
detention, or tax returns—are likely to produce visions of law and
legal ideology at least slightly askew from those promoted by judicial
opinions. Moreover, to the extent these encounters propagate an ide-
ology, they do so inarticulately, through ritual and observed behav-
ior, rather than through announced ideas.

2. The complex nature of law.

Law plays many roles, and it is important to distinguish among
them. One should not confuse, for example, instances in which the
law, by threatening individuals with jail or actually imprisoning
them, acts directly to coerce individuals with instances in which the
law acts ideologically. Many functions of the law do not yield to
Critical legal analysis, and an effort to discover illegitimate ideology
lurking within these functions easily leads to confusion. The law
might stabilize political or social structures while neither directly co-
ering people nor ideologically deluding them.

79. S. Bowles & H. Gintis, Schooling in Capitalist America (1976) provides an
interesting analysis of how a social institution, education, varies across socioeconomic classes
because the educational methods differ in schools attended by different groups.
To understand this function, consider a stylized example based on the role the draft laws played in the controversy over the Vietnam War. I wish to examine the significance of the shift in the system of conscription from administrative discretion to ostensibly random selection. To focus on this shift, I shall ignore a vast number of important, intervening events. In particular, I shall argue that the shift in the draft law diffused dissent, even though dissent increased after the institution of the lottery, an increase that might be attributed to the invasion of Cambodia in spring 1970 and to the killing of student demonstrators at Kent State and Jackson State Universities.

Even a cursory reflection on the dissent against the Vietnam War reveals the complexity both of the law and of ideology. "The draft laws" might refer to many things: to the selective service statute, to the regulations promulgated under them, or to the court decisions in cases challenging those laws or their enforcement. In addition, "the draft laws" might refer to the administrative machinery created to implement them: the local draft boards and the rest of the administrative hierarchy charged with institutionalizing conscription. The complex nature of ideology emerges from an examination of the manner in which opposition to the war was intertwined with opposition to the draft laws. Logically, the claim that the Vietnam War was immoral is distinct from the claim that the (prelottery) draft law was inequitable across class and racial lines. In the opposition to the war, however, these two claims became intimately connected, possibly because college campuses were the sites of the most intense opposition to the war and because the possibility of being conscripted or of losing a classmate to the war was the closest link to the war.

In this context, the institution of the draft lottery in 1970 allows one to identify at least three distinct effects the draft laws had on society. First, the draft laws provided personnel to the armed forces. Surely some people would have enlisted for duty in Vietnam without the presence of the draft laws. Most people who went, however, went reluctantly to Vietnam following conscription, because refusing induction or going AWOL meant jail or exile. The prosecution and incarceration of draft resisters coerced people; it did not simply propagate ideology. Second, the lottery may have served to fragment the interests of organized opposition to the draft laws on college campuses. Prior to the institution of the lottery, everyone holding a student deferment stood in a common, tenuous relation to the draft and to the Vietnam War. After the lottery, students stood in quite distinct positions. Those with low numbers were most threatened by
induction; those with high numbers were almost certain that they would not be called. While this fragmentation may have diffused dissent against both the draft and the war, it could hardly be called ideological since each individual perceived accurately his own immediate self-interest. Third, the lottery gave the appearance of even-handed application across race and class lines and thus eliminated one ground for dissension. The lottery only gave the appearance of justice, because the draft laws still permitted various exemptions that could be more easily exploited by the white middle class than by the black poor. The appearance of equity in the lottery served to legitimate not only the draft but also the war. The lottery not only reduced the number of people opposed to the war by changing the likelihood that they would be drafted; it diffused dissent by eliminating one reason offered against the war: the inequitable distribution of the burden. This latter effect illustrates an ideological function of the law; the change in the law in reality neither distributed the burden equitably nor confronted the issue of the war's immorality.

This draft law example has one important characteristic that distinguishes it from most instances of legal ideology discussed by Critical Legal Studies. The law could perform its ideological function because the issues of draft equity and the justice of the Vietnam War were highly controversial political issues, vigorously debated and hotly contested not only on college campuses but in every public forum. Consequently, people knew what the law was and the justifications offered for it. The ideological function of the law requires such knowledge, but the coercive and divisive functions do not. When the lottery was instituted and numbers assigned, the position of male students with respect to the draft changed, regardless of their knowledge about or interest in the equity of the draft system and the justice of the war. By contrast, in most of the examples offered by Critical Legal Studies, the legal ideology derives from some body of law not central to public debate but rather from “background” rules of law that rarely come to popular consciousness. To investigate the ideological functions of contract or tort law, one must elaborate the process by which the ideology embedded in contract or tort opinions reaches the individuals it is supposed to deceive.

This analysis of the various functions of law is not exhaustive. For instance, the law might also serve to divert attention from an issue. Such a diversion occurred in part during the debate over the draft. The discussion of the equitable allocation of the burden of the war implicitly accepted the legitimacy of the war itself. Thus, the
debate over the draft laws might have been considered a diversion from the "true" issue: the morality of the war (or even its wisdom as foreign policy). Second, the law might perform a ceremonial or ritual function, an aspect of law more clearly illustrated in the next section.

