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How Money for Legal Scholarship Disadvantages Feminism*

Martha T. McCluskey

Abstract

A dramatic infusion of outside money has shaped legal theory over the last several decades, largely to the detriment of feminist theory. Nonetheless, the pervasive influence of this funding is largely ignored in scholarly discussions of legal theory. This denial helps reinforce the marginal position of feminist scholarship and of women in legal theory. Conservative activists and funders have understood the central role of developing community culture and institutions, and have helped shift the prevailing framework for discussion of many questions of theory and policy through substantial investments in law-and-economics centers and in the Federalist Society. Comparing the institutional resources and structures of support for feminist or gender scholarship to those developed for economic analysis of law focused on free-market or neoliberal policy and business interests reveals substantial differences. Further, much of this conservative institution building has been dominated by men and has served to promote legal scholarship by white men in particular. I conclude by considering how feminist legal scholarship might better develop institutional support despite access to much less money.

KEYWORDS: legal theory, jurisprudence, law and economics, Olin foundation, feminism, feminist legal theory, Federalist Society, critical legal studies, critical race theory, Cass Sunstein, Richard Posner, gender, law schools

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In the last several decades, feminist legal theory has flourished as one of a number of schools of thought reexamining law's basic principles, methods, and social functions.¹ Courses, scholarship, journals, and advocacy focused on feminism have become an established part of the legal landscape. Despite these accomplishments, however, feminism's place within theory, practice, and teaching remains largely marginal and subordinate.

In contrast, Law and Economics has emerged from among these recent movements as a powerful, if not dominant force in U.S. legal theory, teaching and policy. The overlapping, but more explicitly conservative Federalist Society has grown from an outpost for radical views to an inside power broker reshaping much of the U.S. legal profession, judiciary, government and legal academia.

One important reason for these different outcomes is that the intellectual energy and reach of feminist legal theory has not been matched with the material and institutional support available to other recent movements. Feminism gained its foothold in law just as legal academia, theory, and law reform became a major focus for economic investment and organizing by conservative activists in the United States.² Compared to other countries, the distinctive strength of conservative legal movements like Law and Economics in the U.S. matches the distinctive economic support for those movements here.

Feminist entrepreneurship, energy and intellectual power has helped to sustain feminist scholarship in the face of this enormous infusion of money to marginalize or oppose egalitarian legal ideas. Nonetheless, to move forward effectively, feminist legal theory will need not only to continue its creative, rigorous, and bold analysis of law and gender, but also to step up its efforts to strategically mobilize and nurture the institutional and material resources vital to being heard, engaged, and implemented.

I. Presuming a Non-Material World of Legal Theory

Legal theory is not only a market of competing ideas, but a market in which ideas are bought, sold, and targeted for investment to procure political and economic gain. Yet the economics of legal theory barely surfaces in polite scholarly conversation. Understanding feminist legal theory's current and future

¹ See, e.g., MARTHA ALBERTSON FINEMAN, ED., *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* (2010) (collecting essays reflecting on the development and future of feminist legal scholarship after twenty-five years of the Feminism and Legal Theory Project). The prolific and passionate "feminist law professors" blog, for example, lists more than 200 affiliated law faculty. See *Feminist Law Professors*, www.feministlawprofessors.com (last visited June 23, 2010).

² STEVEN TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

challenges requires digging deeper into the question of how money shapes the success and substance of competing legal theories.

Scholarly discussion of this recent rise and fall of diverse legal theories has tended to focus mainly on the relative intellectual strengths of the ideas, such as their originality, rigor, or usefulness for policy and legal practice. Questions of “failures” and “distortions” in the “market for ideas” often focus on individual scholars’ intellectual and moral imperfections, or on the ways in which individual scholarly choices are based on emotional factors, imperfect information, or social approval.

