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SYMPOSIUM: THE FUTURE OF LAW AND ECONOMICS: AUSTRIAN ECONOMICS AND THE CURRENT DEBATE BETWEEN CRITICAL LEGAL STUDIES AND LAW AND ECONOMICS.

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-Footnotes-

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-End Footnotes-

HIGHLIGHT:

Professor Schwartzstein identifies common ground between the frequently competing schools of Law and Economics and Critical Legal Studies. She finds a bridge between these ideologies by examining key concepts endemic to the Austrian School of economic theory.

The Article begins with a description of the basic tenets of both Law and Economics and Critical Legal Studies. Professor Schwartzstein explores the philosophical and political differences between the schools concerning their outlook on law and human nature.

Next, Professor Schwartzstein examines the Austrian economic view of law and the nature of rules. First, Austrian theory posits a subjective approach to economics that considers economic choices from the perspective of the individual. Additionally, by conceptualizing law as an evolving institution, the Austrian position accepts an inherent degree of indeterminacy as part of the process. Legal interpretation is therefore viewed as an ongoing mediation between legal theory and specific facts. Since the Austrian School addresses the same issues as Law and Economics and Critical Legal Studies, Professor Schwartzstein suggests that it should prove a useful tool in bridging the existing gulf between Law and Economics and Critical Legal Studies.

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[*1105] INTRODUCTION

Contemporary jurisprudence is marked by a polarization of theoretical constructs represented by Law and Economics at one end of the spectrum and Critical Legal Studies at the other. To date, there has been only increasing fission between these competing schools of legal philosophy. This paper is an attempt to demonstrate how the principles of Austrian Economics may provide some common ground for discussion, and an alternative viewpoint to these two conflicting paradigms.

Austrian Economics sees law and the economy as evolutionary processes which form a spontaneous order. Austrian Economics stresses subjectivism in contrast to the objectivism of neoclassical economics, upon which Law and Economics is based. This subjectivist vantage point and an increasing awareness of hermeneutics makes Austrian Economics more open to the critical legal scholars. The Austrians' rejection of equilibrium economics and its underlying assumptions allows for consideration of competing values. However, Austrian Economics shares many other central concepts of neoclassical economics regarding how persons interact through the market, and thus forms a bridge with traditional Law and Economics.

I. BACKGROUND TO LAW AND ECONOMICS AND CRITICAL LEGAL STUDIES

Critical Legal Studies ("CLS") and Law and Economics both emerged as reactions to legal realism. Legal realism, which arose mainly in the 1920s and 1930s, suggested that law was not systematic and objective. n1 Rather, any interpretation of the law could be justified. Judicial decisions were not the result of applying a set of neutral precepts in order to reach the logically inevitable and correct conclusion. In addition, precedent could not be relied on to the extent it had been in the past because courts were taking on issues and problems that were not traditionally part of their sphere of influence. n2 The Realists sought to dejustify legal rules and turned to sociology as the social science best suited to guide judicial decisionmaking. n3

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n1 See Allan C. Hutchinson & Patrick J. Monahan, Law, Politics, and the Critical Legal Scholars: The Unfolding Drama of American Legal Thought, 36 STAN. L. REV. 199, 204 (1984).

n2 Id.

n3 See id.; Edmund W. Kitch, The Intellectual Foundations of "Law and Economics," 33 J. LEGAL EDUC. 184 (1983); John H. Schlegel, Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies, 36 STAN. L. REV. 391 (1984).

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CLS and Law and Economics represent opposite reactions to the [*1107] Realist movement. CLS generally shares the Realists' goals of revealing the indeterminacy of legal reasoning and showing that there are no "correct" decisions or policies. n4 The political agenda of the CLS movement, however, is generally farther left than the realists. n5



-Footnotes-

n4 Hutchinson & Monahan, supra note 1, at 201.

n5 See id. at 205.

-End Footnotes-

The Law and Economics movement was a response to the search for objective analytic tools that would help judges with the issues with which they were being confronted. The openness to the social sciences that resulted from the Realist movement brought attention to economics as useful to judicial decisionmaking. Although there are liberal Law and Economics academics, generally the movement is associated with conservative political agendas. n6

-Footnotes-

n6 See MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 114 (1987).

-End Footnotes-

In addition to their opposing political bents, these two schools of thought generally have had disdain for each other. This paper will examine each of these schools and their criticisms of each other in more detail below. The paper will then examine how Austrian Economics can provide a bridge between these two schools and form the basis for a dialogue.

II. CRITICAL LEGAL STUDIES

Why can't legal Realism itself be a "bridge"?

This section will examine the basic precept of CLS, the "fundamental contradiction," followed by a discussion of "trashing," the debunking of theories and doctrine in order to reveal their inconsistencies and indeterminacy. Following these two sections is a discussion of a CLS vision of how a better society would be constituted.

A. The Fundamental Contradiction

CLS posits that there is a fundamental contradiction in that we simultaneously want both individual freedom and community with others. n7 However, these two goals are at once interdependent and incompatible. The fundamental contradiction was originally articulated by Duncan Kennedy as follows:

Most participants in American legal culture believe that the goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it

[*1108] But at the same time that it forms and protects us, the universe of others (family, friendship, bureaucracy, culture, the state) threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good Through our existence as members of collectives, we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or on the accident of genetic endowment.



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The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose

The fundamental contradiction -- that relations with others are both necessary to and incompatible with our freedom -- is not only intense. It is also pervasive. n8

Thus, although we want to live in a closely connected collective community, such a collective threatens our individual freedom. In order to protect our individual freedom, we create societal institutions that are alienating.

-Footnotes-

n7 See Hutchinson & Monahan, supra note 1, at 208.

n8 Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 BUFF. L. REV. 205, 211-13 (1979).

-End Footnotes-

This insight is the leading principle of CLS and is used to explain the inherent contradiction in any set of legal concepts which leads to the indeterminacy of law. n9 This contradiction is evident in several distinct ways. First, there is a conflict between the use of rules and standards. n10 Rules confine the discretion of legal decisionmakers to the mechanical application of a particular rule to a set of facts, even with the recognition that this will result in some unintended consequences. n11 Standards are informal, general policy commands, which allow ad hoc fact sensitive decisions. n12 Rules are associated with self-reliance and individualism, standards with altruism. n13 Rules and standards are each simultaneously good and bad. Rules are good because they will produce predictable outcomes and are stabilizing. n14 Rules are bad because they can be over-inclusive or under-inclusive and will have gaps which make them difficult to [*1109] apply mechanistically in many cases. n15 Further, it is possible for people to manipulate rules counterpurposively, and the legal system becomes increasingly complex as new rules are needed to prevent evasion. n16 In addition, as more people come to believe others can manipulate the rules, noncompliance becomes widespread. Standards are good because in theory they cannot be over-inclusive or under-inclusive and because their efficiency cost may be low or they may simply be more efficient. n17 In this view, legal uncertainty may not be a significant source of risk. Standards are bad because people do not know what the consequences of their action will be. n18 Ultimately however, CLS scholars ("Critics") believe that it is impossible to have a rule-based regime, given the ambiguity and vagueness of language and instances where two conflicting rules cover the same set of circumstances, without guidance concerning which one should prevail. n19

-Footnotes-

n9 See, e.g., KELMAN, supra note 6, at 3, 62.

n10 See generally id. at 15-63.



n11 See id. at 40.

n12 See id. at 41.

n13 Id. at 54.

n14 See id. at 44.

n15 See id. at 44-45.

n16 See id. at 44.

n17 See id. at 43-44.

n18 See id. at 43.

n19 See id. at 46-47.

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This rules/standards dichotomy is seen to correspond to the fundamental contradiction inherent in each person. The belief in the politics of individualism leads us to embrace rules, while the belief in the politics of altruism -- that our own desires and purposes have no normative priority over others -- leads us to embrace standards. n20 Rules are associated with classical liberalism and conservative thought. Critics believe rules make people believe that there is fairness or justice in society that in fact is nonexistent. Kelman summarizes this point by saying that "[r]ules are the opiate of the masses." n21

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n20 See id. at 16-17.

n21 Id. at 63.

