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# Interdisciplinary approaches to legal research: law and economics and critical legal studies from a North American perspective

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## I. Introduction

Over the past few decades, academic legal research has become more and more interdisciplinary. Abandoned the old, traditional notion of law as a self-contained discipline, legal academics have identified in economics, social sciences, and politics, among other things, some of the subjects "outside" of the law that are most commonly intertwined with legal issues. They have also started to use methodologies and schemes distinctive of these fields to analyze legal matters.

In particular, two different, interdisciplinary legal approaches have become rather popular in academia: law and economics (hereinafter also referred to as "L&E") and critical legal studies (or "CLS").

This paper intends to offer a broad overview of these two approaches as they have evolved in North America, touching upon their intellectual history, the methodologies used, some of the major critiques moved to each approach, as well as similarities and differences between them. But what is the purpose of comparing two methodologies like L&E and CLS which are profoundly different, almost antithetical?

At least two reasons justify this choice: on one side, both movements, although quite radical in their premises, have become prominent not only in North American legal scholarship (where they

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have both originated), but also internationally. Similarly, both movements have been capable of benefiting from the criticism moved to them to develop new trends in legal thought. For example, behavioral L&E has developed from certain strands of criticism previously moved to neoclassic L&E, while critical race theory and feminist legal thought are generally considered the most recent trends originated from CLS.

On the other side, the two movements are opposite under several aspects: it is first of all a methodological opposition, which stems from the underlying conflicting political thought: indeed, L&E is the expression of right-wing academia, whereas CLS is the product of left-wing scholarship. But this intrinsic difference is what makes the comparison particularly challenging, since both legal economists and critical academics have devoted much of their work in defending their positions against the attacks made by the counterpart. This rivalry had therefore the advantage of generating a very fruitful scholarly production.

In the conclusion, however, I argue that law continually draws from economic and political elements which, along with societal and cultural aspects, inform the legal system. Thus, neither of these interdisciplinary methodologies allows to consider all the aspects that come into play when making a legislative choice, since they both support the legislator and help him understand the limits of the other theories, but none of them is completely self-sufficient.

## II. Law and Economics

### 1. General principles of neoclassic law and economics

Simply stated, law and economics, or economic analysis of law, is a legal theory or methodology that applies economic principles to law. Economic concepts are used to explain the

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effects of law, to assess which legal rules are economically efficient, and to predict which legal rules will be promulgated.[2] Theories and empirical methods of economics are applied to the legal system in its entirety.[3]

Economics is the science of human choice in a world where resources are limited in relation to human desires or needs. It explores and tests the implications of assuming that man is a rational *maximiser* of his ends in life, his satisfactions, and his self-interest.[4] As a result of defining man as a rational *maximiser* of his self-interest, it derives that people respond to incentives: if a person's surroundings change so that he could increase his satisfactions by altering his behavior, he will do so.[5]

Because all human behaviors are viewed as involving participants who maximize their utility, the task of L&E is to determine the implications of such rational maximizing behaviour in and out of markets, as well as its legal implications.[6]

While a close relationship between a country's legal system and the configuration of its economy has always been acknowledged, for a long time legal scholarship has ignored the impact of economics to a given legal system.[7] Until the 1960s, a law and economics perspective was applied by North American Law Schools only to areas like antitrust, public utility regulation, and tax policy. This was referred to as the *old* law and economics.[8]

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[2] David Friedman (1987), *Law and economics,* The New Palgrave: A Dictionary of Economics, v.3, 144
[3] Richard A. Posner, *Economic Analysis of Law,* Boston, 1972, 3
[4] Posner, *Economic Analysis,* cit., 3
[5] Posner, *Economic Analysis,* cit., 4
[6] Christine Jolls, Cass R. Sunstein, and Richard Thaler, *A Behavioural Approach to Law and Economics* (1998) 50 Stanford Law Review, 1476
[7] Michael Trebilcock, *An Introduction to Law and Economics* (1997) 23 Monash University Law Review, 124
[8] Trebilcock, *Introduction,* cit. 124

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As the direct effect of the economic growth of that time, the *new* law and economic movement started in the 1960s thanks to the work of Calabresi on tort law,[9] and of Coase on property rights.[10] This led to a blooming of legal scholarship exploring the economic implications of almost every aspect of the legal system.[11] Whereas the *old* law and economics confined its attention to laws governing economic relationships, the *new* law and economics recognized no such limitation, and was therefore applied to all fields of law.[12]

One of the revolutionary concepts behind the economic analysis of law was the challenge and rejection of the idea of law as a self-contained discipline that could be understood and practiced without a systematic study of any other field. Departing from this long-established understanding, L&E asked lawyers to learn a different set of concepts. It aspired to be scientific, not humanistic. It even used maths.[13]

## 2. The methodology of L&E

When analyzing law from an economic perspective, two major approaches are commonly used: *positive* analysis and *normative* analysis. The analysis done through a *positive* approach is predictive and descriptive, and aims at explaining phenomena. As applied to the economic analysis of legal issues, the analyst will attempt to predict the economic impact of a certain legal policy given the ways in which people are likely to respond to the incentives of the policy. In making these behavioural responses, the positive analysts will assume that most individuals are motivated by rational self-interest. Positive economic analysis is individualistic and subjective: analysts will look at

