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Reflections on Labor Law Scholarship and Its Discontents: The Reveries of Monsieur Verog

Matthew W. Finkin

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ESSAYS

Reflections on Labor Law Scholarship and Its Discontents: The Reveries of Monsieur Verog

MATTHEW W. FINKIN*

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I. INTRODUCTION

It has become fashionable in recent years to refer condescendingly to "traditional" legal scholarship, almost as a term of mild derision. Judge Posner tells us that such work, the dominant form of legal scholarship of the 60s, seems in the 80s to be "old fashioned," "tired," "passé."¹ In its stead we are offered a flowering of schools, movements, and trans-disciplinary approaches: Law-and-economics, critical legal studies, feminism, new race theory, and storytelling. Philosophy, game theory, literary criticism, hermeneutics, and even musicology have been ransacked for legal insight. These develop-

* Professor of Law, University of Illinois. The following is based upon a paper prepared for the Industrial Relations Research Association's decennial review of the literature which explains the labor law scholarship of the past decade to practitioners of other disciplines. The paper was delivered at The Wharton School on October 5, 1991. I am indebted to Tom Ulen and Robert Gorman for critical comments; to Clyde Summers, who commented on the paper at its presentation; and to Bernard Meltzer, *il miglior fabbro*. Lapses and misjudgments remain my own.

1. Richard A. Posner, *The Decline in Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 773 (1987).

ments, evident in meta-theoretical work, are evidenced as well in the unglamorous, humdrum world of labor and employment law.

Several questions are presented. One is the source or sources of the discontent with "traditional" scholarship. Another is the content of these new schools and movements. And yet another is where they are taking the legal academy. These are explored below, using some representative works for critical examination, works that illustrate one or another of the major themes or techniques of these new approaches. Because "law and literature" has not yet found significant application in labor law, and to make this excursion a little more lively, some of what follows will be developed by reference to the poetical work of Ezra Pound.²

Despite the extraordinary length of some of the works reviewed, and despite the fact that they appear in "leading" legal periodicals, it will be argued that some, perhaps much of what is offered is questionable as scholarship and is unlikely to develop into profitable lines of scholarly inquiry. But first the idea of "traditional" scholarship, against which these developments resonate, needs to be examined.

II. "TRADITIONAL" LEGAL SCHOLARSHIP

Not everything written by a scholar is an act of scholarship. Nor, as Daniel Bell, David Riesman and others have emphasized, is every intellectual exercise necessarily a scholarly one.³ Scholarship is the practice of an academic discipline; it applies, tests, reinterprets, and creates a body of learning. The questions it deals with are professional ones, and are answered, at least in part, by research; the conclusions it offers are tested by professional standards.⁴ This is so even in

2. I chose Pound for two reasons. First, Wallace Stevens has been "taken." See David Margolick, *At the Bar: In Search of Wallace Stevens, a Poet-Lawyer (Lawyer-Poet?) Prized for his Very Ambiguity*, N.Y. TIMES, July 12, 1991, at B7 ("[I]n recent years law professors have embraced Stevens with all the fervor of Israelis welcoming Ethiopian Jews."). See also THOMAS C. GREY, *THE WALLACE STEVENS CASE: LAW AND THE PRACTICE OF POETRY* (1991). And inasmuch as what follows may strike some as reactionary, or worse, there seemed to be a kind of logic in selecting a poet who also was a fascist sympathizer, an anti-Semite, and a traitor.

3. DANIEL BELL, *MARXIAN SOCIALISM IN THE UNITED STATES* 152 (1967); CHRISTOPHER JENCKS & DAVID RIESMAN, *THE ACADEMIC REVOLUTION* 242-243 (1968); EVERETT C. LADD, JR. & SEYMOUR M. LIPSET, *THE DIVIDED ACADEMY: PROFESSORS AND POLITICS* 123-124 (1975).

4. As late as the 1840s, America had no concept of how a scholar was distinct from simply being a person of learning or of literary accomplishment. LOUISE L. STEVENSON, *SCHOLARLY MEANS TO EVANGELICAL ENDS: THE NEW HAVEN SCHOLARS AND THE TRANSFORMATION OF HIGHER LEARNING IN AMERICA 1830-1890*, 30-31 (1986). The professionalization of scholarship is part of what Jencks and Riesman termed "The Academic Revolution." See JENCKS & RIESMAN, *supra* note 3.

notoriously "soft" areas of academic study as well as the "hard" sciences. Let us look to literature.

In 1920, Ezra Pound published a sequence of poems, a farewell to London and an acerbic critique of the literature "the age demanded" called *Hugh Selwyn Mauberley*, maddeningly rich in allusion. As Hugh Witemeyer notes,

[T]he allusions and literary backgrounds in Pound's poems often require not only that the reader be able to identify them, but that he also know precisely what significance Pound attached to them. When Pound says 'Turned from the 'eau-forte/Par Jacquemart,' not only do we need to know that he is referring to the frontispiece of the 1884 edition of Gautier's *Emaux et Camées*; we also need to know what he thought of Gautier's achievement in that book, if we are to evaluate Hugh Selwyn Mauberley's allegiances.⁵

One of the *Mauberley* poems, "Siena Mi Fe; Disfecemi Maremma'," the title itself a line borrowed from Dante, opens:

Among the pickled foetuses and bottled bones,
Engaged in perfecting the catalogue,
I found the last scion of the
Senatorial families of Strasbourg, Monsieur Verog.⁶

The tracing of these sources, in this case, who Monsieur Verog was modeled upon, presents scholarly questions the exploration of which may inform and enrich our understanding of the work. In this instance, Pound scholars agree that M. Verog refers to Victor Gustave Plarr, Librarian of the Royal College of Surgeons (whence the "pickled foetuses") whose family left Strasbourg for England after the Franco-Prussian War. He was the author of *In the Dorian Mood* and a member of the Rhymers' Club, some of whose other members are dwelt upon in the reveries of M. Verog that ensue.⁷

Hugh Selwyn Mauberley, notwithstanding the texture of these allusions, is a work of poetry, not scholarship; Plarr was chosen for poetical, not scholarly reasons. What Pound's allusions are, how and why they are used pose scholarly questions; the answers are tested by standards of scholarly rigor. But these explorations can never be other than secondary to the poem—and its music.

When one speaks of legal scholarship one is compelled to inquire into the nature of the discipline, of what is taught in schools of law. And here one at once confronts vintage controversies—on whether

5. HUGH WITEMEYER, *THE POETRY OF EZRA POUND* 11 (1969).

6. EZRA POUND, *Siena Mi Fe; Disfecemi Maremma*, in HUGH SELWYN MAUBERLEY (1920), reprinted in *EZRA POUND: SELECTED POEMS*, at 177 (T.S. Eliot ed.) (1948).

7. See JOHN J. ESPEY, *EZRA POUND'S MAUBERLEY* 91-93 (1955); JO B. BERRYMAN, *CIRCE'S CRAFT: EZRA POUND'S HUGH SELWYN MAUBERLEY* 123-24 (1983).

the study of law is self-contained or necessarily implicates a wider set of disciplines; on whether it is objective or value laden. But whatever else a legal education includes,⁸ at a minimum it encompasses the transmission of the received tradition, of the content legal concepts that flow from Roman law (and its borrowings) through Anglo-Saxon and Norman times down to the reception of the common law in the early American Republic and so to the present. It contemplates as well a method of analyzing legal problems: the dissection of issues into legally cognizable components, and so of distinguishing the relevant from the irrelevant,⁹ either in terms of common law categories or for statutory purposes, the latter a fixture in labor law since the Wagner Act. And it has also included a manner of reasoning, of weighing competing arguments—in labor law especially, of alternative statutory readings—to recognize, assess, and accommodate the strengths of competing interests, eventually to achieve an ostensibly optimal legal solution. It would, as James Atleson said in criticism, purport to present “a fair ‘balancing’ of the relevant interests.”¹⁰

Some traditional legal scholarship is undertaken solely to deepen or enrich our understanding. But more often traditional legal scholarship is instrumental, a bit like civil engineering,¹¹ in Judge Posner’s analogy, or “plumbing,”¹² in Lord Diplock’s. “[S]cholarly criticism,” David Shapiro observed, “is not undertaken simply for the delectation of other scholars; it is designed to improve the world that is the subject of its concern”¹³—although a recurrent suspicion has been that the problems traditional labor law scholars find interesting are mere conundrums in legal logic having scant relationship to the problems of the “real” world.¹⁴ Traditional scholarship has reconsidered the

8. Some of the elements of a legal curricula have been catalogued. See Robert A. Gorman, *President’s Message: The Curriculum: The Role of the Association and Its Member Schools*, NEWSL. ASS’N OF AM. L. SCHS. Aug. 1991, at 2.

9. See Richard Hyland, *A Defense of Legal Writing*, 134 U. PA. L. REV. 599, 614 (1986) (“The separation of meaningful similarities from irrelevancies is work that legal concepts, but not stories, can perform.”).

10. James B. Atleson, *The Implicit Assumptions of Labor Law Scholarship*, 35 J. LEGAL EDUC. 395, 397 (1985).

11. See Posner, *supra* note 1, at 765.

12. Lord Wedderburn, *An Anniversary Preface*, 50 MOD. L. REV. 673, 674 (1987). (“Addresses in that era [the 60’s] to the Society of Public Teachers of Law countered Lord Diplock’s insistence that law was no more than ‘plumbing’ . . .”).

13. David L. Shapiro, *In Defense of Judicial Candor*, 100 HARV. L. REV. 731, 731 (1987).

14. See Paul R. Hays, *Foreword*, 59 COLUM. L. REV. 1, 5 (1959):

[I]t seems to me possible that labor lawyers sometimes conduct with great skill what may in fact be sham battles, battles in which the event is of no real importance, or even battles in which, if they were more aware of the real character of the outcome, they might be on the other side. Is our approach to labor law “too theoretical”? Would the splendid articles in this issue be even

premises upon which the law rests, evaluated the empirical bases of competing claims, and assessed the probable consequences of alternative approaches. Accordingly, it has been notably eclectic in its methods: labor law scholars have consistently had recourse to research in labor economics as, for example, Benjamin Aaron did in his treatment of the regulation of featherbedding in 1953,¹⁵ and Bernard Meltzer in his treatment of lockouts three years later.¹⁶ Research in industrial relations has long played a role in the labor law literature, as, for example, in Ruth Weyand's treatment of majority rule in 1945;¹⁷ and other bodies of social science research have been explored, as Derek Bok did in his work on the regulation of union elections in 1964.¹⁸ Upon occasion, "field" investigation has been undertaken, as Clyde Summers did in his research into the law of union discipline in 1960;¹⁹ and, other bodies of data have been analyzed, as Dan Pollitt did in exploring the consequences of re-run representation elections in 1963.²⁰ More recent examples of such extra-legal resort could readily be given; it suffices to say that there is nothing new in recourse to other disciplines and to non-doctrinal analyses in order to shed light on the "real world" of the traditional scholar's concern.²¹

The tone of the scholar's argument might be intense, even polemical (when an especially perverse decision or doctrine is criticized); or it might be detached, even Olympian. But, uncoupled from the author's rhetorical technique—sweetly to reason, to bludgeon, or to woo—the arguments assayed are weighed ultimately by their analytical power.

better if among the footnote citations, which show such a wealth of learning in the law, there were more references to studies made by scholars in other fields of learning? Or are they too but combatants on a darkling plain in which with present implements all of us are fairly helpless to do much more than speculate on what may happen?

Id.

15. See Benjamin Aaron, *Governmental Restraints on Featherbedding*, 5 STAN. L. REV. 680 (1953).

16. See Bernard D. Meltzer, *Single-Employer and Multi-Employer Lock-Outs Under the Taft-Hartley Act*, 24 U. CHI. L. REV. 70 (1956).

17. See Ruth Weyand, *Majority Rule in Collective Bargaining*, 45 COLUM. L. REV. 556 (1945).

18. See Derek C. Bok, *The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act*, 78 HARV. L. REV. 38 (1964) (discussing *inter alia*, political science research on voter behavior in civil elections and psychological research in communications, as well as in industrial relations).

19. See Clyde W. Summers, *The Law of Union Discipline: What the Courts Do In Fact*, 70 YALE L.J. 175 (1960).

20. See Daniel H. Pollitt, *NLRB Re-run Elections: A Study*, 41 N.C. L. REV. 209 (1963).

21. Posner, *supra* note 1, at 762-63.

This phenomenon, of scholarship as "committed argument,"²² is scarcely unique to the law. Not only in the "hard" sciences, but in the social sciences and the "soft" humanities, arguments are advanced for the better interpretation of the evidence at hand. Whether, for example, Mauberley was Pound's persona, or whether Pound created in Mauberley a representative English poet-critic of the *fin de siècle* whom he proceeded archly to satirize are both conceivable readings. Which is the more persuasive depends upon one's interpretation, which may include a lot of evidence external to the poem itself.²³ The canons of responsible scholarship require the scholar to play fair: to report all the evidence; neither to distort nor to ignore. But assuming that to have been done, the conclusion offered will rise or fall on the cogency of the reasoning, on the closeness of fit of the argument to the evidence.

The agenda for "traditional" legal scholarship, akin to other disciplines grounded in professions practiced outside the academy, is often set by external developments—by new legislation, administrative rulings, or judicial decisions; it is rarely visionary, and has been dismissed on that account as "unsystematic ad hoc tinkering"²⁴ with the status quo. One consequence is that legal scholarship tends to be "compartmentalized."²⁵ It tends not to be an organic development from the work that preceded it; indeed, a premium is placed upon having something genuinely new to say. Another consequence is that traditional legal scholarship tends to have a relatively short shelf-life,²⁶ as the law on point becomes settled, the problem evaporates, or

22. George P. Fletcher, *Two Modes of Legal Thought*, 90 YALE L.J. 970, 986 (1981).

23. Compare the conflicting interpretations of the scholars cited *supra* note 7.

24. Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731, 783 (1985).

Much of post-Realist American legal thought has been devoted to a failed attempt to sustain the proposition that legal problems give rise to determinate solutions, or at least to a fairly well-defined region of correct outcomes. The main approaches are familiar: institutional competence theory, economic efficiency analysis, rationalist moralism, and Professor Finkin's approach, the most widespread in our legal culture, namely, ad hoc, unsystematic tinkering. Though each of these approaches is more or less committed to the idea of a specialized "legal" method of analysis (as distinct from general political or ethical discourse) through which determinate solutions can be derived to legal problems, none of these theories has come close to convincingly demonstrating the existence of such a method.

Id. (reference omitted).

25. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1885 (1988).

26. Disciplinary variation in the mortality rate of scholarship has been noted. See TONY BECHER, *ACADEMIC TRIBES AND TERRITORIES: INTELLECTUAL ENQUIRY AND THE CULTURES OF DISCIPLINES* 87-88 (1989). The American Political Science Association, for

is eclipsed by more pressing and as yet unresolved questions. If a piece of legal writing is still cited, is still worth taking account of for other than purely historical reasons a generation after it was published, it can justifiably lay claim to being a "classic" in its field. What makes it worth taking account of is the scope and persistence of the issue, the painstaking care with which the evidence is assembled, the rigor of the analysis—whether the hard questions have been anticipated and been dealt with—and, ultimately, the power to persuade.

What these standards mean can be made more concrete by examining two of the main *genres* of traditional legal writing: the critique of a particular decision (or doctrine); and, the proposal for a better solution to a legal problem.

A. *The Critique*

The spirited critique, or polemic, is usefully illustrated in some of the writing resulting from a notable case in the law of academic employment. In a *cause célèbre* of 1940, the New York Supreme Court sustained an action brought against the Board of Higher Education of the City of New York to rescind the appointment of Bertrand Russell, who had been hired to teach logic in the department of philosophy at the City College.²⁷ The plaintiff was a Mrs. Jean Kay, whose interest in Russell's appointment was not discussed by the court. The case was heard by Justice John E. McGeehan, whose impartiality Russell's biographer questioned by pointing out that McGeehan once attempted to have a portrait of Martin Luther removed from a courthouse mural illustrating legal history.²⁸

Judge McGeehan held the appointment to have been impermissibly made, in part because Russell was not a citizen, and in part because he had not taken a competitive examination for the post, and so lacked a teaching license.²⁹ Judge McGeehan made plain, however, that had these conditions been satisfied, he still would have sustained the action on the ground that the appointment offended public policy, "because of the notorious immoral and salacious teachings of Bertrand Russell and because . . . he is a man not of good moral character."³⁰ The former claim was supported, the court opined, by

example, has given an award to the author of "a book of exceptional quality by a living political theorist that is still considered significant after a time span of at least 15 years since original publication." *Fellowships and Awards*, CHRON. OF HIGHER EDUC., Sept. 11, 1991, at A17.

27. *Kay v. Bd. of Higher Educ.*, 18 N.Y.S.2d 821 (1940).

28. RONALD W. CLARK, *THE LIFE OF BERTRAND RUSSELL* 472 (1976).

29. 18 N.Y.S.2d at 823-26.