This section has identified five distinct functions that law might play in society. Law can coerce, sanctify, divert, divide, or deceive. Only this last function, that of deception, is ideological in the sense used by Critical theory, although each of the other four functions might also be oppressive or serve to "legitimate" an unjust social structure.

3. Law and other ideological structures.

Critical legal theory embeds its theory of law within a larger theory of society, but this embedding does not imply that social phenomena are undifferentiated. If one identifies "law" with the activities and artifacts of courts, judges, and lawyers, then several reasons suggest that law as an ideological structure differs from other ideological structures, such as religion. For instance, the class, racial, ethnic, and educational background of those within legal institutions differs dramatically from the backgrounds of those within religious institutions. The backgrounds of the actors can affect significantly the content and impact of the ideology expressed by the institution. Similarly, legal institutions have very different structures from religious ones. Individuals confront the law in ways unlike those in which they confront religion. In addition, religious institutions address smaller, more homogeneous communities than does the law. Consequently, we are not surprised when, at least superficially, the ideological message of religion differs from the ideological message of the law. Nor is the manner in which ideology is transmitted necessarily identical across institutions.

The task of distinguishing legal ideology from nonlegal ideologies, such as morality and literature, raises problems similar to those presented in the earlier discussion. To understand these difficulties, consider briefly the relation between marriage law and the institution itself. One cannot easily identify either the boundary between the institution and the law, the effect the law has on the institution, or the varying influences of legal as opposed to religious or other ideology.

80. See note 79 supra and accompanying text.
What does it mean to say that X and Y are married? The legal answer depends only on whether certain legal formalities have been met or, with respect to "common law marriage," on a determination that the conduct of X and Y meets the legal test. Sociologically, the meaning of marriage is more complex. Marriage suggests that a man and woman live together, are intimate in various ways, and hold themselves out to the world as a "couple." To the extent that the ordinary person is aware of the law of marriage, he is more familiar with the legal formalities, such as the requirement of a license, than with the views expressed by judges in obscure opinions. Yet, the import of these formalities in structuring marriage attitudes, roles, and behavior is ambiguous.

For instance, although legal marriage may require the taking of a blood test, the recitation of specific words by someone with appropriate legal authority, and the signing of a document, most people would consider X and Y socially married even if, despite their attempt to comply, an official failed to sign the document or lacked proper authority because her commission had expired. On the other hand, if no ceremony marked the marriage and if X and Y explicitly denied both the ceremony and the institution, we might regard X and Y as in a state akin to marriage but not "married."

It may be that the legal formalities simply mark the event of marriage or serve to induce serious forethought in the couple. In this respect, the marriage laws are analogous to procedures, such as seal in contract or witnesses in wills, that ensure that the promisor or testator has seriously contemplated her acts. But with marriage, other institutions, most notably religious ones, mark the event. Moreover, in the realm of wills and of some contracts, the marking of the event is the sole way to accomplish the actor's intention. Absent a will, a testator may be unable to retain control of her property while she lives and to determine its disposition at death. The marriage ceremony, on the other hand, does not serve primarily to mark the legal event or necessarily to effect the primary intentions of the parties but rather serves to mark the personal commitment of the parties.

Thus, while law may serve a ceremonial function, other institutions may serve that same function as well. Law hardly seems essential to marking the event. In addition, the desire to mark an event with ceremony is insufficient to give rise to legal forms. The law

81. For example, in New York prior to 1933 an agreement between competent parties that they were in fact married constituted a valid marriage. The agreement might be evidenced by cohabitation and other acts. See 15 N.Y. JURIS. REV. DOM. REL. §§ 37–39 (1972).
must serve more than merely to ceremonialize an event. For example, in the case of births and deaths, legal registration, which does make these events public, serves chiefly to provide documentation for the manifold legal consequences of births and deaths. Christenings or brisses following births, and funerals or wakes after deaths serve as ceremonies to solemnize the events.

As a "marker" of marriage, the law duplicates other social institutions. As a source of attitudes and norms about marriage, it may in part confirm and in part contradict the positions advocated by other ideological structures. Catholic ideology, for instance, adopts very different positions than the laws of most states with respect to divorce and birth control, though both may condemn ideologically extra-marital sexual relations. As a second example, one could find within the vast writings of popular and elite literature some attitudes that contradict the legal and religious position on fidelity in marriage. The superficial ideological content of church, law, or literature may not represent its true ideological significance, but the method of reading these ideologies must address the fact that both the content and the audience of the ideological structures differ.

The role of law in marriage, then, is both complex and obscure. The law certainly comes into play when the marriage dissolves through either divorce or the death of one of the parties; the law frequently determines, directly or indirectly, the division of property and the custody of children. The law may even affect the decision to divorce or the post-separation acts of the parties, but it is unlikely to influence many other decisions in marriage. For instance, the law of marriage is unlikely to have much effect on decisions to have children or even on decisions of how to characterize the ownership of property. Nor is the law likely to influence decisions to marry at all, since people are often ignorant at the time these decisions are made of the actual laws of marriage.

