

**Drake University**

---

**From the Selected Works of Jerry L. Anderson**

---

June, 2004

# Law School Enters the Matrix: Teaching Critical Legal Studies

Jerry L. Anderson



SELECTEDWORKS™

Available at: [http://works.bepress.com/jerry\\_anderson/2/](http://works.bepress.com/jerry_anderson/2/)

Association of  
American Law Schools

Journal of  
Legal Education

ON GLOBALIZATION

Catherine Valcke  
M. C. Mirow

ON TEACHING

Jerry L. Anderson  
Thomas Hayes  
Tina L. Stark  
William R. Slomanson  
Kevin R. Johnson  
Peter A. Appel

GENERAL ARTICLES

Desmond Manderson  
Gary Lawson

Printed and distributed to law teachers as a public service  
by West Group and Foundation Press

Volume 54

June 2004

Number 2

The *Journal of Legal Education* (ISSN 0022-2208) is a quarterly publication of the Association of American Law Schools. The primary purpose of the *Journal* is to foster a rich interchange of ideas and information about legal education and related matters, including but not limited to the legal profession, legal theory, and legal scholarship. With a readership of more than 6,000 law teachers and about 600 subscribers, the *Journal* offers an unusually effective medium for communication to the law school world.

The views expressed in the *Journal* are those of the authors and should not be attributed to the Association of American Law Schools, the institutions with which the authors are affiliated, or the editors.

Except as otherwise expressly indicated, the author of each article in this issue of the *Journal* has granted permission for copies to be made for classroom or other educational use as long as (1) copies are distributed at or below cost, (2) the author and the *Journal* are identified, and (3) proper notice of the Association's copyright is affixed.

**Mailing address:** Journal of Legal Education  
Georgetown University Law Center  
600 New Jersey Avenue, S.W.  
Washington, D.C. 20001-2075

**Electronic mail:** [journal.legaled@law.georgetown.edu](mailto:journal.legaled@law.georgetown.edu)

**Telephone:** 202/662-9877

**Fax:** 202/662-9335

**Editorial communications.** The editors welcome unsolicited manuscripts (including responses to articles recently published in the *Journal*), books for review, and suggestions for improvement of the *Journal*. Unsolicited book reviews will not be accepted. **Manuscripts submitted to the *Journal* must not be under consideration by another publication.**

**Manuscripts** may be submitted by electronic mail. Hard-copy manuscripts should be in duplicate, preferably double-spaced. Citation style should conform to the most recent edition of *A Uniform System of Citation*, published by the Harvard Law Review Association, except that citations of books and monographs should include place as well as date of publication. Manuscripts over fifty pages will be reviewed with particular care to determine whether such length is warranted.

**Business communications** (including subscription correspondence, orders of back issues, and requests for permission) should be directed to the attention of the Business Manager.

**Prices:** The subscription rate is \$38 per volume for U.S. subscribers and \$42 for foreign subscribers. Single issues are \$15 per copy, except for double issues (\$17.50).

# Contents

From the Editors .....	157
On Globalization	
Global Law Teaching	
by Catherine Valcke .....	160
Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes	
by M. C. Mirow .....	183
On Teaching	
Law School Enters the Matrix: Teaching Critical Legal Studies	
by Jerry L. Anderson .....	201
A Goode Judge Is Hard to Find: An Essay on Legal Realism and Law School Casebooks	
by Thomas Hayes .....	216
Thinking Like a Deal Lawyer	
by Tina L. Stark .....	223
State Civil Procedure Plea	
by William R. Slomanson .....	235
Integrating Racial Justice into the Civil Procedure Survey Course	
by Kevin R. Johnson .....	242
The Embarrassing Rule Against Perpetuities	
by Peter A. Appel .....	264
General Articles	
In the <i>Tout Court</i> of Shakespeare: Interdisciplinary Pedagogy in Law	
by Desmond Manderson .....	283
Making Workshops Work	
by Gary Lawson .....	302

## Law School Enters the Matrix: Teaching Critical Legal Studies

Jerry L. Anderson

A teacher who contemplates including a unit on critical legal studies in a legal methods or jurisprudence class or injecting a CLS perspective into a doctrinal course is generally confronted with two issues: whether to teach CLS at all, and if so, how to teach it. The first question arises because of mounting sentiment that CLS is passé, that the theory is discredited and therefore irrelevant to our students. And even if we believe it has some merit, for many of us the language of CLS theory remains incomprehensible—a kind of Middle Earth dialect that we would not dream of inflicting on our students.

Critical legal studies can be characterized in two ways. In the late 1970s and 1980s, it was a movement made up primarily of law professors, who were “trying to create a left legal academic intelligentsia as a new social grouping that would influence both its own workplaces and the general political culture.”<sup>1</sup> Although the “movement” has become fragmented, various pieces of it remain active and committed to this project.

Second, and more important for this piece, CLS is a theory of law, a method of legal analysis which argues not only that law is essentially indeterminate, but that it is used to conceal and justify “unacceptable hierarchies of ‘social power.’”<sup>2</sup> While CLS analysis of the inherent indeterminacy of law has much in common with its realist roots,<sup>3</sup> crit scholars push the theory further and argue that all law is nothing more than politics in a different form. Moreover, the legal structure, with its mystical language portraying the system’s results in terms like *justice* and *equality*, is in reality an instrument of oppression, de-

**Jerry L. Anderson** is the Richard M. and Anita Calkins professor of law at Drake University.

I benefited from discussions with numerous colleagues, including Akhil Amar, Danny Bogart, Dennis Hirsch, Keith Miller, Greg Sisk, and Maura Strassberg. I thank Susan Anderson for her editing assistance.