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Further, the Critics attack the concept that values are subjective since this suggests that the role of government should be facilitative of individual objectives only. The fundamental contradiction is again seen in the desire for freedom to pursue one's subjectively chosen ends and the desire for order. The Critics suggest that this leads to indeterminateness, for there is no reason for one person's desires to prevail over another's. n22

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n22 See id. at 66-67.

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Critics believe that by exposing the contradictions and indeterminateness of law, the CLS movement will lead the way to legal rules [*1110] that are more just. n23 In addition, Critics seek to show how contradictions and indeterminacy are repressed and the status quo presented as a natural and not contingent set



of affairs. n24 One of the difficulties, however, is that people live with "false consciousness," that is, they do not realize that their views are shaped by the culture in which they live. Thus, Critics posit that the choices people make do not really reflect their values, as evidenced by the fact that they may later regret their actions n25 or because their choices and values have already been manipulated by the capitalist system. n26 In addition, since Critics realize that law and society are mutually constituting, interacting in complex and multidirectional ways, one must attempt to transcend the dichotomy between the intellectual and the material worlds of humankind. n27

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n23 See Schlegel, *supra* note 3; David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 *STAN. L. REV.* 575 (1984).

n24 See Hutchinson & Monahan, *supra* note 1, at 217.

n25 See Mark Kelman, *Choice and Utility*, 1979 *WIS. L. REV.* 769, 784-87.

n26 See Mark Hager, *Against Liberal Ideology*, 37 *AM. U. L. REV.* 1051, 1072-73 (1988) (reviewing KELMAN, *supra* note 6).

n27 See Trubek, *supra* note 23, at 609.

- - - - -End Footnotes- - - - -

Many Critics believe that law is used as a way for some groups in society to dominate others. n28 The dominant group manipulates the legal rules so as to strengthen its position to the detriment of less advantaged and less empowered groups. Others, such as Kelman, believe that law is so indeterminate that no one group can ever dominate. n29 At any time, any position can prevail.

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n28 See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 26 (1987); William J. Chambliss, *Toward a Radical Criminology*, in *THE POLITICS OF LAW* 230, 234 (David Kairys ed., 1982); Hager, *supra* note 26, at 1063; Nadine Taub & Elizabeth M. Schneider, *Perspectives on Women's Subordination and the Role of the Law*, in *THE POLITICS OF LAW* 117, 117-39 (David Kairys ed., 1982).

n29 See KELMAN, *supra* note 6, at 261.

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B. Trashing

Trashing is a technique designed to expose weaknesses in arguments and theories and to reveal how they are shaped by underlying ideological beliefs. Kelman describes this technique as follows: "Take specific arguments very seriously in their own terms; discover they are actually foolish ([tragi]-comic); and then look for some (external observer's) order (not the germ of truth) in the internally contradictory, incoherent chaos we've exposed."

n30



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n30 Mark G. Kelman, *Trashing*, 36 *STAN. L. REV.* 293 (1984) (punctuation and emphasis in original).

-End Footnotes-

[*1111] CLS focuses on ambiguity and does not try to find synthesis. One goal of this approach is to upset theoretical world views that imply that the way things are is also the way things have to be. n31 As people's awareness of the limitations of theory is raised, the constraints that these theories place on people's evaluation of choices may be lessened. n32 An example of this approach is Duncan Kennedy's article on cost/benefit analysis. n33 In this article, Kennedy attacks what he calls "liberal law and economics." n34 He suggests that any cost/benefit analysis is manipulable by the way costs and values are determined. The analyst simply sets valuations which reach the result his or her personal political or ethical beliefs deem appropriate. n35 The article proceeds to analyze cost/benefit analysis as indeterminate, even given costless bargaining, set factor shares and set definitions of entitlements. n36 There will be many efficient outcomes that are consistent with any given set of assumptions about factor shares and entitlements. n37 The decisionmaker can then choose among the range of possible outcomes according to his or her social welfare function. n38 Kennedy's conclusion is as follows:

It is nonetheless unlikely that the enthusiasm for efficiency will abate, given its enormous apologetic usefulness. In this discussion, I have touched on only one of those apologetic uses -- that of generating an apparently "scientific" justification for liberal reformist proposals. In this phase, the primary function of efficiency has been to drive the right crazy by using their weapons against them. But efficiency serves not only as a justification but also as a restraint on reformist enthusiasm. The concept will now appear as a way to drive the left crazy by showing that its naive hopes of reconciling social justice with material plenty are inconsistent with elementary economic laws. n39

The article thus trashes all cost/benefit analysis. Such analysis is seen as being used to reach any conclusion desired.

-Footnotes-

n31 See *id.* at 327-29.

n32 See *id.* at 299.

n33 Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 *STAN. L. REV.* 387 (1981).

n34 *Id.*

n35 *Id.* at 410-11.

n36 *Id.* at 422-42.

n37 *Id.* at 444.



n38 Id.
n39 Id. at 445 (emphasis in original).

what about his own?

-End Footnotes-

[*1112] More generally, and perhaps to a greater extent than many in the CLS movement, Kennedy eschews any belief in doctrine and abstract philosophy. Despite the fact that he created the concept of the fundamental contradiction and that it has been a central tenet of CLS doctrine, Kennedy himself has recanted it because it was being used as doctrine. n40 Despite Kennedy's statement, the concept of the fundamental contradiction still dominates most CLS work, a testimony perhaps to the fact that literary works have a life of their own.

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n40 See Peter Gabel & Duncan Kennedy, Roll Over Beethoven, 36 STAN. L. REV. 1, 15-16 (1984).

-End Footnotes-

C. Alternative Visions

There is some disagreement among Critics as to whether it is possible or desirable to proscribe a vision of a better world. Some believe that if the movement is to be of lasting significance, some alternative to the present system must be advanced. However, concern is also expressed that any vision offered will have no more normative justification than any other view of society. These Critics believe that CLS theory cannot seek to impose its structure of thought on others. Otherwise they are doing what they are criticizing others for. This position leads to the view that each individual must be left to act alone, free from the constraints of any superimposed thought structure. Hutchinson and Monahan suggest that:

this is so Silly!

The transformation of society must be effected by spontaneous individual action. It cannot be orchestrated in tune with any score, no matter how elaborate or simple. As a theory for political action, therefore, Critical theory alone is impotent. The most it can do is put the individual in the right frame of mind to achieve his or her own emancipation. n41

This view suggests that CLS can raise people's consciousness about the conditions under which they live, but not try to impose a different view as to how they should live.

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n41 Hutchinson & Monahan, supra note 1, at 229.

-End Footnotes-

One attempt to set forth a concept of a better world is contained in Roberto Unger's The Critical Legal Studies Movement. n42 Unger envisions what he calls a program of "empowered democracy." n43 Unger would multiply the branches of



government so that for every important aspect of the social order there is an arena for arguing and [*1113] resolving conflicts. n44 The purpose of this, apparently, is to broaden democracy and make government institutions more accessible to the electorate. Unger objects to the current structure of the market and the formulation of property rights because he believes it allows relatively small groups to control investment decisions that then affect collective prosperity or impoverishment, and also because it lets such groups reduce others to dependence. n45 He also believes it discourages innovation because it keeps workers assigned to particular roles. n46 His economic plan would establish a rotating capital fund. Capital would be made temporarily available to teams of workers under conditions set by the central government. These conditions might include limits on the disparities of income or authority within the organization, on capital accumulation, and on the distribution of profit as income. The interest charged on the capital would be the main source of government finance, and the differentials among interest rates would be used to encourage risk taking and socially responsive investment. The fund would be administered in a way that would ensure a constant stream of new entrants into markets. Enterprises could not consolidate market positions or use other means to protect themselves against market instabilities. n47

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n42 ROBERTO M. UNGER, THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

n43 See *id.* at 22-24.

n44 *Id.* at 31.

n45 See *id.* at 32-35.

n46 See *id.*

n47 See *id.* at 35.