[9] Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts,* (1961), Yale Law Journal, 70
[10] Ronald Coase, *The Problem of Social Cost,* (1960), The Journal of Law and Economics, 3
[11] Michael Trebilcock, *Introduction,* cit.,125
[12] Posner, *Economic Analysis,* cit. 16
[13] Posner, *Law and Literature*, Cambridge, Harvard University Press, 2009, 230

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individuals, and not at groups or society. Individuals are those who can best decide what is good for them.[14]

*Normative* law and economics, on the other side, adopts a more prescriptive and judgmental approach, making policy recommendations based on the economic consequences of various policies. This type of analysis is also referred to as *welfare economics*.[15] A key concept for normative economic analysis is *efficiency*. Law and economic scholars use either the concept of Pareto efficiency or that of Kaldor-Hicks efficiency. Of a given transaction, policy, or legal change, Pareto efficiency would ask whether this transaction, policy or legal change make somebody better off while making no one worse off. Conversely, Kaldor-Hicks efficiency would ask whether a change in legal rules would, for example, generate sufficient gains to the beneficiaries so that they could *hypothetically* compensate the losers from the change and render the latter indifferent to it but still have gains left over for themselves. This is a form of cost/benefit analysis.[16]

One famous example of the application of economic principles to law is represented by the *Tragedy of the Common,* a dilemma devised by Gareth Hardin in 1968 to describe the inefficiency of common property. The dilemma was used to show how lack of ownership leads to overexploitation and degradation of resources that are unowned or owned in common. The inefficiency of common property was originally illustrated by looking at village commons of feudal England used by villagers to graze cattle. If each villager enjoyed unrestricted use of the common land, he or she would be tempted to graze as many cows as possible. Each villager would use the village commons and treat it as a free resource. This resulted in the wasteful and destructive overexploitation of the common

[14] Trebilcock, *Introduction,* cit.,125-126
[15] Trebilcock, *Introduction,* cit.,132
[16] Trebilcock, *Introduction,* cit.,132

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land. [17] In contemporary society, examples of common property resources problems to which the tragedy of the *commons* dilemma can be applied include certain environmental issues, urban or highway congestion, or over-utilization of beaches and parks.[18]

## 3. Successive developments of L&E: public choice theory and behavioral L&E

In recent years, conventional L&E has developed in a variety of directions in an effort to adapt and respond to some of the critiques made to the neoclassic L&E approach.[19] The incorporation of public choice theory and behavioral economics into economic analysis of law are two examples of this more recent scholarship.

### 3.1 Public Choice Theory: principles and methodology

Public choice refers to the application of economic principles to political sciences.[20] Similarly to neoclassic economics, public choice theory assumes that behaviors in both public and private transactions are ruled by self-interest.[21] In particular, this theory studies the behaviors of politicians and government officials as self-interested agents, on the assumption that individuals in all their roles act to maximise their personal self-interest under conditions of uncertainty.[22]

Public choice theory has addressed various questions in contemporary scholarship in political sciences, economics, and law departments.[23] In legal scholarship, for example, it has been

[17] Cento Veljanovski, *Economic Principles of Law,* 2007, Cambridge University Press, 66. See also Trebilcock, *Introduction*, cit. 138 et ss.
[18] Trebilcock, *Introduction,* cit., 139
[19] Critique to L&E is analyzed *infra*
[20] Tom Ginsburg, *Ways of Criticizing Public Choice: The Uses of Empiricism and Theory in Legal Scholarship*, 2002 University of Illinois Law Review (2002), 1139
[21] Richard E. Epstein, *The Independence of Judges: The Uses and Limitations of Public Choice Theory*, (1990) Brigham Young University Law Review, 827
[22] Epstein, *Independence of Judges*, cit., 828
[23] Ginsburg, *Ways of Criticising,* cit., 1141-42

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used to investigate the behaviors of federal judges in US courts (specifically, the US Supreme Court) to determine whether they are indeed independent or act as self-interested agents.[24]

This approach has also been used by William Riker in political science and federal constitutional theory when discussing the origins of federations. In identifying the "expansion" condition and the "military" condition as two necessary conditions to the occurrence of federations, Riker assumed that men engaged in politics behave rationally while making bargains that involve mutual benefits. This pursuit of self-interest could be applied to constitution-making, the latter being defined as participation in a rational political bargain. Thus, according to Riker, for federations to appear it was necessary some significant threat and this would be sufficient to compel the participating actors to strike a mutually beneficial bargain or compact.[25]

### 3.2 Behavioral L&E: principles and methodology

As explained *supra,* the traditional approach to law from an economic perspective speculates that legal rules are best analyzed and understood in light of standard economic principles, providing that human behavior involves participants who maximise their utility from a stable set of preferences and accumulate an optimal amount of information in a variety of markets. Therefore, L&E shall

[24] Epstein, *Independence of Judges*, cit., 827 and ff. In applying public choice and self-interest theories to analyze the behaviors of federal judges, Epstein distinguishes between two ordinary judicial roles. The more conventional role of the judiciary includes hearing arguments, deciding cases, and writing opinions, whereas the less conventional role is that of hiring clerks, appearing before Congress, or participating in professional organizations and conferences. Traditional public choice analysis presupposes that politicians (or other government agents) are moved by a desire for re-election to office, election to higher office, or power and influence within the office. When judges act in their traditional roles of judging controversies, the whole set of constitutional constraints (like life tenure or ban on Congress to reduce their salaries) work as an effective safeguard of the independence of the judges, which are therefore cut off from the usual sources of market and political gain. But when judges act as market actors in their secondary, administrative roles, external constraints are reduced, and they act to maximise their interest. Therefore, if public choice theory is very weak when applied to the judiciary in their traditional vestige, it becomes powerful when applied outside of the conventional judicial output. See Epstein, *Independence* of Judges, cit., 832, 836, 844.
[25] Michael Burgess, *Comparative Federalism: Theory and Practice*, Routledge, 2006, 78