1. Duncan Kennedy, *A Critique of Adjudication: Fin de Siècle* 9 (Cambridge, Mass., 1997).
2. E. Dana Neaçsu, CLS Stands for Critical Legal Studies, If Anyone Remembers, 8 *J.L. & Pol’y* 415, 422 (2000).
3. See James E. Herget, Unearthing the Origins of a Radical Idea: The Case of Legal Indeterminacy, 39 *Am. J. Legal Hist.* 59 (1995). I could list the typical cites to the authors of the realist movement—Llewellyn, Frank, Cohen, and Holmes—but I will limit myself to one of my favorites, which I also believe is both accessible and eye-opening for students: Karl Llewellyn, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed, 3 *Vand. L. Rev.* 395, 401 (1950). But see Cass R. Sunstein, Interpreting Statutes in the Regulatory State, 103 *Harv. L. Rev.* 405, 452 (1989).

signed to create the illusion of fairness while really legitimizing and furthering the position of the upper class.

In the first section of this piece I argue that, even for those who will never become card-carrying members of the movement, CLS theory should be more widely taught as a useful way of analyzing the law. My thesis is that many of us have been too quick to dismiss CLS as either a radical theory we would be foolish to toy with or a set of worthless concepts that are all hat and no cattle. If we truly aim to encourage “critical thinking”—a term used in almost every law school mission statement—CLS can provide some of the means for acquiring that skill. The critiques of the movement, I believe, do not diminish the theory’s usefulness as a teaching tool.

In the second section I attempt to illustrate that even those of us without Ph.D.s in philosophy need not be intimidated by CLS or despair of ever making the theory accessible to midlevel students. CLS tools will never be widely accepted if they remain the province only of those who speak in the accepted code. Yet the movement has made few attempts to make the analysis useful to law teachers.<sup>4</sup> Just as many teachers have absorbed and integrated law and economics analysis in the classroom, CLS can be successfully used without having the class wade through Kierkegaard first. Without sinking to the level of *CLS for Dummies*, I try in this article to make the critical approach more concrete by going through some examples of CLS case analysis one might try in class. Finally, only half whimsically, I suggest that a simple analogy to the popular movie *The Matrix* may be just the right mechanism for introducing the modern student to the basic CLS doctrine.<sup>5</sup>

#### **A Moderate Argument for Teaching Critical Legal Studies**

A growing number of my colleagues seem to scoff at the idea of using CLS analysis in their classrooms. The reasons for this are varied, but my informal survey reveals three basic objections. First, some argue that the theory does not add anything to the insights provided by legal realism and that, to the extent it goes beyond legal realism to attack the perpetuation of hierarchy, it basically preaches communism or anarchy, which most of us have no interest in promoting. The Marxists lost the Cold War, after all, and continuing to teach CLS is riding a dead horse.<sup>6</sup>

4. For a good example of what is needed, see Francisco Valdes, *Outsider Jurisprudence, Critical Pedagogy and Social Justice Activism: Marking the Stirrings of Critical Legal Education*, 10 *Asian L.J.* 65 (2003). Nevertheless, most law schools cannot hope to offer “and the Law” courses on every aspect of “outsider” jurisprudence, nor is this necessarily a better approach than introducing the critique into mainstream courses like Contracts and Property.
5. Larry and Andy Wachowski, *The Matrix* (1996). My thanks to Greg Sisk for introducing me to *The Matrix* on his big TV screen with surround sound.
6. One commentator has declared that “CLS is dead as a doornail”: “It was an elitist group teaching revolution at prestigious schools, affecting the proletariat look in class before getting in BMWs to drive home to enjoy a glass of wine and toast the struggle against hierarchy and privilege.” Arthur Austin, *The Top Ten Politically Correct Law Review Articles*, 27 *Fla. St. U. L. Rev.* 233, 250 (1999).

Second, there is a general impression that CLS is good only for deconstruction with few positive suggestions for improvement.<sup>7</sup> CLS scholars, when pressed about what to do about the problems they exposed, would ultimately fall back on radical schemes involving anarchy, Marxism, or complete reordering of society in ways that are not only unworkable but ultimately undesirable. Without any policy for meaningful reform, the theory is not a helpful method of legal analysis. Law and economics and traditional liberal takes on realism point to concrete outcomes and therefore are of much greater value. Law and economics in particular has a clear and popular endpoint—economic efficiency. While we can argue about its place in the hierarchy of desirable policy outcomes, it is hard to argue that economic efficiency is not relevant. Critics, however, have a much vaguer agenda, which often, when clarified, finds few supporters.