-End Footnotes-

Legally, property rights would be disaggregated. Each individual would have four types of rights. n48 The first is the right to immunity, which is the "nearly absolute claim of the individual to security against the state, other organizations, and other individuals." n49 The second is a destabilization right which includes claims to disrupt established institutions and forms of social practice that have encouraged the entrenchment of social hierarchy and division. n50 Market rights would give the individual provisional and conditional claims to divisible portions of social capital. n51 Conscious collective decisions would determine how provisional and conditional these claims would be. The last right is the right to the solidarity of communal life. This right has two components. The first incorporates standards of good-faith loyalty or responsibility. The second sets boundaries on the exercise [*1114] of the right according to the actual effect exercising the right seems likely to have upon others. n52

-Footnotes-

n48 See *id.* at 38.



n49 *Id.* at 39.

n50 See *id.* at 39, 52-56.

n51 See *id.* at 39.

n52 See *id.* at 39-40.

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Unger says that these changes could be made gradually and even partially. His aim is to create what he calls a "superliberalism," which he describes as follows:

It pushes the liberal premises about state and society, about freedom from dependence and governance of social relations by the will, to the point at which they merge into a large[r] ambition: the building of a social world less alien to a self that can always violate the generative rules of its own mental or social constructs and put other rules and other constructs in [its] place. n53

Unger believes changing the economic structure and the system of legal rights will lead to more community. n54

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n53 *Id.* at 41.

n54 *Id.* at 36-42.

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III. LAW AND ECONOMICS

Law and Economics takes an attitude towards law which is diametrically opposed to Critical Legal Studies. The Law and Economics movement sees law as a system that can be illuminated by economics. Posner has been one of the most prolific and influential of the law and economists, and his book, *Economic Analysis of Law* n55 sets out a basic framework for analyzing the legal system from an economic viewpoint.

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n55 RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (3d ed. 1986).

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The economic assumption that humans rationally maximize their ends in life -- that is, they act in their self-interest and will respond to incentives -- is a basic precept. n56 Building on this premise, one is led to the belief that "resources [will] tend to gravitate [to] their most valuable uses if voluntary exchange . . . is permitted When resources are being used where their value is [the] highest they are being [used] efficiently." n57

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n56 See *id.* at 3-4.
n57 *Id.* at 9.

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Posner posits that legal doctrines and institutions aim at increasing efficiency. The common law is best seen as a vehicle for maximizing the wealth of society. Positive Law and Economics can describe the impact of current legal doctrines and outcomes. n58 Justice [*1115] can be equated with efficiency. n59 Thus, Posner suggests:

We shall see, among many other examples, that when people describe as unjust convicting a person without a trial, taking property without just compensation, or failing to make a negligent automobile driver answer in damages to the victim of his negligence, this means nothing more pretentious than that the conduct wastes resources. n60

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n58 See *id.* at 21.
n59 See, e.g., *id.* at 25.
n60 *Id.*

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Law and Economics does not address distributive justice. Posner suggests that positive economic analysis is not normative. Economics does not tell us whether a particular social distribution of income is just, and efficiency is not the ultimate criterion of the public good. n61 In addition, economics does not suggest whether "consumer satisfaction should be the dominant value of society." n62 Instead, positive economics starts from a given distribution of income and a given set of institutions and explains the outcomes that will result.

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n61 *Id.* at 13.
n62 *Id.*

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Generally, Posner believes that society is better off if courts solely try to promote wealth maximization and not redistribution. The common law should focus on efficiency. Redistribution of wealth is the proper domain of the legislature. Legislation that redistributes wealth tends to be efficiency reducing. n63

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n63 *Id.* at 495-96.



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Economics can also be helpful in analyzing legislation by revealing the efficiency costs of legislation. Economics can identify what society must sacrifice in order to achieve a particular legislative objective. Thus, economics can aid in value clarification. Further, Posner suggests that due to interest groups, legislatures may not in fact promote either efficiency or equity. n64

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n64 See id. at 24-25; see also A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS (1983).

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Prior case law can be viewed as a stock of capital goods. n65 This stock is a stock of knowledge. Precedent promotes efficiency by reducing legal uncertainty. Judges have an incentive to follow precedent. Adherence to the tradition of not frequently overruling precedent means that the judge's own decisions will not be lightly overturned. A judge's influence over law depends on his or her decisions having an effect beyond the particular case being decided. Over time, like [*1116] any capital stock, the value of some precedents will depreciate and be replaced with new precedents. This process will occur more quickly in eras where the rate of technological progress is rapid. n66

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n65 See POSNER, supra note 55, at 509.

n66 See id. at 509-12.

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With respect to the rules/standards dichotomy, which the Critics tend to approach philosophically, Law and Economics focuses on the tradeoffs between laws adopting specific rules and those adopting more general standards as economic. More particularized rules cost more to produce and deteriorate faster as conditions change than do general standards. However, the benefits of rules are several. By providing more guidance to judges, they limit the scope and the cost of judicial proceedings. Rules also have more of a deterrent effect. Violators will discount the cost of violating a more general standard both by the probability of being apprehended and by the probability that the law will be found to apply to them. Although the specificity of a rule makes it easier to find loopholes, one remedy is to make the law over-inclusive. An example is reducing the speed limit by five miles more than the speed limit desired. n67

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n67 See id. at 512-14.

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A largely-used methodological approach of Law and Economics is based on the Coase Theorem. n68 The Coase Theorem posits that in the absence of transaction costs, an initial assignment of rights will not affect efficiency. n69 Given an initial assignment of rights, parties will bargain to the result that maximizes wealth for the society. Law and Economics analysis often tries to reconstruct the likely terms of market transactions which would occur if there were no transaction costs in order to determine what the efficient outcome is given an initial assignment of rights.

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n68 *Id.* at 7, 43-48. Ronald H. Coase won the Nobel Prize for Economics in 1991. The Coase Theorem is based on his classic article, R.H. Coase, *The Problem of Social Cost*, 3 *J.L. & ECON.* 1 (1960).

n69 See POSNER, *supra* note 55, at 43-44.

-End Footnotes-

In addition, Law and Economics uses the methodology of neoclassical microeconomics. Neoclassical microeconomics posits an economy in equilibrium in order to isolate the effect of a change in one variable. Underlying equilibrium models are the assumptions of perfect competition. Perfect competition assumes the following: each economic agent acts as a price taker -- that is, as if prices are given; the product is homogenous; there is free entry into the market; and all economic agents in the market possess complete and perfect knowledge about the relevant prices. Further, equilibrium models are [*1117] generally static, focusing on a point in time. Other simplifying assumptions may be made in order to make the particular effect the model is designed to study tractable. The economy described by these assumptions is not meant as a description of reality. Rather, the model is to be judged on its ability to predict the result of the changes being studied. n70

-Footnotes-

n70 *Id.* at 15-17.

-End Footnotes-

IV. THE BATTLE JOINED

One of the unifying themes of CLS is its disdain for Law and Economics. Thus, there is more CLS literature directly attacking Law and Economics than vice versa. This section will discuss three major areas of conflict between CLS and Law and Economics. These revolve around views of human nature, the belief in markets, and objectivism.

A. View of Human Nature

One of the main thrusts of CLS criticism of Law and Economics is the claim that Law and Economics asserts that values and desires are the arbitrary assertions of individuals, unbounded by any underlying moral or political imperatives. The Critics claim that Law and Economics reduces all behavior to individuals pursuing their own selfish interests. Kelman states:



The sense of contradiction that dominates CLS writing is utterly absent in legal economic literature. At the technical level of the choice of form of legal pronouncement, the rules-standards "dilemma" is reduced to an argument over the relative costs of substantively misgoverned conduct and administratively costly case-by-case fact-finding. At the philosophical level, the conflict between individualism and altruism is unfathomable. It is simply reduced to (even perhaps defined as) an individual's arbitrary taste to incorporate the interests of others in making his own selfish calculations, and like other tastes it is neither to be condemned nor encouraged. n71

The critical literature tends to use the term "selfishly" as opposed to in one's "self-interest" to describe the economic view of the way people act. Selfish, which is not used in the economic literature, [*1118] connotes people taking care of their own comfort, pleasure or interest, excessively or without regard for others. n72 This connotation inappropriately characterizes the concept that economics is describing. The fact that one's self-interest may include the happiness or well-being of others is routinely recognized in the economics literature. Unfortunately, economics is vulnerable to this type of attack, since after stating that considerations such as equality, happiness, and other people's welfare may enter into people's determination of their self-interest, these considerations tend not to be given much attention since they cannot be quantified. Rather, the simplifying assumption is made that all costs and benefits can be measured in dollars. n73 It is not made clear in either the Economics or the Law and Economics literature how these more social concerns impact on the outcomes posited.

