Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?

Jean Stefancic  
*University of Alabama - School of Law, jstefancic@law.ua.edu*

Richard Delgado  
*University of Alabama - School of Law, rdelgado@law.ua.edu*

Follow this and additional works at: [https://scholarship.law.ua.edu/fac_working_papers](https://scholarship.law.ua.edu/fac_working_papers)

**Recommended Citation**

Available at: [https://scholarship.law.ua.edu/fac_working_papers/70](https://scholarship.law.ua.edu/fac_working_papers/70)
Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?

Richard Delgado & Jean Stefancic


This paper can be downloaded without charge from the Social Science Research Network Electronic Paper Collection: http://ssrn.com/abstract=2411638
Outsider Jurisprudence and the Electronic Revolution: Will Technology Help or Hinder the Cause of Law Reform?

JEAN STEFANCIC* AND RICHARD DELGADO**

I. INTRODUCTION

Legal scholarship today stands at a crossroad, its form and substance subject to transformation by two movements that are about to converge. These movements, or forces, are (i) outsider jurisprudence—the writing of Critical Legal Studies scholars, feminists, and minorities of color; and (ii) the electronic transformation of media. Our first task will be to describe the two forces—the new legal scholarship and the electronic revolution—in some detail. Following this, we shall offer some predictions on what may happen should they merge. Will one force cancel the other out, as some have suggested? Or, will computerization of legal research facilitate the work of law reform, uniting the two forces in a single powerful impetus for social and legal change? What, if anything, can lawyers and legal scholars do to assure that the second eventuality, not the first, takes place?

II. OUTSIDER JURISPRUDENCE: THE FIRST MOVEMENT

Outsider jurisprudence takes three principal forms: Critical Legal Studies (CLS),¹ feminism,² and the “New” or Critical Race Theory (CRT).³ Critical thought, in general, traces its origins to such European writers as Marx, Heidegger, Gramsci, and Foucault, as well as to the work of the
Frankfurt school that flourished during the 1920s. Critical thought first gained a foothold in philosophy, literature, sociology, and anthropology. Here, criticalists challenged received ideas such as universality, objectivity, neutrality, and the notion that every text had a single or determinate meaning.

Law lagged behind other text-based disciplines in incorporating these new approaches. For example, hermeneutics, the science of textual interpretation, had entered the study of scriptural texts in the 1800s through the writings of Friedrich Schleiermacher. In the 1970s, structuralism and deconstruction added a radical new dimension to the interpretation of literary texts. Not until the 1980s, however, did critical legal scholars introduce deconstruction into law.

They also borrowed the idea of indeterminacy and applied it to law, urging that legal reasoning rarely, if ever, has just “one right answer.” Instead, there will be multiple interpretations of the available precedent from which judges may choose on the way to resolving the case before them. Other criticalists look behind legal reasoning to the panoply of presuppositions, agendas, and hidden assumptions that make up legal culture—the baseline from which legal argument proceeds.

---


5 M. Kelman, supra note 4; Symposium, supra note 4; Unger, supra note 4. On the origins of contemporary critical thought in these other disciplines, see R. Unger, Knowledge and Politics (1975); M. Jay, The Dialectical Imagination: A History of the Frankfurt School & The Institute of Social Research, 1923–1950 (1973).


8 S. Fish, Is There a Text in This Class? (1980); A. Berman, From the New Criticism to Deconstruction: The Reception of Structuralism and Post-Structuralism (1988).

9 D. Kairys, supra note 1; Symposium, supra note 4.

10 E.g., Kelman, supra note 6 (indeterminacy, sometimes called “trashing” by CLS adherents); Kennedy & Gabel, Roll Over Beethoven, 36 Stan. L. Rev. 1 (1984). For early exposition of law’s indeterminacy from a leading Legal Realist, see K. Llewellyn, The Bramble Bush (1926).