30. *Id.* at 826.

examination of passages from Russell's works dealing with sex and marriage. It was pointed out, however, that Russell was to teach logic, not morals. And so Judge McGeehan turned from the books to the man, approaching Russell as what would be termed in contemporary parlance a "role model."³¹

Assuming that Mr. Russell could teach for two years in City College without promulgating the doctrines which he seems to find necessary to spread on the printed pages at frequent intervals, his appointment violates a perfectly obvious canon of pedagogy, namely, that the personality of the teacher has more to do with forming a student's opinion than many syllogisms. A person we despise and who is lacking in ability cannot argue us into imitating him. A person whom we like and who is of outstanding ability, does not have to try. It is contended that Bertrand Russell is extraordinary. That makes him the more dangerous.³²

Among the many responses to the decision was a brief, elegant, and devastating critique by Walton Hamilton, then Southmayd Professor of Law at Yale, though he had had no formal legal education.³³ Hamilton inquired of the plaintiff, Jean Kay, of her status as a party and so of the jurisdiction of the court. The action could have been one brought in her capacity as a taxpayer. But, as Hamilton noted after a brief dilation upon the standing of taxpayers, "it is difficult to vest her as a tax-payer with a legal interest in *who* is to have and to hold a chair of mathematics."³⁴ Alternatively, from what could be gleaned from the press accounts, Mrs. Kay sued because she feared for Russell's impact on a child or children of hers then attending City College. The law, argued Hamilton, makes no provision for a *causa matris*; were it so to allow it would be "impossible to fix its bounds."³⁵

31. *Id.*

32. *Id.* at 829.

The contention that Mr. Russell will teach mathematics and not his philosophy does not in any way detract from the fact that his very presence as a teacher will cause the students to look up to him, seek to know more about him, and the more he is able to charm them and impress them with his personal presence, the more potent will grow his influence in all spheres of their lives, causing the students in many instances to strive to emulate him in every respect.

Id. at 830.

33. Walton H. Hamilton, *Trial By Ordeal, New Style*, 50 YALE L.J. 778 (1941). Hamilton had a Ph.D. in economics; he went on to found the law firm of Arnold and Porter.

34. *Id.* at 780 (emphasis in original).

35. *Id.* at 782.

Mothers are an unstandardized lot; their urges run the spectrum of all the emotions. Their solicitude for their young presents a motley pattern; there is no unity in maternal beliefs as to which sort of words of teachers will incite immature youth to sin. If one would shield against honest utterance about the facts of life, another would tolerate no plain speech about business enterprise and

But what of Russell's evil tendencies revealed in his writings and in his person? "A whole catalogue of learned folk—whose writings have long been the stock in trade of higher erudition,"³⁶ Shakespeare, Goethe, George Eliot (who was at times "slightly confused as to who was her lawful husband") would be subject to the same injunction.³⁷ As to the impact of Russell's presence, as role model, the theory, Hamilton argued, sinks in the sands of causation.³⁸ He ends with a peroration of enduring power.

All of this may seem to exhibit an overconcern with the technical issues of party and jurisdiction. But it is in just such procedural matters that the issue of substance lies. It is here that the judge strikes his real blow at academic freedom. In abuse of his judicial trust, he accepts a case he has no right to entertain and makes a decision which does not belong to his court Let Bertrand Russell be any instructor; let his remarks on sex be any utterance on race, religion, finance, politics, industry, foreign affairs which is not in lockstep with the symbols which currently circulate as fact; let Jean Kay be any parent-turned-taxpayer for purposes of litigation only, who finds printed passages anathema; let Justice McGeehan be any inferior judge who gets his prejudices and the law all muddled; and overall make the word "tends" pinchhit for cause in all questions of legal liability—and ask what can be the future of critical inquiry in a democratic land.³⁹

Hamilton's critique elicited a response from two members of the faculty of the Fordham law school. The first is a personal attack; it need not detain us.⁴⁰ The second attempts to take on Hamilton's

a third would refuse to condone any criticism of the national state There is not an aspect of life—race, religion, the arts, literature, finance, government, human nature—in which a critical attitude towards dominant belief could not be challenged as immoral.

Id. at 781.

36. *Id.* at 782.

37. *Id.* at 782.

38. *Id.* at 786. To Judge McGeehan's opinion that Russell's presence would tend to cause sexual misconduct forbidden by the criminal code, Hamilton replied:

A thing is to be acclaimed evil if it tends to a fracture of the penal code. It matters not that we live in a culture which has related aspects but no isolated parts. Nor is it of note that every influence plays upon objects which are subject to countless other influences; or that gradually the force of an influence is spent as it takes its way down the maze of human activity. Nor is it relevant that logic has never subdued "tends" into cause; that in philosophy tendency is still at large; that hitherto the law has refused to assess liability or impose punishment by so vague a reference.

Id. at 785-86.

39. *Id.* at 786.

40. See Walter B. Kennedy, *The Bertrand Russell Case Again. Portrait of a Realist*, New

treatment of the case.⁴¹ The author focuses on the grounds Hamilton dismissed as makeweights—the want of citizenship and the failure to pass a competitive examination; but these are dealt with inartfully, to say the least.⁴² The writer then supports the use the court made of Russell's character, but only in one brief paragraph, and that only to point out that Hamilton had cited no authority. As to the gravamen of Hamilton's attack, the infringement of academic freedom and the unlimited potential for future such infringements, the author is altogether silent.

The Bertrand Russell case, and so Hamilton's critique, is of more than antiquarian interest.⁴³ "Political correctness" has become a cur-

Style, 10 FORDHAM L. REVIEW 196 (1941). The flavor of the philippic can be conveyed in a brief excerpt:

But it would be unfair to minimize the intellectual stature and professorial prestige of Walton H. Hamilton or to imply that the Hamilton-Russell combination is another Boswell-Johnson alliance. True enough, Dr. Johnson and Dr. Russell both came out of Oxford but there the resemblance ends. Hamilton did not need a Russell to give him standing in American legal literature. Long before Dr. Russell was peddling his precious palliative of trial marriage along the book stalls, the Yale professor was already an outstanding figure in legal education, specializing in the study of the jurist's art, the probing of judicial minds, the delicate dissecting of the innermost secrets of the judiciary. . . .

[O]ur "judicial analyst" condescends to add Justice McGeehan . . . to the Hamilton Hall of Fame. It is so touching a tribute that one may well excuse the humble justice of the New York Supreme Court for a momentary flash of pride in his elevation by our leading brain-pan bisector to Olympian heights along with Marshall, Holmes, Brandeis and Black.

Id. at 202-03 (references omitted). Russell, it should be noted, was a fellow of Trinity College, Cambridge.

41. See William R. White, Jr., *The Bertrand Russell Case Again. Professor Hamilton's Law*, 10 FORDHAM L. REVIEW 205 (1941).

42. White noted that Kay's action, brought under the New York Practice Act, was not a taxpayer suit, but an action for which the law granted standing to compel a public body to perform a *mandatory* act. But the statute requiring citizenship provided an exemption for one who would later seek citizenship—a possibility available to Russell. Judge McGeehan was aware of this exemption, and opined that Russell would not be admitted even if he did apply. White endorses this prediction, necessarily to assume that such was a permissible judicial function, relying on *United States v. Schneiderman*, 33 F. Supp. 510 (D.C. Cal. 1940), for the merits of the prediction. *Schneiderman*, however, was reversed by the United States Supreme Court after White's article. *Schneiderman v. United States*, 320 U.S. 118 (1943). White relies also on the fact that Russell was an atheist, and "traditional American political philosophy is based on a belief in God and God-given natural rights—as set forth in the Declaration of Independence. How any fair-minded person can say then that Bertrand Russell is attached to our institutions would present a problem for the Cumaean sibyl." *Id.* at 210. In retrospect, neither of these grounds would be sustainable.

White then writes in support of the competitive examination requirement; but from his own discussion it appears that that requirement was waivable by the Board of Higher Education. And if waivable, its application to Russell could not have been a *mandatory* act.

43. See, e.g., Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1285 (1988).

rent concern.⁴⁴ And litigation over the use of offensive books remains with us.⁴⁵ Indeed, Hamilton's warning of the prospect of endless litigation by offended parents and others was vindicated only a few years later, when the New York Supreme Court dismissed such an action on the very ground of Hamilton's critique, albeit without the courtesy of an acknowledgement.⁴⁶ Even the theory of teacher as "role model," that "sinking sand," was embraced by the United States Supreme Court in sustaining the New York law prohibiting non-citizens from teaching in the public schools as against attack on equal protection grounds.⁴⁷

Walton Hamilton's attack upon Judge McGeehan's decision—and the Fordham defense of it—present useful if antipodal examples of the spirited critique. "Polemic," Wittgenstein told Rush Rhees, "or the art of throwing eggs, is, as you well know, as highly skilled a job as, say, boxing . . ."⁴⁸ The blows have to be telling, well aimed, well timed, and with no superfluous expenditure of energy. Hamilton demolishes the decision—in nine pages of elegant prose. His detractor does something less. These standards should be borne in mind as more recent examples of the spirited critique are encountered later on.

B. *Solving Legal Problems*

Of this *genre*, inquiry is appropriately devoted to what it means to ask if a work has been "rigorous," has "asked itself the hard questions," has been "analytically persuasive." These questions are usefully explored by a comparison of two recent pieces treating very

44. See *Levin v. Harellston*, 770 F. Supp. 895, 897 (S.D.N.Y. 1991) (footnote omitted).

45. See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982); *Cary v. Bd. of Educ.*, 598 F.2d 535 (10th Cir. 1979). Compare Mark G. Yudof, *Three Faces of Academic Freedom*, 32 LOY. L. REV. 831, 846-50 (1987) (discussing the *Cary* case) with the Amicus Curiae Brief of the American Association of University Professors in that case. (The author was the principal draftsman of the AAUP's brief.)

46. See *Rosenberg v. Bd. of Educ.*, 92 N.Y.S.2d 344 (1949). *Rosenberg* involved an action to disallow Dickens' *Oliver Twist* and Shakespeare's *Merchant of Venice* from school use as engendering hatred of Jews. The court opined:

Literary value of a work of fiction does not depend upon the religious or national origin of the characters portrayed therein. If evaluation of any literary work is permitted to be based upon a requirement that each book be free from derogatory reference to any religion, race, country, nation or personality, endless litigation respecting many books would probably ensue, dependent upon sensibilities and views of the person suing.

Id. at 346.

47. *Ambach v. Norwick*, 441 U.S. 68 (1979).

48. RAY MONK, LUDWIG WITTGENSTEIN: THE DUTY OF GENIUS 482 (1990). I am indebted to Thomas Little of Chicago for bringing this reference to my attention.

different but perennial subjects in labor law—preemption and fair representation.

In 1959, the United States Supreme Court's decision in *San Diego Building Trades Council v. Garmon*⁴⁹ announced a sweeping doctrine of federal labor law preemption. "Administration is more than a means of regulation," the Court opined, "administration is regulation."⁵⁰ Where the underlying conduct is even "arguably" protected or prohibited by the federal Act, the Court concluded that to allow the States to act would involve "too great a danger of conflict between power asserted by Congress and [the] requirements imposed by state law."⁵¹ It is not obvious, however, why conduct which the federal Act prohibits could not also be prohibited by the states, perhaps under an even stronger remedial scheme. But the latter was taken by the Court only to punctuate its conclusion. "[S]ince remedies form an ingredient of any integrated scheme of regulation, to allow the State to grant a remedy here which has been withheld from the NLRB accentuates the danger of conflict."⁵²

The Court's reasoning was anticipated⁵³ and later approved by Archibald Cox. On the latter point, Cox observed that,

If Congress were to make employer unfair labor practices crimes and authorize private suits for damages, the amendments would be regarded as a major change in labor policy. No less a change of policy results if a state creates the crime or right of action for damages. The NLRA provides only administrative remedies because Congress felt that they were more suited to the sensitive problems of labor relations.⁵⁴

Professor Michael Gottesman has recently challenged Cox's conclusion.⁵⁵ *Garmon* is defensible, Gottesman argues, insofar as the conduct involved lies on a spectrum of the protected to the prohibited—such as picketing, the conduct actually involved in the *Garmon* case.⁵⁶ One easily perceives how a state's miscalculation of where the line is to be drawn would upset the federal scheme, such that the mere danger of such interference requires a prophylactic rule. This consid-

49. 359 U.S. 236 (1959).

50. *Id.* at 243.

51. *Id.* at 244.

52. *Id.* at 247.

53. See Archibald Cox, *Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297, 1308-09 (1954).

54. Archibald Cox, *Labor Law Preemption Revisited*, 85 HARV. L. REV. 1337, 1343 (1972).

55. See Michael H. Gottesman, *Rethinking Labor Law Preemption: State Laws Facilitating Unionization*, 7 YALE J. ON REG. 355 (1990).

56. *Id.* at 357.

eration, he argues, does not apply to protected conduct that does not lie on such a spectrum, such as whether or not an employee's discharge was for union activity.⁵⁷ The state's refusal to afford a remedy leaves the federal remedy in tact; the state's affordance of an additional remedy in no way upsets the federal structure, unless Cox was right in concluding that the federal Act's remedial scheme was intended to preclude any state remedy. But Gottesman makes a compelling case that the Act's remedial scheme was driven solely by Congress' desire to protect the role of the NLRB, necessarily to preclude a jury trial otherwise required by the Seventh Amendment. Consequently, "[i]n the absence of concrete evidence that remedies were restricted for substantive reasons apart from the Seventh Amendment, there is no warrant for assuming that the Congress that enacted the Wagner Act intended to insulate employers from stronger state remedies for wrongful discharge."⁵⁸ Without fully rehearsing his analysis, Professor Gottesman shows how the narrower view is more consistent with the Court's approach to preemption at the time the Act was passed⁵⁹—from which the *Garmon* decision was itself a departure⁶⁰—and is better in keeping with how the Court has dealt with preemption more recently.

In contrast, note Michael Harper and Ira Lupu's equally ambitious search for a philosopher's stone to resolve the duty of fair representation.⁶¹ The duty was created by the United States Supreme Court's 1944 decision in *Steele v. Louisville & Nashville R.R.*,⁶² in part by analogy to the constitutional guaranty of equal protection of the laws. The law of equal protection was rudimentary at the time, but it

57. *Id.* at 357-58.

58. *Id.* at 409.

59. The question of federal-state relations was not addressed in the 1935 Act. It was addressed, however, in the Landrum-Griffin Act of 1959 which dealt with the "no man's land" problem credited in *Guss v. Utah Labor Relations Bd.*, 353 U.S. 1 (1957). An argument that Gottesman does not discuss, however, is whether in dealing with that problem, the Congress acted upon the structure created by *Garmon* and so, in the absence of an amendment to the contrary, tacitly approved it. But, with the exception of that Act's limited treatment, federal-state relations were left to the courts to shape. This contrasts sharply with the sweeping preemption provision of the Employee Retirement Income Security Act, 29 U.S.C. § 1144 (1983), suggesting that Congress could choose to command a clearer course.

60. It was not until 1950 that the United States Supreme Court held, in an unexplained per curiam opinion, that a state could not apply its labor law to a discriminatory discharge. See *Plankinton Packing Co. v. Wisconsin Employment Relations Bd.*, 338 U.S. 953 (1950). See generally Bernard D. Meltzer, *The Supreme Court, Congress, and State Jurisdiction Over Labor Relations: I*, 59 COLUM. L. REV. 6, 14-15 (1959) (discussing the ramifications of the *Plankinton* decision).

61. Michael C. Harper & Ira C. Lupu, *Fair Representation As Equal Protection*, 98 HARV. L. REV. 1211 (1985).

62. 323 U.S. 192 (1944).

has since taken on a considerable texture; and Harper and Lupu argue that that touchstone should be returned to, so to inform the limits the courts should impose upon union agreements that advantage some at the expense of others. To view fair representation "as" equal protection, they argue, is to pose this question: did the "union decisionmakers act in accordance with a principle that regards all as equals?"⁶³ Did the union accord those it represents "equal respect?"⁶⁴ The latter is developed by analogy to the constitutional law governing distinctions between citizens and aliens: our propensity "to divide the world into insiders and outsiders," Harper and Lupu argue, is a "flaw in human nature."⁶⁵ The courts should accordingly be more skeptical of union credibility "whenever the qualities of insider-outsider classifications are present."⁶⁶ For illustration, they take the case of seniority. Seniority seems at first blush to be "disrespectful" of junior workers. But, on closer inspection, such is not the case.