Answering the question why Critical Legal Studies “disappear[ed],” while Law and Economics and the Federalist Society have prospered, prominent legal scholar (and federal “regulatory czar”) Cass Sunstein explains that the “market” for legal theory can be skewed by “fads, fashions, and bandwagon effects.”³ He describes how ideas about good legal theory get shaped by irrational and unintended “cascade effects” such as habit, reputational pressures, imperfect information, mass psychology and emotional ties. For example, he notes that feminism succeeded in the mid-1980s because of an “informational cascade” whereby skeptics who had not themselves carefully investigated the truth of feminism’s underlying claims came to nonetheless accept feminist legal theory as valuable mainly because many others thought so.⁴ He describes a similar phenomenon with the contemporary predominance of Law and Economics at the University of Chicago, where the simple fact of ubiquitous exposure steers new faculty and students to a particular version of economic thinking.⁵ Sunstein observes that it takes confidence for any individual scholar to assert her own skepticism in the face of prevailing trends.⁶

In this examination of psychological and discursive digressions from intellectual merit, Sunstein stops short of considering the distorting influence of money and institutional resources. He does acknowledge that individual scholars reasonably depend on reputation and other non-intellectual influences in choosing their ideas and arguments.⁷ He also notes that “external shocks... outside of the [legal] academic domain” have a role in stopping or starting intellectual bandwagons, acknowledging that legal theory responds to market “demand” not just from other law scholars but from a broader set of consumers.⁸ Yet he limits his view of these external influences on legal scholarship to changes in the federal

³ Cass R. Sunstein, *Foreword, On Academic Fads and Fashions*, 99 MICH. L. REV. 1251, 1251 (2001).

⁴ *Id.* at 1255.

⁵ *Id.* at 1256.

⁶ *Id.* at 1255.

⁷ *Id.* at 1257.

⁸ *Id.* at 1253.

judiciary, hot-button political issues, and trends in other academic disciplines.⁹ He identifies the “consumers” whose demand influences the supply of legal theory as those with largely professional rather than overtly financial or political interests or agendas: “other academics, students, government officials, judges, and law clerks,”¹⁰ not (for example) business interests, upper class interests, ideologically-oriented foundations and think tanks, or conservative activists.

This vision of a “market” for theory mostly removed from direct material interests and political power is particularly striking in a contemporary jurisprudential context in which it is standard scholarly fare to critique the economic interests beneath righteously defended principle, thanks to the success of Law and Economics. Indeed, Judge Richard Posner, a founding figure of Law and Economics, has dismissed as “extreme” and absurd the idea that this movement’s success rested on lavish funding by conservative foundations rather than on intellectual merit, or that other movements’ relative weakness is related to lack of foundation funding.¹¹ To support this sweeping claim, Posner asserts that “[f]oundation or government grants are indeed vital in many areas of natural science and some areas of social science, but they are not vital to research conducted in law schools or to purely theoretical investigations by economists.”¹²

Sunstein similarly distinguishes what he sees as the non-material interests driving the market for legal theory from typical markets, noting that “no one pays directly for what academics produce.”¹³ He explains that the journals that publish law scholarship “usually do not compensate contributors for articles and essays,”¹⁴ and though authors may be paid for books, “little money is usually involved.”¹⁵ Nonetheless, Sunstein acknowledges that “indirect compensation – monetary and nonmonetary—is omnipresent.”¹⁶ He acknowledges that job opportunities and (in part) salary directly depend on scholarly output.¹⁷ But he quickly glosses over these direct material incentives to emphasize the importance of invitations to scholarly events as the primary kind of non-intellectual factor that “disciplines academic activity.”¹⁸ He treats these influences as social and psychological phenomena that can skew the production of ideas away from pure

⁹ *Id.* at 1261-63.

¹⁰ *Id.* at 1253.

¹¹ Richard A. Posner, *Comment on Lempert on Posner*, 87 VA. L. REV. 1713, 1714-15 (2001). Posner appears to take a somewhat different view of the significance of money in scholarship elsewhere, however. See *infra* note 35 and accompanying text.