Kennedy, for example, deconstructed Blackstone's Commentaries, showing how their underlying structure reflected and advanced the values of Western liberal-capitalist thought. Other scholars have applied deconstructionist techniques to such areas of law as contracts, property, and civil rights.

Critical Legal Studies spawned and influenced two additional movements, feminist legal thought and CRT. A number of women and scholars of color found CLS attractive because it challenged the dominant liberal beliefs about law's objectivity and the sacred inviolability of texts. Feminist legal scholars (some of whom identify themselves as fem-Crits) write about the ubiquitous patriarchy of the law and other social institutions. Scholars such as Catharine MacKinnon and Robin West have focused on pornography, divorce laws, and sexual harassment in the workplace. Other writers have decried law's embrace of universality, urging instead an emphasis on context, particularity, and "voice."

Feminist legal scholars also examine legal education, addressing such issues as bias in the curriculum, silencing in the classroom, and lack of opportunities for women following graduation. They have challenged male
bias in law school appointments, promotion, and tenure standards. They have been concerned that unorthodox scholarship be accepted as valid and worthy. Some write critiques of standard casebooks that exclude women or women's point of view. Others write women's legal history and biography.

Within feminism itself, two debates currently are being waged. In one, feminist scholars debate the extent to which feminism can be incorporated within traditional jurisprudence, or whether, by contrast, it has a unique methodology. A related issue is the necessity or advisability of defining a unitary ("essential") position for the movement. Feminists of color, for example, have been urging that the privileging of white women's perspectives leads to marginalization of their own experience and inattention to their unique needs. Further, they stress that the difference in perspective and agenda that feminists in general find between themselves and the dominant male framework must be carried further to include differences within the female community itself. Writers such as Kim Crenshaw, Mari Matsuda, and Leslie Espinoza have been raising such issues in connection with race-remedies law, hate-speech, employment discrimination, and other areas.

---


28 Fineman, supra note 26; Harris, supra note 26; Crenshaw, supra note 27; Scales-Trent, Commonalities: On Being Black and White, Different and the Same, 2 Yale J.L. & Fem. 305 (1990).

Critical Race Theory took root in the late 1970s when Derrick Bell first questioned the adequacy of conventional race-remedies law to achieve its self-professed aims. Minorities scholars in this movement expressed dismay that the gains of the Civil Rights era were unstable, and indeed were being rolled back in the late 1970s and 1980s. New approaches were needed to take account of the complex interaction among race, racism, and American law. A central theme of much of this scholarship is “interest convergence”—an idea developed by Derrick Bell—which holds that the majority group advances the cause of racial justice only when it suits its interest to do so.

Other writers question whether race-remedies law is even designed to benefit Blacks. Some put forward the equally surprising suggestion that civil rights law itself furthers and deepens the dilemma of persons of color. Some explain that race-remedies law serves a homeostatic function, assuring that racial progress occurs at just the right slow pace. Too-rapid change would be terrifying for the white majority; too-slow change could prove destabilizing. Other writers use critical tools to address classic civil rights issues, such as federal Indian law, reparations for Blacks and Asians, remedies for racist speech and hate crimes, immigration policy

31 Delgado, supra note 3, at 6.
32 Id.
34 The most prominent spokesperson for this view is Derrick Bell. See, e.g., D. BELL, AND WE ARE NOT SAVED (1988).
37 Id.
40 Matsuda, supra note 29; Lawrence, If He Hollers, Let Him Go, 1990 DUKE L.J. 431.
and bilingual education,\textsuperscript{41} sentencing and capital punishment,\textsuperscript{42} and the elimination of bias in civil litigation and alternative dispute resolution.\textsuperscript{43}

Many of these writers employ innovative forms of writing, such as parables, narratives, poems, and chronicles to depict racial injustice in ways not possible in conventional legal style.\textsuperscript{44}