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determine the implications of such rational maximizing behavior in and out of markets as well as its legal implications.[26]

On the contrary, behavioral L&E analyses the implications of *actual* human behavior (the behavior of real people) as opposed to *hypothesized* behavior, and draws from social sciences bounds models (i.e. bounded rationality, bounded will power and bounded self-interest) to conclude that these bounds point to systematic departures from conventional economic models, each of them generating predictions for law, and providing the foundations for new behavioral models.[27]

Although abandoning some of the conclusions reached by neoclassic L&E, behavioral economics remains a form of economics whose goal is not to undermine the predictive and analytic power of L&E but to strengthen it by suggesting that behavior is systematic, not random or impossible to predict, and thus it can be modeled.[28] However, behavioral and conventional L&E differ not only in the assumption about human behavior; they differ in their predictions about how law affects behavior.[29]

The methodology used by behavioral economists is quite different than that used by conventional legal economists: if the latter is primarily theoretical or analytical, behavioral analysis is

[26] Jolls, Sunstein, and Thaler, *Behavioral Approach,* cit., 1476
[27] Jolls, Sunstein, and Thaler, *Behavioral Approach*, cit., 1476-79. Bounded rationality refers to the fact that human cognitive abilities are limited; hence human behaviors differ from the unbounded rationality model of standard economics. Bounded willpower refers to the fact that human beings often take actions in conflict with their long term interests. Finally, bounded self-interest refers to the fact that, at least in most circumstances, people care about others. This bound operates in different ways than those suggested by conventional economics.
[28] Jolls, Sunstein, and Thaler, *Behavioral Approach*, cit., 1475
[29] Jolls, Sunstein, and Thaler, *Behavioral Approach,* cit., 1481

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mainly empirical.[30] The project of behavioral L&E is to take the core insights and successes of economics and build upon them by making more realistic assumptions about human behavior.[31]

Whilst both conventional and behavioral L&E apply models borrowed from other disciplines (especially economics) to the study of law, behavioral economics also applies principles and schemas very popular in social sciences (like those of bounded personality) which have been quite unexplored by law and economics.[32]

One key merit of behavioral legal economics lies in the idea that people can be motivated by concerns inconsistent with material self-interest, as neoclassical economics postulates. Experimental research has proved that, for example, fairness is also important.[33]

## 4. Criticism to the L&E movement

Notwithstanding the importance and influence of L&E in contemporary legal thought, this movement has been criticized from a number of directions. The economic approach to law has aroused antagonism especially among academics who did not like the idea that the logic of law could be economics.[34] CLS scholars have been among the harshest critics of L&E.

[30] Jolls, Sunstein, and Thaler, *Behavioral Approach*, cit., 1500
[31] Jolls, Sunstein, and Thaler, *Behavioral Approach*, cit., 1487. For example, one of the fundamental principles of conventional economic approach is that of "downward-sloping" demand: total demand for a good falls when its price rises. Behavioral legal economics acknowledge the validity of this principle. However, they assert that the validity of the predictions made following this principle does not imply that people are optimizing, because even people choosing at random will tend to consume less of a good whose price goes up as long as their resources are limited. Because this behavior has been proved with tests on laboratory rats, they conclude that evidence of downward-sloping demand is not evidence in support of optimizing models See Jolls, Sunstein, and Thaler, *Behavioral Approach*, cit., 1481-82
[32] Jolls, Sunstein, and Thaler, *Behavioral Approach*, cit., 1473 and 1476
[33] Ginsburg, *Ways of Criticizing,* cit., 1153
[34] Posner, *Economic Analysis,* cit., 19

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On first place, critical legal scholars have criticized L&E for being a restatement of that formalism and objectivism that they had rejected.[35]

Secondly, L&E has as a methodology has been applied to all areas of law, from transaction-oriented disciplines like property, contracts, and torts, to theoretical aspects of legislation and judicial administration (through public choice theory). Yet it has been pointed out that in certain situations something more than rational maximising is involved: for example, how could the motivations of a violent criminal be reduced to income maximization?[36] Therefore, L&E appears to be not very helpful in areas like criminal law. However, it is fair to say that this criticism has been acknowledged and further elaborated by behavioral economists.

Furthermore, it has been underlined how law and economics as separate disciplines are intrinsically different. Legal discourse assumes an equality of actors and speakers, not of dollars. It provides a set of speaking places where real differences of view and interests can be defined and addressed. The language of the law leaves room for argument in both ways. Its methods of reasoning are not linear but multidimensional. Its conversations take place among a plurality of voices.[37] On the other hand, economics is single voiced, and in the legal context it tends to reduce all questions to the only dimension of policy.[38] Therefore, the combination of these two subjects for legal research purposes may be anomalous, since the points of departure are not the same.