-Footnotes-

n71 KELMAN, supra note 6, at 119 (citing POSNER, supra note 55, at 129, 512-14); see also Isaac Ehrlich & Richard Posner, An Economic Analysis of Legal Rulemaking, 3 J. LEGAL STUD. 257 (1974).

n72 RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 1737 (2d ed., unabridged, 1987).

n73 See POLINSKY, supra note 64, at 10.

-End Footnotes-

Critics also reject the view that people make utility maximizing choices. n74 First, they suggest that people sometimes make choices that are not truly in their self-interest, which is evidenced by the fact that people sometimes experience ambivalence and regret over the choices they have made. The argument suggests that there can be a divergence between what a person chooses and what that person actually values. Further, what a person values is not a static concept, but will change over that person's lifetime. n75 This concern has led Duncan Kennedy to justify "ad hoc" paternalism, based on love and altruism and an intimate understanding of what is in another person's best interest. n76 Kennedy suggests that the legal system can incorporate this "ad hoc" paternalism. n77 However, no guidance is available as to when it is appropriate to override individual decisionmaking, and no serious effort is made to refute the concerns that such paternalism will lead to a more totalitarian state. Law and Economics would reject the idea that people do not act in their



self-interest and do not have stable preferences. Further, Law and Economics would not condone government interference in private decisionmaking.

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n74 See KELMAN, supra note 6; Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563 (1982).

n75 Hager, supra note 26, at 1065-68.

n76 See Kennedy, supra note 74, at 638-49.

n77 See id.

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Second, CLS suggests that people's choices are determined by [*1119] the societal conditions in which they live. If society were different, other choices would be available. An example of this is the battered woman who "chooses" to remain with her husband because she cannot support herself and her children given the lack of opportunity for women in the society. Law and Economics tends to beg this issue by using only positive analysis, a description of results based on a given distribution of income and not a normative one.

Finally, the rules-standards debate is seen very differently. Critics see rules and standards as a dichotomy between individualism and altruism. Law and Economic advocates view this issue as a question of efficiency.

B. Belief in the Market

Critics attack what they assert is the Law and Economics view of the market. For example, Hutchinson states:

For instance, the ostensibly hard-headed practitioners of law and economics view life as a perfect market, populated by rational, riskneutral, perfectly informed egoists who voluntarily maximize their stable preferences in conditions of relative scarcity. Not only is this objectionable as utopian speculation, but it is used as the basis for explaining and organizing our present society. n78

This description of Law and Economics is simply inaccurate and confuses simplifying assumptions with descriptions of reality. No advocate of Law and Economics would assert that perfect competition, along with its assumption of perfect information, actually exists. Rather, these assumptions are clearly used in order to make the economic variable under study more tractable.

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n78 Allan C. Hutchinson, Introduction, in CRITICAL LEGAL STUDIES 9 (Allan C. Hutchinson, ed., 1989).

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The Critics also believe that there is no politically neutral way to



determine whether a decision is potentially efficient, wealth maximizing or whether its benefits outweigh its costs. A judgment about whether society is better off or not by a change in legal rules necessarily involves a view of what makes a particular society better or worse. Thus, they criticize economic concepts as being as indeterminate as legal conceptualizations. One response to this is to suggest that if the Critics are correct in this assertion, Law and Economics can do no more good or harm than other legal concepts. n79 A more [*1120] affirmative response is that Law and Economics does produce a systematic view of the legal system and suggests possible outcomes based on its assumptions. Given that judges and lawmakers must make decisions, Law and Economics provides one way of influencing their decisions or helping to illuminate the issues while CLS suggests there is no way to reach a rational decision.

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n79 See Bruce A. Ackerman, Law, Economics, and the Problem of Legal Culture, 1986 DUKE L.J. 929, 938.

-End Footnotes-

Kelman further asserts that Law and Economics treats law as an objective price constraint that tells actors what it will cost them to act in a particular way, and is a guide to the effect of self-determined action. n80 The Critics contend that this view does not give consideration to law as a moral force. Since Law and Economics claims not to be asserting a moral viewpoint, this attack is not clearly answered other than to repeat that Law and Economics gives a positive description of human behavior under a particular set of rules. This latter claim at times appears disingenuous. For example, in the Economic Analysis of Law, Posner discusses the effect of a market for babies:

There is, it is argued, no assurance that the adoptive parents who are willing to pay the most money for a child will provide it with the best home. But the parents who value a child the most are likely to give it the most care, and at the very least the sacrifice of a substantial sum of money to obtain a child attests to the seriousness of the purchaser's desire to have the child . . .

Opponents of the market approach also argue that the rich would end up with all the babies, or at least all the good babies Such a result might of course be in the children's best interest, but it is unlikely to materialize. Because people with high incomes tend to have high opportunity costs of time, the wealthy usually have smaller families than the poor Moreover, the total demand for children on the part of wealthy childless couples must be very small in relation to the supply of children, even high quality children, that would be generated in a system where there were economic incentives to produce children for purchase by childless couples. n81

Posner also suggests that one need not worry about people acquiring babies for the wrong motivations, such as for abuse, because of the laws against such behavior. n82

-Footnotes-



n80 See KELMAN, supra note 6, at 120.

n81 POSNER, supra note 55, at 141-42.

n82 Id. at 141.

- - - - -End Footnotes- - - - -

[*1121] It is difficult to regard this passage as just a positive model of what would happen if there was a market for babies. Normative judgments appear implicit in statements that suggest that a child's best interest may be tied to the parents' wealth. The fact that poorer people are without the means to demonstrate their commitment to a child is not given serious consideration. In addition, reliance is placed on child abuse laws that are well known not to be very effective. The impression is given that Posner believes a market for babies would have beneficial results. CLS's claim that moral judgments are embedded in these arguments, or that the arguments result in normative implications seems well founded.

C. Objectivism v. Relativism v. Subjectivism

Critics see Law and Economics as promoting a conservative ideology, while professing to be objective and value free. Thus the use of efficiency as a guideline and decisionmaking as impersonal, general, and unbiased, is central to preserving the status quo and making the distribution of benefits appear impersonally justified. n83 The Critics argue that the indeterminacy of legal and economic concepts precludes any objective result. Critics claim that Law and Economics suggests that legal rules follow an inevitable path, when in fact there are many possible outcomes and courses of legal evolution that could occur. n84

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n83 See KELMAN, supra note 6, at 114-26.

n84 See id. at 127-29.

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The general criticism of CLS is that it leads to a dead end. n85 Even if one accepts that law is indeterminate, in reality, judges and lawmakers must make decisions. At the point at which a judge recognizes that there are two conflicting interpretations of a statute, for example, with no clear guidance as to legislative intent, CLS has nothing more to offer than that the result is indeterminate. Whatever the judge decides, he could have decided something else. Law and Economics provides a vehicle which, while not perfect, may help illuminate potential outcomes of the judge's decisions.

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n85 Ackerman, supra note 79, at 933-34.

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This debate can be characterized as one between objectivism and relativism. Objectivism means there is some system or framework that can be appealed to in determining the nature of truth or knowledge. Relativism suggests that there is a plurality of such frameworks, and so concepts cannot have a determinate and unequivocal meaning. [*1122] There is no way to adjudicate between conflicting theories. n86 Law and Economics is an objectivist viewpoint, and CLS a relativist one. Austrian Economics and hermeneutics, as will be discussed below, can help to steer between these two positions.

-Footnotes-

n86 See RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM (1988).