¹² Posner, *supra* note 11, at 1715.

¹³ Sunstein, *supra* note 3, at 1253.

¹⁴ *Id.*

¹⁵ *Id.* at 1254.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

merit, even though tenure and other academic structures may insulate ideas from outside material pressures.¹⁹

This non-material picture of the question of biases in legal theory begs three questions. First, it leaves unanalyzed the extent to which money actually does directly shape the production of contemporary legal scholarship. Second, it fails to examine the ways in which the omnipresence of indirect material influences on legal scholarship have constrained and controlled ideas about law. Third, this analysis suggests that the biases in the “market” for legal theory are ideologically and economically neutral or random, because it abstracts the biases in this “market” from larger socioeconomic structures and power inequalities. Sunstein portrays feminism, critical legal theory and Law and Economics as seemingly equal examples of how legal theories occasionally benefit from reputational biases,²⁰ without comparing the depth, breadth, interrelationships and nature of the impact of non-intellectual factors on these different schools of thought. By situating the market for legal theory in the broader socioeconomic context, we can better see how the non-intellectual influences on theory are instead systemically and dramatically skewed against feminist legal theory (and other egalitarian legal theories) and in favor of Law and Economics and other conservative movements.

Not only does this standard picture of competing legal theories stop short of intellectual engagement with questions of the material influence, but it also risks contributing to an academic culture in which those questions are outside the bounds of intellectual inquiry. As Sunstein’s discussion of reputation in scholarship explains, if prominent scholars repeatedly and systematically dismiss questions of monetary influence as absurd, and if these questions are treated as crass personal attacks rather invitations to sophisticated analysis, serious intellectual evaluation of the issue is likely to be deterred.

II. Outside Funding for Scholarship

The vast inequalities of money in legal theory probably have skewed many scholars’ choices away from focusing on gender and toward interests and ideologies likely to undermine feminist perspectives and goals. In addition, this lack of outside funding means that feminist legal scholarship is likely to get less attention, prestige, and distribution than more well-funded schools of thought.

¹⁹ *Id.*

²⁰ *Id.* at 1255-56.

A. Directly Funding Legal Scholarship for Economic and Political Gain

1. Money for production, publication, and distribution of legal scholarship

Although, as Posner and Sunstein observe, most scholarship in law reviews is funded generally by law faculty salaries,²¹ direct payment for individual research and publication from outside groups with material interests in the subject matter is a significant and probably growing trend. A 2008 study of law review articles in the Westlaw database found about 12,000 (out of 441,170 total) that explicitly acknowledged funding by government, industry or interest groups.²² Outside funding for scholarship from business and advocacy groups is particularly likely to differ from typical grants from general university or government research funds by being orchestrated to advance specific ideologies or interests.

In one widely discussed example of hired scholarship, Exxon Corporation extensively funded research and publications critical of punitive damages during its protracted appeal of a multibillion dollar punitive damage award for the Valdez oil spill.²³ Indeed, Sunstein was one of several law scholars who acknowledge receiving an unspecified amount of Exxon's largess for scholarship useful to those supporting restrictions on jurors' punitive damage awards.²⁴ Even though the Supreme Court claimed to discount the Exxon-funded research,²⁵ this scholarship has been highly influential in promoting opposition to punitive damages in policy, litigation, and academic discussions.²⁶

Funds for recruiting and developing legal scholarship to support specific litigation or policy results have been provided not just by individual businesses, but also by advocacy groups or foundations with missions and funding explicitly linked to the interests of large corporations. One example is the Pacific Legal Foundation, a national "public interest" litigation firm that describes its mission as promoting "limited government, property rights, individual rights and a balanced

²¹ See *supra* notes 11, 12, & 13 & accompanying text.

²² Shireen A. Barday, *Punitive Damages, Remunerated Research, and the Legal Profession*, 61 STAN. L. REV. 711, 713 & n. 5 (2008).