[35] Unger, *The Critical Legal Studies Movement,* 96 Harvard Law Review (1983), 574. For a description of the concepts of *formalism* and *objectivism* see *infra,* section 6
[36] Posner, *Economic Analysis,* cit., 20
[37] White, *Economics and Law: two cultures in tension,* 54 Tennessee Law Review, 1986-87, 199
[38] White, *Economics and Law,* cit. 200

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Other critical legal scholars explained that economics offers only one *vision* of human fulfillment and not a *scientific* account of actual fulfillment. The problem with economists is that they *assume* that observed behavior maximises self-interest, but they do not explain why this is the case.[39]

L&E has been attacked also by critical race theorists[40] on the ground that, since L&E is centered on notions of economic efficiency, it does not accommodate inquiries into social justice and fairness. On the contrary, all models underlying L&E proposals are characterized by assumptions about rational actors and perfect markets. According to this scholarship, L&E fails to conceptualize racial discrimination in the workplace. Viewing race as an independent variable, something fixed, static, and easily measurable, L&E pays little attention to the internal dynamics of the workplace. And because legal economic scholars focus more on markets than on workplace, they do not reflect an understanding of the dialectic between racial identity and workplace culture.[41]

Finally, one of the sharpest critiques made to L&E is that this perspective leads to *commodification*, namely, the transformation of goods and services (like money, body parts, or the environment) into a commodity. In other words, perplexities have been raised with regards to the tendency to speak, as economists do, of all transactions as if they were exchanges, or seeing the language of the market as the sole language.[42] By adopting the language of economics, there is the inevitable risk of viewing and treating all objects, relationships, conditions (from babies to sex, from

[39] Mark G. Kelman, *Trashing,* 36 Stanford Law Review (1984), 306-307
[40] Critical race theory ("CRT") is one of the most recent developments of the traditional CLS movement. CRT departs from the basic concept that the American legal system is inherently racist and advances discriminatory practices.
[41] Devon Carbado and Mitu Gulati, *The Law and Economics of Critical Race Theory*, Yale Law Journal (forthcoming), available at http://ssrn.com/abstract=409360 or doi:10.2139/ssrn.409360 , 101-103.
[42] White, *Economics and Law,* cit., 197

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blood to kidneys, clean air, or privacy) as tradeable elements.[43] Therefore, a too rigid application of economic principles to law might risk to denaturize the whole understanding of the legal framework. The most dangerous risk of this use of a radical economic approach is not only that of reducing people to automated rational maximizers, but also that of blurring the boundaries between what can be sold, traded, or made the object of an exchange, and what should not.

Moving to public choice theory, this school of thought has been criticized for lack of empirical support and for its methodological approach, its use in support of statutory interpretation and judicial review of administrative action and decision making, and part of this criticism has come again from critical legal scholar.[44]

Finally, behavioral L&E has also been subjected to certain forms of criticism. Specifically, it has been emphasized how conventional economics has the advantage of simplicity and parsimony, and provides a theory, whereas the behavioral variant offers only a more complicated picture of human behavior, making predictions more difficult.[45]

Some critical legal scholars have sometimes attacked a legal research that focuses on attitudes, behaviors, and impact, as a form of *social science mystification* that hides the true nature of social relations and the real importance of law in society.[46] But this is probably a response to an attack moved to CLS on their methodology, which is void of any form of empirical evidence.[47]

[43] See http://cyber.law.harvard.edu/bridge/LawEconomics/critique5.htm (last checked: 09/12/09). See also Michael Trebilcock, *Commodification,* in Trebilcock, *The Limits of Freedom of Contracts,* Harvard University Press, 1993, 23
[44] Ginsburg, *Ways of Criticizing,* cit., 1140 and 1141 (ft.8)
[45] Jolls, Sunstein, and Thaler, *Behavioral Approach*, cit., 1487
[46] David M. Trubeck, *Where The Action Is: Critical Legal Studies and Empiricism,* 36 Stanford Law Review (1984), 576
[47] Trubeck, *Where The Action Is,* cit., 576.

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Besides the above criticism, however, other more general remarks can be made to the L&E movement. For instance, one of the challenges that a legal researcher might encounter in opting for a legal economic approach is that it might be problematical for him or her to utilize this method without having a solid background or knowledge of economic or social science theories. The risk is that, without a sound technical preparation, the researcher would misunderstand how certain principles work, or misinterpret the results obtained. One of the major concerns of scholars who do empirical research (behavioral economists for instance) is that most lawyers do not have the appropriate training to conduct such experiments, because empirical research as a discipline is new to law schools. Consequently, in order to avoid mistakes or miscalculations, prior adequate preparation should be recommended or, alternatively, the legal scholar should team up with someone expert in this genre of research.

Also, I have already discussed how L&E can be helpful in investigating and interpreting the *effects* of a legislative provision. Similarly, the concept of e*fficiency*, very dear to legal economists, can be used to assess the economic impact of laws in general. But things can be quite different when we shift our attention to the *production* or *creative* stage of a legal provision. Is it still true what legal economists mandate, i.e. that the legislator acts as rational maximiser? Or is there more than rational maximising involved? The answer to this question points to one of the limits of L&E. Indeed, as behavioral economists have explained, L&E depicts what would happen in an ideal world, i.e. legislators or judges acting as rational maximizers for the good of the nation. But in the real world other aspects come into play and L&E tends to disregards social and cultural elements, which are involved when laws are produced.