Finally, even if one wanted to use CLS theory, there is the problem of figuring out what it is. More than most areas of legal analysis, CLS theory is typically expressed in language that sometimes seems deliberately obscure, incomprehensible to non-CLS faculty. It is not likely that legal analysis weighted with terminology like *unalienated relatedness* or *intersubjective zap* will catch on quickly with teachers not steeped in the lingo.<sup>8</sup> Although law and economics principles can be complex enough for non-econ types, economic analysis proponents have made an effort to “translate” the doctrine into language most of us can understand and communicate to students.<sup>9</sup>

Critics themselves have recognized these problems. Jeremy Paul recently summarized the ways in which CLS is “haunted . . . by the weight of certain failures”:

Most narrowly, cls has achieved substantial representation within the legal academy but has failed to dominate the intellectual agenda at any major law school, despite hopes for this at Harvard or elsewhere during the early 1980s. Most broadly, cls has been almost entirely unsuccessful at presenting ideas in a form that would capture the imagination of a wide spectrum of the American public. Most significantly, cls has thus far lost the battle for the hearts and minds of many progressive intellectuals who seemed to be prime candidates for persuasion. Most paradoxically, cls has failed to make headway despite winning the battle of ideas concerning issues such as the presence of significant indeterminacy within traditional legal reasoning. Most sadly, as a result of internal divisions and inevitable fatigue, cls people appear to have lost the energy to continue as the united group of legal academics and lawyers who previously had the commitment to gather at least once a year to share ideas and dreams.<sup>10</sup>

7. See, e.g., Richard Michael Fischl, *The Question That Killed Critical Legal Studies*, 17 *Law & Soc. Inquiry* 779 (1993).

8. These terms come from Duncan Kennedy & Peter Gabel, *Roll Over Beethoven*, 36 *Stan. L. Rev.* 1 (1984). For examples of mainstream reaction to such terminology, see Thomas E. Baker, *A Compendium of Clever and Amusing Legal Writings*, 51 *Drake L. Rev.* 105, 142 (2001); Austin, *supra* note 6; James D. Gordon, *How Not to Succeed in Law School*, 100 *Yale L.J.* 1679, 1698 (1991).

9. See, e.g., Richard Posner, *Economic Analysis of Law*, 6th ed. (New York, 2003).

10. Introduction, *Critical Legal Studies (Debut de Siècle): A Symposium on Duncan Kennedy's A Critique of Adjudication*, 22 *Cardozo L. Rev.* 701, 706 (2001).

The demise of CLS as a theory has been widely reported,<sup>11</sup> although its cofounder, Duncan Kennedy, distinguishes between the collapse of the political movement and the continued vitality of the approach to legal analysis.<sup>12</sup> The 2003 AALS annual meeting included a session titled “Where Is Critical Scholarship Headed?” and noted in the brochure that “some observers argue that [the critical] movements have run out of steam and no longer have anything useful to contribute.” The session itself, in defending the continuing relevance of the various segments of the movement, seemed to protest too much.

Moreover, the movement has now fragmented, to a large extent, into various interest groups of “outsiders”—RaceCrits, LatCrits, QueerCrits, FemCrits, and so on—that in many ways have differentiated or distanced themselves from the core principles of the original CLS theorists. This makes teaching crit theory at once more complex and time-consuming for the typical law teacher and adds to the feeling that there is no coherent theory we can teach. But beyond that, to the extent that these scholars want to use the law to achieve a particular outcome, some argue that these versions of crit theory are nothing more than legal realism skewed to achieve the particular outcomes that a particular group espouses. For traditional legal realism goals like “fairness” or “economic efficiency,” you may plug in “equality for homosexuals,” for example, but the basic legal analysis is the same. If, on the other hand, these crit theories go beyond realism to argue that there are no rules and everything is political, then promoting a particular interest group’s agenda does not belong in the classroom.

For some, therefore, the soup seems too thin: on close analysis, there’s not a whole lot to it. For others, it may be too thick, an opaque morass that is difficult to get through and even more difficult to digest once you do. But the danger in wholesale rejection of CLS theory is that we risk discarding some pearls along with the oyster shells. It may be true that the movement was dominated early on by Marxists who, in pushing for an extreme version of their agenda that the majority of law teachers totally rejected, tended to overshadow some of their more useful insights.<sup>13</sup> It may also be true that, as Greg Sisk complained to me, CLS scholars have tended to “look for the patriarchal hierarchist under every legal bed”—to overstate their case, in other words, in a way that quickly becomes tiresome and too easy to dismiss. But even those of us who ultimately disagree with the extreme version of the theory or the political agenda of the proponents can find much that is useful in the basic analysis.

The complaint that deconstruction lacks a positive theory of reform is not entirely true and, in any event, misses the point. The second section of this

11. See, e.g., Fischl, *supra* note 7.

12. Kennedy, *supra* note 1, at 8–11.

13. Even this objection seems unpersuasive. Surely we would consider a political theory class incomplete without a discussion of Marxism; the fact that most political theorists reject the theory does not render it irrelevant.



piece takes a few concrete examples of legal reform suggested by CLS analysis. The critique allows the student to imagine that the current legal structure is not a given, and that there are other ways of ordering society that might be possible and perhaps desirable. In this way, it achieves much the same purpose as a comparative law class.

But even without a positive theory of reform, CLS analysis can be useful, even vital, in thinking critically about the law. Let's assume that you are teaching an art appreciation class, covering George Seurat's pointillist masterpiece, *A Sunday Afternoon on the Island of La Grande Jatte*. Certainly one could limit the discussion to how the painting looks from a distance, but to really analyze it, the class must see how the painter used tiny dots of color to fool your eyes, to create an optical illusion of certain blends of color and hue. One can ultimately conclude that the creation of this illusion is a good thing, a beautiful thing, but a true critic must first understand *how the trick is accomplished*.