[S]eniority is derived from conceptions of the good of the bargaining unit that do not disparage the intrinsic value of junior workers. Preference for senior employees over junior employees in job security and promotional opportunities can be justified by the senior employees' greater aggregate contribution to their firm, by the larger proportion of their lives that they have invested in the workplace, and by a concern for their decreasing job mobility.⁶⁷

On the other hand, a decision by a larger group of employees to end-tail the seniority of a smaller group, acquired as a result of a business merger, would offend the duty of fair representation, for the larger group will have denied the smaller equal respect: "[T]he social empathy on which principled decisionmaking depends was never established."⁶⁸

There are several infirmities in their theory. It refashions what was only one analogy, employed to create a statutory, not a constitutional limitation into a singular prism through which all of fair representation is to be focused. Aside from the fact that the prism is of less than crystal clarity even in the constitutional setting—evidenced in the Court's sustaining New York's prohibition on non-citizens teaching in the public schools⁶⁹—the refashioning is not faithful to the historical context. Only months before the Court created the duty of fair

63. *Id.* at 1252.

64. *Id.* at 1221.

65. *Id.* at 1236.

66. *Id.*

67. *Id.* at 1237 (footnote omitted).

68. *Id.* at 1238-39 (reference omitted).

69. See *Ambach v. Norwick*, 441 U.S. 68 (1979).

representation, it stressed that the labor Act rested upon legislative "absorption" and "approval" of "the philosophy of bargaining as worked out in the labor movement of the United States."⁷⁰ The "practice and philosophy of collective bargaining" so absorbed and approved is concerned with the "welfare of the group," and the Court noted that a majority may act to the disadvantage of individuals or minority groups who might well do better without a union.⁷¹ "[T]he majority rules," said the Court, "and if it collectivizes the employment bargain, individual advantages . . . will generally in practice go in as a contribution to the collective result."⁷²

But Harper and Lupu neglect to look to the nature of collective bargaining, as their own treatment of seniority illustrates, for the very essence of a seniority system is the manufacture of a more or less elaborate and highly artificial structure of "insiders" and "outsiders."⁷³ The rules must first determine eligibility for placement on the list, and it is not uncommon for incumbent workers to make it difficult for probationary employees to be eligible for permanent status or to classify employees as temporary or probationary in a way to limit their availability for permanent work.⁷⁴ The unit or units in which seniority is acquired must be determined; the variations for these distinctions are "almost infinite"⁷⁵ and their essential function is to

70. *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 346 (1944), *citing* *H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523-26 (1941).

71. *J.I. Case Co. v. NLRB*, 321 U.S. 332, 338 (1944).

72. *Id.* at 339.

73. *See supra* note 65.

74. *See* FREDERICK H. HARBISON, *SENIORITY POLICIES AND PROCEDURES AS DEVELOPED THROUGH COLLECTIVE BARGAINING* (1941).

Probationary employees are the first to be laid off in a time of recession and normally they do not participate with permanent employees in work-sharing. It is natural that employees with seniority rights should want to limit the size of the seniority list by making it difficult for new workers to acquire permanent status. This desire becomes intensified in those plants and industries where there is little prospect of future expansion in employment. A long probationary period shifts the burden of unemployment to new workers and entitles the short-service permanent employees not only to a greater share of available work, but also to added protection against lay-offs. For example, in one electrical manufacturing plant where the probationary period is eighteen months, it will be unnecessary to lay off any permanent employees unless there is a very drastic depression.

The exemption of temporary and probationary workers from seniority rights brings into sharp focus the conflict of interest between those who have reasonably permanent work opportunities and those who are unemployed or working only on a temporary basis. A long probationary period prior to attainment of seniority rights is a means of exclusion of certain groups of workers.

Id. at 10.

75. SUMNER H. SLICHTER, *UNION POLICIES AND INDUSTRIAL MANAGEMENT* 116-17 (1941). The United States Supreme Court later noted that "[v]ariations acceptable in the

exclude fellow workers from competition for available jobs, as is evidenced in a rich literature that Harper and Lupu neglect.⁷⁶ It cannot be argued that the rules governing the distinction between "permanent" and "probationary," or between job progression seniority, department seniority, and plant seniority rest upon principled or neutral distinctions. As a statement of the "philosophy of bargaining worked out by the labor movement" put it:

In many situations the union ranks are split on what kind of seniority rules should be in force, as one set of workers will get better job protection through departmental seniority, or even job seniority, than through plant-wide seniority, which another set of men prefers. Here the rule of the majority is the only solution, for all a union can hope to do is serve the best interests of the greatest number of its members. . . . [O]f necessity, the union's approach to seniority rules is frankly opportunistic; it is job protection the union members want, and they fit seniority rules into this desire and not job protection into seniority rules.⁷⁷

Even the decision made by some unions to limit seniority and expand work sharing as an alternative to lay-off has been explained by the numerical strength of short-service employees.⁷⁸ The point is that in making these classifications the union is governed by no objective principle other than the self-interest of the majority or of the union's leadership.⁷⁹

Gottesman's and Harper and Lupu's pieces are ambitious, they address persistent and seemingly intractable problems, and they attempt to resolve them. There the similarity ends. Gottesman has anticipated and dealt with the hard questions: he is at pains to deal

discretion of bargaining representatives" may include "the unit within which seniority is to be computed" *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338-39 (1953).

76. This would be evidenced in virtually any study of collective bargaining in a particular industry in which seniority was negotiated. See, e.g., VERNON H. JENSEN, *STRIKE ON THE WATERFRONT* 336-37 (1974); RONALD W. SCHATZ, *THE ELECTRICAL WORKERS* 117-18 (1983).

77. CLINTON S. GOLDEN & HAROLD J. RUTTENBERG, *THE DYNAMICS OF INDUSTRIAL DEMOCRACY* 127 (1942). This work was cited by the United States Supreme Court as reflecting the philosophy and practice of collective bargaining absorbed and approved by collective bargaining law. See *Order of R.R. Telegraphers v. Ry. Express Agency*, 321 U.S. 342, 346 n.7 (1944).

78. See SLICHTER, *supra* note 75, at 120.

79. *Steele* itself was a seniority case; the railroads and the unions agreed to alter the seniority rules to exclude black firemen, some who gave service of great length. Other seniority rules, such as those working to the express disadvantage of women, today would violate the duty of fair representation. Thus, *Hartley v. Brotherhood of Railway & Steamship Clerks*, 277 N.W. 885 (1938), noted with approval in *Steele*, would be decided very differently today. This evidences that when seniority rules depart from some very clearly defined federal policy they violate the duty of fair representation.

with the historical setting, and with the role of the courts in reading vintage statutes under arguably altered circumstances; and he comes to grips with the critical question of the status of the remedial scheme. Harper and Lupu slight the Court's contemporaneous conception of collective bargaining and decline to confront the serious obstacle their own example of seniority poses.

Nor is this all. David Feller observed that a legal theory is important "if solutions to particular problems can be derived from it," and is sound "if the solutions it produces are more satisfactory than those which would result without it."⁸⁰ Gottesman's approach to preemption would eliminate the contemporary anomaly that allows the state to afford tort relief for a discharge violative of the state's public policy, including other cases where the state's policy coincides with or absorbs federal policy—such as complaints over job safety, occupational health, employment discrimination, environmental quality, wage garnishment, and dereliction from federal regulatory requirements⁸¹—but not where the state would apply a policy that parallels the federal policy of freedom of workplace association; thus it would solve a real world issue in a more satisfactory manner than the rule it would replace. Harper and Lupu's theory—their tests of "equal respect," "principled democracy," and "social empathy"—are incapable of solving concrete cases.

III. "NON-TRADITIONAL" LEGAL WRITING

The 20s and 30s were, by Malcolm Sharp's account (as well as others) a time of "variety, change, novelty, and evolution" identified with "the new realists."⁸² By the 60s, according to Judge Posner, realists had run their course and law had come to be thought of in largely technical terms. In the 80s, however, all that changed: "The spectrum of political opinion in law schools, which in 1960 occupied a narrow band between mild liberalism and mild conservatism, today runs from Marxism, feminism, and left-wing nihilism and anarchism on the left to economic and political libertarianism and Christian fundamentalism on the right."⁸³ Whether or not his characterization of the "traditional" scholarship of the 60s is sound, some of the new movements he adverts to are played out in the labor law literature.

80. David E. Feller, *A General Theory of the Collective Bargaining Agreement*, 61 CAL. L. REV. 663, 664 (1973). See also Edward L. Rubin, *Beyond Public Choice: Comprehensive Rationality in the Writing and Reading of Statutes*, 66 N.Y.U. L. REV. 1, 4 (1991).

81. See HOWARD A. SPECTER & MATTHEW W. FINKIN, *INDIVIDUAL EMPLOYMENT LAW AND LITIGATION* §§ 10.33-10.42 (1989).

82. Malcolm P. Sharp, *Realism and Natural Law*, 24 U. CHI. L. REV. 648, 648-49 (1957).

83. Posner, *supra* note 1, at 766.

What each has had to offer is explored below, after which a broader assessment will be offered.

A. *Law and Economics*

"Traditional" labor law scholarship has long been eclectic; and when labor economists have had something to say, labor law scholars have listened.⁸⁴ But the law-and-economics "movement" transcends the search for economic data and analyses; it is closely identified with the application of a neo-classical economic model.⁸⁵ To this school, the market is the best available mechanism for aggregating private preferences, so for the maximization of wealth; and the dominant (if not exclusive) function of law is to foster market efficiency. To its adherents, unions are anathema, as "attempts by workers to act in concert for the purpose of charging monopoly prices for their labor,"⁸⁶ and the critique of legal intervention in individual employment, on grounds of economic efficiency,⁸⁷ is sometimes scarcely distinguishable from the arch-advocacy of laissez-faire of a century ago. One of the following excerpts is from that 19th century staple—the Reverend Francis Wayland's *The Elements of Political Economy*.⁸⁸ The other is by Professor Richard Epstein of the University of Chicago Law School.⁸⁹ The reader may decide which is which:

So long as it is accepted that the employer is the full owner of

84. This is amply evidenced in the writing on the application of antitrust laws to union activity. See generally Thomas J. Campbell, *Labor Law and Economics*, 38 STAN. L. REV. 991, 998-1004 (1986).

85. Daniel A. Farber, *The 'Law and Economics' Movement*, in 4 RESEARCH IN SOCIAL PROBLEMS AND PUBLIC POLICY 21 (JoAnn L. Miller & Michael Lewis eds., 1987) (discussing the impact of the law and economics movement on legal scholarship).

86. Daniel R. Fischel, *Labor Markets and Labor Law Compared with Capital Markets and Corporate Law*, 51 U. CHI. L. REV. 1061, 1071 (1984) (citing Richard A. Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 991-99 (1984); but noting contra RICHARD B. FREEMAN & JAMES L. MEDOFF, WHAT DO UNIONS DO? 19 (1984)). See also Richard A. Epstein, *A Common Law for Labor Relations: A Critique of the New Deal Labor Legislation*, 92 YALE L.J. 1357 (1983). But see Richard A. Epstein, *Common Law, Labor Law, and Reality: A Rejoinder to Professors Getman and Kohler*, 92 YALE L.J. 1435 (1983); Julius G. Getman & Thomas C. Kohler, *The Common Law, Labor Law, and Reality: A Response to Professor Epstein*, 92 YALE L.J. 1415 (1983).

87. See, e.g., Mayer G. Freed & Daniel D. Polsby, *Just Cause for Termination Rules and Economic Efficiency*, 38 EMORY L.J. 1097 (1989); Jeffrey L. Harrison, *The 'New' Terminable-at-Will Employment Contract: An Interest and Cost Incidence Analysis*, 69 IOWA L. REV. 327 (1984); Timothy J. Heinsz, *The Assault on the Employment at Will Doctrine: Management Considerations*, 48 MO. L. REV. 855 (1983); Richard W. Power, *A Defense of the Employment At Will Rule*, 27 St. Louis U. L.J. 881 (1983).

88. FRANCIS WAYLAND, *THE ELEMENTS OF POLITICAL ECONOMY* (1837). See generally RICHARD HOFSTADTER, *SOCIAL DARWINISM IN AMERICAN THOUGHT* 145-46 (1959) (for comment on the historical significance of Wayland's text).

89. Richard A. Epstein, *In Defense of the Contract At Will*, 51 U. CHI. L. REV. 947 (1984).

his capital and the employee is the full owner of his labor, the two are free to exchange on whatever terms and conditions they see fit It is hardly plausible that contracts at will could be so pervasive in all businesses and at all levels if they did not serve the interests of employees as well as employers.⁹⁰

Both of these parties are equally necessary to each other. If the laborer could not procure work, or could not exchange his labor for some value which he created, he must starve. If the capitalist could not create value from the employment of his capital, he must starve. . . . Both, therefore, come into the market on equal terms; each needs the product of the other; and, under these circumstances, they will each receive either less or more, in consequence of the conditions under which the exchange is made.⁹¹

There have been more interesting and, perhaps, more useful contributions. Professor John Donohue, picking up on Gary Becker's analysis of employer bias as the source of discrimination in the labor market,⁹² has argued for the economic efficiency of Title VII.⁹³ Others have examined the economic aspects of "comparable worth,"⁹⁴ of unit determination⁹⁵ and of the rules governing collective bargaining.⁹⁶ The use of an economic "model" to explore and explain legal rules is illustrated in Cohen and Wachter's, *Replacing Striking Workers: The Law and Economics Approach*,⁹⁷ applying an "efficiency wage" theory to labor law.

90. *Id.* at 955.

91. WAYLAND, *supra* note 88, at 301.

92. GARY S. BECKER, *THE ECONOMICS OF DISCRIMINATION* (1957).

93. See John J. Donohue III, *Is Title VII Efficient?*, 134 U. PA. L. REV. 1411 (1986). This article provoked a rebuttal, see Richard A. Posner, *The Efficiency and Efficacy of Title VII*, 136 U. PA. L. REV. 517 (1987); and Donohue replied, see John J. Donohue III, *Further Thoughts on Employment Discrimination Legislation: A Reply to Judge Posner*, 136 U. PA. L. REV. 523 (1987).

94. See, e.g., Mary E. Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel & Lazear*, 53 U. CHI. L. REV. 934 (1986); Daniel R. Fischel & Edward P. Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. CHI. L. REV. 891 (1986); Daniel R. Fischel & Edward P. Lazear, *Comparable Worth: A Rejoinder*, 53 U. CHI. L. REV. 950 (1986); James D. Holzhauser, *The Economic Possibilities of Comparable Worth*, 53 U. CHI. L. REV. 919 (1986).

95. See Douglas L. Leslie, *Labor Bargaining Units*, 70 VA. L. REV. 353 (1984); Douglas L. Leslie, *Multiemployer Bargaining Rules*, 75 VA. L. REV. 241 (1989). But see Jan Vetter, *Commentary on "Multiemployer Bargaining Rules": Searching for the Right Questions*, 75 VA. L. REV. 285 (1989).

96. See Stewart J. Schwab, *Collective Bargaining and the Coase Theorem*, 72 CORNELL L. REV. 245 (1987); Michael L. Wachter & George M. Cohen, *The Law and Economics of Collective Bargaining: An Introduction and Application to the Problems of Subcontracting, Partial Closure, and Relocation*, 136 U. PA. L. REV. 1349 (1988). But see Andrew D. Freeman, *A Critique of Economic Consistency*, 39 STAN. L. REV. 1259 (1987).

97. George M. Cohen & Michael L. Wachter, *Replacing Striking Workers: The Law and Economics Approach*, 43 N.Y.U. ANN. NAT'L CONF. ON LAB. 109 (1990).

Cohen and Wachter commence by asserting that the National Labor Relations Act is "a statute in search of a theory."⁹⁸ They argue that none of the traditional explanations of the Act's intent "explain or anticipate the development of labor law doctrine;" indeed, that many of the major judicial decisions are viewed as "aberrant to the traditional model."⁹⁹ They advance their own model of the Act as an attempt to foster "economic efficiency."¹⁰⁰

In their model, employers expend what are sunk (irretrievable) investments in the firm-specific training of workers who, in effect, invest as well in their training by working for wages that are lower than their current opportunity wage in the labor market. Employees recoup that investment by receiving higher than opportunity wages later; if they quit, their own investment (as well as the firm's) is lost.¹⁰¹ There is, however, a potential for both parties to behave opportunistically. Employers by reneging on the tacit commitment to a subsequent higher than opportunity wage; employees by seeking to exact a wage premium based upon the firm-specific knowledge they have acquired.

Consequently, Cohen and Wachter defend the Mackay Radio rule, which allows employers permanently to replace economic strikers, as a deterrent to opportunistic behavior.¹⁰² If the employer's wage demand is to lower the expected return on the employee's sunk investment, without regard to market conditions, the employer will be behaving opportunistically:

In this case, striking workers would have little to fear from replacement workers, because these replacements would not accept jobs that offer a stream of future wages below competitive levels. Alternatively, any replacement workers who accepted jobs would be reluctant to make sunk investments in a firm that had developed a reputation for opportunistic behavior.¹⁰³

But if the union is seeking to exact a wage premium without regard to market conditions, the extant wage would render the job more attractive to replacements.

This analysis rests upon a series of assumptions: that there is a benchmark "opportunity" wage against which both insiders and outsiders measure their interests;¹⁰⁴ that putative strike replacements

98. *Id.* at 110.