A group of CRT scholars met formally for the first time in Madison, Wisconsin, in the summer of 1989 to discuss the future of the movement and their common themes. Later meetings focused on neomarxism, critical methodology, the purported neutrality of law, the role of “merit,” and post-Western political theory. Their voices seem to have had an impact. The Association of American Law Schools (AALS) chose as its theme for the 1990 Annual Meeting in San Francisco, California, “A Time for Sharing: Speaking Difference, Sharing Strength.”\textsuperscript{45} Plenary speakers and workshop panelists of color addressed such critical issues as narrative theory and race, the current retrenchment of American race remedies law, and majority mindset in legal institutions.\textsuperscript{46}

Recently, the movement has come under fire from mainstream writers.\textsuperscript{47} In a recent article in the \textit{Harvard Law Review}, Randall Kennedy attacked the scholarship of some of the group’s central members.\textsuperscript{48} He accused the group of making unsubstantiated claims and charges, of engaging in self-serving “racial politics,” and of militarizing discourse in the area of racial justice.\textsuperscript{49} Members of the group, and a few white sympathizers,


\textsuperscript{44} D. BELL, \textit{supra} note 34; Williams, \textit{Alchemical Notes: Reconstructing Ideals from Deconstructed Rights}, 22 HARV. C.R.-C.L. L. REV. 401 (1987); Delgado, \textit{supra} note 11.

\textsuperscript{45} Ass’n of American Law Schools, \textit{A Time for Sharing: Speaking Difference, Sharing Strength} (1989) (program of annual meeting).

\textsuperscript{46} Id.


\textsuperscript{49} Id. at 1760–87, 1789–97, 1807–15.
responded that Kennedy had failed to understand and appreciate the unique message of the insurgent scholars, that he had misread their scholarship and applied inconsistent standards to their work. For now, the coalition seems to be weathering these and other criticisms. More critiques of the racial status quo appear almost monthly and show no sign of abating.

As the foregoing indicates, legal scholarship has reached an exciting crossroad. Women, minorities, and Criticalists of the majority group have developed powerful critiques using innovative modes of expression. They have challenged law's stability and predictability, relentlessly showing its self-serving, hierarchy-maintaining quality and exposing its indeterminacy. New voices are being heard and, indeed, being accepted. Whether the current ferment will endure, and in what form, will be analyzed following discussion of the second transformation, or movement, namely the electronic revolution in media.

III. COMPUTERIZATION OF LEGAL RESEARCH: THE SECOND REVOLUTION

While outsider jurisprudence has been developing and winning acceptance, another transformation has been taking place in legal information science. The invention of electronic data processing led to the development of the two main legal databases—LEXIS and WESTLAW. These and other proprietary research services afford attorneys and legal scholars virtually instant access to multiple libraries of data including cases, statutes, administrative materials, and law review articles. The last decade brought CD ROM technology, which allows thousands of pages of printed text to be stored on, and retrieved from a disc no larger than a dinner

---

50 See generally Colloquy, supra note 3 (containing reply articles by Milner Ball, Leslie Espinoza, Robin Barnes and Richard Delgado); Delgado, supra note 3; Delgado, supra note 30.

51 Robert Williams, Professor of Law, University of Arizona School of Law, is currently preparing a bibliography of Critical Race Theory articles and books.


53 Delgado & Stefancic, supra note 52, at 216 n.59.
It allows access to pleadings, contracts, and other documents in special subject libraries. It allows access to pleadings, contracts, and other documents in special subject libraries. These new technologies in conjunction with word processing programs allow researchers to combine materials in novel ways. They make research easier and faster, prompting some enthusiasts to predict that the pace of law reform will accelerate. Others, however, warn that the new technology can just as easily solidify the status quo; these issues are treated in greater detail in Part IV.