²³ See Deborah Rhode, *The Professional Ethics of Professors*, 56 J. OF LEGAL EDUCATION 70, 76 (2006) (citing Alan Zarembo, *Funding Studies to Suit Need*, L.A. TIMES, Dec.3, 2003, at A1).

²⁴ See Barday, *supra* note 22, at 720; Cass R. Sunstein, Daniel Kahneman, and David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071 (1998); Cass R. Sunstein, David Schkade, & Daniel Kahneman, *Do People Want Optimal Deterrence?* 29 J. LEGAL STUD. 237 (2000); CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE ix (2002).

²⁵ *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2626 n.17 (2008).

²⁶ See Barday, *supra* note 22, at 734, Appendix A (listing judicial citations).

approach to environmental protection.”²⁷ This organization provides up to four grants of \$10,000 a year to U.S. law faculty for production of scholarly articles advancing that group’s litigation interests.²⁸

In addition to funding individual publications by law school faculty, an extensive network of well-funded conservative think tanks provides substantial financial support for in-house staff to produce legal scholarship. For example, the Pacific Legal Foundation’s web site includes a bibliography of “sponsored scholarship,” much of which has been produced by in-house attorneys.²⁹ Other prominent examples include the American Enterprise Institute (listing over seventy-five staff scholars, including paid positions for resident or visiting scholars and doctoral student fellowships)³⁰; the Cato Institute (listing over fifty “policy scholars” on staff)³¹ and the Independence Institute (listing fourteen scholars on staff)³². Taken as a group, scholars working for these advocacy-oriented organizations have developed an extensive body of work in law reviews and other academic sources promoting not just only particular policy positions, but also certain strands of legal theory.

Does this targeted funding matter to the direction and success of legal theory, given that individual legal scholars are likely motivated by a range of factors other than direct economic gain (such as concern for truth, justice, or intellectual rigor and prestige)? In the case of punitive damages scholarship, funding source strongly predicts substantive position: university and government funded scholarship overwhelmingly defended punitive damages awards, while scholarship funded by business interests or business-oriented foundations (not surprisingly) provided support for corporate defendants’ efforts to reduce punitive damage awards.³³

The problem is not simply that outcome-oriented funding induces academics to produce substandard, incorrect or fraudulent evidence and analysis. Even when the funders do not improperly influence the process or results of the research, and even when the research and analysis is reasonable, the presence of outside funding steers scholarship toward particular questions and information useful to particular interests while ignoring competing concerns and evidence.

²⁷ Pacific Legal Foundation: Rescuing Liberty from Coast to Coast, About PLF, <http://www.pacificlegal.org/page.aspx?pid=262> (last visited Aug. 12, 2011).

²⁸ Pacific Legal Foundation, Legal Scholarship: Faculty Grants, <http://www.pacificlegal.org/page.aspx?pid=346> (last visited Aug. 12, 2011).

²⁹ Pacific Legal Foundation, Legal Scholarship: Bibliography of Sponsored Scholarship, <http://www.pacificlegal.org/page.aspx?pid=347> (last visited Aug. 12, 2011).

³⁰ American Enterprise Institute, Contact List of Scholars and Fellows, <http://www.aei.org/scholars> (last visited June 23, 2010).

³¹ Cato Institute; Experts, <http://www.cato.org/people/experts.html> (last visited June 23, 2010).

³² Independence Institute, Staff, <http://www.i2i.org/staff.php> (last visited Aug. 9, 2010).

³³ Barday, *supra* note 22, at 720 n.33.

This steering of information production is especially problematic given a socioeconomic context of highly unequal resources for private production of knowledge.