-End Footnotes-

Critics further reject the belief that values are subjective. They assert that this claim is simply a rationale for laissez faire government. "Since there is no objective good, only preference satisfaction has any moral claim . . ." n87 Critics believe, though they do not tend to develop this analysis, that there are shared societal values which can be incorporated into the legal system. Law and Economics, however, does not tend to concern itself with the subjectiveness of values. Rather, value is used solely to mean what a person is willing to pay for something, which is an objective measure. n88

-Footnotes-

n87 KELMAN, supra note 6, at 73.

n88 POSNER, supra note 55.

-End Footnotes-

D. Alternative Vision

Law and Economics, as a positive discipline, does not suggest alternative visions, except in the sense of analyzing the effect of individual changes given a static equilibrium. It is useful in suggesting what might happen if a particular rule is changed.

As discussed above, generally Critics also do not suggest an alternate vision. Rather, they stress the indeterminacy of law and "trash" theories that try to systemize legal decisions. Without an alternative vision, however, trashing amounts to grouching. Critics, themselves, have recognized this lack of an alternative as a problem.

Unger does attempt to envision an alternative. However, his approach ignores many basic economic principles, such as comparative advantage and the gains from specialization. He also does not consider the effect on incentives when government money, as opposed to one's own capital, is being invested. Further, Unger relies on government as a benevolent entity capable of directing innovation. Unger does not discuss how collective decisions will be made, or how people will be prevented from using their rights to the disadvantage of others. If Unger wishes to reject these economic insights, he should at least discuss his rationale for doing so. Further, Unger does not address why his



system has never evolved anywhere, and does not address the concerns advanced by Hayek and others as to the dangers of collectivism. n89

-Footnotes-

n89 See FRIEDRICH A. HAYEK, THE ROAD TO SERFDOM (1944); LUDWIG VON MISES, HUMAN ACTION (1949).

-End Footnotes-

[*1123] V. AUSTRIAN ECONOMICS

At present, Law and Economics and CLS appear to be at a standoff. Austrian Economics can add another view that may provide a common ground on which to join the debate.

A. A Brief History of the Austrian School of Economics

The Austrian school of economics began with the work of Carl Menger, who published his Principles of Economics in Austria in 1871. Menger is credited as one of three economists who independently discovered the principles leading to the "Marginalist Revolution" in economics. Contrary to the classical economists who believed that value was determined by resource costs in the past, Menger believed that value expressed judgments about future usefulness to consumers. n90 Unlike other theorists of the time, Menger stressed that values were determined solely by the actions of consumers in the framework of existing production possibilities. n91 Menger called his school of thought the "subjective value" school because he believed that economic phenomena had to be traced to human motivations and to individuals' interpretations of events. n92 Menger stressed the uncertainty surrounding economic decision-making in contrast to the classical and neoclassical models that assumed perfect information. Further, Menger believed that it was the fact that economic processes took place over time which caused much of the uncertainty. n93 Since production takes time, for example, producers can never know for sure what market conditions they will face when their goods are ready for sale. At that point, their costs are irrelevant to what price they will receive for their product. n94 Menger also stressed the importance of information and entrepreneurs as important parts of the economic process. n95 These contributions to economic thought were further studied [*1124] and developed by other Austrian scholars, notably Bohm Ritter von Bawerk and Fredrich Freiherr von Wieser, and remain distinctive features of modern Austrian Economics.

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n90 Israel M. Kirzner, Austrian School of Economics, in 1 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 145, 147 (John Eatwell et al. eds., 1987).

n91 Id. at 146.

n92 See Erich Streissler, The Intellectual and Political Impact of the Austrian School of Economics, 9 HIST. EUR. IDEAS 191 (1988), reprinted in I AUSTRIAN ECONOMICS 24, 26 (Stephen Littlechild ed., 1990) [hereinafter AUSTRIAN ECONOMICS]; Karen I. Vaughn, Carl Menger, in 3 THE NEW PALGRAVE: A DICTIONARY OF ECONOMICS 438 (John Eatwell et al. eds., 1987).



n93 Streissler, supra note 92, at 26.

n94 See id.

n95 See id. at 27.

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Menger became a full professor at the University of Vienna in 1879 where he lectured law students. n96 Bohm-Bawerk and Wieser, although not among his students, were instrumental in bringing attention to Menger's ideas, and themselves made important contributions to Austrian theory. n97 Both became professors at the University of Vienna, and Bohm-Bawerk's seminar, attended by Joseph Schumpeter and Ludwig von Mises, became famous as the intellectual focal point of Austrian ideas prior to Bohm-Bawerk's death in 1914. n98

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n96 Friedrich A. Hayek, Carl Menger, 10 INT'L ENCYCLOPEDIA SOC. SCI. 124-27 (David L. Sills ed., 1968), reprinted in AUSTRIAN ECONOMICS, supra note 92, at 47, 48.

n97 Bohm-Bawerk's treatise, CAPITAL AND INTEREST, was recognized as an important advance in capital theory. Wieser's major contributions were his analyses of innovation and of large scale business organizations. His most important work was THE THEORY OF SOCIAL ECONOMICS which he published in 1914. See Erich Streissler, Arma Virumque Cano: Friedrich von Wieser, the Bard as Economist, DIE WIENER SCHULE DER NATIONALOKONOMIE 83, 91 (Norbert Leser ed., 1986), reprinted in AUSTRIAN ECONOMICS, supra note 92, at 71, 80; see also Robert B. Ekelund, Jr. & Mark Thornton, Wieser and the Austrian Connection to Social Economics, in 16 FORUM SOC. ECON. 1-12 (Spring, 1987), reprinted in AUSTRIAN ECONOMICS, supra note 92, at 96. Bohm-Bawerk was married to Wieser's sister.

n98 See Kirzner, supra note 90, at 147.

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After the war, younger scholars further promoted the Austrian School. Chief among these were Ludwig von Mises and Hans Mayer, who had studied under Wieser. Several of their students became influential economists, including Friedrich August von Hayek, Fritz Machlup and Oskar Morganstein. Mises conducted discussion groups which included not only these young scholars, but also those in other social sciences such as Felix Kaufman, Alfred Schutz and Erik Voegelin. n99 Among Mises' many books, Human Action is probably the most thorough exposition of his views of economic theory. n100 As the name implies, Mises stressed that the purpose of economics was the study of purposeful human action. n101

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n99 See id.

n100 See Israel M. Kirzner, Mises and the Renaissance of Austrian Economics,



in HOMAGE TO MISES 14 (John K. Andrews, Jr. ed., 1981), reprinted in AUSTRIAN ECONOMICS, supra note 92, at 113.

n101 See Edwin G. Dolan, Austrian Economics as Extraordinary Science, in THE FOUNDATIONS OF MODERN AUSTRIAN ECONOMICS 3, 6 (Edwin G. Dolan ed., 1976).

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Lionel Robbins, the British economist, became exposed to Austrian ideas at the University of Vienna and later incorporated several of them into his 1932 book, The Nature and Significance of Economic [*1125] Science. In this way, some of the Austrian concepts came to be adopted by neoclassical economics. Robbins was also responsible for inviting Hayek to the London School of Economics, from which he was able to increase awareness of Austrian theory. n102 In the 1930s, the Austrian school was to have its greatest influence on the economics profession generally. n103

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n102 Kirzner, supra note 90, at 147.

n103 See id. at 148.

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However, the outbreak of World War II dispersed the Austrian economists and there was no longer an intellectual center for the school; Hayek was in London and Mises was in the United States. Mises and Hayek, however, did engage in an intellectual battle with the leading socialist economists, most notably Oskar Lange, on whether a centrally planned economy could prosper. n104

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n104 Id.

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During this debate, distinctive features of Austrian Economics were articulated. Specifically, Austrians stressed the role of prices as dispersing knowledge in the market, which in turn gives rise to entrepreneurial activity as new opportunities are created and discovered in an open-ended process embodying expectations and uncertainty. n105 These ideas remain central to scholarship in Austrian Economics today.

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n105 Id. at 149.