What remains clear is that changes which allow wider access to more information have affected legal knowledge itself. Free text searching allows the searcher a wider range of choice in subject searching, freeing him or her from former reliance on fixed subject headings. In the future, thesaurally based subject headings may unlock powerful new avenues for legal research. Law libraries need not be limited to traditional printed legal materials, but may serve as gateways to larger and more general networks of information, such as DIALOG and BRS. Researchers will have quick, though expensive, access to journal literature of other academic disciplines, statistical data, news reports, and even monographs.

The first book to be published electronically may well be a legal treatise; the market is right and the technology is nearly in place. A century from now, books as we know them may be on their way to extinction. Scholars and attorneys may be forced increasingly to rely on online services of various types to be effective and current.

58 Berring, supra note 57.
59 See Dykstra, LC Subject Headings Disguised as a Thesaurus, 113 LIBR. J. 42 (Mar. 1, 1988); Dykstra, Can Subject Headings Be Saved?, 113 LIBR. J. 55 (Sept. 15, 1988).
60 For a description of these databases, see DIALOG on Disc: Information for Everyone (1987)(Dialog advertising brochure).
61 Cohen, supra note 56, at 13.
IV. SYNERGY? WHAT WILL HAPPEN WHEN THE TWO MOVEMENTS CONVERGE?

Will computer-based research assist oppositionist lawyers and scholars in their efforts to reform the law? Word-based computerized search strategies do enable the searcher to devise searches that are flexible; they avoid the constraints of preconstructed keynotes and subject headings. For example, let us suppose that the West digest system lacks a key number for discrimination cases affecting black women: it has categories for "sex discrimination" and "race discrimination," but not both. A searcher employing conventional means would find the relevant cases only with great difficulty. A searcher employing computer search techniques could find the cases easily, by simply constructing a search containing words such as "black female employee" or "African-American female worker." Still, computer-based research does not solve all problems. Articles and cases dealing with ideas like civil disobedience or legitimation may not refer to these by name; others that do so may not be included in standard databases. Further, for a search to be successful, the court and the searcher must use the same word or phrase for the idea in question. Computers may be quite useful tools for finding cases about children who injure themselves on trampolines. They are less helpful for finding cases dealing with abstract or complex socio-political ideas, like those of interest to oppositionist law reformers.

Moreover, errors may occur in entering items into databases. For example, a leading critical scholar recently was surprised to learn that two of his articles were included in Legaltrac under a misspelling of his name. A searcher trying to find these articles would have been unlikely to do so. In addition, several journals and other sources of critical writing are not included in standard periodical index databases, so that even the most diligent

---

62 Berring, supra note 57.
63 Delgado & Stefancic, supra note 52, at 219–20.
64 Id.
65 Id. at 221.
66 Id. at 220–21.
67 Id. at 220.
68 Id. at 213 n.42.
69 Telephone conversation between Jean Stefancic (who noticed the error) and Richard Delgado, Professor of Law, University of Colorado School of Law (Jan. 28, 1991).
search might miss a leading article. Computer-assisted research can sometimes be too literal, thereby discouraging innovation and law reform.

Finally effective research must allow for intuition and synchronicity; it should encourage browsing and analogical reasoning. Computer-assisted research is also costly. Since many law reformers and oppositional scholars are located at small schools or practice with small law firms, they may not have access to unlimited computerized resources. Thus, although computer-assisted research potentially affords a means by which to break legal lockstep and reassemble data in novel ways, it can impair as well as promote outsider jurisprudence and the cause of law reform.