99. *Id.*

100. *Id.* at 111.

101. *See id.* at 115.

102. *See id.* at 117-19.

103. *Id.* at 118.

104. An "opportunity wage" would seem to be an employee's next best wage offer. But

know that the prospective employer is (or is not) behaving opportunistically, they know, that is, whether or not the employer is reneging on a tacit commitment to a higher-than-opportunity wage; that the prospective replacements' willingness to accept the particular job at the particular time is governed by that knowledge; even that the only time strikers are replaced permanently is when the strike is over wages. Suffice it to say there is virtually no evidence on when or why employers resort to permanent replacement, what they are paid vis-à-vis strikers, what jobs they tend to occupy, or how long they tend to stay.

Taken on its own terms, Cohen and Wachter's model presents an interesting scenario. Assume that a non-unionized employer assembles her employees and announces:

When you were hired, you worked for a wage less than your opportunity wage in the labor market and I incurred certain sunk costs in training you. You agreed to work on the non-contractual though bilateral assumption that your wage would eventually exceed your opportunity wage and that I would not act opportunistically, since new workers would be reluctant to replace you knowing that I had so acted. Well, your assumption was wrong. I have researched the labor market and have concluded that the supply of labor is such that I can renege on my non-contractual commitment and, if you don't like it, I can replace you all and still get an adequate supply of qualified labor at your opportunity wage. Take it or quit.

They are free to do just that, which, under Cohen and Wachter's theory, would test the employer's proposition. But assume instead that the workers want both to retain their jobs and keep the non-contractually promised higher-than-opportunity rate, so they unionize and strike. In Cohen and Wachter's theory, the function of their collective effort to block production, the essence of the strike, is more efficiently to test whether the employer had really done her homework. And in order to find out that she had, the employees will have lost their jobs permanently. It is a very odd reason for the legislature to extend statutory protection for unionization, collective bargaining, and the right to strike.

Cohen and Wachter's efficiency wage approach is a special the-

employers commonly do not bargain with each employee over the employee's wage; employers set wage rates. Another problem that has vexed labor economists for some time is how to explain the fact that different employers pay different wages to workers of equal ability doing similar work. See generally Erica L. Groshen, *Five Reasons Why Wages Vary Among Employers*, 30 INDUS. REL. 350 (1991). The idea of a single "opportunity wage" for the entire workforce seems to be something of an artificial construct.

ory. But it does illustrate a larger aspect of applying economic theories to the solution of labor law issues. A legal theory and an economic one are not conceptually identical. In law, a statutory "theory" can refer either to the Act's desideratum or to its instrumental justifications; one can say the "theory" of the labor Act is to create an industrial democracy, or that the "theory" of the Act's protection of the economic strike is as a necessary cost of disagreement that drives the process of collective bargaining in an on-going relationship between union and employer. In economics, a theory is a model that "explains" and so potentially predicts certain results. If a "traditional" scholar concludes that Mackay Radio cannot be reconciled with the text or policy of the labor Act, it would argue that the decision, not the Act's "theory" is flawed.

B. *Critical Legal Studies*

Perhaps the best summary has been supplied by Mark Tushnet:

[C]ritical legal studies is a political location for a group of people on the Left who share the project of supporting and extending the domain of the Left in the legal academy. On this view the project of critical legal studies does not have any essential intellectual component. . . . There should be nothing surprising about this conclusion, of course, in light of the proposition common to most CLS authors that law is politics. For, if law is politics, presumably one might also believe that legal-intellectual positions are politics too.¹⁰⁵

Louis Schwartz has suggested nevertheless that CLS writing tends to share certain features: it sees the results of liberal legal balancing as indeterminate and so "incoherent;" accordingly, "[I]t seeks to demolish 'liberalism' " which, while purporting to defend an objective balancing of competing interests, actually masks an oppressive legal system; it denies that there is any distinctive "legal" discourse, other than "stereotyped rhetorical maneuvers" that are manipulated to sustain the dominance of the powerful; it maintains consequently that "law is politics."¹⁰⁶

Two of the leading CLS labor law pieces play out several of the themes adverted to by Schwartz: Karl Klare has argued that the labor Act's radical potential was thwarted by the United States

105. Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1516-17 (1991) (footnotes omitted).

106. Louis B. Schwartz, *With Gun and Camera Through Darkest CLS-Land*, 36 STAN. L. REV. 413 (1984).

Supreme Court;¹⁰⁷ and Katherine Stone has argued that American labor law has been dominated by a philosophy of "industrial pluralism" that is doctrinally "incoherent" and serves as a "vehicle for the manipulation of employee discontent and for the legitimization of existing inequalities of power in the workplace."¹⁰⁸ A close reading of these pieces claimed that they were, literally, nonsense, not because of any inability intrinsic to their theories to be verified (or falsified), but because of their failure to adhere to the canons of responsible scholarship adverted to earlier.¹⁰⁹ The reader is free to read that critique and the resulting rejoinders¹¹⁰ and make an independent assessment.

Some CLS writing is scarcely distinguishable from traditional reformism: an argument that the Landrum Griffin Act should be read to give employees a right to vote on contract ratification;¹¹¹ an argument for statutory protection against wrongful discharge;¹¹² or criticism of the contemporary approach to determining what is conduct for "mutual aid or protection" under the labor Act.¹¹³ But other work illustrates some of the larger CLS themes.¹¹⁴

Take, for example, some of commentary spawned by the decision of the United States Supreme Court in *Eastex, Inc. v. NLRB*.¹¹⁵ The question was whether employees had the right to distribute union literature, on the employer's premises but on their own time, that expressed positions on pending political issues. The Court sustained the employees' right so to do, but observed in passing that there may be situations where the relationship of the political message to the

107. See Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

108. Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509, 1517 (1981).

109. See Matthew W. Finkin, *Revisionism in Labor Law*, 43 MD. L. REV. 23 (1984).

110. See Karl E. Klare, *Traditional Labor Law Scholarship and the Crisis of Collective Bargaining Law: A Reply to Professor Finkin*, 44 MD. L. REV. 731 (1985); Matthew W. Finkin, *Does Karl Klare Protest Too Much?*, 44 MD. L. REV. 1100 (1985); Karl E. Klare, *Lost Opportunity: Concluding Thoughts on the Finkin Critique*, 44 MD. L. REV. 1111 (1985); Katherine Van Wezel Stone, *Re-Envisioning Labor Law: A Response to Professor Finkin*, 45 MD. L. REV. 978 (1986).

111. See Alan Hyde, *Democracy in Collective Bargaining*, 93 YALE L.J. 793 (1984).

112. See Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 BROOK. L. REV. 1137 (1989).

113. See Richard M. Fischl, *Self, Others, and Section 7: Mutualism and Protected Protest Activities Under the National Labor Relations Act*, 89 COLUM. L. REV. 789 (1989).

114. See, e.g., JAMES B. ATLESON, *VALUES AND ASSUMPTIONS IN AMERICAN LABOR LAW* (1983); Jack M. Beerman & Joseph W. Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911 (1989); Karl E. Klare, *The Quest for Industrial Democracy and the Struggle Against Racism: Perspectives for Labor Law and Civil Rights Law*, 61 OR. L. REV. 157 (1982); Karl E. Klare, *Workplace Democracy & Market Reconstruction: An Agenda for Legal Reform*, 38 CATH. U. L. REV. 1 (1988).

115. 437 U.S. 556 (1978).

employees interests as employees becomes so attenuated that it would not be statutorily protected.¹¹⁶ The NLRB's General Counsel proceeded in part upon that distinction by refusing to issue a complaint where employees were discharged allegedly for leafletting, on their own time, at a rally on behalf of a petition for political asylum for Hector Marroquin, a Mexican national assertedly "persecuted by the Mexican police in reprisal for his advocacy of democratic rights and independent trade unions."¹¹⁷

Professors James Atleson and Alan Hyde have separately attacked the Court's distinction.¹¹⁸ Atleson argues that it rests upon "a hallmark of liberal thought"¹¹⁹—the public/private distinction, reiterating Karl Klare's argument that:

The essence of the public/private distinction is the conviction that it is possible to conceive of social and economic life apart from government and law, indeed that it is impossible or dangerous to conceive of it any other way. The core ideological function served by the public/private distinction is to deny that the practices comprising the private sphere of life—the worlds of business, education and culture, the community, and the family—are inextricably linked to and at least partially constituted by politics and law.¹²⁰

He argues further that the Court's distinction in *Eastex* exemplifies "how neutral sounding principles operate in non-neutral ways;"¹²¹ and that the very fragility of the distinction can only produce "incoherent" results.¹²² Professor Hyde shares the latter view, and argues further that the distinction is grounded in an ideology shared by the labor Board, the courts, "and the unions themselves that politics is separate from economics."¹²³

An important element in the self-image and practice of the American Federation of Labor (AFL)—the element that distinguished it from its unsuccessful predecessors—was "voluntarism," the notion

116. *Id.* at 573.

117. *Eagle Elec. Mfg. Co.*, No. 29-CA-10504, 1983 WL 29378, at *1 (Nov. 3, 1983). The General Counsel also declined to proceed because the employer had argued that the employees were not dismissed for this activity, but for falsifying their employment applications. In the face of this allegation and because of the burden of proof in mixed motive cases, the General Counsel deemed it a poor vehicle for presenting difficult issues under *Eastex*. *Id.* at *2.

118. See James B. Atleson, *Reflections on Labor, Power, and Society*, 44 MD. L. REV. 841 (1985); Alan Hyde, *Economic Labor Law v. Political Labor Relations: Dilemmas for Liberal Legalism*, 60 TEX. L. REV. 1 (1981).

119. Atleson, *supra* note 118, at 860.

120. Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1417 (1983) (footnote omitted).

121. Atleson, *supra* note 118, at 861.

122. *Id.* at 859.

123. Hyde, *supra* note 118, at 13.

that trade unions should eschew political activity and rely on their own economic power. Small matter that the AFL in fact kept detailed records on legislators and participated actively in elections and politics; the ideology is more revealing than the practice.¹²⁴

This assertion is supported by a reference to an unidentified union official who made the observation that American labor unions do not fill the role of labor parties. And because organized labor declined that role, Hyde implies that labor's active political engagement is somehow inconsistent with its ideology.¹²⁵

Some of the criticism of *Eastex* is sound: it is not textually obvious that the Act draws a distinction between speech as employee and speech as citizen; the distinction is likely to prove operationally vexing, especially in mixed message cases; and, as Hyde rightly observes, if the Court's concern were grounded in impediments to production occasioned by the distribution of political literature, it would be entirely possible to develop rules to deal with that problem.

But the Court's dictum is questionable in terms that Atleson and Hyde do not address. From the mid-teens through the 30s, progressive reformers were concerned about the achievement of "industrial democracy."¹²⁶ They saw a close connection between the employee's liberty in the workplace, including freedom of expression on workplace issues, and the maintenance of a political democracy.¹²⁷ It could be argued that the labor Act reflects that desideratum; and, if so, the Court's distinction would become perverse: it would allow employers to sanction political speech and activity, undertaken away from the employer's premises and on the employees' own time, when that very conduct was conceived of as the fruit of allowing protection for speech on workplace issues. And if it is appropriate to look at "the practice and philosophy" of the American labor movement as a

124. *Id.* at 12 (footnote omitted).

125. The unnamed union official observed in part, "[b]ecause there is no labor party in America, unions are sometimes expected to fill that role. But they can't, and they never have, not in America or anywhere else for that matter." *Id.* at 13 (reference omitted). To which Professor Hyde responds:

The statement is astonishing—in much of "anywhere else" the unions do support labor parties—but it illustrates the deep-seatedness of the distinction in American labor history and theory between politics and "normal" activity. Examining the conventional view as applied permits us to see that the distinction in labor law is more ideological than narrowly functional.

Id.

126. See generally ALAN DAWLEY, *STRUGGLES FOR JUSTICE: SOCIAL RESPONSIBILITY AND THE LIBERAL STATE* 155, 203 (1991); MILTON DERBER, *THE AMERICAN IDEA OF INDUSTRIAL DEMOCRACY 1865-1965* (1970).

127. See R.W. Fleming, *The Significance of the Wagner Act*, in *LABOR AND THE NEW DEAL* 121, 135 (Milton Derber & Edwin Young eds., 1972).

source to inform the content of the labor Act, much as the Court said in 1944, then the law should draw from labor's active and extensive engagement in the political process,¹²⁸ notwithstanding its declination to form a labor party, even to its maintenance of a foreign policy.¹²⁹ The General Counsel's refusal to seek protection for the protest over Hector Marroquin's deportation, on the assumption that these protests had "little or no relationship to employee problems and concerns as employees," is difficult to reconcile with the AFL's vehement protest over the arrest of Mexican anarchists in 1907, to the point of its 1908 Convention resolving to seek a Congressional investigation.¹³⁰

To these "critical legal studies" writers, however, the Court is wrong for very different reasons. On the basis of a leap in logic, Hyde asks us to see the Court's declination fully to protect organized labor's political speech as a reification of organized labor's own ideology. And Atleson asks us to connect that declination to the public/private distinction, so to the legal permissibility of establishing a home for aged immigrants from Minsk.¹³¹

C. *Feminism*

Feminism as a political movement in defense of women's rights has deep roots in American history. Feminism in scholarship, in the sense of looking at the world from the point of view of women, or, more narrowly of issues particular to women, has an equally rich pedigree and has made extraordinary contributions, for example, in labor history.¹³² But recent feminist legal scholarship has become more avowedly "political" in the sense that it brings certain presuppositions to the resolution of legal issues.¹³³ Cass Sunstein has suggested that

128. See generally J. DAVID GREENSTONE, *LABOR IN AMERICAN POLITICS* (1969).

129. See generally RONALD RADOSH, *AMERICAN LABOR AND UNITED STATES FOREIGN POLICY* (1969).

130. See PHILIP TAFT, *THE A. F. OF L. IN THE TIME OF GOMPERS* 321 (1957). The AFL's involvement in Mexican labor during this period has been the subject of more recent scholarly inquiry. See, e.g., GREGG ANDREWS, *SHOULDER TO SHOULDER? THE AMERICAN FEDERATION OF LABOR, THE UNITED STATES, AND THE MEXICAN REVOLUTION, 1910-1924* (1991).

131. HENRY FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 20 (1988).

132. See, e.g., CINDY S. ARON, *LADIES AND GENTLEMEN OF THE CIVIL SERVICE* (1987); SUSAN P. BENSON, *COUNTER CULTURES: SALESWOMEN, MANAGERS, AND CUSTOMERS IN AMERICAN DEPARTMENT STORES, 1890-1940* (1986); SUSAN LEHRER, *ORIGINS OF PROTECTIVE LABOR LEGISLATION FOR WOMEN, 1905-1925* (1987); JUDITH A. MCGAW, *MOST WONDERFUL MACHINE: MECHANIZATION AND SOCIAL CHANGE IN BERKSHIRE PAPER MAKING, 1801-1885* (1987); JOANNE MEYEROWITZ, *WOMEN ADRIFT: INDEPENDENT WAGE EARNERS IN CHICAGO, 1880-1930* (1988).

133. See, e.g., Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990); Angela P. Harris, *Race and Essentialism in Feminist Legal Theory*, 42 STAN. L. REV.

there are at least three distinct groupings.¹³⁴ The first, embodying traditional liberal notions of individual rights, argues that women should be legally perceived of and treated no differently from men.¹³⁵ The second insists upon fundamental female differences that are not only biological and psychological but moral as well.¹³⁶ As Sunstein put it, "[i]n this view, women tend to value relationships and connections—an 'ethic of care'—whereas men tend to place a higher premium on abstraction, rights, autonomy, separation, formality, and neutrality—an 'ethic of justice.'"¹³⁷ In one consequence, some feminists have criticized the very idea of individual rights as a male invention, which the philosopher, Judith Thomson, has pointed out would place at risk the tenability of the claim women make for the right to control their reproductive lives.¹³⁸ The third, or "radical" feminism sees the law as playing out a culture of male dominance that works a systematic, pervasive, and relentless oppression of women.¹³⁹ So relentless, so pervasive, that some feminists of this persuasion view all heterosexual relations as indistinguishable from rape, and consequently debate whether lesbianism represents sexual liberation or is yet a further extension of male dominance.¹⁴⁰

How these presuppositions play out are illustrated in the feminist response to two developments in the law of sex discrimination in employment. The first is illustrated in the reaction to the opinion of the United States Supreme Court in *Meritor Savings Bank v. Vinson*.¹⁴¹ The decision sustained the theory of sexual harassment under Title VII, including an employer's liability for "unwelcome" sexual advances; but in so doing the Court suggested that evidence of sexually provocative speech or dress would be relevant to the question of

581 (1990); Catharine A. MacKinnon, *Reflections on Sexual Equality Under Law*, 100 YALE L.J. 1281 (1991); Deborah Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617 (1990); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

134. See Cass R. Sunstein, *Feminism and Legal Theory*, 101 HARV. L. REV. 826 (1988) (reviewing CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)).