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After the war, interest in Austrian Economics began to wane. Many of the Austrians insights had been incorporated into neoclassical economics. In addition, neoclassical economics became increasingly mathematically oriented, as work on partial and general equilibrium theory developed. Austrians, as explained more fully below, do not use mathematical constructs in their theories



or empirical work. Further, the Austrian school was eclipsed by Keynesian economics in the late 1930s. n106

-Footnotes-

n106 Streissler, supra note 92, at 25.

-End Footnotes-

Austrian economists, such as Israel Kirzner, Murray Rothbard, and Ludwig Lachmann, along with the continuing work of Hayek, helped keep the Austrian school alive in the years following World War II by emphasizing the unique contributions of Austrian theory to economics. Hayek's award of the Nobel Prize in economics in 1974 brought greater recognition to Austrian Economics. Recently, there has been a revival of interest in Austrian theories, notably in the United States, although Austrians are now generally considered outside [*1126] of the mainstream of economics. Currently, there are major academic centers for Austrian Economics at New York University and George Mason University. Austrian economists are often associated with libertarianism and free market ideology, but there are also Austrians with other political philosophies. n107

-Footnotes-

n107 See Kirzner, supra note 90, at 149; Richard E. Wagner, Carl Menger's Contribution to Economics: Introduction, 6 ATLANTIC J. ECON. 1 (1978). In THE ESSENCE OF HAYEK 281 (Chiaki Nishiyama & Kurt R. Leube eds., 1984), Hayek expresses his political beliefs generally as "liberal" in the classical sense. By liberal, he means a set of ideals that consistently opposes all arbitrary power. Liberals, he asserts, are ready to let change run its course, even though one cannot predict to where it will lead. For Hayek, the acceptance of liberal principles means that one will not try to force others to believe in or serve any particular set of principles, even though those may be the principles the liberal prefers, and even though this requires toleration of views that one finds personally disagreeable.

-End Footnotes-

B. Austrian View of Issues

This section will consider the Austrian viewpoint on the four issues discussed above: the view of human nature, the belief in the market, objectivism, and alternative visions. Attention will be given to the contribution of hermeneutics.

1. View of Human Nature

Austrians view people as social beings. n108 Hayek, in The Fatal Conceit, n109 suggests that people are instinctively social, not individualistic. Primitive cultures consisted of small groups, where collectivist practices were followed. These small groups shared aims and perceptions that were coordinated among members, who were readily identifiable. n110 Only as society evolved into a more complex order was it necessary to suppress these collectivist impulses



and apply them to more intimate groupings, such as families, in order to survive. n111 As society became more complex, it was both impossible and unnecessary for there to be agreement on aims, for knowledge was dispersed, people became more specialized and exchange developed as a way to satisfy diverse ends. n112

-Footnotes-

n108 See FRIEDRICH A. HAYEK, THE FATAL CONCEIT (1988); VON MISES, supra note 89.

n109 See HAYEK, supra note 108.

n110 See id. at 11.

n111 See id. at 18.

n112 See id. at 38-40.

-End Footnotes-

However, that has not changed basic human nature, which still strives for community. In effect, people live in two worlds; their small group, in which collectivist practices prevail, and the world [*1127] external to this group, for which collectivist practices are not suitable. Different rules apply within each world. Our small group would not survive if we tried to apply the rules of the external world to it; similarly, the complex order of the larger society would not survive if we applied the rules of our small group to it. n113

-Footnotes-

n113 See id. at 18.

-End Footnotes-

Hayek's concept of human nature is very similar to CLS's view of the fundamental contradiction. Although he would find it understandable, I believe Hayek would disagree with CLS's attempt to attack legal rules on the basis of the fundamental contradiction, or suggestion that society can be based on more altruistic rules of behavior. Such rules are appropriate for small groups, with common aims and shared habits, knowledge, and beliefs about what is possible. They are not appropriate for an extended order, which evolves spontaneously and is beyond the comprehension of any one individual mind.

Further, Hayek rejects the individual/altruism dichotomy. In Law, Legislation and Liberty, he states:

The freedom to pursue his own aims is, however, at least as important for the complete altruist as for the most selfish

We need not return here to the undeniable fact that the beneficial effects on others of one's efforts will often become visible to one only if one acts as part of a concerted effort of many in accordance with a coherent plan, and that it may often be difficult for the isolated individual to do much about the evils that deeply concern him. But it is, of course, part of his freedom that for



such purposes he can join (or create) organizations which will enable him to take part in concerted action. And though some of the ends of the altruist will be achievable only by collective action, purely selfish ends too will as often be achieved through it. There is no necessary connection between altruism and collective action, or between egotism and individual action. n114

Thus, Hayek views the individualism/altruism distinction as a false dichotomy.

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n114 1 FRIEDRICH A. HAYEK, LAW, LEGISLATION AND LIBERTY 56 (1973).

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The Austrian view of law and the nature of rules provides a different framework for considering the rules/standards debate. Law is an institution, a set of rules that evolve as part of the extended order. The system of rules evolves as a spontaneous order, not as the result of the design of judges or legislators. The rules evolve both from the [*1128] growth of customs and deliberate action taken by judges and legislators where there are gaps in the rules. Hayek's vision of the role of a judge in a legal dispute is as follows:

In this it will often be impossible to distinguish between the mere articulation of rules which have so far existed only as practices and the statement of rules which have never been acted upon before but which, once stated, will be accepted as reasonable by most. But in neither case will the judge be free to pronounce any rule he likes. The rules which he pronounces will have to fill a definite gap in the body of already recognized rules in a manner that will serve to maintain and improve that order of actions which the already existing rules make possible. n115

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n115 Id. at 99-100.

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Thus, Hayek accepts indeterminacy in legal rules. However, if one adopts his view of the evolution of the extended order and of legal institutions as a part of that, then this indeterminacy does not lead to a dead end. Nor is the indeterminacy unbounded. Rather, the judge must decide in the context of the society of which he is a part. In effect, the judge is applying standards within the context of rules. His discretion is limited by the rule as it has evolved. His goal is to fill in the gaps in the rule. His purpose is to prevent the recurrence of the conflict.

Over time, groups that adopt rules that are more conducive to an effective order will prosper over groups with a less effective order. Certain rules will predominate by successfully guiding expectations among people acting independently. n116 This does not mean that the rules do not change. Rather, they evolve over time. Certainly, the law in the United States demonstrates such evolutionary changes, though the changes may not occur as quickly as some would like, and too quickly for others.



-Footnotes-

n116 Id. at 99.

-End Footnotes-

2. Belief in the Market

Austrians view the market as a spontaneous order. The spontaneous order results from individuals adapting themselves to circumstances they perceive in the market. Prices send signals to producers and consumers, who in turn interpret this information and use it to guide their actions. It is unnecessary and impossible for any person to know or understand the full complexity of the extended order. n117 Austrians [*1129] emphasize the market as a process, rather than a configuration of prices, qualities and quantities in equilibrium.

-Footnotes-

n117 FRIEDRICH A. HAYEK, INDIVIDUALISM AND ECONOMIC ORDER 77 (1948).

-End Footnotes-

The market order is not complete, nor is it possible to predict its future evolution. Entrepreneurship is an evolutionary process, whereby new opportunities are discovered. The market is not in equilibrium, but in disequilibrium due to ignorance. Market ignorance is responsible for the emergence of market opportunities. n118 In this view, the market is an ongoing process, evolving as new knowledge and technology is discovered.

-Footnotes-

n118 See ISRAEL M. KIRZNER, PERCEPTION, OPPORTUNITY AND PROFIT 8 (1979).

-End Footnotes-

Austrians do not view the economy as being in equilibrium, and some Austrians reject the concept of equilibrium totally. For example, Kirzner believes that the economy tends towards equilibrium, but this tendency is agitated by entrepreneurs discovering new opportunities in the market on one hand, and business failures on the other. Others, such as Lachmann believe that there is no need to think of the economy proceeding towards a particular equilibrium, but instead as a market process. n119 Just as one would not think of there being an end-state to the process of evolution towards which the evolutionary process is moving, one need not think of there being a particular endstate to the economic process.

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n119 See LUDWIG M. LACHMANN, THE MARKET AS AN ECONOMIC PROCESS (1986).