The same thing must be true for legal analysis. How can we hope to have our students understand legal rules and processes without looking behind the façade, to see what is really going on when judges construct these pictures? Ultimately we may agree that the construction is valuable, or necessary, but unless we deconstruct it, we are not truly aware of the way the legal regime has been constructed and of the possibilities of changing the background in fundamental ways.

For many students, and indeed for many teachers, a good CLS critique can open up a whole new way of looking at the world. There is nothing like deconstruction to encourage students to begin thinking outside the box, to imagine possibilities of new rules for social interaction. The discovery that an entire legal system can be viewed as a hierarchical construct can be an epiphany as dramatic as finding out that Santa Claus doesn't really come down your chimney.<sup>14</sup>

But is it possible to separate the analytical tools of CLS from the ideological baggage the movement brings with it? And if one does separate the theory from the ant子subordination agenda, does CLS really provide anything more than legal realism already offers? After all, over a century ago Oliver Wendell Holmes saw that the apparently formalistic method of legal reasoning often masked political judgments between competing policies.<sup>15</sup> If CLS is nothing more than an extreme form of legal realism—suggesting that, instead of political “influence” on judicial decision making, the entire legal system is totally political, or that instead of *some* indeterminacy in law there is essentially no determinacy—well, the consensus seems to be that the theory is just wrong.

Nevertheless, I hope to demonstrate in the next section that, even for those who do not accept the CLS theory wholeheartedly, the use of CLS analysis

14. I compare it to one of those “Magic Eye” pictures. There is something lurking behind the picture that the untrained eye does not comprehend. But once you get it and the hidden image pops out at you, the impact is quite remarkable.

15. Oliver Wendell Holmes Jr., *The Common Law* 1 (Boston, 1881); Oliver Wendell Holmes Jr., *The Path of the Law*, 10 *Harv. L. Rev.* 457, 465–66 (1897).

provides students insights beyond those of legal realism. Through a few examples, I urge my colleagues, as Ahkil Amar put it to me, to place CLS on the “list of lenses” through which your class can view a legal doctrine.

### **Basic Classroom Insights Provided by Critical Legal Studies**

In this section I attempt to illustrate how a “moderate” might inject CLS concepts into classroom discussion.<sup>16</sup> I use examples from property law, which I teach. My thought is that if more of us begin to share concrete illustrations of ways that mainstream teachers can use CLS theory, we can help each other broaden the usefulness of this approach. Finally I suggest, only partly in jest, that the movie *The Matrix* might be a way to use popular culture to introduce the students to CLS theory.

#### *Property Ownership Through a CLS Lens*

The concept of property is ripe for CLS critique. How property rights should be defined in a just society is “at the very center of political philosophy.”<sup>17</sup> Because the right of property is a creature of society’s collective judgment as to its proper extent and characteristics, “[p]roperty and law are born together and die together.”<sup>18</sup> And because society’s wealth consists of property, in one form or another, the question of its protection and distribution is central to the questions of hierarchy which CLS critiques explore.<sup>19</sup>

The Supreme Court’s conception of property rights in *Lyng v. Northwest Indian Cemetery Association*<sup>20</sup> provides ample grist for the CLS mill. In *Lyng*, the U.S. Forest Service proposed extending a road through the Chimney Rock section of the Six Rivers National Forest and adopted a management plan that would allow extensive timber harvesting in that area. The forest land, which adjoins the Hoopa Valley Indian Reservation, has historically been used for religious rituals by several Native American tribes. The Supreme Court did not question the religious significance of the area for tribal spirituality; a study found that the land was “an indispensable part” of the Indians’ religious practices. Because those rituals require “privacy, silence, and an undisturbed natural setting,” the completion of the road project would cause “serious and irreparable damage” to the exercise of the Indians’ religion.<sup>21</sup>

Lower courts had adopted a balancing test for weighing religious claims against the public’s interest in government land use. If the Indian tribes could establish that the use of the area was “indispensable and central to their

16. For “moderate” you might substitute “a merely mortal professor who will quite frankly admit that he doesn’t quite understand everything critics have written and isn’t quite sure he agrees with it all.” I suspect there are quite a few of us in this category.

17. Kenneth R. Minogue, *The Concept of Property and Its Significance*, in *Property: Nomos XXII*, eds. J. Roland Pennock & John W. Chapman, 3 (New York, 1980).

18. Jeremy Bentham, *Theory of Legislation*, 4th ed., 111–13 (London, 1882).

19. On the effect of property rights on the hierarchical power structure, see Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 *Colum. L. Rev.* 603 (1943).

20. 485 U.S. 439 (1988).

21. 485 U.S. at 442–43.

religious practices and beliefs,” and that the proposed governmental action would “seriously interfere with or impair those religious practices,” the government would have to establish a compelling governmental interest sufficient to override the Indians’ religious interests.<sup>22</sup> Such an approach recognized the legitimate interests of the Native Americans without totally inhibiting government actions.