The current lack of transparency about the amount or manner of outside funding of legal scholarship heightens concerns about the possible impact of direct payments for scholarship on the substance of individual scholar's work. Although the AALS has a "statement of good practice" directing law faculty to footnote the fact of outside funding for any article submitted to law reviews for publication, no system has been established by the AALS, law schools, or law reviews for enforcing this vague guideline, and this guideline fails to specify disclosure of the amount of the funding or the relationship of the funding to the publication's content.³⁴ Judge Posner (writing about the decline of public intellectuals) has criticized the failure of scholars writing industry-funded scholarship to disclose the amount of their remuneration, and reports that the law scholar most often funded by Exxon compared his remuneration to typical economic consulting fees that Posner estimated at around \$1,000 an hour.³⁵ Whatever their other motives, academics are unlikely to be completely immune from the influence of money, especially at such lavish rates of compensation.

Outside funding targeted to specific outcomes is likely to shape legal theory and practice not only through the incentive effects of direct remuneration but also through the impact of funding on nonmonetary rewards such as media attention and academic prestige. Business interests or advocacy groups that pay for production of scholarship also are likely to distribute that scholarship to their lawyers for use in litigation³⁶ as well as to lobbyists, policymakers, the media, and other academics (particularly though academic centers and organizations supported by the same funders). This "marketing" can help build recognition increasing legal scholars' professional status (particularly when it leads to judicial citation and invitations to academic events), contributing to benefits such as higher salaries, job mobility and advancement, and more support for scholarship as well as further outside funding for research or consulting.³⁷ This connection

³⁴ See Barday, *supra* note 22, at 732 & n.93.

³⁵ RICHARD A. POSNER, PUBLIC INTELLECTUALS: A STUDY OF DECLINE 394-95 (2003). One legal scholar who has advocated for tougher disclosure requirements, Susan B. Koniak, reported that she earned \$50,000 for serving as an expert witness over a period of two years in an asbestos class action case. Richard Lippitt, *Intellectual Honesty, Industry and Interest Sponsored Professorial Works, and Full Disclosure: Is the Viewpoint Earning the Money, or is the Money Earning the Viewpoint?*, 47 WAYNE L. REV. 1075, 1083-85 (2001).

³⁶ Barday, *supra* note 22, at 722-23.

³⁷ Writing in 2003 about law professors' income-earning potential, the author of a prominent legal theory blog commented that law professors frequently engage in outside consulting activities for pay, with some earning \$1,000 an hour and "hundreds" earning in the range of \$400 an hour. Posting of Brian Leiter, Leiter Reports: A Philosophy Blog (Oct. 11, 2003),

with resources for distribution also means “scholarship for hire” is likely to have influence well beyond its relatively small numbers.

Moreover, the Exxon example suggests that in addition to purchasing scholarship based on desired outcomes in specific cases or legislation battles, interested industries have sought more far-reaching results by strategically advancing the work of selected scholars and theoretical approaches. An analysis of punitive damages scholarship, for example, showed that three prominent law professors (including Sunstein) accounted for most of the (acknowledged) funded scholarship, with each of the three receiving funding from Exxon for more than one publication, and with each already a leading figure in promoting economic analysis of law at an elite law school.³⁸

Although feminist legal research and writing projects undoubtedly have benefited from general university and government funding, targeted support for individual scholarly production of feminist legal theory or work on gender and law appears rare. No industry organizations, foundations, or interest groups appear to have systematically funded work by feminist legal scholars comparable to the funding of scholarship advancing business interests or free-market ideology. Nor have nonacademic feminist legal advocacy groups regularly (if ever) offered funding for individual scholarly publications by law faculty. The Center for Reproductive Rights (a public interest law firm) recently has initiated an award for legal scholarship promoting its goals, and though this award brings recognition and opportunities for involvement with the Center, no mention is made of any monetary payment (in contrast to the awards offered by the Pacific Legal Foundation).³⁹ Unlike conservative advocacy groups, paid opportunities for scholarly research and publication within non-academic feminist advocacy organizations appear rare or nonexistent. Staff of feminist advocacy organizations (like the National Women’s Law Center, the National Partnership for Women and Families, or the National Organization for Women) tend to produce primarily non-academic publications.