-End Footnotes-

The neoclassical constructs of perfect competition and of "competitive equilibria" assume that all data are known. n120 Hayek asserts that in such a setting there is no room for true competition because all opportunities have



been utilized. n121 Austrians view competition as a more dynamic process, in which individual expectations based on uncertainty and incomplete information are coordinated by the market. The fundamental characteristics of this process, however, are assumed away in static analysis. n122 The Austrians' dynamic view of competition avoids the implication of neoclassical economics that there are no unexploited opportunities.

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n120 See HAYEK, supra note 117, at 94.

n121 See id. at 92-106.

n122 Id. at 94; FRIEDRICH A. HAYEK, NEW STUDIES IN PHILOSOPHY, POLITICS, ECONOMICS AND THE HISTORY OF IDEAS 179 (1978).

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This view of the market, along with subjectivism, leads Austrians generally to reject mathematical and quantitative analyses as appropriate methodologies for economics. In Human Action, von Mises wrote:

The impracticability of measurement is not due to the lack of technical [*1130] methods for the establishment of measure. It is due to the absence of constant relations. If it were only caused by technical insufficiency, at least an approximate estimation would be possible in some cases. But the main fact is that there are no constant relations. Economics is not, as ignorant positivists repeat again and again, backward because it is not "quantitative." It is not quantitative and does not measure because there are no constants. n123

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n123 VON MISES, supra note 89, at 56.

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Hayek, in his 1974 Nobel Memorial Lecture, expressed related concerns. In contrast to the physical sciences, Hayek asserted that in the study of the market, with all its complexities, all the factors which are important to the outcome will rarely be "observable or measurable." n124 Further, Hayek stated:

And because the effects of these facts in any particular instance cannot be confirmed by quantitative evidence, they are simply disregarded by those sworn to admit only what they regard as scientific evidence: they thereupon happily proceed on the fiction that the factors which they can measure are the only ones that are relevant. n125

Hayek does not reject the use of mathematics totally. He rather cautions against losing sight of its limitations. n126

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n124 Friedrich A. Hayek, The Pretence of Knowledge, 79 AM. ECON. REV. 3



(1974).

n125 Id.

n126 *Id.* at 5.

-----End Footnotes-----
 Austrian methodology is easily applicable to law and accessible to non-economist lawyers and judges. In fact, when one examines many areas of the law, such as contracts, one sees that the thrust of the law is an attempt to determine what the intentions of the parties were, to provide legal rules which approximate these intentions, and provide remedies to respond to situations where unanticipated events or unintended consequences frustrate the purposeful action of the parties to the contract.

The evolution of the extended order is not determinate in the sense that one can predict what will happen in the future. It also does not suggest that what exists now is inevitable, or that it is the best possible outcome, or that the rules upon which it is based cannot be altered. In *The Fatal Conceit*, Hayek states, "Recognizing that rules generally tend to select, via competition, on the basis of their human survival-value certainly does not protect those rules from critical scrutiny. This is so, if for no other reason, because there has so often [*1131] been coercive interference in the process of cultural evolution." n127

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 n127 HAYEK, *supra* note 108, at 20.

-----End Footnotes-----
 The Austrian view of legal institutions takes into account the richness and complexity of society. Law is seen as a dynamic institution, and legal rules can be seen in that context. Further, Austrians do not tend to assume away the uncertainty and incomplete knowledge that face economic actors. Austrians recognize that preferences are being formed and reformed constantly. People often have inconsistent preferences that are competing with one another and which have to find a resolution. Economics and law are part of a creative, ongoing process in which new discoveries are always being made.

Thus, Austrians do not have the static orientation of Law and Economics. While their view of the market as an evolving extended order makes them more amenable to the Critics claim of indeterminacy, however, the Austrian view sees this indeterminacy as simply a part of the evolutionary process, and not a cause for despair.

3. Objectivism v. Relativism v. Subjectivism

Austrians view the claim to objectivism of neoclassical economics as misplaced. There is no way to rid oneself of the context in which one views the world. Neither is it desirable. Austrians study human action by attending to the economic actor's view of his actions from the standpoint of the investigator. n128 Subjectivism asserts that what drives the real processes observed by economics is what the agents think they are doing.



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n128 See CARL MENGER, INVESTIGATIONS INTO THE METHOD OF THE SOCIAL SCIENCES WITH SPECIAL REFERENCE TO ECONOMICS (1985); VON MISES, supra note 89.

-End Footnotes-

As Edwin G. Dolan wrote in Austrian Economics as Extraordinary Science:

The Austrian method, simply put, is to spin out by verbal deductive reasoning the logical implications of a few fundamental axioms. First among the axioms is the fact of purposeful human action. Supplementary axioms are that human beings are diverse in tastes and abilities, that all action takes place through time, and that people learn from experience. n129

-Footnotes-

n129 Dolan, supra note 101, at 7.

-End Footnotes-

Austrians' view of costs as subjective lead them to see choice differently than most neoclassical economists. While the concept of opportunity cost, that is, that the true cost of a given choice is the highest valued forgone opportunity, is accepted by neoclassical economists, [*1132] it is not given the same far-reaching implications that it is in Austrian Economics. Thus, for example, in neoclassical economics, economic activity is often a matter of maximizing utility given a defined set of choices, prices, and a budget constraint. As James M. Buchanan noted in Cost and Choice:

Cost as just defined is faced in the strict sense only by the automaton, the pure economic man, who inhabits the scientist's model. It is the behavior-inhibiting element that is plugged into the purely mechanistic market model. The conversion of objective data reflecting prospective money outlays into the subjective evaluations made by real-world decision-makers is of no concern to the predictive theorist. In the strict sense, this theory is not a theory of choice at all. Individuals do not choose; they behave predictably in response to objectively measurable changes in their environment. n130

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n130 JAMES M. BUCHANAN, COST AND CHOICE 42 (1969).

-End Footnotes-

In a theory of choice, there are several different "costs" that must be considered. In a subjective theory of choice, there is first ex ante cost. n131 This cost is subjective and is based on the individual's expectations. Cost in this sense cannot be measured because subjective experience cannot be directly observed. n132 There is also ex post cost. n133 This is the cost that results from the choice made. Finally, in the predictive science of economics, which is generally the approach of neoclassical economics, cost is the directly observable dollar amount. Using a subjective view of cost, there is no difficulty in reconciling the fact that people may make choices that they later



regret with the view of people acting in a rational way. As Karen Vaughn suggests:

Individual economic actors always operate under conditions of uncertainty, and in such an environment, error is the norm and the correction of error the *raison d'etre* of markets. In this setting, there can be no question that subjective evaluations of cost bear little predictable relation to objectively measured outlays. Each person evaluates alternatives open to him within the context of uncertainty about the likelihood of expected outcomes, ignorance of the total realm of alternatives open to him and the possibilities of error in judgment about the value to him of the alternatives he does perceive.

[*1133] In such a world, it would seem to be purely happenstance if two separate individuals were to evaluate the same set of alternatives in the same ways. Thus the central problem of economic analysis in this context is to explain how millions of separate individuals with differing perceptions of reality and differing valuations and expectations about the future ever manage to achieve any kind of coordination of economic activity. n134

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n131 Buchanan calls this "choice-influencing cost." *Id.* at 45.

n132 *Id.* at 43. Buchanan also suggests other attributes of *ex ante* cost, particularly that it is borne entirely by the chooser and that it is never realized, because that which is given up can never be enjoyed.

n133 Buchanan refers to this also as "choice-influenced cost." *Id.* at 45.

n134 Karen I. Vaughn, *Does it Matter that Costs are Subjective?*, 46 S. ECON. J. 702, 708 (1980) (footnote omitted).