135. See *id.* at 827.

136. See *id.* at 827-28.

137. *Id.* This "feminism of difference"—or "relational feminism"—reclaims, in the words of one sympathetic critic, "the compliments of Victorian gender ideology" (women as more nurturing and more moral than men) "while rejecting its insults" (women as more passive and less competent than men). Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 807 (1989).

138. JUDITH THOMSON, *THE REALM OF RIGHTS* 288 n.3 (1990).

139. See Sunstein, *supra* note 134, at 828-29.

140. See Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State*, 100 YALE L.J. 2247 (1991) (book review).

141. 477 U.S. 57 (1986).

welcomeness.¹⁴²

If women differ from men in terms of their perception of sexual "cues,"¹⁴³ if women select clothing that is perceived by men as sexually provocative, but do so without intent so to provoke, then to the "feminism of difference" consideration of "provocative" dress as evidence of the welcomeness of male advances would hold women accountable to a male standard.¹⁴⁴ On the other hand, the Court's intuition might be factually sound. But even if women as a group dress with an eye toward male response, it does not follow that all women do so. And so a different issue would be presented. In some cases Title VII does not permit the ascription of valid group characteristics to individuals: an employer may not refuse to hire women with pre-school age children even if on the valid belief that that group will incur a disproportionately high rate of absenteeism;¹⁴⁵ nor may it discriminate in compensation because women as a group live longer than men.¹⁴⁶ Here the feminism of individualism would argue for the disregard of group characteristics.

In the foregoing, the assumptions of the "feminism of difference," if factually accurate, conduce toward a result congenial to its larger end of a better world of work for women. But a more difficult problem is posed when the assumption is consistent with a result contrary to that end, as is illustrated in the literature following the decision in *EEOC v. Sears, Roebuck & Co.*¹⁴⁷ In order to understand how vexing the case is from a feminist point of view, a little bit of law is in

142. *Id.* at 69.

143. See Antonia Abbey et al., *The Effects of Clothing and Dyad Sex Composition on Perceptions of Sexual Intent: Do Women and Men Evaluate These Cues Differently*, 17 J. APPLIED SOC. PSYCHOL. 108 (1987).

144. See Christine A. Littleton, 41 STAN. L. REV. 751, 770 (1989) (reviewing CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* (1987)). See also Susan Estrich, *Sex at Work*, 43 STAN. L. REV. 813 (1991) (drawing analogies to the law of rape).

145. See *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

146. See *City of Los Angeles Dept. of Water and Power v. Manhart*, 435 U.S. 702 (1978); *Ariz. Governing Comm. for Tax Deferral Annuity and Deferred Compensation Plans v. Norris*, 463 U.S. 1073 (1983). See also George J. Benston, *Discrimination and Economic Efficiency in Employee Fringe Benefits: A Clarification of Issues and a Response to Professors Brilmayer, Laycock, and Sullivan*, 50 U. CHI. L. REV. 250 (1983); George J. Benston, *The Economics of Gender Discrimination in Employee Fringe Benefits: Manhart Revisited*, 49 U. CHI. L. REV. 489 (1982); Lea Brilmayer et al., *Sex Discrimination in Employer Sponsored Insurance Plans: A Legal and Demographic Analysis*, 47 U. CHI. L. REV. 505 (1980); Lea Brilmayer et al., *The Efficient Use of Group Averages as Nondiscrimination: A Rejoinder to Professor Benston*, 50 U. CHI. L. REV. 222 (1983).

147. 628 F. Supp. 1264 (N.D. Ill. 1986), *aff'd*, 839 F.2d 302 (7th Cir. 1988). Vehement controversy surrounded a prominent female historian's agreement to testify for the defendant employer in the *Sears* case. See Thomas Haskell & Sanford Levinson, *Academic Freedom and Expert Witnessing: Historians and the Sears Case*, 66 TEX. L. REV. 1629 (1988).

order. In the absence of a policy expressly to exclude women from certain jobs, a plaintiff may attempt to prove intentional discrimination by reliance upon the statistical display of women in the employer's work force. This requires that that display be measured against some benchmark, either of the general population or some subset. As Douglas Laycock explains,

Most statistics in employment discrimination cases compare two populations, such as blacks and whites or men and women. One assumption that can never be relaxed is that the two populations are the same in all respects except for the possible difference under investigation and for any differences that have been controlled. If the two populations are a little bit different, the inference will be a little bit off, but usable. If the two populations are a lot different, the inference will be worthless.¹⁴⁸

In the *Sears* case, women made up about 75% of Sears non-commission sales force; but only 27% of commission sales employees, who sold "big ticket" items such as furnaces, who would be required to become proficient in technical knowledge of the product, and who might be required to make visits to customers homes. The EEOC's benchmark was based upon a statistically projected female hiring rate of four women for every ten openings, based upon its analysis of applicants for all sales jobs and adjusting for six variables such as education and experience. It had not accounted, however, for any sex differential in interest between the commission and non-commission sales jobs. On average, Sears had hired three women for every ten openings. The question, then, was of the significance of that statistic, and so of the soundness of the EEOC's statistical benchmark.¹⁴⁹

The trial court rejected the EEOC's claim of intentional discrimination on three grounds: (1) the EEOC's benchmark failed to take account of "the interests of applicants in commission sales and products sold on commission;"¹⁵⁰ (2) the claim of intentional discrimination was contradicted by Sears' commitment to affirmative action, including efforts specifically to recruit women for its commission sales force;¹⁵¹ and, (3) the EEOC failed to produce a single witness of intentional discrimination, about which the court was simply incredulous.¹⁵²

148. Douglas Laycock, *Statistical Proof and Theories of Discrimination*, 49 LAW & CONTEMP. PROBS. 97, 98 (1986).

149. See *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264 (N.D. Ill. 1986).

150. *Id.* at 1324.

151. *Id.* at 1292-94, 1306-09.

152. *Id.* at 1300.

The first ground of the court's reasoning seems congruent with the tenets of "feminism of difference," for the court opined:

[W]omen generally prefer to sell soft-line products, such as apparel, housewares or accessories sold on a noncommission basis, and are less interested in selling products such as fencing, refrigeration equipment and tires. Women tend to be more interested than men in the social and cooperative aspects of the workplace. Women tend to see themselves as less competitive. They often view noncommission sales as more attractive than commission sales, because they can enter and leave the job more easily, and because there is more social contact and friendship, and less stress in noncommission selling.¹⁵³

Yet the feminist response has been in part to criticize the court, and in part to see the *Sears* case as a basis for a much broader challenge to job content and structures.

On the former, Professor Williams faults the court for requiring the EEOC to prove the percentage of women interested in commission sales while "not requiring Sears to provide *equivalent proof* of the specific percentage of women who fit gender stereotypes."¹⁵⁴ But the burden of proof in Title VII cases, consistent with the norm of defendants being presumed innocent until proven guilty, always rests with the plaintiff; while free to challenge the fit claimed by the plaintiff, Sears labored under no obligation to "prove" anything. Professor Rhode notes that Sears "relied on tests that measured prospective employees' 'vigor' by reference to their views towards boxing, wrestling, hunting and swearing."¹⁵⁵ But she does not note the trial court's rejection of the relevance of that evidence on the basis of uncontroverted testimony that Sears managers paid no attention to it.¹⁵⁶ Professor Rhode also asserts that, "[i]f, as Sears emphasized, women generally didn't seek commission positions, neither did Sears actively seek women for those positions."¹⁵⁷ But this ignores the evidence of Sears' extensive affirmative action plan in general, and the uncontradicted testimony from Sears' managers of their efforts to recruit women for commission sales jobs in particular.¹⁵⁸ The testimony on both issues may have been inaccurate; but the EEOC offered nothing in rebuttal, and it cannot be ignored out of hand.

153. *Id.* at 1308 (summarizing the testimony of Sears' expert witness).

154. Williams, *supra* note 137, at 818-19 (emphasis omitted and added).

155. Deborah L. Rhode, *The 'No-Problem' Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1770 (1991).

156. *See Sears*, 628 F. Supp. at 1317.

157. Rhode, *supra* note 155, at 1770.

158. *See Sears*, 628 F. Supp. at 1306.

Both elements of the feminist attack on the *Sears* case are illustrated in a comprehensive treatment, over ninety pages in the *Harvard Law Review* by Professor Vicki Schultz,¹⁵⁹ and it is worthy of more extended consideration as an example of a spirited feminist critique. Professor Schultz supplies a statistical assessment: for the period 1972-1989, there are fifty-four reported cases in which the "lack of interest argument" was assayed, and in which plaintiffs prevailed a little more than half the time. If the "lack of interest" argument would have explanatory power in one setting, for example, in jobs requiring a high level of mathematical skill,¹⁶⁰ would be ludicrous in another, for example, operating room nurse, and would be debatable in a third, for example, selling furnaces, and if a court could err at times in deciding which is which, then one can question whether any meaningful generalizations can be made from the statistics of how the courts have treated it. But Professor Schultz labels as "liberal" the courts that have rejected the lack of interest argument and "conservative"¹⁶¹ those that have accepted it, irrespective of the merits of the particular case, which labels would seem to tell us precisely nothing.

Professor Schultz then aggregates the statistics in several ways. Defendants, for example, tend to win when they produce evidence of having made efforts to recruit women (12 cases), and plaintiffs have tended to win when no such efforts were testified to (22 cases).¹⁶² This seems entirely consistent with the "lack of interest" explanation. Professor Schultz attempts to rebut that conclusion by arguing that in those cases where employers claimed to have tried to recruit women, "not one presented documentation that women had declined actual job offers at a higher rate than men,"¹⁶³ and when such special efforts were accepted they "fell far short of what is encompassed in a traditional affirmative action plan,"¹⁶⁴ by which she presumably means one involving express goals.

This will not hold up. The critique of the court's acceptance of anecdotal evidence in lieu of a "traditional" affirmative action plan

159. Vicki Schultz, *Telling Stories About Women and Work: Judicial Interpretations of Sex Segregation in the Workplace in Title VII Cases Raising the Lack of Interest Argument*, 103 HARV. L. REV. 1749 (1990).

160. There is a rich literature on the differential achievement of women as compared to men in mathematics. See, e.g., Marwan Awartani & Mary W. Gray, *Cultural Influences on Sex Differentials in Mathematics Aptitude and Achievement*, 20 INT'L J. MATH. EDUC. SCI. TECH. 317 (1989); Mary Gray, *The Mathematical Education of Women*, 84 AM. MATHEMATICAL MONTHLY 374 (1977).

161. Schultz, *supra* note 159.

162. *Id.* at 1790.

163. *Id.* at 1791.

164. *Id.* at 1790.

begs the question, for to develop such a plan the employer would have to undertake a workforce utilization study that compares the incumbent workforce with a reasonable assessment of the qualified female representation in the relevant labor market, that is, a benchmark. The "lack of interest" question goes to the benchmark.

The argument to the lack of rejected offers is made in connection with an illustrative case, *Davis v. City of Dallas*.¹⁶⁵ That case tested whether the City's hiring of female police officers should be measured by a benchmark of the female composition in the general population, 39%, or the applicant pool of 15% to 18%. The court accepted the latter figure, relying, just as Professor Schultz notes, on the City recruiter's testimony of market resistance from women. But, in a passage Professor Schultz does not mention, the Court observed, "[t]he city recruiter, a black female, testified persuasively that substantial numbers of females decided against police work upon learning that assignment to patrol duty was mandatory."¹⁶⁶ Requiring a higher "rejection of job offer" rate by women than men under such circumstances, requiring, that is, that offers be extended to women who declined to apply after securing an accurate, non-discriminatory picture of what the job entailed, would not appear to make a great deal of sense.

Professor Schultz tries another tack. In race cases, the employer's prior history of racial discrimination has been taken to evidence to blacks that it would be a futility to apply; and so the lack of a significant pool of black applicants would evidence not a lack of interest, but a consequence of the employer's antecedent discriminatory policies or practices. In sex cases, however, Professor Schultz argues that the courts "have been far less willing to find that employers engaged in past discrimination from statistical evidence than from direct or anecdotal evidence suggesting the same history."¹⁶⁷ But this is another circular argument: if women do disprefer certain non-traditional jobs, then statistical evidence of prior disparity would be no more probative than current statistical evidence.

To make her point on the disparate treatment the courts accord sex where futility might explain the low female representation, Professor Schultz discusses several cases decided by both "liberal" (that is, where women won) and "conservative" (that is, where women lost) courts. But her treatment of the cases is a tad Procrustean.¹⁶⁸ She

165. 483 F. Supp. 54 (N.D. Tex. 1979).

166. *Id.* at 61.

167. Schultz, *supra* note 159, at 1783.

168. Professor Schultz, however, is rightly critical of the court's cavalier treatment of

criticizes the Eighth Circuit in *Catlett v. Missouri Highway and Transportation Commission*,¹⁶⁹ for failing "to mention that the state's long history of excluding women may have discouraged them from applying for road maintenance work."¹⁷⁰ And she criticizes the Court's vacating the trial court's order of quota hiring: "[t]he court of appeals seemed to believe that once the plaintiffs had made the state aware of women's interest in road maintenance jobs, Missouri would voluntarily place women in those jobs *without any judicial supervision*."¹⁷¹

That is not quite right.¹⁷² Professor Schultz neglects to mention that vacated order was replaced by a general injunction—scarcely the want of "any judicial supervision" in hiring.¹⁷³ And Professor

women in *EEOC v. Korn Industries*, 17 Fair Empl. Prac. Cas. (BNA) 954 (D.S.C. 1978), *aff'd on other grounds and remanded*, 662 F.2d 256 (4th Cir. 1981). She is also critical of *EEOC v. Mead Foods, Inc.*, 466 F. Supp. 1 (W.D. Okla. 1977), where the court accepted the argument of lack of women's interest in bakery work and the work of route drivers, who made up nearly a third of the workforce. The former was hot, heavy, and difficult work requiring night duty; the latter work required drivers to rise at 3:00 a.m., drive heavy trucks, and handle heavy trays and racks. Professor Schultz observes:

Given that the employers in *Mead* and *Korn* had *never* hired women for nontraditional jobs, the courts in both cases could easily have found that both employers had engaged in past discrimination. The courts could then have invoked the futility doctrine to reject the employers' suggestions that women's failure to pursue the jobs was attributable to some timeless set of "feminine" preferences unrelated to their historical experience of discrimination. That these and other conservative courts were unwilling to take this approach reveals their view of the history of women's experience in the labor market. They were not only hostile to, but also incredulous at, the suggestion that sex segregation exists because employers have historically imposed it on women.

Schultz, *supra* note 159, at 1785 (emphasis in original).

The *Korn* court was equally cavalier in its treatment of the total absence of blacks in clerical employment on the grounds of the qualified labor pool. See *Korn*, 17 Fair Empl. Prac. Cas. (BNA) at 960. It would not appear to have applied a standard differential in effect. And contrary to Professor Schultz's assertion of *Mead* that the Company had *never* hired a woman for the non-traditional jobs at issue, the court observed of the bakery work that: "Women have been recruited for and placed in Defendant's baking operation. They have never lasted more than a few days." *Mead*, 466 F. Supp. at 3. And of routework: "Women have tried this job but apparently only one stuck it out." *Id.* at 4.

169. 828 F.2d 1260 (8th Cir. 1987).

170. Schultz, *supra* note 159, at 1786.

171. *Id.* at 1787 (emphasis added).

172. Professor Schultz neglects to mention that the *Catlett* Court vacated the order upon its understanding of the law, which was binding upon it: "The Supreme Court has not yet approved a court-ordered race- or gender-conscious remedy against a defendant which has not been given a chance voluntarily to bring its personnel practices into compliance with a generalized injunction against further discrimination. We decline to take that step here." 828 F.2d at 1269.

173. The *Catlett* court noted:

The order imposing hiring goals shall be replaced by a generalized injunction prohibiting further discrimination by Missouri in hiring highway

Schultz neglects to mention that the court of appeals approved back pay for a class of female discriminatees consisting not only of those who had been rejected for the job, but also of those who "might have applied" but for the employer's discrimination.¹⁷⁴ In other words, the very women whom the court is criticized for failing to "mention," those discouraged from applying, constituted a certified class for whom relief was affirmed.