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## III. Critical Legal Studies

### 1. General principles

*"The critical legal studies movement has undermined the central ideas of modern legal thought and put another conception of law in their place. This conception implies a view of society and informs a practice of politics."*[48]

CLS is a movement that applies to law critical methods analogous to those used by critical theory (and by the Frankfurt School). It is a direct descendant of American Legal Realism, which attacked formalistic and deductive methods of legal reasoning and maintained that law is what officials do about disputes.[49] Thus, likewise legal realism "[CLS] too attacks from the left the complacency of the existing center; it too denies that law is autonomous; it too insists on the contradictions within the rule system."[50]

CLS emerged as a left-wing political/academic movement at the end of the 1970s and reached its intellectual peak during the first half of the 1980s. Yet at that time, some of its harshest critics had predicted that the movement would be no more than a passing fashion.[51] Today, although the influence and prominence of CLS has faded, and the movement has become mainly a school of thought in legal academia,[52] the critical legal approach has inspired new movements which have

[48] Unger, *The Critical Legal Studies Movement,* cit., 563
[49] Joseph W. Singer, *The Player and the Card: Nihilism and Legal Theory* (1984) 94 Yale Law Journal, cit., 48
[50] Mark Tushnet, *Critical Legal Studies and Constitutional Law: An Essay in Deconstruction*, 36 Stanford Law Review (1984), 626
[51] John M. Finnis, *On "The Critical Legal Studies Movement"* 30 American Journal of Jurisprudence (1985), 21
[52] Duncan Kennedy, *Law and Economics from the Perspective of Critical Legal Studies,* in *The New Palgrave Dictionary of Economics and the Law* edited by Peter Newman, Macmillan Reference Ltd., 1998, 465

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progressively acquired popularity and have become quite prominent, like critical race theory or contemporary feminist theory. CLS has also influenced the study of international and comparative law.[53]

The body of thought produced by CLS is not monolithic. CLS has tried to encourage various approaches to law within a general commitment to democratic and egalitarian values in the belief that legal practitioners and scholars have contributions to make in creating a more just society.[54]

Broadly speaking, critical legal scholars share the view that law is "[A] hegemonic system legitimating direct forms of domination: legal rules shape and reproduce hierarchical structures of power (race, class, gender) by both forging legal identities and affecting the redistribution of social resources (...) [I]t regards the legal system as an instrument for the legitimization of the *status quo*: (false) legal consciousness is a cluster of beliefs shared by legal actors; it reinforces current power structures by mediating or denying contradictions, creating false necessities, and producing false justifications. (...) Critical Legal Studies scholars (...) subscribe to an agenda of liberation through disruption and disorientation (...) to illuminate the fallacies of legalistic strategies."[55]

The tradition pursued by CLS is that of a critique of the legal order, which challenges the idea that a legal order exists in any society. Such critique is based on the principle of *indeterminacy* (legal doctrine neither provides an answer to questions, nor covers all possible situations); *antiformalism* (there is no neutral mode of legal reasoning through which legal specialists apply

[53] Ugo Mattei, *Comparative Law and Critical Legal Studies,* available at http://works.bepress.com/cgi/viewcontent.cgi?article=1031&context=ugo_mattei, 816
[54] Duncan Kennedy and Karl Klare, *A Bibliography of Critical Legal Studies,* 94 Yale Law Journal (1984), 462
[55] Mattei, *Comparative Law,* cit., 819

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doctrine in concrete cases to reach results independent of the specialists' political ideas); *contradiction* (legal doctrine does not contain a single or coherent view of human relations); and *marginality* (law is not a decisive factor in social behavior).[56]

In particular, continuing the tradition of leftist tendencies in modern legal thought and practice, critical legal scholars strongly critique both *formalism* and *objectivism*.[57] Formalism is a theory that sees law as a set of rules and principles independent of other political and social institutions.[58] Critical legal scholars intend formalism both as a commitment to and a belief in the possibility of a method of legal justification contrasted to open-ended disputes about the basic terms of social life, disputes that are called ideological, philosophical, or visionary. This formalism invokes impersonal purposes, policies, and principles as indispensable components of legal reasoning.[59] Conversely, objectivism creates standards by which it is possible to judge the legitimacy of political institutions and legal rules. CLS rejects this perspective, and claims that all attempts to provide a rational foundation for legal theory have been incoherent, because it is not possible to ground the legal system on a rational foundation.[60]

CLS objects traditional legal theory because it asserts that it is capable of giving determinate or neutral decision procedures to resolve contradictions.[61] Critical legal scholars believe that law is neither apolitical nor objective. In their opinion, judges and lawyers make political choices and use the ideology of legal reasoning to make the institutions and the rules appear natural. However, there

[56] Trubeck, *Where The Action Is,* cit., 578
[57] Unger, *The Critical Legal Studies Movement,* cit., 564
[58] Black's Law Dictionary 913 (7th ed. 1999)
[59] Unger, *The Critical Legal Studies Movement,* cit., 564
[60] Singer, *The Player,* cit., 25-26
[61] Singer, *The Player,* cit., 60

are no rational, objective criteria that can govern the system or that help making legal decisions.[62] Legal reasoning is indeterminate and contradictory, and cannot resolve legal questions objectively.[63]