Looking at the specific subject of tort reform as a leading example of money skewing theory, research on gender equity in the civil justice system has not received funding for research comparable to scholarship critical of punitive damage awards. In what appears to be an isolated exception, Lucinda Finley acknowledges funding from a source related to trial lawyers for her empirical research exploring the harmful impact on women of restrictions on non-economic

http://leiterreports.typepad.com/blog/2003/10/how_much_money_.html.

³⁸ See Barday, *supra* note 22, at 720 (discussing funded work by A. Mitchell Polinsky, W. Kip Viscusi, and Cass R. Sunstein).

³⁹ See Center for Reproductive Rights: CRR Innovation in Scholarship Award, <http://reproductiverights.org/en/project/crr-innovation-in-scholarship-award> (last visited Aug. 9, 2010).

damages.⁴⁰ Nonetheless, outside funders such as trial lawyers or labor unions do not seem to have designed their funding to strategically advance and institutionalize legal scholarship on gender or feminism, for example by targeting prominent feminist scholars for repeated funding or by aiming to advance feminist theory more generally.⁴¹

2. *Money for scholarship time and professional development*

More important than payment for individual publications, outside money selectively supports faculty time for legal scholarship. General university-sponsored fellowships freeing faculty from teaching and administrative duties for research and writing are relatively rare in legal academia, other than sabbaticals or pre-tenure research leaves and occasional course relief by a faculty member's home institution for extraordinary achievement or special projects. In recent years, national rankings and other competitive pressures probably have contributed to increased demands on faculty not just for publication, but also for increased service to students and for heightened administrative responsibilities (such as student and faculty recruitment, fundraising, curricular reform, career services, and public relations). Furthermore, recent budget pressures on universities often have decreased academic funding available for scholarship time. Think tanks, foundations, law firms, and advocacy groups providing research fellowships for scholarship can play an important role in relieving this time pressure and advancing academic careers now highly dependent on scholarly productivity.

Scholarly fellowships by nonacademic funders appear highly skewed toward conservative non-feminist research and writing. For example, the Federalist Society's Olin/Searle/Smith Fellows in Law program awards up to three fellowships of \$50,000 a year plus benefits to give "top young legal thinkers the opportunity to spend a year working full time on writing and developing their scholarship with the goal of entering the legal academy."⁴² In his book *The Rise of the Conservative Legal Movement*, political scientist Steven Teles explains how this Fellows program was designed to explicitly promote conservative scholarship

⁴⁰ Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children and the Elderly*, 53 EMORY L.J. 1263, 1263 n.a1 (2004) (acknowledging the Robert L. Habush Endowment of the Association of American Trial Lawyers).

⁴¹ Tort scholars Martha Chamallas and Jennifer Wriggins, for example, reported they have not received any nonacademic funding for their research and publications on gender and race in tort law. Email communications with author, Feb. 24, 2010; see MARTHA CHAMALLAS & JENNIFER B. WRIGGINS, *THE MEASURE OF INJURY: RACE, GENDER & TORT LAW* (2010) (analyzing case law showing undercompensation of women and minorities).

⁴² The Federalist Society for Law and Public Policy Studies, Olin/Searle Fellows in Law, <http://www.fed-soc.org/aboutus/id.40/default.asp> (last visited Aug. 9, 2010).

by those “dedicated to the principles of the rule of law and limited government” and to counter control of existing generalized academic fellowships by faculty members perceived to lack sufficient right-wing political commitments.⁴³ In 2009, the Federalist Society reported that two-thirds of recipients of the fellowship now hold tenure-track law faculty positions.⁴⁴ Individual fellowship recipients have credited this fellowship with providing networking, knowledge, and prestige important to their career direction and success.⁴⁵