Professor Schultz also takes issue with the court in *Capaci v. Katz & Besthoff, Inc.*,¹⁷⁵ because the court, which found discrimination in the period 1965-1972, "accepted the same lack of interest argument to justify the women's continuing underrepresentation from 1973 to 1977," and "failed even to discuss whether the company's proven history of discrimination might have dissuaded women from seeking management jobs during the more recent period."¹⁷⁶

The decision is badly in need of explanation.¹⁷⁷ But the above proposition suffers from two infirmities. First, the text reveals no connection between the court's rejection of the 1973-1977 claims and the "lack of interest" argument.¹⁷⁸ Second and more important, the testimonial evidence that the court credited was of the company's effort to hire female manager trainees after Ms. Capaci filed her charge of discrimination in 1973. "Thereafter," the district court observed, "the promotion of females into management [had] continuously accelerated."¹⁷⁹ According to the EEOC's expert, the projected benchmark was 16% to 29% female. From July 1976 through 1977, the only period for which applicant flow data were available, 19.2% of the applicants for manager trainee were female.¹⁸⁰

In other words, Professor Schultz faults the court of appeals for

maintenance workers, and nothing in our opinion should be construed as diminishing Missouri's obligation to take effective, affirmative steps to publicize employment opportunities and manifest its receptiveness to female maintenance applicants. We particularly observe that the thirty-seven to forty-eight percent female goal selected by the district court reflects the jury's and the court's view of the evidence in this case and may prove a useful standard for Missouri in evaluating its own compliance with our injunction.

Id.

174. *Id.* at 1262.

175. 711 F.2d 647 (5th Cir. 1983), *cert. denied* 466 U.S. 927 (1984).

176. Schultz, *supra* note 159, at 1786.

177. The court characterized the statistics for 1973 to 1977 as "weak," but noted the probability of random selection of female hiring at the employer's rate in that period to have been less than 1 in 10,000. *Capaci*, 711 F.2d at 652, 662.

178. All the court said was, "[t]he statistical evidence was relatively weak, the testimonial evidence strong and there was no questionable advertising during this period." *Id.*

179. *Capaci*, 525 F. Supp. at 338.

180. *Capaci*, 711 F.2d at 652.

failing to come to grips with the possibility that the company's history of discrimination had dissuaded women from seeking management jobs, when the percentage of female applicants for those jobs, once the employer's barriers to entry had been lifted, was within the range projected by the assumption that women do not have different job preferences from men. But that fact contradicts her criticism of the courts for assuming such would in fact result from the lifting of those barriers without additional judicially imposed recruitment efforts. And so it is ignored.

Professor Schultz next turns to sociological research on occupational sex segregation. She finds that young women *do* enter the labor market with different preferences from men, but that these preferences change as a result of women's work experience; and, indeed, that as the doors to non-traditional jobs have opened, almost as many women have been leaving them as have been entering them.¹⁸¹ From this she argues that

Employers do not simply erect "barriers" to already formed preferences: they create the workplace structures and relations out of which those preferences arise in the first place. Thus, in resolving the lack of interest argument, courts must look beyond whether the employer has provided women the formal opportunity to enter non-traditional jobs.¹⁸²

The role of the courts, she argues, is to enable women "to aspire to work they have never before been able to dream of doing,"¹⁸³ to restructure career ladders "in ways that will infuse women workers with new hopes and aspirations,"¹⁸⁴ to "redefine the content of entry-level jobs . . . in less stereotypically feminine terms."¹⁸⁵ Presumably, Sears should have done something about the way it sold furnaces that would have attracted more women to the job, and its failure so to have done was somehow violative of Title VII. This is a provocative suggestion, but she does not deal any more precisely with what employers would be required to do and upon what statutory bases the courts should require them to do it.¹⁸⁶

181. Schultz, *supra* note 159, at 1826.

182. *Id.* at 1841.

183. *Id.* at 1793.

184. *Id.* at 1831 (footnote omitted).

185. *Id.* at 1832.

186. Professor Schultz notes two studies that suggest how work can be restructured "in ways that will . . . reduce sex segregation." *Id.* at 1831 n.316. But she does not develop the thesis, nor does she address the legal grounds for the courts to so require. Moreover, the reduction of sex segregated work may be more complicated than Professor Schultz by this passing reference suggests. One study published subsequent to Professor Schultz's article, and which proceeds upon the assumption of no sex differences in the desire for particular jobs,

Professor Schultz criticizes the courts for accepting the assumption that women have preferences in work and surroundings different from men; but her ultimate conclusion is consistent with it. She joins other feminist writers in calling for a restructuring of the workplace in a manner more accommodating to feminine traits,¹⁸⁷ possibly even to challenge the entire "Western wage labor system as a system of power relations that leaves women economically and socially vulnerable."¹⁸⁸

D. Critical Race Theory

Some legal academics, identified as the Critical Race Theory or New Race Theory group,¹⁸⁹ center upon racism, which is held to be as pervasive and relentless in American legal consciousness as radical feminists hold male dominance to be.¹⁹⁰ Their writing, according to Richard Delgado, is characterized by the following themes:

- (1) an insistence on "naming our own reality;" (2) the belief that knowledge and ideas are powerful; (3) a readiness to question basic premises of moderate/incremental civil rights law; (4) the borrowing of insights from social science on race and racism; (5) critical examination of the myths and stories powerful groups use to justify racial subordination; (6) a more contextualized treatment of doctrine; (7) criticism of liberal legalisms; and (8) an interest in structural determinism—the ways in which legal tools and thought-structures can impede law reform.¹⁹¹

Thus far, however, their critique in labor and employment law

argues that some traditional male jobs have in fact been restructured and working conditions refashioned in ways that render the jobs more available to women. A common consequence, however, is a sexual resegmentation of work. See BARBARA F. RESKIN & PATRICIA A. ROOS, *JOB QUEUES, GENDER QUEUES: EXPLAINING WOMEN'S INROADS INTO MALE OCCUPATIONS* (1990). Baking, for example, has become sub-divided: partially finished baked goods (prepared by male bakers) are now shipped to grocery chains where they are "baked-off" by a largely part-time workforce of female bakers. The latter are attracted to the work among other things by its part-time nature, while men are discouraged from it for the same reason. See *id.* at 58, 268. One result is a feminization of the work, which fact further discourages male participation. This scenario plays out with respect to a number of the occupations studied.

187. See Lucinda M. Finley, *Choice and Freedom: Elusive Issues in the Search for Gender Justice*, 96 YALE L.J. 914, 939-40 (1987) (reviewing DAVID L. KIRP ET AL., *GENDER JUSTICE* (1986)).

188. Williams, *supra* note 137, at 822.

189. See Richard Delgado, *When A Story Is Just A Story: Does Voice Really Matter?*, 76 VA. L. REV. 95, 95 n.1 (1990); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 n.7 (1991); Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758, 759 n.6 (1990).

190. See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331 (1988).

191. Delgado, *supra* note 189, at 95 n.1.

has been largely negligible.¹⁹² An exception is Professor Regina Austin's attack on a decision of the Eighth Circuit sustaining the discharge of Crystal Chambers, a pregnant, unmarried, black teacher who was considered a bad "role model" for her students—predominantly black, female teenagers in a program geared in part to discourage teenage pregnancy.¹⁹³ Austin mounts a powerful challenge to the idea that a black teacher's unwed pregnancy would have any effect upon the conduct of her students;¹⁹⁴ and she places that challenge in the special sociological context of black teenagers. She also challenges the "role model" theory on broader grounds:

The requirement that one allow one's self to be modeled in order to keep one's job is not limited to blacks who are young fertile females. To a certain extent, the trouble Crystal Chambers encountered is a generic infliction suffered by black role models of both sexes and all ages who reject the part and become rebellious renegades or traitors to the cause of black cultural containment.¹⁹⁵

Broader, but still racial grounds; which is to state the limits of the "Critical Race Theory" horizon. The question in Crystal Chambers' case is a reprise, albeit in a special setting, of the Bertrand Russell case. One could accordingly restate the issue as whether *any* employer, including a school, should be allowed to require *any* of its employees, including teachers, "to be modeled," irrespective of race. If the more persuasive answer to that question is "no," then race becomes a non-issue.

Professor Austin moves on to a different level of commentary, one possibly reflective of the "'naming [of] our own reality'" and the "more contextualized treatment of doctrine" that is claimed to characterize New Race Theory. She applauds the plaintiff as "more nearly a role model when she fought back."¹⁹⁶ That approval, however, is not limited to Ms. Chambers' workplace resistance or legal struggle. "Her single motherhood," Professor Austin opines, "repre-

192. Judge Posner has argued that "whereas feminism is an approach (or cluster of approaches), race is not;" and that critical race theory has not produced a single idea. Richard A. Posner, *Duncan Kennedy on Affirmative Action*, 1990 DUKE L.J. 1157, 1160 (1990). On the former, other scholars as well have been critical of "attempts to find a universal characteristic defining 'black' people" despite the "professional investment" some have made in the effort. Charles Johnson, *Inventing Africa*, N.Y. TIMES, June 21, 1992, § 7 (Book Review), at 8 (reviewing KWAME A. APPIAH, *IN MY FATHER'S HOUSE: AFRICA IN THE PHILOSOPHY OF CULTURE* (1992)).

193. See Regina Austin, *Sapphire Bound!*, 1989 WIS. L. REV. 539 (1989) (examining *Chambers v. Omaha Girls Club*, 834 F.2d 697 (8th Cir. 1987), *reh'g denied*, 840 F.2d 583 (1988)).

194. See *id.*

195. *Id.* at 557.

196. *Id.* at 576.

sented an alternative social form that one might choose deliberately, rationally, and proudly."¹⁹⁷ And so she speculates on whether Ms. Chambers' "single pregnancy" is "potentially revolutionary and emancipatory."¹⁹⁸ But if Ms. Chambers' single pregnancy was a potentially emancipatory act, if her single pregnancy "represented" a rational choice, proudly made, it could be so only if the representation is made to others and is perceived as such by them; and those so represented to and so perceiving her single pregnancy would have to include the unwed teenage girls who were her pupils. But Professor Austin does not acknowledge the tension between her arguments, nor the disturbing implications of the latter claim.

The larger themes of New Race Theorists have tended to lack programmatic precision, save, interestingly, in its application to the legal-academic labor market. Some of its proponents have claimed that "persons of color" have a unique perspective on racial-legal issues that whites cannot have.¹⁹⁹ This leads to the corollary that the published work of "the voice of color" be evaluated by non-white, non-hierarchical, non-majoritarian standards;²⁰⁰ in other words, that there is "black" legal scholarship and "white" legal scholarship, and that the former cannot be judged by the standards of the latter. In this, the New Race Theorists' claim of endemic racism achieves full intellectual closure.

E. "Voice" and Storytelling

There has been considerable commentary on the role of narrative in law and in legal scholarship.²⁰¹ Some feminists, "new race theo-

197. *Id.*

198. *Id.* at 578. In keeping with the idea of literally "naming our own reality," Professor Austin speculates on why black women give their daughters names like Kanti, Ebony, Tamika, and Latoya among others. It could, she suggests, constitute "an expression of group solidarity" or a "tactic of opposition." *Id.* But neither would be unique to America or to the African-American experience. During the French Revolution it was not uncommon for children to be given appropriately revolutionary names; and in the Agitprop period, children of radical American parents were sometimes named after Marx, Lenin or other similarly hagiographical figures. If, in the early nineteenth century, two textile workers named their sons after Samuel Slater, the mill's owner, another named his Liberty and Independence. JONATHAN PRUDE, *THE COMING OF INDUSTRIAL ORDER* 136 (1983).

199. This assertion has provoked quite a heated debate. Compare Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) with Colloquy, *Responses to Randall Kennedy's Racial Critiques of Legal Academia*, 103 HARV. L. REV. 1844 (1990).

200. Compare Alex M. Johnson, Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991) with Stephen L. Carter, *Academic Tenure and "White Male" Standards: Some Lessons from the Patent Law*, 100 YALE L.J. 2065 (1991).

201. See Symposium *Legal Storytelling*, 87 MICH. L. REV. 2073 (1989). See also Julius G. Getman, *Voices*, 66 TEX. L. REV. 577 (1988); Mark G. Yudof, *'Tea and the Palaz of Hoon': The Human Voice in Legal Rules*, 66 TEX. L. REV. 589 (1988).

rists," and others make special claims for the "voice" of the oppressed and the marginalized: they "tell stories different from the ones legal scholars usually hear. . . . [T]hey reveal things about the world that we *ought* to know."²⁰²

How "storytelling" is employed is illustrated in a recent article by Professor Mari Matsuda criticizing what the courts have done in cases of discrimination on the basis of foreign accent.²⁰³ Taking *Fragrante v. City and County of Honolulu*²⁰⁴ as an archetypical case, she proceeds to tell "Manuel Fragante's Story." Mr. Fragante, a Philippine national, was a guerilla against the Japanese; he became an army officer and served in Vietnam; he "believed in self-reliance, hard work, and respect for authority"²⁰⁵ He moved to Honolulu, became a United States citizen, applied for a clerk's job in Division of Motor Vehicles, and placed first on the civil service examination out of 700 competitors. Contrary to others, he did not think the job "beneath him."²⁰⁶ He interviewed with "assured dignity." "He knew the job was his."²⁰⁷ But it wasn't to be. Although he was one of five finalists for the job, it was given to another on the interviewers' conclusion that his Filipino accent would make it difficult for him to be understood. He sued for violation of Title VII, on grounds of national origin discrimination, and lost both on trial and on appeal.

The Ninth Circuit held that a refusal to hire on the basis of accent could violate the Act, citing authority to that effect; and it stressed that a "very searching look" by the trial courts was necessary to assure that an employer's explanation, that the applicant lacked an adequate level of intelligibility, is not a "cover" for unlawful discrimination.²⁰⁸ But it found no basis in the record to challenge the trial court's finding that the Division had made an honest assessment of Mr. Fragante's ability to communicate.

Professor Matsuda challenges this conclusion both on the facts and on the law. It is possible that she is correct on the first;²⁰⁹ but

202. Delgado, *supra* note 189, at 95 (footnote omitted).

203. See Matsuda, *supra* note 189.

204. 888 F.2d 591 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1811 (1990). Professor Matsuda was counsel for the plaintiff in this case.

205. Matsuda, *supra* note 189, at 1334.

206. *Id.* at 1336.

207. *Id.* at 1337.

208. *Fragrante*, 888 F.2d at 596 n.3.

209. Professor Matsuda claims that plaintiffs "almost never" win in accent cases. Matsuda, *supra* note 189, at 1332, and that "in almost every reported case the courts have accepted" the "can't understand" defense. *Id.* at 1350. But Matsuda does not supply us with a list of the cases, so, short of researching the question, there is no way to tell if she is accurate. One's suspicions in regard to these assertions are heightened by the *Fragrante* court's reference to

that would scarcely be worth almost eighty pages in the *Yale Law Journal*. On the second and more important ground, however, one may inquire of the relevance of Manuel Frangante's "story." Professor Matsuda's "method" she tells us, is to "use personal experience . . . [to] express emotion and desire alongside logic and analysis."²¹⁰ But, as Richard Hyland has pointed out, "[t]he elements of a story are undifferentiated and undifferentiable."²¹¹ Legal concepts, not stories, separate the meaningful from the irrelevant; in this case, the concept of discrimination by reason of national origin under Title VII of the Civil Rights Act of 1964. From this standpoint, Mr. Frangante's story states no greater claim on the law's solicitude than any other job applicant.²¹² If Mr. Frangante had been a collaborator with the Japanese, a black marketeer in Vietnam, and, not to put too fine a point on it, a despicable swine, his rights under Title VII should vary not one whit.

Personal experience she does relate; and in abundance. More of that in a moment. What of logic and analysis? Here she proposes a scheme to deal with cases where the employer's valid concern for communicative ability in certain jobs, such as university lecturer or 911 operator, may be bound up with assumptions or beliefs, even unconscious ones, about the spoken word that disfavor certain national groups. She connects her approach, and quite rightly, both to the general framework of Title VII analysis and to the law of physical or mental handicap.²¹³

The scheme she proposes is responsive to the situation where a person applies for a job, is turned down, and the job is kept open. But Mr. Frangante was one of five finalists for the job, all of whom were at

three accent cases in two of which the plaintiffs prevailed. See 888 F.2d at 597. The only case Professor Matsuda cites is unreported. See Matsuda, *supra* note 189, at 1350 n.80.

210. *Id.* at 1331.

211. Hyland, *supra* note 9, at 614.

212. See Yudof, *supra* note 201, at 595.

213. Matsuda proposes that a plaintiff be required to prove:

- a. Plaintiff is "otherwise qualified" for the job.
- b. The job is available.
- c. Plaintiff was not hired because of accent discrimination, even though the job remained open to others.

Matsuda, *supra* note 189, at 1383 (references omitted). This would establish a *prima facie* case. The employer may then rebut, if it can, on these grounds:

- a. Plaintiff's speech was fairly evaluated.
- b. Plaintiff could not communicate with relevant, nonprejudiced listeners at the level required for the job.
- c. Reasonable accommodation could not alleviate the inability to communicate at the level required for the job.

Matsuda, *supra* note 189, at 1384.

least minimally qualified. He was turned down because two others were rated higher in terms of communicative ability. Now this is a tougher problem. Assume, for example, that the minimum words per minute for a typing job is 80, but greater speed is job related. Applicant *A* can type 80, but not more due to a physical handicap. Applicant *B*, who has no handicap, can type 120. If the employer hires *B*, has the employer discriminated impermissibly on grounds of handicap? On the one hand, *A* can function in performing at the minimum speed required for the job; and so disfavoring her would seem to be handicap discrimination. But on the other hand, may not an employer select the *better* qualified, if that qualification is legitimately related to the job?