The Supreme Court, however, completely rejected the balancing test. Instead Justice O’Connor, writing for the majority, held that the Constitution provided no basis for the Indians’ claims. “The First Amendment must apply to all citizens alike,” O’Connor wrote, “and it can give none of them a veto over public programs that do not prohibit the free exercise of religion.”<sup>23</sup> The religious interests of the Native American tribes “do not divest the Government of its right to use what is, after all, *its* land.” To recognize the Indians’ rights would diminish the government’s property rights, according to the majority, and because the government would forgo profits for timber leases, it would amount to a financial subsidy of the Indians’ religion.<sup>24</sup>

A legal realist critique of this case might run as follows. The central policy the majority is trying to further here is preserving the government’s right to control the use of public lands. The Court does not want to open the door to numerous claims by countless religious fringe groups that would effectively make efficient management of the public lands impossible. The groups might even start battling each other, with one group claiming that another’s use of the public land was an interference with religion. So a legal realist might conclude that the Court’s holding furthers the important policy of certainty by creating a bright-line rule insulating government decisions about land use from constant attack. A realist with a law and economics bent would point out that the decision maximizes the efficient use of our property and natural resources, because cutting down trees presumably will provide society more wealth overall than would meditation.

The critical legal analysis, however, would go much further.<sup>25</sup> First, the crit would question the fundamental label of “government property” attached to this land, which allows the Court to conclude in a cursory manner that the Indians have no right to control what is done with it. The crit might recall that the recognized way to acquire property interests in early American history was by homesteading, which involved fencing the land, cultivating it, cutting down trees, and otherwise marking it as your own, all of which was totally foreign to the Native American way of life. And of course the Native Americans would

22. Northwest Indian Cemetery Ass’n v. Peterson, 795 F.2d 688, 691–92 (9th Cir. 1986), *rev’d*, 485 U.S. 439 (1988).

23. 485 U.S. at 452. Of course, the tribes were not asking for “veto power” but rather wanted heightened scrutiny or a balancing test for projects affecting tribal spiritual interests.

24. *Id.* at 453.

25. Kristen A. Carpenter starts down this road by looking at the property aspects of *Lyng* in *In the Absence of Title: Responding to Federal Ownership in Sacred Sites Cases*, 37 New Eng. L. Rev. 619, 627–28 (2003). See also Howard J. Vogel, *The Clash of Stories at Chimney Rock: A Narrative Approach to Cultural Conflict over Native American Sacred Site on Public Land*, 41 Santa Clara L. Rev. 757, 799 (2001).

not have been allowed to acquire property by homestead anyway, but rather were forced off their native lands and onto reservations by the conquering settlers. The system was set up, from the beginning of European occupation, in a way that made it impossible for the Indians to participate. But even if you accepted the property regime set up by the white man as legitimate, the Indians' historical use of the property for these religious ceremonies, *for hundreds of years*, should at least have been recognized as some kind of prescriptive easement. But it was not recognized as such for one reason—because the Court wanted the white man, the majority, to win, and once again the Native American minority lost, as it has from the very beginning.

One question for discussion, for example, might be whether students could imagine the government condemning a site sacred to Judeo-Christian religions and tearing it down. Suppose the government decided to put a highway through the Mormon Tabernacle in Salt Lake City, or needed the site of the Western Wall in Jerusalem for a new army base; or suppose the government was going to flood St. Peter's in Rome for a new hydroelectric dam. Even if these sites were on public property, could you so easily conclude there's no First Amendment issue? Or even closer to the case, suppose the government prohibited something central to your religion, say by banning the sale of wine used for communion<sup>26</sup> or by prohibiting head coverings on Friday nights. Could you so easily say it was an "incidental interference" with religion?

The point is that legal realism deals only with the competing policies the Court must weigh in reaching its decision. CLS analysis goes much further, questioning whether the whole concept of "property" is a convenient label that perpetuates the majority's ability to control the minority. Moreover, CLS provides, in this instance, a positive suggestion for reform, because once you set aside the preconceived notions of "property" there are clear opportunities for progress—either by adopting a balancing test as suggested by lower courts or by giving Indians an easement to continue their ceremonies.<sup>27</sup>

Another area ripe for CLS critique is nuisance doctrine. Nuisance law is notoriously malleable, providing judges with numerous opportunities to use legal hooks to reach hierarchical results. Again, realism does not provide the richness of legal analysis that CLS theory provides.

Take, for example, two funeral parlor cases decided by the Arkansas Supreme Court. In *Powell v. Taylor*,<sup>28</sup> the court, per Justice George Rose Smith, found that a funeral home in an "essentially residential" neighborhood could be enjoined as a nuisance. The opinion is remarkable for its early recognition that nuisance law protects mental health and aesthetic interests as well as the more physical harms traditionally recognized. Yet twenty-three years later, in *Elston v. Paal*,<sup>29</sup> the same court, in an opinion written by the same judge, held

26. Cf. Volstead Act, Title II, Sec. 3 (exempting sacramental wine from Prohibition).

27. Of course, a hard-line crit might not want to take this incremental approach to reform, because it would mean accepting, at least for the moment, the very system and nomenclature we are deconstructing in order to achieve a particular result.

28. 263 S.W.2d 906 (Ark. 1954).

29. 550 S.W.2d 771 (Ark. 1977).

that a funeral home operating in a residential district was not a nuisance. This time, the court downplayed the effects of funeral homes on the neighbors.

The cases make an interesting exercise in “case synthesis” for law students, because *Elston* does not overrule *Powell*, and yet seems to come to precisely the opposite conclusion on similar facts. The legal realist, indeed, can have great fun with the court’s clever use of language and terminology to reach a seemingly inevitable result in each case.<sup>30</sup> By examining policy considerations, the realist can point out how, in the years between 1954 and 1977, zoning laws had become much more prevalent, shifting the primary burden of deciding “proper” land use from the courts to the city council. Indeed, in comparative institutional terms, courts increasingly recognized that legislative bodies were better able to make land use decisions of this sort.