Instead of legal theory relying on the assumptions of determinacy, objectivity, and neutrality, CLS believes that legal theory should *edify* and help the society as a whole to break free from old fashioned vocabulary and attitudes.[64] Indeed, although theorists and judges have claimed that the legal system has a certain amount of determinacy, CLS assert that legal doctrine is far more indeterminate than traditional theorists realises it is.[65]

Another tenet of critical legal scholarship is its attack upon hierarchy. CLS view law as a hegemonic system legitimating domination, where legal rules reproduce hierarchical structures of power.[66] Law is not neutral; it is a mechanism for creating and legitimating configurations of economic and political power.[67] For example, critical legal scholars have harshly attacked the whole system of American legal education in an attempt to undermine the illegitimate power within, and demystify the *phoniness of hierarchy* in law schools.[68]

Finally, critical legal scholars have challenged traditional ways of writing legal historiography, and evolutionary legal functionalism[69] has been the target of this attack.[70] More generally, critical legal scholars claim that historicism, intended as the recognition of the historical and cultural

[62] Singer, *The Player,* cit., 5
[63] Singer, *The Player,* cit., 6
[64] Singer, *The Player,* cit., 8
[65] Singer, *The Player,* cit., 14
[66] Mattei, *Comparative Law,* cit., 819
[67] Singer, *The Player,* cit., 6
[68] Kelman, *Trashing*, cit., 325. See also Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy,* 32 Journal of Legal Education, (1982), 591
[69] Legal functionalism construe the law as functionally adapting to evolving social needs
[70] Robert W. Gordon, *Critical Legal Histories,* 36 Stanford Law Review (1984), 68

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contingency of law, is a threat to the aims of legal scholarship as conventionally practiced, [71] and that legal history as conventionally intended is destabilizing and subversive.[72]

## 2. The methodology of CLS

Two major facets distinguish the methodology used by critical legal scholars in analyzing legal texts: use of language and critique. This approach has been ironically (and provocatively) described as *trashing:* "Take specific arguments very *seriously* in their own terms; discover that they are actually *foolish* ([tragic]-*comic*); and then look for some (external observer's) *order* (*not* the germ of truth) in the internally contradictory, incoherent chaos we've exposed."[73]

Critical legal scholars use deconstruction as model of critique, and have used deconstruction to buttress their critical accounts of liberal legal doctrine as indeterminate and contradictory. This scholarship views law as language, and treats all language use as a figurative or literary practice of signification.[74]

Language is truly the most powerful tool in the hands of critical legal scholars, the means they use to accomplish their project of deconstruction of, and departure from, conventional legal pillars. Language as they use it is at times deliberately provocative, as if their goal were to scandalize mainstream academia.[75] Other times, language is used incomprehensibly, so that scholars not belonging to the CLS movement may find it difficult to fully understand their ideas.[76]

[71] Robert W. Gordon, *Historicism in Legal Scholarship,* 90 Yale Law Journal (1981), 1017
[72] Morton J. Horwitz, *The Historical Contingency of the Role of History,* 90 Yale Law Journal (1981), 1057
[73] Kelman, *Trashing*, cit., 293
[74] Guyora Binder and Robert Weisberg, *Literary Criticism of Law,* Princeton University Press, 2000, 378
[75] Kelman's *Trashing* (cit. *supra*) is a good example of provocative language as used by critical legal scholars
[76] Gordon, *Critical Legal Histories,* cit., 116

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Thus, language is mainly used to identify those contradictions that are so pervasive in mainstream legal theory.[77] Language is then used to deconstruct such contradictions, prove their weakness, their fallacies, and eventually critiquing the whole legal system as conventionally intended.

### 3. Criticism to CLS

Because of their radical views of the legal system, their provocative language as well as their unconventional approach, critical legal scholars have attracted criticism, especially from more conservative or liberal academics. The same name *Critical Legal Studies Movement* has been the target of fervent disapproval as having no place in a critical social theory or legal study, and being only a label chosen by its supporters as an instrument of persuasion in the rhetoric of political action within the academy. Also, the use of this label with self-identificatory intent was not seen as a guarantee that the movement was actually critical in method, or had a clear conception of legal studies, or constituted a movement fit to accomplish coherent goals.[78]

On first place, CLS has been strongly accused of being a destructive, vague, and utopian movement.[79] These attacks are built on the fact that critical legal scholars rarely offer alternative options, criticizing the *status quo* through a skilful use of the language that on the other hand is void, as it only rarely offers solutions to the problems presented.

This attack has been rebutted by CLS in various ways. On one side, it was emphasized how active criticism of the legal system is indeed one of the greatest services that can be provided to the

[77] Mark Kelman, *A Guide to Critical Legal Studies,* Harvard University Press, 1987, 2-3. See also Duncan Kennedy, *Form and Substance in Private Law Adjudication,* 89 Harvard Law Review (1975-76), 1685
[78] Finnis, *On "The Critical Legal Studies Movement,"* cit., 21 and 22
[79] Kelman, *Trashing*, cit., 296-297

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legal system by legal theorists. Indeed, initially all criticism is reactive and destructive, rather than constructive.[80] Also, criticism cannot magically generate answers,[81] and the new cannot be expected to emerge *phoenix-like* from the old.[82]