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Some modern Austrians have used hermeneutics as a means of examining human action. Hermeneutics is the philosophy of interpretation. n135 Gadamer, one of the leading hermeneutic philosophers, suggests that there is no truly "objective" or "positive" science. Any interpretation of events is subject to the perspective of the interpreter. To try to transcend this perspective is futile and artificial. However, unlike the Critics, Gadamer believes that one's perspectives are thresholds, not limits. Thus, when an issue is encountered, although one approaches it from one's own point of view, one learns from the process of attempting to understand. As the interpreter strives for an understanding of others and their actions, the interpreter's own underlying assumptions are amended and he moves to a deeper and more sophisticated understanding of the events and their surrounding issues. A social science such as economics, or law, involves a double hermeneutic. There is the subject's own viewpoint, and the interpreter's view from which he is examining the subject's behavior. In this sense, subjectivism does not mean arbitrariness. Striving for objectivism is misplaced. Hermeneutics recognizes that it is only our subjective knowledge of our society, much of which is tacit knowledge, that makes it possible to interpret our world and to communicate with one another. The purpose of hermeneutics is to take advantage of our shared understandings to further our knowledge. As Lavoie suggests:



[E]lements of shared understandings which are "passed down" to us as traditions, are what make the mutual communication among scientists possible. We only understand our world because we understand one another. We only understand each other, in turn, because [*1134] we all spent some substantial part of our lives being enculturated into the life-world, a specific domain we have in common. n136

It is our shared intersubjective tacit understanding that makes rational discourse possible. The interpreter must mediate between his own theory of what he thinks is going on and the purposes of agents as best he can determine them. The hermeneutical view would say that law evolves, as does all other knowledge, from the interaction of theory and facts. This is the hermeneutical circle. Gadamer describes the role of legal hermeneutics as follows:

The judge who adapts the transmitted law to the needs of the present is undoubtedly seeking to perform a practical task, but his interpretation of the law is by no means merely for that reason an arbitrary revision. Here again, to understand and to interpret means to discover and recognize a valid meaning. The judge seeks to be in accord with the "legal idea" in mediating it with the present. This is, of course, a legal mediation. It is the legal significance of the law -- and not the historical significance of the law's promulgation or of particular cases of its application -- that he is trying to understand . . .

The work of interpretation is to concretize the law in each specific case -- i.e., it is a work of application. The creative supplementing of the law that is involved is a task reserved to the judge, but he is subject to the law in the same way as is every other member of the community. It is part of the idea of a rule of law that the judge's judgment does not proceed from an arbitrary and unpredictable decision, but from the just weighing up of the whole. n137

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n135 See HANS-GEORG GADAMER, PHILOSOPHICAL HERMENEUTICS (1976); HANS-GEORG GADAMER, TRUTH AND METHOD (2d ed. 1991) [hereinafter GADAMER, TRUTH AND METHOD]; PAUL RICOEUR, HERMENEUTICS AND THE HUMAN SCIENCES (1981); GEORGIA WARNKE, GADAMER: HERMENEUTICS, TRADITION AND REASON (1987); JOEL C. WEINSHEIMER, GADAMER'S HERMENEUTICS (1985).

n136 Don Lavoie, The Accounting of Interpretations and the Interpretation of Accounts: The Communicative Function of "The Language of Business," 12 ACCT. ORG. & SOC'Y 579, 586 (1987). Although beyond the scope of this paper, it should be noted that this hermeneutical perspective leaves Austrian theory more open to the insights of feminist legal theory.

n137 GADAMER, TRUTH AND METHOD, supra note 135, at 328-29.

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The Austrian approach to both law and economics is that of an evolutionary process. Economic insights can be derived from human action as part of this process without adopting the neoclassical economic apparatus. The process is indeterminate, but not arbitrary. Rather, legal interpretation is an ongoing mediation between legal theory and the facts of actual cases. Legal knowledge

grows through the process of the hermeneutical circle. Law is interpreted when it is applied. [*1135] Each new application adds to our understanding of the law. As Lavoie has suggested:

A spontaneous order is not designed and never really under our control, since it evolves according to a logic all its own. This does not mean, however, that we are utterly helpless to exert influence over the workings of such ordering processes. Its order may be intelligible in terms of general principles, and these principles may well show us that some environments are more conducive to its self-ordering process than others. Understanding a spontaneous order may enable us to tailor the general conditions for its flourishing. n138

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n138 Don Lavoie, Economic Chaos or Spontaneous Order? Implications for Political Economy of the New View of Science, 8 CATO J. 613, 621 (1989).

-End Footnotes-

Austrians have emphasized the market and the legal process as a system of communication. The information that is being communicated must be interpreted. This view of the law and the economy is considerably more dynamic and rich than the neoclassical equilibrium viewpoint.

Austrian Economics and hermeneutics provides a path between the objectivism of Law and Economics and the relativism of CLS by emphasizing the ongoing nature of the process of evolution. The future is not predictable. Rather, there is an ongoing interaction between the institutions and participants that shape and change the nature of the institutions and the nature of the participation.

The subjectivism of Austrian Economics stresses the role of individual expectations, knowledge, and awareness. Economic changes arise not so much from the circumstances that exist as from a person's awareness of these circumstances. n139 Subjectivity means that it is not the intrinsic characteristics of a good that gives it value. Rather, it is its meaning to the person who buys or sells it. Subjectivity underlines the importance of understanding this meaning as it is perceived by the subject and not by the observer. n140 Although Austrians do predominantly favor free markets, it is not because they do not believe there cannot be shared values. Rather, it is because they believe no one mind, or group of minds, can possess the knowledge necessary for central planning. Shared social values are incorporated [*1136] in institutions such as law as the spontaneous order evolves. n141

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n139 See Kirzner, supra note 90.

n140 See Don Lavoie, Hermeneutics, Subjectivity, and the Lester/Machlup Debate: Toward a More Anthropological Approach to Empirical Economics, in ECONOMICS AS DISCOURSE 167 (Warren J. Samuels ed., 1990).

n141 See generally Hayek, supra note 114, at 9-11.

-End Footnotes-



4. Alternative Vision

Austrians generally adopt a comparative system approach. Generally, the comparison has been to a world under socialism or central planning. n142 Much of what Austrians have said in this regard can be used to challenge Unger's vision of an alternative structure of society. Unger's vision depends on the government being able to determine where the economy's resources should be allocated. Unger also depends on people behaving collectively and using their destabilizing rights in ways that are not detrimental to society. Also, Unger assumes that people would invest their resources despite the fact that the order could be readily destabilized. Hayek's vision of the evolution of the extended order would posit that such a system would destroy the order. Government or any central planning agency is incapable of understanding the complexity of the extended order. n143 In addition, Hayek sees the value of the extended order as being able to embody the knowledge of all its members, and to serve the ends of individuals in all their variety and contrariness. Many individual purposes are served, which are not known to any single individual or small group of individuals. n144

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n142 See HAYEK, supra note 89; Ludwig von Mises, SOCIALISM (1951).

n143 Hayek, supra note 108, at 85.

n144 Id. at 86-87.

-End Footnotes-

VI. CONCLUSION

Given the various viewpoints suggested by CLS, Law and Economics, and Austrian Economics, the question arises as to how to progress from here. Theories are like lenses through which to see the world. Those that show us the world most clearly are most influential. The problem of theory choice poses the fundamental methodological issue of how to choose what theory to believe in. n145 Hermeneutics suggests that by engaging in dialogue about our alternative interpretations, we will be able eventually to determine which theory is more persuasive, and perhaps reach some agreement on what are the important questions to be asked. n146

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n145 See generally, THOMAS S. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTION (2d ed. 1970).

n146 One could envision having a direct debate among Critics, Law and Economics advocates, and Austrian Economists over specific issues concerning the legal system. Parallel papers that analyze the same topic from each point of view could be prepared and then discussed and published. This would allow all those interested to try on different lenses to view the same central question, and to be persuaded or not. Such an approach was effectively used to advance the argument concerning antitrust law. See INDUSTRIAL CONCENTRATION: THE NEW



LEARNING (Harvey J. Goldschmid et al. eds., 1974).

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[*1137] Austrian Economics provides insight into the debate between Critical Legal Studies and Law and Economics. Austrian Economics shares elements of each of these schools, and provides an alternative vision of the debate. At the least, the Austrian school of economics provides an alternative lens through which to analyze issues and events. A focused dialogue on specific issues would enable a more direct comparison of theories and a further understanding of the underlying issues and concerns.



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