In addition, the Federalist Society has recently offered the “Searle Young Legal Scholars Research Fellowships,” which replace the academic salaries of two tenure-track junior law faculty in order to provide a semester-long research leave.⁴⁶ The Society reports that these fellowships aim not only to increase scholarly production by junior faculty at schools with relatively heavy teaching loads and low research budgets, but also to enhance their professional standing so that they may move to more prestigious schools where “their voices will be amplified.”⁴⁷

Fellowship funding has also become a prominent strategy for individual corporations to advance their direct economic interests in the substantive direction of legal scholarship. Microsoft has recently begun directly funding law fellowships to promote scholarship with particular content relevant to its interests at elite universities. The University of Michigan’s “Microsoft Fellowship in Law, Economics Technology” explicitly promotes intellectual property research⁴⁸; Princeton’s Program for Law and Public Affairs hosts a similar new one-year funded Microsoft Fellowship;⁴⁹ and the Berkeley Center for Law and Technology

⁴³ TELES, *supra* note 2, at 174.

⁴⁴ FEDERALIST SOCIETY FOR LAW AND PUBLIC POLICY STUDIES 2009 ANNUAL REPORT 10 [hereinafter Fed. Soc’y 2009 Ann. Rep.], available at http://www.fed-soc.org/doclib/20100416_2009AnnualReport.pdf. See also Teles, *supra* note 2, at 109-110 (counting 16 recipients).

⁴⁵ TELES, *supra* note 2, at 178.

⁴⁶ Eugene Volokh, *Federalist Society’s Searle Young Legal Scholars Research Fellowships* (blog posting), The Volokh Conspiracy, June 3, 2010 <http://volokh.com/2010/06/03/federalist-societys-searle-young-legal-scholars-research-fellowships-2/> (last visited Aug. 12, 2011).

⁴⁷ Fed. Soc’y 2009 Ann. Rep., *supra* note 44, at 9.

⁴⁸ See Michigan Law, Program in Law, Economics and Technology, Fellowships, <http://www.law.umich.edu/centersandprograms/lawecontech/Pages/lawecontechfellowships.aspx> (last visited Aug. 9, 2010).

⁴⁹ Program in Law and Public Affairs, LAPA Fellows Program, <http://lapa.princeton.edu/fellowships.php> (last visited Aug. 9, 2010). The 2009-10 Microsoft fellow is the President of the European Law and Economics Association and received an Olin Fellowship earlier in his career, see LAPA Fellow, Eli M. Salzberger (profile), <http://lapa.princeton.edu/people/detail.php?ID=615> (last visited Aug. 9, 2010).

hosts another recently established Microsoft research fellowship on intellectual property.⁵⁰

In addition to these fellowships explicitly and directly linked to outside entities with particular conservative ideologies and interests, a number of elite law schools have used money from the Olin Foundation or other conservative donors to provide internal fellowships for aspiring or existing law professors for production of Law and Economics scholarship. For example, the University of Chicago Law School has had an Olin Student Fellowship since 1984,⁵¹ along with additional fellowships from the Ewing Marion Kauffman Foundation and the Bradley Foundation.⁵² Many of the law students who received scholarships from the Olin Foundation to pursue Law and Economics at elite law schools have gone on to become academics.⁵³ One report counted forty-eight law faculty, including twenty-one at “top-ten law schools” who received Olin fellowships as students.⁵⁴

With the goal of continuing the Olin Foundation’s work in Law and Economics (which ended in 2005), in 2008 the Kauffman Foundation launched a new fellowship program in six prominent law schools.⁵⁵ This program provides up to two years of salary, with benefits and additional funds for scholarly expenses, to support the careers of new and aspiring scholars focusing on “economic innovation, entrepreneurship and economic growth.”⁵⁶ Another new

⁵⁰ See Berkeley Law, Campaign for Boalt Hall News, <http://www.law.berkeley.edu/2286.htm> (last visited July 19, 2010) (announcing the Microsoft fellowship as part of a \$1 million Microsoft grant for research at that law school institute).

⁵¹ See The University of Chicago, The Law School, Law and Economics, Student Fellowships, <http://www.law.uchicago.edu/Lawecon/studentfellowships.html> (last visited Aug. 12, 2011).