This is the hard question, the one actually presented in Mr. Fragarante's case, and Professor Matsuda anticipates it using Tran, a hypothetical lecturer in computer science:

To make the case harder, let's assume that Tran is able to prove to the court's satisfaction that with some minor adjustments, such as the student asking for a clarification or a word-spelling on the average of once in every three lectures, students will have no trouble comprehending lectures and taking notes. May the university still refuse to renew Tran's contract on the ground that it has a better candidate, Buddy, who speaks with an accent more familiar to the students? Buddy is similar to Tran in qualifications and experience. The only difference is that Buddy speaks in the same regional, white-identified accent as most of the students, and the university argues that rapport and the ability to counsel students and engage them in lively debate makes Buddy a better teacher.

The question here is whether the employer is free to choose the "best" accent from among a set of functional accents.²¹⁴

But this isn't a hard case, merely a close one. The real question is whether, within a universe of "functional" accents, some are more functional, more intelligible than others. Assume that Tran has far more frequently to clarify himself, not once every three lectures but thrice a lecture, then proceed along a scale of increasing unintelligibility and at each point compare him to Buddy. That would test Professor Matsuda's approach; but she refuses to confront it because she denies that such a scale exists.

214. *Id.* at 1354. This example is followed by a series of rhetorical questions including whether a radio station could fire a disc jockey because his accent is deemed unsuitable for the target market. *Id.* at 1354-55. (She cites this hypothetical with *cf.* *Jurado v. Eleven-Fifty Corp.*, 813 F.2d 1406 (9th Cir. 1987) (bilingual disc jockey fired for refusing to speak only English on the air)). *Id.* at 1355 n.88. This is a very different question from intelligibility, however, and as to the *Jurado* case, one would think the fairest analogy would be whether an English language newspaper could discharge a reporter who insisted on writing in German.

Professor Matsuda devotes several pages to urging the courts to attend very closely to "[t]he importance of speech in a particular job . . . in order to recognize the gradation between speech as essential and speech as irrelevant."²¹⁵ But she refuses to extend the idea of gradation to the applicants ability to be understood. Instead, she dispenses with it in one sentence, by fiat: "[t]he court should state unequivocally that once a person's speech is found functional, the employer may not reject it because a competitor's speech is less 'foreign,'"²¹⁶ that is, more functional, more comprehensible to a non-prejudiced audience.

Professor Matsuda denies that some "functional" speakers may be more comprehensible than others to a non-prejudiced audience on ideological grounds: the very claim of unintelligibility, she asserts, masks a dominant Anglo linguistic hegemony.²¹⁷ But many nation-states have a "standard" accent, reflecting their cultures and social structures. A French speaker of the Berry dialect would be labeled in Paris as a country bumpkin; a Cockney accent in London immediately identifies the speaker's social class. And some indigenous accents may be unintelligible even to the native speaker.²¹⁸ It is not surprising that foreign language departments in American universities attempt to teach the preferred accent of the country; and when English is taught abroad, it is surely "standard" English and not creole.

Professor Matsuda's dismissal of degree as having any bearing on comprehensibility has a practical consequence which she declines squarely to confront. Assume the applicants for a hypothetical (mid-

215. *Id.* at 1369.

216. *Id.* at 1386.

217. *Id.* at 1394. She notes:

The work of feminists, critical legal scholars, critical race theorists, and other progressive scholars has been the work of unmasking: unmasking a grab for power disguised as science, unmasking a justification for tyranny disguised as history, unmasking an assault on the poor disguised as law. Applying this new scholarship to the accent cases helps reveal the power disparities and contests for control that lie behind the doctrine.

What employers purport to do when they identify an accent and declare it unintelligible is to apply neutral standards of evaluation to objective reality. This familiar process, critical scholars have argued, is often what disguises value as fact. In looking at the accent cases, what emerges is not the "fact" that Asian or Latino or African American accents are unintelligible, but the hidden assumption of an Anglo accent at the center. The Anglo speech is normal, everything else is different, and acceptability of any given speech depends upon its closeness to Anglo speech.

Id.

218. The court nobility of Heian Japan, for example, occasionally found the language of the peasantry to be virtually unintelligible, as uncouth jabbering. See IVAN MORRIS, *THE WORLD OF THE SHINING PRINCE* 99-100 (1964).

western) university lectureship include not only Buddy and a Tran who is "functional" but must much more often correct and explain his speech, but also Billy Bob, a heavily accented Texan, and Muffy, who speaks an almost impenetrable Lockust Valley Lockjaw. All four are minimally functional; but Buddy can communicate with little or none of the spelling and repetition the other three would require. Neither Billy Bob's regional accent nor Muffy's class-based one reflect categories protected under Title VII. And so, under Professor Matsuda's theory, the job has to go to Tran. Indeed, so long as Tran is minimally functional and no other similarly accented but more intelligible applicant appears (so to dispel the claim of national origin discrimination), Tran will have *always* to get the job.

Professor Matsuda never discusses the interests of the hapless students (or the 911 callers) affected by the preferential consequences of her theory; but she adverts to that preference indirectly, as her announced method alerted us, as a consequence of her personal desire:

Outside my office door I can hear a Caribbean voice and an African American voice involved in deep discussion as a maintenance crew works its way down the hall. Each accent is thick and deeply divergent both from the other and from the generic standard of the evening news. The conversation, however, is urgent and lively and the difference is no barrier. As I eavesdrop and sit in my office thinking about accents I think, "I want to live in a country that sounds like this"—a land of many voices, each bringing a gift of wisdom and culture wrapped with a gold ribbon of accent.²¹⁹

If legal "scholarship" can be self-referential, there is no reason to separate scholarship from autobiography.²²⁰

IV. "THE AGE DEMANDED"²²¹

Hugh Selwyn Mauberley is in part a diatribe against the literature "the age demanded,"

[C]hiefly a mould in plaster,
Made with no loss of time,
A prose kinema, not, not assuredly, alabaster

219. Matsuda, *supra* note 189, at 1376. After reading this passage, I finally appreciated S. J. Perelman's reaction to reading Cyril Hume's *Wife of the Centaur* in 1923: "'Hot puppies!' I burst out excitedly. 'This isn't prose—it's frozen music!'" S. J. PERELMAN, *Cloudland Revisited: Antic Hey-Hey*, in *THE MOST OF S.J. PERELMAN* 515 (1957).

220. See Jerome McCristal Culp, Jr., *Autobiography and Legal Scholarship and Teaching: Finding Me in the Legal Academy*, 77 VA. L. REV. 539 (1991).

221. POUND, "The Age Demanded", in *supra* note 6, at 184.

Or the "sculpture" of rhyme.²²²

What of the legal literature this age apparently demands? What do these movements offer?

Judge Posner tells us that other disciplines, especially economics, hold the keys to understanding law. But "traditional" legal scholarship has long been receptive to non-legal sources and analyses. In the midst of the "doctrinal" 60s, Justice Douglas observed that

Law journals and business journals . . . furnish helpful guides to the profession. They can be provocative and stimulating by showing the dimensions of a problem. They often reveal complexities and dangers where the frame of reference of a single controversy makes the case seem simple. The economic and business aspects of problems can be so presented as to help the lawyer or the judge understand the facts and realities of a relevant segment of life.²²³

As his passing observation assumes, economic reasoning has been a staple of traditional legal analysis. Curiously, the one argument Walton Hamilton did not make directly in treating the Bertrand Russell case (though it is surely instinct in his peroration) was to the chilling effect the decision would have on the future willingness of scholars to write about controversial subjects. Such a prediction of human behavior might be considered "economic;" but it has been a feature of legal reasoning at least since the United States Supreme Court struck down loyalty oaths on the ground that their vagueness would cause oath takers (including professors) to "steer far wider of the unlawful zone."²²⁴

An obstacle to a fuller integration of legal scholarship with the work of other disciplines is that other disciplines have their own research agendas. The problems they find "interesting," and so worthy of exploration, either intrinsically or because of the discipline's reward structure, may be of no use to the law; and what the law would find useful may not be of interest to them. It is not entirely by chance that when legal academics look to labor economists for help on the strike replacement issue, they find that the cupboard is bare. Instead of useful empirical work, what law-and-economics gives us, at least on this issue, is an entirely theoretical exercise.²²⁵

The latter serves also as a sobering caution; for even if an eco-

222. POUND, "E.P. Ode Pour L'election De Son Sepulcre", in *supra* note 6, at 174.

223. William O. Douglas, *Law Reviews and Full Disclosure*, 40 WASH. L. REV. 227, 228 (1965).

224. *Speiser v. Randall*, 357 U.S. 513, 526 (1958). See generally Arval A. Morris, *Academic Freedom and Loyalty Oaths*, 28 LAW & CONTEMP. PROBS. 487 (1963).

225. It should be noted, however, that nothing has prohibited legal academics from engaging in empirical research that might have shed light on the issue.

conomic model sheds light on a legal issue, it may not illuminate the whole of it. The labor market, as Robert Solow has reminded us, is a social system as well as an economic one.²²⁶ Even if featherbedding is indistinguishable from wages and benefits in economic terms, as Benjamin Aaron pointed out almost forty years ago,²²⁷ we have been reminded more recently that it is nevertheless a practice that resonates against strong societal attitudes about work.²²⁸

Some of the propositions of critical legal and feminists studies are removed not only from legal analysis, but from the idea of scholarship. When organized labor is tacitly criticized for its failure to form a political party,²²⁹ or when the call is made to restructure the "Western wage labor system"²³⁰ we are not being offered disciplinary propositions about law; and legal periodicals seem curious pulpits for these appeals. It may make a lot of sense for women to increase their number and power in labor unions;²³¹ but, I suspect, few of those subject to the call subscribe to the *Michigan Law Review*.

"Moral and political questions," Jencks and Riesman point out, "that cannot be resolved by research . . . are almost by definition outside the academic orbit."²³² There may well be a need for "public intellectuals;" and law professors have as much of a privilege to perform that role as anyone else. Frankfurter wrote numerous pieces for the *New Republic*; one scarcely can avoid a law professor's pitch laid out on the Op-Ed page of some major newspaper. "[I]ntellectuals," Richard Hofstadter noted, "have often tried to serve as the moral antennae of the race, anticipating and if possible clarifying fundamental moral issues before these have forced themselves upon the public consciousness."²³³ This is by no means intended to denigrate the

226. See ROBERT M. SOLOW, *THE LABOR MARKET AS A SOCIAL INSTITUTION* (1990).

227. See Aaron, *supra* note 15.

228. See Andrew D. Freeman, *A Critique of Consistency*, 39 STAN. L. REV. 1259 (1987).

229. See Hyde, *supra* note 118.

230. Williams, *supra* note 137.

231. See Marion Crain, *Feminizing Unions: Challenging the Gendered Structure of Wage Labor*, 89 MICH. L. REV. 1155 (1991): "My agenda has two components: (1) increasing the number of women in labor unions and their power within the union structure, and (2) as the voices of more working class women become audible, a deconstruction and ungending of labor law." *Id.* at 1207.

232. CHRISTOPHER JENCKS & DAVID RIESMAN, *THE ACADEMIC REVOLUTION* 243 (1969).

233. RICHARD HOFSTADTER, *ANTI-INTELLECTUALISM IN AMERICAN LIFE* 29 (1963). The author observed:

[T]he thinker feels that he ought to be the special custodian of values like reason and justice which are related to his own search for truth, and at times he strikes out passionately as a public figure because his very identity seems to be threatened by some gross abuse. One thinks here of Voltaire defending the Calas family, of Zola speaking out for Dreyfus, of the American intellectuals outraged

value of such efforts; but it is more modestly to suggest that they are not necessarily works of scholarship.

The distinction between scholarship and intellection is not a sharp one, as those who insist on drawing it concede; and this may be especially so in law, where a traditional scholar's argument for a "better," "fairer," or "more just" solution may state what is, at bottom, a personal preference. Accordingly, one could question the significance of drawing it at all.

There are at least two closely related reasons for keeping the categories distinct. One is precision of language, and so precision of thought,²³⁴ else a kind of Gresham's Law come into play.²³⁵ The other concerns the standards of evaluation. The expression of emotions, personal experiences and preferences cannot be evaluated by professional standards; it is judged either by a test of the writer's depth of sincerity or the degree of congruence with the evaluator's own emotions and preferences. In this way the idea of "scholarship" loses all meaning.

Poets and prophets may be the moral antennae of the race. Scholars—when not poeticizing or prophesying—do something else. "[T]hey knit the socks of the spirit," spoke Nietzsche's Zarathustra.²³⁶ But socks, like law, serve a human need; and knitting, like legal scholarship, is a craft. Only with education can one learn to distinguish good knitwork from bad.²³⁷

at the trial of Sacco and Vanzetti. . . . Behind the intellectual's feeling of commitment is the belief that in some measure the world should be made responsive to his capacity for rationality, his passion for justice and order: out of this conviction arises much of his value to mankind and, equally, much of his ability to do mischief.

Id.

234. Judge Posner, while calling for a literature more candid "on the political merits of contested legal doctrines," would require the writer to "acknowledge the point at which authoritative legal materials run out." Posner, *supra* note 1, at 778. Some of the pieces surveyed seem to do just that.

235. See D.A.F., *Gresham's Law of Legal Scholarship*, 3 CONST. COMMENTARY 307 (1986).

236. NIETZSCHE, *Thus Spoke Zarathustra: Second Part*, in THE PORTABLE NIETZSCHE 237 (W. Kaufmann trans. 1954).

237. The critique of some of the critical legal studies writing noted earlier reserved some criticism as well for the students who edit the law journals in which these articles appeared. See Finkin, *supra* note 109. He notes:

These students are often terribly bright and may even have advanced degrees in other disciplines. But by definition, they are not yet especially knowledgeable in the law. So one is tempted to exonerate them. After all, they can scarcely be faulted for failing to be aware of books or articles that the authors did not supply. But they can be faulted for failing to find the non sequiturs and misstatements the authors do supply. That failure means that the non-expert reader assumes for the most part that the cases hold and say what the authors assert and that the historical record is as they claim.

In sum, much creative and even classic legal scholarship may start from an aspiration for a better world; and the scholar so imbued might fashion a "committed argument" toward that end, as might any lawyer burning with zeal in his client's cause. But, "I want to live in such a world" is not an adequate substitute for a reasoned explication of why what is proposed is preferable to what it would replace—of why anyone else would want to live in it—and how the law, acknowledging the strengths of competing interests, reasonably can achieve it.

The emphasis some radical feminists and new race theorists place upon a pervasive and relentless male and white oppression respectively suffers from an additional infirmity that Hofstadter identified, not only in the scholar but in the intellectual as well.

When one's concern for ideas, no matter how dedicated and sincere, reduces them to the service of some central limited preconception or some wholly external end, intellect gets swallowed by fanaticism. If there is anything more dangerous to the life of the mind than having no independent commitment to ideas, it is having an excess of commitment to some special and constricting idea. The effect is as observable in politics as in theology: the intellectual function can be overwhelmed by an excess of piety expended within too contracted a frame of reference.²³⁸

At least one practical consequence is the proponents' loss of credibility among those who are not true believers.²³⁹

And storytelling rests upon an even more tenuous intellectual foundation. The role of narrative in law is a complex question, wor-

Id. at 87. Similar criticism could be made of some of the articles discussed in the instant review. It is one thing for the student editors of the *Harvard Law Review* to be unaware of the industrial relations literature that Harper and Lupu neglect. But when the student editors of the *Harvard Law Review* publish that an employer had "never" hired women for a job, when, in fact, it had, *see supra* note 168; when they publish criticism of a court for assuming that women would be hired "without any judicial supervision," when the court had enforced an injunction, *see supra* note 173; when they publish criticism of a court for failing to discuss whether the company's history of discrimination might have discouraged women from seeking management jobs, when the percentage of women seeking those jobs was consistent with no such discouragement, *see supra* text accompanying notes 179-180—one has to inquire of what is being taught at Harvard Law School.

238. HOFSTADTER, *supra* note 233, at 29.

239. TONY BECHER, *ACADEMIC TRIBES AND TERRITORIES* 78-79 (1989):

A sectarian approach, in the academic as much as in the religious context, combines a narrowness of outlook with a breadth of application. It is a matter of seeing the world which one inhabits only from one particular angle: but it is the whole of that world, and not simply a limited part of it, which falls within the scope of the sect's defining dogma. Along another dimension, one might say that a sect is a revolution which has become established without achieving orthodoxy, permeating the whole of its relevant domain but winning the hearts and minds of only a minority of the population.

thy of extended scholarly treatment, but that is not what "story-telling" is about. On one level, it asks the reader to identify with a particular person or class. This is a common technique in legal rhetoric; and it has special significance in labor law. The playing out of a law made for working people may look very different from the spectator stands than it does from the playing field, as Judge Paul Hays noted;²⁴⁰ and it is altogether proper for the scholar to call attention to that possibility.²⁴¹ But what some storytellers seem to be saying is something else: they make a special claim for the stories of persons or groups "whose marginality defines the boundaries of the mainstream, whose voice and perspective—whose consciousness—has been suppressed, devalued, and abnormalized."²⁴² Their stories, it is said, have a higher moral claim, and upon those stories a jurisprudence is to be built.