Other scholars, in turn, have pointed out how CLS can be constructive and concrete, especially when it advocates legal reforms, even if it does so in a more radical mode than mainstream legal scholarship.[83] And when critical legal scholars take the role of descriptive academics, attempting to explain the legal culture and deconstructing arguments, although in a way that has apparently no immediate help,[84] "they are often engaged [...] in the perfectly concrete and constructive enterprise of trying to understand human behavior, whether or not that understanding will directly help us reformulate legal practice [...]"[85]

Because of their idea that law is a form of politics, and the rejection of the traditional idea of objectivity and rationality in traditional legal reasoning, critical legal scholars have also been strongly accused of *nihilism*.[86] This type of critique shares some similarities with the accusations previously moved to American Legal Realism (of which CLS is somehow an extension) of leading to Nazism, Stalinism, and therefore totalitarianism because of its deference to the powerful.[87]

The same methodology used by CLS, particularly their critique of conventional legal doctrine, has been discussed. Dissenters have enquired whether critical legal scholars can produce

[80] Singer, *The Player,* cit., 58
[81] Singer, *The Player,* cit., 60
[82] Singer, *The Player,* cit., 61
[83] Kelman, *Trashing*, cit., 297-298
[84] Kelman, *Trashing*, cit., 299
[85] Kelman, *Trashing*, cit., 303-304
[86] Singer, *The Player,* cit., 6. As used by Singer in the article, nihilism as a theory of knowledge asserts that it is impossible to say anything true about the world, and as a theory of morality nihilism claims that there is no objective way to decide how to act. *Ibid.,* 4
[87] Singer, *The Player,* cit., 49

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valid knowledge about law in society since the method they use focuses on the study of legal doctrine and cases but neglects empirical evidence of the social impact of law or the behaviors of legal actors.[88] The hostility that CLS shows towards empiricism is justified by the fact that they see it as associated with determinism and positivism, which are precisely the main targets of the whole critical scholarship.[89]

To face all the criticism made towards this movement, CLS has produced an impressive amount of work to defend their methodology and legal theories. Apparently, critical scholars have used the same attacks made to them as a tool to counterattack mainstream scholarship.[90] Nonetheless, critical legal scholarship has struggled in defending some apparently indefensible positions, and this is probably one of the reasons why the influence of this school of thought has gradually faded over the years.

Finally, a critique that has come from within the same CLS movement is that for the most part this movement has not succeeded in communicating its ideas clearly enough, so that most of the interesting controversies have taken place within CLS.[91]

More in general, however, it can be said that the way that CLS choose to promote their ideas sounds at times quite naive. For example, while traditional legal theory maintains that laws are imposed on people because otherwise they would do horrible things to each other, CLS counterclaims that people want freedom and happiness, they do not want to harm or be harmed,

[88] Trubeck, *Where The Action Is,* cit., 576
[89] Trubeck, *Where The Action Is*, cit., 579
[90] For example, when accused of vagueness and utopian views, CLS have asserted that mainstream legal scholarship is also vague and utopian.
[91] Gordon, *Critical Legal Histories,* cit., 116

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they do not want to be beastly to each other. Although it is true that the world is full of people who are caring, supportive, and altruistic, it is also true that evidence of beastly behaviors is all around us.[92] Therefore, the reforms in terms of a more equalitarian and just society advocated by critical legal scholars, although commendable, are not always accompanied with a realist perception of society. The lack of valid proposals to implement these reforms comes as a deficiency in the application of the methodology, which seems too theoretical and too far from being able to solve real problems.

Similarly, if the choice of using a language that is intentionally provocative may appear courageous, especially in light of the fact that legal academia is by definition a conservative ambience, at the same time this whole school of thought leaves the reader with a sense of incompleteness. Despite the efforts made by critical scholars in showing that they are constructive and not merely destructive in their pervasive criticism, and although being critical is another way to present things, still the whole critical legal project seems incomplete, and by itself of difficult application.

## IV. Similarities and differences between L&E and CLS

I have already emphasized in my introduction how L&E and CLS are generally considered as opposite discourses or antithetical methodologies. This makes it easier to identify the ways in which they diverge rather than the elements of convergence. Yet, it is not impossible to recognize some common components, if not in the methodology used, at least in the general underlying ideas.

[92] Singer, *The Player,* cit., 54

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## 1. Similarities between the two approaches

To begin with, L&E and CLS have been (and still are) leading movements in legal academia. Initially, they both were the product of North American scholarship, but later their influence has extended worldwide. Indeed, L&E societies and organizations are present in Europe and Asia, whereas the most contemporary CLS trends share similar views with French post-structuralists.[93] Also, a quite influential branch of CLS has grown in the United Kingdom, qualifying itself as British CLS, an independent school of thought.

Because of this leadership, each movement has become the favourite target of the "opponent" counterpart for its criticism. This is particularly true for CLS, whose members have spent a great deal of time attacking L&E, which they saw as an attempt to restate objectivism and formalism, like I explained *supra*. But this rivalry has been prolific, and has resulted in the flourishing of an extraordinary amount of legal literature on both sides, which can also be seen as an implicit acknowledgment by one movement of the merits of the rival scholarship.

Another major common characteristic of L&E and CLS is interdisciplinarity. Both movements have contributed to the idea that the whole legal apparatus should be seen not separate from other fields, rather interplaying with them. Both movements ask lawyers and legal scholars to think differently. This is quite obvious for L&E where economic models and theorems are used to make predictions on the impacts of the legal system, or to explain how a given law will work in fact. The interdisciplinary approach is even more evident in the case of behavioral L&E, where scholars

[93] For example, Michel Foucault.