This ignorance raises difficulty with an ideological interpretation of marriage law. How does the law propagate its ideological message if people in general are ignorant of it? On the other hand, many people believe that the types of relations that the law sanctions profoundly affect the legitimacy of those relations. If New York and California were to allow homosexual marriage, we would think the

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82. Larry Sager suggested to me that birth is significant in the sense that it confers citizenship rights that have both functional and ideological roles. On this view, the appropriate analogue to baptism might be naturalization, by which an individual is admitted to the polity. This event is likewise ceremonialized and marked by the law.
world to be very different. But would the world differ because the law had changed? Or would the law differ because the world had changed?

Much of the difficulty in understanding the import of law in marriage stems from the centrality of marriage to the social structure. This central position means that other ideological structures also focus on marriage. Thus, religious and legal ceremony seem to duplicate one another; similarly, legal and religious ideology seem to parallel each other.

Sometimes, we attempt to differentiate legal ideology from other ideological structures by reference either to the nonideological functions of law or to the elaborate institutional structure of law. This elaborate structure, we might conclude, allows the law to play roles more varied than nonlegal structures and gives it a special force. Unfortunately, this argument fails to account for the complex institutional structures that support other ideologies. Religion, for example, is embedded in a complex web of churches and activities, the most imposing of which is the Catholic Church. Even ideology that appears simply textual, like literature, in fact is rooted in social institutions and practices. Publishing houses, schools which teach literature, and foundations which support it all provide substance to what initially appears only “ideological.”

VI. Conclusion

The contrast between the visions of law inherent in law and economics and in Critical Legal Studies suggests both what a theory of law should be and what the potential contribution of Critical Legal Studies to legal theory could be.

My discussion of Critical legal theory and law and economics has identified at least three dimensions along which one might classify theories of law: (1) the function the law performs in society; (2) the source of values or beliefs embedded in the law; and (3) the mechanism by which law affects behavior.

A. Function

One can distinguish at least four functions law might perform in society. First, law might channel behavior. Under this view, different legal rules or different legal doctrines would induce different behaviors in the world. Second, law might resolve past disputes without necessarily affecting future behavior. Under this view, law serves to restore order to a world disrupted by some event. Some
natural law theorists, for instance, argue that the function of law is to "do justice" between the parties regardless of any effects the law might have on future conduct. Third, law might serve to mark or to ceremonialize a particular event. Finally, law might simply reflect fundamental aspects of the world. For example, orthodox Marxist theory considers the law to be "superstructure," an institution determined by fundamental social relations that are themselves not affected by the law.

B. Source

This section will explain how the law sets the goals towards which it prompts behavior, how it forms the principles by which it resolves disputes, and how it cultivates the values that it expresses. Law might "adopt" specific values because particular individuals in society intend that it do so. For instance, the law might pursue efficiency because legislatures or judges thought it desirable to do so. Under this view, the law might be thought to achieve consciously the goals imputed to it. Alternatively, the law might be efficient not because lawmakers wish it to be but because the rulemaking process produces efficient rules regardless of the decisionmaker's intent. This account is one example of an "invisible hand" theory. If one posits such a mechanism, one should recognize that the invisible hand quite possibly promotes goals other than efficiency. If one believes that the law promotes the interests of the dominant group in society, one need not believe that the law does so because the dominant group knows its own mind and controls the lawmaking process consciously. The institution may produce results outside the intent of actors within the system.

C. Behavioral Mechanisms

One can imagine a number of mechanisms by which law might influence behavior. First, the law might affect individual decisions by altering the consequences that attach to the acts of the individual. This incentive theory of behavior is embodied in the economic analysis of law, which assumes that law affects behavior by altering the consequences of illegal acts and thus the price that people face when considering a course of action. However, a theory of behavior under law need not be economic, even in the narrow sense suggested by the economic analysis of law. For instance, the law might alter people's preferences or otherwise change their valuation of the consequences of their actions. Alternatively, the law might alter the set of choices
available to the actor. On a naive level, any restriction on contract, such as the thirteenth amendment's prohibition of slavery, limits the choices available to individuals. However, this example does not foreclose an economic analysis. To the extent the law redefines the available choices, it does so through coercion, that is, by altering the price placed on particular conduct.

D. Ideology

The concept of ideology offered by Critical Legal Studies allows one to assimilate the coercive view of how the law might affect behavior into more traditional types of social theory. The choice set is in part determined by a person's perception of what it is possible to do. False consciousness implies that the individual misperceives the opportunities available to her; the law thus alters her choice set by causing her, in a limited sense, to revise her valuation of a consequence.

Critical legal theory offers an important alternative view of the law. This new movement promises both to provoke significant rethinking of the conventional theory of law and to stimulate research into interesting, but hitherto neglected, aspects of law. Critical legal theory in its current state, however, is incomplete in two important ways: (1) It has yet to articulate a distinctive theory of ideology that distinguishes law from other ideological structures and that links these structures to behaviors or to ideas that particular individuals hold; and (2) even if Critical Legal Studies were to articulate such a distinctive theory of ideology, that theory would not be comprehensive enough to encompass the manifold functions of law in society.