The theory can be tested by telling a story, much the way Professor Matsuda told Manuel Fragrante's story. This story is about a boy, beaten by his father until the latter's death when the boy was fourteen. He adored his mother, but had to endure her slow, agonizing death of cancer three years later. Cast adrift, by the age of twenty he became homeless, sleeping in parks and doorways, until he found relief for some time in a men's shelter. He joined the army, then engaged in a foreign war, and was decorated four times for conspicuous bravery. But the war was a defeat. Our storyteller returned, wounded and demoralized, to find the war he supported soundly rebuked, and to social, political, economic, and even cultural chaos. He found himself marginalized, devalued, suppressed to the point of being jailed for his political activity. From these experiences he developed a critique of the "liberal" state. The state, he felt, should be a means to an end: not merely one that conceived abstractly its citizens' welfare, but that promotes a community in which all actually *are* physically and psychically "equal living beings."

Could one construct a jurisprudence from his story? Could one develop a theory that would ask the judges, in deciding questions arising under indeterminate statutory language, to see the issue through his eyes, to decide the case the way our storyteller would? It has, at least at the theoretical level, been tried: "[B]ecause the judge must

240. See *NLRB v. Golub Corp.*, 388 F.2d 921, 929 (2d Cir. 1967) (Hays, J., dissenting) ("The majority opinion demonstrates once more the inescapable truth that United States Circuit Judges safely ensconced in their chambers do not feel threatened by what employers tell their employees.").

241. See Getman, *supra* note 201.

242. Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411, 2412 (1989).

find the law 'like the *Führer*,'"²⁴³ argued Curt Rothenberger, a high official of the Ministry of Justice in the Third Reich, "the German judges must be furnished with the attributes that are to be regarded as the judicial attributes of the *Führer*."²⁴⁴

This is not to suggest that the jurisprudential claims of storytelling are rooted in the ideology of National Socialism. But it is to emphasize Mark Yudof's caution that voice "may be used in a way that is destructive of the concept of law."²⁴⁵ And to challenge the very odd notion that the marginalized are, by virtue of their marginalization, any more moral than anyone else.

It ought be obvious from all that has gone before that self-referential writing is not scholarship. *A La Recherche du Temps Perdu* is a monument of Western literature; but Proust's *Recherche*, no matter how much scholarly work has been expended on it, is not academic research.

There is another way to compare these alternatives to "traditional" scholarship, on grounds of how they help us solve real world legal problems. We have seen Walton Hamilton's critique of the Bertrand Russell case; it is a paradigm of traditional legal scholarship, and has continuing vitality today. What would these new schools and movements have to say about Judge McGeehan's decision? From what appears, one imagines they would say something like this:

243. MARC LINDER, THE SUPREME LABOR COURT IN NAZI GERMANY: A JURISPRUDENTIAL ANALYSIS 11 (1987) (quoting CURT F. ROTHENBERGER, DER DEUTSCHE RICHTER 51 (1943)). The facts of our storyteller's life are taken from JOHN TOLAND, ADOLF HITLER (1976). The statement of our storyteller's political views are excerpted from ADOLF HITLER, MEIN KAMPF (John Chamberlain et al. eds, 1939). The equality our storyteller sought was, it suffices to say, an equality within the "racial stock," which the State's function is to preserve. *Id.* at 594-95.

244. LINDER, *supra* note 243, at 11.

245. Yudof, *supra* note 201, at 594. Actually, Nazi legal theory does supply an example that would seem to come pretty close to according "storytelling" a legal basis. One school of thought—the *Kieler Schule* or Phenomenological School (which appears to have had some practical influence as well as an academic following) maintained that the criminal law's concern was not with the volitional doing of a criminal act but with the innate character of the criminal. As Franz Neumann explained by reference to the crime of theft: "The phenomenological school defines him by his personality. A burglar is one who is a burglar 'in essence . . .'" FRANZ NEUMANN, BEHEMOTH: THE STRUCTURE AND PRACTICE OF NATIONAL SOCIALISM 453 (1942). That personality—that "essence"—was accordingly to be discerned by examination of the defendant's whole career and earlier life: by his story, it would seem. "[G]uilt becomes guilt not in relation to the [crime in question], but in relation to the whole career and the earlier ways of life of the criminal." Otto Kirchheimer, *Criminal Law in Nationalist-Socialist Germany*, 8 STUD. PHIL. & SOC. SCI. 444, 459 (1939). The result, to emphasize Yudof's point, connects the theory to the practical end sought by the Nazi regime for "[t]here could be no more complete negation of the rationality of law, nor a better means of terrorizing the masses without the restraint of predictable rules." Neumann, *supra* at 453.

Law and Economics: The decision was wrong because it interferes with efficient contracting in the academic labor market by imposing an external cost on future contracting.

Critical Legal Studies: The decision evidences how law is merely a set of rhetorical maneuvers which allows the dominant class to enforce its hegemonic values.

Critical Feminist: My critical legal studies brother (above) is right as far as he goes, but he neglects to mention that the reasons for Russell's exclusion were primarily his liberating views on sex and marriage; that is, Russell was excluded because he challenged male dominance.

Radical Feminist: I do not agree with my sister (above). Russell had an insatiable appetite for young women and a history of exploiting and then abandoning them. His example spoke far more powerfully than his words. In excluding a past and potential rapist (for, in a culture of pervasive male dominance, none of Russell's frequent liaisons could have been freely consented to by the women involved), the court did better than it knew.

New Race Theorist: This is a dispute between a group of white people about whether another white man (an English aristocrat!) should teach logic at the City College of New York. The real question is: why were there no persons of color teaching logic at City College, and why none were considered for the job? The very silence on that question masks the racism endemic to academe.

Storyteller: I just don't see myself in this story.

V. "THE AGE DEMANDED AN IMAGE/OF ITS ACCELERATED GRIMACE"²⁴⁶

Inquiry next turns what there is about "traditional" legal scholarship that makes it seem "old fashioned" and "passé" to a new generation of legal academics, that makes it smack so of M. Verog's "pickled fetuses and bottled bones."²⁴⁷ This is, no doubt, an intricate question, one bound up in a complex of issues from the academic reward structure to the *Zeitgeist*. But in published ruminations one finds at least three considerations laid upon the page. One is the allegedly "arid" state of contemporary legal theory,²⁴⁸ which drives the search for meta-legal theories and resort to non-legal paradigms. Assuming *arguendo* that to be so, the real world legal problems of

246. EZRA POUND, *E.P. Ode Pour L'election De Son Sepulcre*, in *supra* note 6, at 173.

247. POUND, "Siena Mi Fe; Disfecemi Maremma", *supra* note 6, at 177.

248. W.T. Murphy & Simon Roberts, *Introduction*, 50 MOD. L. REV. 677, 682 (1987). They argue that law and economics has "generated some questions which give scholars something to do." *Id.* at n.20.

working people will not (and need not) wait for the generation of a more satisfying theory of law.

The second is adverted to by Judge Posner as the desire to be on the "cutting edge,"²⁴⁹ the absence of law or, more accurately, of law professors from "the main currents of significant intellectual activity."²⁵⁰ The age demands something new. As Mark Tushnet observed,

There may of course be an erroneous premise implicit in the view that legal scholarship should be a central element of the serious intellectual discourse in this country. After all, law, like engineering, is an applied rather than pure endeavor, and no one expects engineers to participate in the intellectual life of the community.²⁵¹

But:

The intellectual marginality of legal scholarship is all the more striking in light of the immense role that law plays in American society. . . . I contend that legal scholarship lies at the edges of serious intellectual activity because of the nature of the legal scholar's enterprise.²⁵²

It seems, in other words, that a great intellectual feast is being held, a veritable Banquet of Ideas, to which law professors have not been invited. Plumbing is important²⁵³—one could scarcely hold a banquet were the pipes in bad order; but one doesn't invite one's plumber to dine. Concrete construction may have a lot more to do with how people actually live than deconstructionism,²⁵⁴ but, civil engineers are excluded from the Great Conversation. Nor is Tushnet alone in this perception.²⁵⁵

249. Posner, *supra* note 1, at 773.

250. Mark Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1205 (1981).

251. *Id.* (reference omitted).

252. *Id.* at 1205-06 (reference omitted).

253. *See supra* note 12.

254. *See* William J. Broad, *Ho-Hum No More, Concrete Goes High Tech*, N.Y. TIMES, June 25, 1991, at C1.

255. As a student of the ethnography of academic tribes reports about engineers:

Engineers give rise to a fairly clear, if unsurprising external image [among other academics]. Their practicality and pragmatic values are frequently emphasized; they are respected as being 'in touch with reality.' But at the same time they come across to their more hostile observers as dull, conservative, conformist and mercenary; as unintellectual, unacademic and 'not very clever'; as politically naïve and uncultured—'technocrats with no refinement.' Those who take a more favourable view see them as hearty, likeable and enthusiastic; as creative, lateral thinkers; and as having a broad outlook.

BECHER, *supra* note 239, at 28-29 (1989). And of academic lawyers:

The predominant notion of academic lawyers is that they are not really academic—one critical respondent described them as 'arcane, distant and alien: an

Law professors may join their humanist colleagues at the table; but, it is a moveable feast, one as subject to disciplinary fashion as M. Verog was to literary fashion.²⁵⁶ A generation ago the New Criticism held unchallenged sway; and, at least at the undergraduate level (and in some graduate departments), existentialism was all the rage. By these lights, Archibald Cox should have been writing "Strikes, Picketing and the Objective Correlative,"²⁵⁷ and Howard Lesnick "The Phenomenology of the Secondary Boycott."²⁵⁸ Today, if Cynthia Ozick is to be credited, T.S. Eliot has all but disappeared from the canon;²⁵⁹ and it appears to the untutored that Wittgenstein has trumped Husserl. And so these articles would naturally have to be recast to remain *au courant*. There is, in other words, no free lunch; a price must be paid for admission to the feast. And that is the increasing irrelevance of what legal scholars have to say to "the unruly realities, the grubby particulars"²⁶⁰ that make up the real world of legal problems.

At this point the third discontent emerges, for Professor Atleson has argued that there is really very little evidence that the real world decisionmakers to whom traditional labor law scholars direct their work—the National Labor Relations Board, the courts, the legislatures—heed it.²⁶¹ "[M]ost law review articles, no matter how brilliantly done, have had little impact on decisionmakers."²⁶² Traditional scholars, he argues, assume a rationality that does not

appendage to the university world.' Their personal qualities are dubious: they are variously represented as vociferous, untrustworthy, immoral, narrow, arrogant and conservative, though kinder eyes see them as impressive and intelligent. Their scholarly activities are thought to be unexciting and uncreative, comprising a series of intellectual puzzles scattered among 'large areas of description.'

This generally negative view seems to be shared by its victims, a number of whom diagnosed a common 'tendency towards self-denigration' and 'a sense of doubt about one's intellectual quality.'

Id. at 30.

256. See POUND, "Siena Mi Fe; Disfecemi Maremma", *supra* note 6.

M. Verog, out of step with the decade,
Detached from his contemporaries,
Neglected by the young,
Because of these reveries.

Id. at 177.

257. Cf. Archibald Cox, *Strikes, Picketing and the Constitution*, 4 VAND. L. REV. 574 (1951).

258. Cf. Howard Lesnick, *The Gravamen of the Secondary Boycott*, 62 COLUM. L. REV. 1363 (1962).

259. See Cynthia Ozick, *A Critic At Large: T.S. Eliot At 101*, NEW YORKER, Nov. 20, 1989, at 119.

260. Bernard D. Meltzer, *Ruminations About Law Reviews*, 37 LAW SCHOOL RECORD, Spring 1991, at 15, 16.

261. See Atleson, *supra* note 10.

262. *Id.* at 403.

exist.²⁶³

The short answer is that we know rather little about what does and does not influence real world decisionmakers.²⁶⁴ It is a complicated question: of when and why real world decisionmakers cite to scholarly sources—as they have in the past and continue to today;²⁶⁵ of how legal scholarship finds its way into the legal process; of what works the lawyers, the decisionmakers, or their staffs may have encountered that left an unrecorded impression. And the “demands of the age” only complicate the question further, for the proliferation of student edited law reviews means that less time can be spent remaining abreast of the literature. If one uses the lustre of the institution as a proxy for the quality of the journals one follows, and if the student editors of these “leading” journals seek to publish the trendy works of meta-theoreticians, feminists, new race theorists, and storytellers instead of “traditional” scholarship, there might actually be less for real world decisionmakers to find influential.

But a more pointed response, even if Atleson’s assertion draws blood, is a demurrer; for, at bottom, his claim is a reprise of the “law is politics” theme.²⁶⁶ And, “[i]f law is politics, presumably one might

263. Atleson notes:

When we look at the model of most law review articles, we see an image of the legal system we know not to be true. We know there is no inherently rational scheme. We know that if prior law is not consistent, a new theory will not necessarily have predictive value or be acceptable or even useful, except in a very strange analytical sense. Authors are satisfied to have “rationalized” the area so that it makes sense at least to them, is consistent with what they believe the statutes mean (with all the problems inherent in these assumptions), and meets the various competing interests. This is what law students call the “True View,” that is, not the law but the professor’s view of the law—not what exists, but what *should* exist in some perfect world, which does not now exist and which, I think we know, will not exist in the future.

Id. at 413.

264. See generally Olavi Maru, *Measuring the Impact of Legal Periodicals*, 1976 AM. B. FOUND. RES. J. 227.

265. See John H. Merryman, *Toward a Theory of Citations: An Empirical Study of the Citation Practice of the California Supreme Court in 1950, 1960, and 1970*, 50 S. CAL. L. REV. 381 (1977).

266. For example, it was argued that faculty members in private universities were not rendered managerial employees under the Labor Relations Act by virtue of their role in educational policy-making, see Matthew W. Finkin, *The NLRB in Higher Education*, 5 U. TOL. L. REV. 608 (1974), however, the United States Supreme Court paid no heed, see *NLRB v. Yeshiva Univ.*, 444 U.S. 672 (1980). It was argued that an individual employee in a non-unionized workplace should have the same self-protective rights that are accorded to unionized employees subject to disciplinary interrogation, see Matthew W. Finkin, *Labor Law By Boz—A Theory of Meyers Industries, Inc., Sears, Roebuck and Co., and Bird Engineering*, 71 IOWA L. REV. 155 (1985), but the National Labor Relations Board didn’t listen, see *E.I. Dupont de Nemours*, 289 N.L.R.B. 627 (1988). It was argued that the National Labor Relations Act ought to be amended to forbid the hiring of permanent strike replacements, see

also believe that legal-intellectual positions are politics too.”²⁶⁷ “Presumably,” only if one equated “legal-intellectual positions” with scholarship; but the equation would be wrong. As Edward Rubin has argued, even if “law is politics” it does not follow that scholarship about law is also politics.²⁶⁸ Even if “traditional” scholarly argument is an exercise in a rationality that does not routinely obtain in the political world, it is scholarship because it is an exercise in reason and not something else. The scholar holds reason up to power: Scholarship can legitimately complain from a high ground if it is muzzled. But that it passes unheeded is not an especially high order of criticism.

Some work may lie in the bosom of time, as did Lawrence Blades’ appraisal of the at-will rule, awaiting a change in legal climate or receptivity to find its influence.²⁶⁹ Other work may be still born for the want of such change. And some, humility compels one to concede, may be undeserving ever to persuade. It might be helpful for legal scholars of a reformist bent to have the words of the ninth century hermit Master of Cold Mountain inscribed on their walls, to be glanced at from time to time:

Body clothed in a no-cloth robe,
Feet clad in turtle’s fur boots,
I seize my bow of rabbit horn
And prepare to shoot the devil Ignorance.²⁷⁰

Matthew W. Finkin, *Labor Policy and the Enervation of the Economic Strike*, 1990 U. ILL. L. REV. 547, but Congress was not persuaded—at least not in sufficient numbers to override a presidential veto. 137 CONG. REC. H5589-90 (daily ed. July 17, 1991). Thus, one empathizes with the anxious wolf who says to another, whilst the remainder of the pack bay madly at the moon, “My question is: Are we making an impact?” S. Gross, Cartoon, NEW YORKER, Aug. 5, 1991, at 31.

267. Tushnet, *supra* note 105, at 1517.

268. Edward L. Rubin, *The Practice and Discourse of Legal Scholarship*, 86 MICH. L. REV. 1835, 1853 (1988).

269. See Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967).

270. COLD MOUNTAIN: 100 POEMS BY THE T’ANG POET HAN-SHAN 109 (Burton Watson trans., 1962).