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experiment on models borrowed not only from economics, but also from behavioral psychology and social science.

The approach of CLS is similar at least in theory: as an elaboration of American legal realism, CLS also seek to abandon the well rooted idea of law as a world separate and apart. The interdisciplinary approach is also reflected in a novel academic curricula proposed by critical legal scholars: Kennedy for example suggested that law school students should be given the opportunity to study subjects other than law, like history or sociology, in order to allow a broader understanding of the whole system.[94] He proposed what he calls a *new model curriculum*, where an interdisciplinary course (covering areas other than law, like history, social psychology, social theory, etc.) runs parallel to doctrinal and clinical study, and taught in order to expose the student to both left and right approaches of the material.[95]

More similarities can be found between CLS and behavioral L&E: they both depart from conventional beliefs in an attempt to show that traditional thought is often wrong. I have explained *supra* how CLS uses language to deconstruct and criticize traditional legal assumptions to prove that these concepts are misleading. Behavioral L&E does something similar with regards to the conclusion reached by neoclassic economic analysis of law. The use of behavioral models borrowed from social sciences and applied to law is an attempt to empirically prove that traditional L&E is often wrong in its assumptions.[96]

[94] Kennedy, *Legal Education,* cit., 614
[95] Kennedy, *Legal Education,* cit., 614. It is fair to say though that also law schools which are close to the L&E ideals are offering joint programs in law and economics.
[96] Jolls, Sunstein, and Thaler, *Behavioral Approach*, cit., 1505-06. As an example, a frequent claim in conventional legal economics is that the imposition of mandatory terms on the parties to a contract will make both parties worse off. But behavioral economics suggests that bounded rationality casts doubts on this claim.

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Similarly, both behavioral L&E and CLS share the idea of the role of human beings in society. Behavioral L&E abandons the neoclassic economics premise that men always behave as maximisers of their self-interests, and propose instead the concept that human beings have bounded personalities, so that maximisation of self-interest is not always proven. Likewise, CLS departs from the assumption that all human beings innately possess a common thinking process (which makes legal reasoning always predictable). They postulate that not all discourse about law can be crammed into a single decision procedure, because human beings are indeed different and do not have an innate thinking process uniting all in a common framework of inquiry.[97] Therefore, both movements conceive of men as individuals that do not act mechanically.

In summary, CLS and L&E alike have the merit of offering a novel perspective of the whole legal system, as integrated in an interdisciplinary context, as part of this context. A clear depart from tradition. Obviously, the methodology adopted by the two schools in achieving this goal is very different, and this is where the dissimilarities are most manifest.

## 2. Differences between the two approaches

The methodology used by L&E and CLS is deeply diverse. L&E intentionally adopts a *scientific* approach. Legal economic scholars apply to law models borrowed from economics, mathematics, psychology, and social sciences. They use empirical testing as well. Some of these models are used to prove that other models previously adopted were wrong, or lead to wrong results, but this does not change the fact that, with L&E, law leaves the sphere of humanities, where it had been confined until that moment, to enter the realm of sciences.

[97] Singer, *The Player,* cit., 34

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The scientific and objective application of theorems and models by legal economic scholars is antithetical to the much more theoretical (or philosophical) approach adopted by CLS, whose principal goal is to use dialectical deconstruction to demystify conventional legal framework and prove that they are not valid.

The work of deconstruction and disruption of traditional legal theorems clearly aims at undermining the traditional institutions how we were used to think of them. Critical legal scholars are masters in the art of *critiquing* and challenging basic pillars of legal thought. Sometimes they offer an alternative proposal, most often they merely disapprove of the *status quo*. L&E, on the other hand, set for itself a different purpose, an objective that is not that of disruption. They propose to think about law in alternate ways; they suggest the use of economic theorems to give answers. They offer alternatives, they propose solutions which, at the end of the day, may or may not be accepted.

However, it is possible to identify differences even within the same broad movement, as it happens with conventional and behavioral L&E. One major dissimilarity between the two rests on the fact that the conventional approach looks at a more static human behavior, that of human beings as rational maximisers of their self-interests. In this sense, it seems rather hypothetical. Behavioral L&E, on the other side, looks at real human behaviors, and pays more attention to the human being as a full personality, whose behaviors are both nice and spiteful, but not necessarily aiming at maximising his or her self.

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## V. Conclusion

For various reasons, but mainly because of their presuppositions, both L&E and CLS qualify as quite radical, although fascinating, movements in contemporaneous legal scholarship. In the previous sections, I tried to critically outline their reciprocal weakness and strengths, as well as their merits and shortcomings. Both methodologies offer extremely interesting perspectives, specifically the interdisciplinary approach that they suggest, and these perspectives may be used in a potential research. However, too radical positions are often dangerous. Law continually evolves, promoting societal changes and responding to evolving needs. But at the same time, it continually draws from economic, political, social, and cultural aspects. Neither L&E nor CLS allows taking into account all the elements that come into play when making legal or legislative choices. Strict adherence to the idea that "all law boils down to politics" or that "all law is economics" may lead to wrong outcomes or misunderstandings. Therefore, a more moderate approach to law would be preferred, one that takes into account the multi-faceted feature of law and law-making process.