There is one level at which computerization is likely to increase the influence of an outsider group. Because of mounting caseloads, courts and court administrators have been turning increasingly to computer-assisted treatment of cases and dockets. One approach to streamlining judicial work is a “cut and paste” approach to opinion writing—a kind of recombinant CPA (cut and paste adjudication). Although such routinized, bureaucratized law could bode ill for the cause of law reform—since cases presenting novel issues may fail to be perceived or treated as such—a recent study of women judges shows that the situation may also work in reverse. The National Organization of Women Legal Defense and Education Fund sponsored a project to gather data about gender bias in the courts. The study generated fourteen volumes detailing discrimination in all phases of court activity. As a consequence, several states decided to initiate studies or reforms of their own. The National Association of Women Judges, one

70 Wise, Of Lizards, Intersubjective Zap, and Trashing, 8 LEGAL REFERENCE SERVICES Q., nos. 1-2, at 7 (1988); Delgado & Stefancic, supra note 52, at 220. More recently, one of us discovered that a much-cited article on “intersectionality” (the dilemma of, e.g., black women) did not appear on Legaltrac, because the journal in which the article appeared was not included in the database.


72 See Childress, supra note 71; Cole, supra note 71; Dabney, supra note 71; Delgado & Stefancic, supra note 52.

73 M. KATSH, supra note 52, at 108-12; interview with ex-student now clerking for a state Supreme Court (December, 1990) (name withheld upon request).

74 M. KATSH, supra note 52; Interview, supra note 73.


76 Id.

77 Id.
of the study's cosponsors, has been meeting in an effort to increase the influence of women judges' opinions in areas such as family law and employment discrimination.\textsuperscript{78} Although it is too early to predict with any certainty, it seems possible that the cut-and-paste method of opinion writing may allow these judges' approaches to enter the mainstream more rapidly than they otherwise would have.

One of us has offered a more pessimistic view of the likely effect of computerization in the field of civil rights. In a recent article in \textit{Wisconsin Law Review}, Richard Delgado shows that as plaintiffs' attorneys in civil rights cases offer ever more powerful statistical showings of discrimination, courts merely redefine legal doctrine so as to cancel out any gains.\textsuperscript{79} Yet, on reflection, this bleak scenario is not the only possible one. Fact patterns demonstrable with computerized statistical analysis may spur helpful reform. For example, the General Accounting Office, responding to congressional inquiries, was able to demonstrate that women were being excluded from biomedical research in federally sponsored programs.\textsuperscript{80} This finding led to legislation prompting equitable treatment of women in the health care system.\textsuperscript{81} The same may happen in law. Just as the authority of abstract legal principles has been weakened by deconstructors and other criticalists, so has the stability of printed texts been challenged by computerization. Precedent will become more manipulable; arguments and lines of cases for opposing viewpoints will be readily available, arguably to the advantage of law reform. New legal theories may arise to reshape legal thought. If so, the path of the oppositional scholar and advocate may become easier, not harder.

\textbf{V. CONCLUSION}

As the foregoing has shown, our tools of thought are changing. These changes are mirrored in changes in legal scholarship. As society has become less monolithic, less monocultural, legal boundaries have become more fluid. In the short run, this may be accompanied by turmoil, as the legal status quo resists both the new voices and the newly broadened horizons made available through the electronic revolution. Yet, in the long run, diversity and inclusiveness may be enhanced.


\textsuperscript{79} Delgado, \textit{supra} note 42.


\textsuperscript{81} Myers, \textit{supra} note 80; La Follette, \textit{supra} note 80.
In this Article, we began by observing that two forces, outsider (oppositional) jurisprudence and computerization, are currently in full development in the law. Each has the potential to reshape drastically the nature of legal thought in the years ahead. We described each movement and detailed the ways in which each is beginning to affect the other. In the final section, we offered some cautious predictions on the ways in which the two movements could combine to strengthen the cause of legal and social reform. Yet, they may have little—or even a negative—effect on one another. The question is still open. The situation is elastic. The final contours remain to be completed. As one of us has put it: “Reality, like our hopes for it, is not fixed. We construct it through conversations, through our lives together. The sad fact of race is that too few of these conversations ever take place; to that extent our lives are diminished.”

Oppositional scholarship—and, with luck, computerization—may increase the number and quality of those conversations. If that convergence does take place, our prediction is that our lives will not be diminished, but much enriched.

---

Delgado, supra note 35, at 947.