From a law and economics standpoint, you could analyze the cases by examining which rule better maximized wealth. In other words, the court’s description of the area as “essentially residential” in *Powell* is another way of expressing the court’s judgment that the economic impacts of the funeral parlor on neighboring property values would outweigh the economic value of adding that commercial use to the area. Later, in *Elston*, the court is more concerned that we are unduly hampering commercial uses and believes that overall economic growth requires loosening up the restrictions on relatively benign uses like funeral homes.<sup>31</sup>

But the CLS critique would deconstruct these decisions to reveal something deeper going on in nuisance law. The court’s goal—the protection of “property value”—should be carefully examined. Protecting property value is noth-

30. In *Powell*, for example, Justice Smith emphasizes the “essentially residential” character of the neighborhood by summarizing a long list of commercial uses in terms that clearly minimize their commercial aspects and potential conflicts with the neighborhood. The dissent on the other hand, uses language that highlights the commercial nature of the uses.

<i>Majority</i>	<i>Dissent</i>
1. “A seamstress . . . earns some income by sewing at home.”	1. “a seamstress place of business”
2. “The couple . . . rent rooms to elderly people and take care of them when they are ill.”	2. “a nursing home”
3. “J. T. McAllister . . . is in the wholesale lumber business and uses one room as an office, keeping books there and transacting business with persons who call.”	3. “a lumber office”
4. “An eighty-year-old dentist has a small office in his yard and occasionally treats patients.”	4. “a dentist office”
Conclusion: neighborhood is “exclusively residential” or at least “essentially residential.”	Conclusion: neighborhood is “mixed residential and business area.”

31. There was also a racial point in *Elston* because the proposed funeral home owner was African-American. The lower court based its nuisance decision, at least in part, on a city official’s testimony that allowing the black-owned funeral parlor could slow the influx of whites into the racially mixed neighborhood. The Arkansas Supreme Court held that such “social” considerations were irrelevant to the nuisance analysis. So a legal realist could also say that the court’s decision furthered the policy of equal treatment.

ing more than using the court system to favor one group of citizens over another. The protected group consists of property owners—those who have gained wealth in our society—while the nonprotected group is the rest of society—those who do not own property. Those who can afford to buy a house receive much greater protection than those who merely rent.<sup>32</sup> Even within the protected group, hierarchy prevails: high-income neighborhoods are protected much more stringently than low-income neighborhoods from “conflicting” uses. Is it possible that the Arkansas court was less protective of the inner-city neighborhood in *Elston* precisely because by the 1970s urban mixed-race neighborhoods were no longer the bastions of upper-class wealth?

CLS theory would argue that protection of property value is code for allowing upper-class property owners to make the decisions about what will be allowed in our society—what our towns will look like, for example, and what businesses will be allowed to locate where. These are decisions that affect all of us in our daily lives, but only those with property are “recognized” as having a stake in the outcome through this focus on protecting property value. CLS causes us to question that assumption, to ask whether the courts are using property rights language merely as a subterfuge for perpetuating upper-class power. A CLS critique would therefore question whether the protection of property value should be the central goal of the system. Again, the class may conclude that this protection is necessary and perhaps even desirable, but the critique at least forces students to consider those first principles of our property system.

Even if the students agree that protecting property value is a good thing overall, the critique forces them to consider whether the definition of property rights is necessarily a given, or whether it is a fluid concept that we can redefine to better balance the needs of society. If one keeps in mind that property rights stem from societal agreement about their proper parameters, why isn't it just as legitimate to reconceptualize property in ways that better accommodate public needs? For example, why couldn't we give homeless people the right to camp out on private property if necessary?<sup>33</sup> Why can't we require property owners to provide public access to beaches free of charge?<sup>34</sup> Why should owning land include the right to change its essential character and destroy sensitive environments?<sup>35</sup> Certainly the students may conclude that there are good reasons for our current definition of property. Nevertheless, invoking the magic word *property* does not end the debate, and the student who wants to engage in critical thinking should understand what is going on behind the curtain.

32. See *Village of Euclid v. Amber Realty*, 272 U.S. 365, 394 (1926) (apartment houses are “mere parasite[s]” that take advantage of amenities of single-family residential districts).

33. See Letter from Thomas Jefferson to James Madison (Oct. 28, 1785), in *The Portable Jefferson*, ed. M. Peterson, 395, 396–97 (New York, 1975) (“Whenever there is in any country, uncultivated lands and unemployed poor, it is clear that the laws of property have been so far extended as to violate natural right. The earth is given as a common stock for man to labour and live on.”).

34. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

35. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

*Using The Matrix to Teach CLS*

Law teachers may be reluctant to introduce CLS concepts in class because the theory is often expressed in language layered in terminology that is likely to bewilder and confuse your average law student (not to mention your average professor). Moreover, the concepts of CLS are frankly mind-bending; most students are not prepared for thinking this far outside the box. The philosophy teacher who asks whether we can prove that we really exist or the physics teacher who introduces quantum theory runs into much the same roadblock. The average student simply may not be receptive to a theory that questions the fundamental premises on which our lives are based.

Popular culture, however, can be amazingly helpful in providing points of reference for modern students. I have shown a film clip of *Body Heat* to help students relate to the rule against perpetuities and have referenced *Titanic* to contemplate how lifeboat space (a license) is allocated in the first instance.<sup>36</sup> And who among us has not put down *Pride and Prejudice* with a sigh and the lingering lament: "If only the estate had not been tied up in fee tail male, all this commotion could have been avoided."

So it is not surprising, I think, that my first thought after seeing *The Matrix* was "Aha! Critical legal studies." My idea is that we might be able to use the movie to provide a suitable entrée into CLS theory.

If you are not familiar with it, *The Matrix* follows its hero, Neo, as he awakens to the idea that our whole existence, what we have been taught to discern as reality, is in fact a computer-generated illusion. Humans have been dominated by intelligent machines, who have turned our bodies into their main energy source. In order to keep the humans docile, the machines have wired our brains to perceive an alternate reality. The most haunting image of the movie is a scene showing thousands of humans floating in pods filled with gelatinous ooze, their bodies connected by cables to the main energy plant.

Notice the parallels to CLS? Consider, for example, that the main thrust of CLS is that the entire legal system is merely an apparatus designed to appease the masses, fooling them into thinking that their needs may be addressed, while in fact its purpose is merely to keep them docile while perpetuating the hierarchy that provides the upper class with its advantages. Instead of pods filled with bodies attached to the power plant, just substitute workers stuck in

36. Although most unowned property is allocated according to the "first possession" rule, the "law of the sea" is a modified version of it, with women and children at least ostensibly given first crack. This was further modified, we are told, by allowing rich people space before those in the lower class or steerage compartments. You can then analyze, if you're bored by the movie itself, whether this allocation rule comports with the typical policy reasons for property allocation—for example, economic efficiency, fairness, and certainty. It is possible, for example, that favoring children makes sense because they have more years ahead of them, on average, than adults, and favoring them will maximize the total life-years rescued. Because mothers were traditionally the caregivers, they would need to accompany the children to ensure the success of this scheme. But would this make sense today, or should the "law of the sea" allocation scheme be reexamined in light of modern views of equality? This analysis can continue as long as the movie's dialog remains sappy and unrealistic. As my colleague David McCord noted, the introduction of the Coke bottle into the aboriginal tribe in *The Gods Must Be Crazy* also provides fertile ground for examining how property rights arise in the first instance.

cubicles in a high-rise office building, all working to feed the vast machine that lines the pockets of the CEO. If I were to try to create a metaphorical vision of CLS, it would look a lot like *The Matrix*.

In the film Morpheus is the head of a small band of humans who have broken free of the Matrix and are trying to defeat it and free humankind. I like to think of Morpheus as Duncan Kennedy, one of the CLS founders. Morpheus has spent his life trying to convince others, and now especially his new recruit Neo, that their existence isn't real. Can you imagine Kennedy saying something like this?

MORPHEUS:

It's that feeling you have had all your life. That feeling that something was wrong with the world. You don't know what it is but it's there, like a splinter in your mind, driving you mad, driving you to me. But what is it?

*The leather creaks as he leans back.*

MORPHEUS:

The Matrix is everywhere, it's all around us, here even in this room. You can see it out your window, or on your television. You feel it when you go to work, or go to church or pay your taxes. It is the world that has been pulled over your eyes to blind you from the truth.

NEO:

What truth?

MORPHEUS:

That you are a slave, Neo. That you, like everyone else, were born into bondage, kept inside a prison that you cannot smell, taste, or touch. A prison for your mind.

Compare that with quotations from CLS adherents who claim that the entire legal system has been "socially constructed to reflect prevailing interests of power and domination" and that "the mythology of legal discourse serves to mystify and pacify the oppressed":<sup>37</sup>

[T]he CLS project is to identify the role played by law and legal reasoning in the process through which social structures acquire the appearance of inevitability. By identifying and overturning the extant forms of legal consciousness, the CLSers hope to liberate the individual in society. Their method for exposing the distortion between the apparent order of the legal process and the disorder of social life is to examine the intellectual devices that conceal this discrepancy. . . . As a necessary precondition to the restructuring of society, the CLS movement seeks to penetrate the surface of "social reality," to expose the actual workings of society . . . and to discover the process by which . . . the status quo is presented as a natural, rather than contingent, state of affairs.

The authors just quoted go on to say that Duncan Kennedy "portrays liberals as deep dreamers who, if shaken long enough, eventually waken and

37. Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 *Phil. & Pub. Aff.* 205, 216-35 (1986), *quoted in* Neacsu, *supra* note 2, at 430.



experience the nightmare of reality.”<sup>38</sup> In other words, he is Morpheus, engaged in a project to free the world from the oppression of the Matrix:

MORPHEUS:

I promised you the truth, Neo, and the truth is that the world you were living in was a lie.

I say much the same thing to my first-year students during Intro to Law!

In fact, Duncan Kennedy himself could have given the creators of *The Matrix* the idea for the movie in a conversation with Peter Gabel back in 1984:

The problem is the tendency to develop a *theory* that I am a robot, that there is actually a program, a set of electrodes that has been implanted in me by, say, Capitalism or The System, or something, so that I am now a programmed entity, and until someone plucks out the electrodes, I'm a pod.<sup>39</sup>

At first, CLS faces the problem of trying to convince people to look past the social constructs, past the legal jargon, to see what's really going on. They encounter reluctance, skepticism, and even ridicule from those still stuck in the Matrix. They must feel like Morpheus as he unveils secrets of the Matrix to Neo for the first time:

NEO:

No! I don't believe it! It's not possible!

MORPHEUS:

I didn't say that it would be easy, Neo. I just said that it would be the truth.

And then, even when people understand and agree with critics that the legal system is merely an illusion that perpetuates hierarchy, many end up saying: “So what?” The result, even though it may be terribly unfair to those at the bottom who feed the system, is infinitely preferable to anarchy or Marxism or any other system you want to replace it with. In other words, once you've seen the world without the Matrix loaded into it, it is not a pretty place. In the movie, at least one member of the enlightened, Cypher, similarly understands that even though the world he lived in before was a complete illusion, he prefers it to reality:

CYPHER:

You know, I know that this steak doesn't exist. I know when I put it in my mouth, the Matrix is telling my brain that it is juicy and delicious. After nine years, do you know what I've realized?

*Pausing, he examines the meat skewered on his fork. He pops it in, eyes rolling up, savoring the tender beef melting in his mouth.*

38. 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, 219, 225 (1984).

39. Kennedy & Gabel, *supra* note 8, at 43. See also *id.* at 7 (“[U]nfortunately the body snatchers are always nearby, and you wake up and they're all pods. The whole conceptual structure has been turned into a cluster of pods.”). O.K., so this is all really a reference to another movie, *Invasion of the Body-Snatchers*, but still —

CYPHER:

Ignorance is bliss.

Similarly, we may conclude that the world works pretty well with these social constructs in place; we may not really want to peek behind the curtain, as long as the system is working for us. As long as we aren't confronted with the unpleasantness of living in the underclass, life is good.

In the film, agents capture Neo (known in real life—oops, I mean in what we *thought* was real life—as “Mr. Anderson”), and when he asks for his rights, for his one telephone call, Agent Smith responds:

AGENT SMITH:

And tell me, Mr. Anderson, what good is a phone call if you are unable to speak?

*The question unnerves Neo and strangely, he begins to feel the muscles in his jaw tighten. The standing agents snicker, watching Neo's confusion grow into panic. Neo feels his lips grow soft and sticky as they slowly seal shut, melding into each other until all trace of his mouth is gone.*

So, even though the system ostensibly gives us “rights,” when it comes to exercising them they turn out to be meaningless. Just as the crits have said, “rights” fool us into thinking the system is fair, but then the game is fixed so that rights can never amount to a real threat against those in power. You may have a right to a fair trial, for example, but we won't fund the system that provides you with a lawyer, or will so underpay the lawyer that there is no possible way you will get effective representation. Those with real power can use the system to their advantage, but for most of society, the system is just a means to pacify you without really giving you a voice. You can have your phone call, sure, but you can't really talk.

Truthfully, I'm writing this *Matrix* comparison partially with my tongue in cheek. But there is no question that if you start students off with CLS jargon, such as the old “unalienated relatedness/ fundamental contradiction” mumbo-jumbo, you might get a few blank stares and some downright rude scoffs, especially from those who didn't major in philosophy. But if you say, “you know, like *The Matrix*,” all of a sudden the lights go on and they may *get it*. Literature and movies provide a way of accessing an experience that is beyond your personal history, a way of seeing the world through different eyes. Besides, it's a lot more fun than plowing through Kierkegaard.

In my dream cast, it's a given that Duncan Kennedy will star as Morpheus, the guy devoting his life to the effort to break us all free of this vast illusion. I haven't decided who should play Trinity, the female lead. Kimberle Williams Crenshaw, perhaps? Or Catharine MacKinnon?

And what about Neo, the chosen one who will supposedly lead the battle to save us all, who has learned to be impervious to the weapons the system can mount against him? That may be one of the biggest problems the critical legal studies movement faces: they have yet to find their Neo.

\* \* \* \* \*

Roberto Unger once said that CLS can provide students with a sense of “living in history, which constitutes an indispensable prelude to every generous impulse capable of extending beyond the closest personal attachments.”

To live in history means among other things to be an active and conscious participant in the conflict over the terms of collective life, with the knowledge that this conflict continues in the midst of the technical and everyday.<sup>40</sup>

That is what I want for my students—the ability to think beyond the way things are to the way things might be, to imagine the different forms civilized society might take. CLS is one way to get there, and I hope we will not dismiss it before we really give it a chance.

40. The Critical Legal Studies Movement, 96 Harv. L. Rev. 561, 669–70 (1983).

**On Globalization**

- 160 Catherine Valcke, *Global Law Teaching*
- 183 M. C. Mirow, *Globalizing Property: Incorporating Comparative and International Law into First-Year Property Classes*

**On Teaching**

- 201 Jerry L. Anderson, *Law School Enters the Matrix: Teaching Critical Legal Studies*
- 216 Thomas Hayes, *A Goode Judge Is Hard to Find: An Essay on Legal Realism and Law School Casebooks*
- 223 Tina L. Stark, *Thinking Like a Deal Lawyer*
- 235 William R. Slomanson, *State Civil Procedure Plea*
- 242 Kevin R. Johnson, *Integrating Racial Justice into the Civil Procedure Survey Course*
- 264 Peter A. Appel, *The Embarrassing Rule Against Perpetuities*

**General Articles**

- 283 Desmond Manderson, *In the Tout Court of Shakespeare: Interdisciplinary Pedagogy in Law*
- 302 Gary Lawson, *Making Workshops Work*