⁵² *Id.* Other fellowships at law school law and economics centers do not identify the source of their funding, but may include outside donors with business interests. For example, NYU Law School provides fellowships of \$60,000 to provide one or two years of full time scholarly study and writing related to economic analysis of law and public choice theory. See NYU Law, Center for Law, Economics and Organization, Scholarship, Fellowships, and Prizes, <http://www.law.nyu.edu/centers/laweconomics/scholarshipsfellowshipsandprizes/postgraduatefellowships/index.htm> (last visited Aug. 9, 2010).

⁵³ Teles, *supra* note 2, at 109-110 (discussing Olin’s early fellowship program focusing on funding law degrees for PhD economists); *id.* at 189-190 (discussing Olin’s student fellowships at elite law schools such as Yale).

⁵⁴ JOHN J. MILLER, A GIFT OF FREEDOM: HOW THE JOHN M. OLIN FOUNDATION CHANGED AMERICA 77 (2006).

⁵⁵ See Kauffman Foundation, *Kauffman Foundation Invests \$10 Million to Cultivate Innovation-Friendly Law, Policy, and Legal Scholarship*, Dec. 11, 2008) [hereinafter Kauffman Foundation press release], <http://www.kauffman.org/newsroom/grant-to-cultivate-innovation-friendly-law-policy-and-legal-scholarship.aspx> (last visited Aug. 9, 2010).

⁵⁶ See, e.g., Harvard Law School, The Kauffman Legal Fellowship 2009-2010, Post-Graduate Fellowship in Law, Innovation, and Economic Growth,

program targeting business-oriented scholarship is the Columbia Law School's Charles E. Gerber Transactional Studies Program, which provides a two-year research fellowship designed to allow transactional lawyers to devote time to scholarship with the goal of moving from practice into academic careers.⁵⁷

When fellowships are offered through university-based programs, conservative philanthropists likely forgo some degree of control over scholarship recipients' interests and views in exchange for identification with a prestigious academic institution.⁵⁸ Olin fellowships have undoubtedly gone to a few scholars using neoclassical economics to address gender inequity, such as Christine Jolls and Joni Hersch. However, it seems likely that in most law schools, the Olin Fellows were selected and supervised by faculty without expertise or interest in feminist legal theory and that Olin fellowships as a whole have not been a significant source of support for feminist legal scholarship.⁵⁹ Moreover, the direct involvement of nonacademic business leaders in some of the newer fellowships based in law schools may impede support for feminists or scholars whose work is perceived to undermine corporate interests. Applicants for New York University Law School's 2010-11 Kauffman Fellowship, for example, are selected by a committee that includes outside advisors to that school's Jacobson Leadership Institute for Law and Business.⁶⁰

Feminist legal theory has developed over the last quarter century without fellowship programs specifically aimed at providing time for feminist work by new or established legal academics. The interdisciplinary Radcliffe Institute (formerly Bunting Institute) Fellowship⁶¹ has supported work on gender by a few

<http://www.law.harvard.edu/academics/fellowships/the-kauffman-legal-fellowship-2009-2010.html> (stating that "Kauffman Fellows will analyze the interplay between the need to maintain predictability under the rule of law, and the need to foster innovation, entrepreneurship, and economic growth") (last visited Aug. 12, 2011); *see also*

<http://www.law.uchicago.edu/Lawecon/studentfellowships.html> (University of Chicago Law School fellowship) (last visited Aug. 12, 2011);

<http://www.law.nyu.edu/leadershipprogram/kauffmanfellowship/howtoapply/index.htm> (NYU Law School fellowship) (last visited Aug. 12, 2011).

⁵⁷ Columbia Law School, Research Fellowship,

http://www.law.columbia.edu/center_program/deals/resources (last visited Aug. 9, 2010).

⁵⁸ *See* TELES, *supra* note 2, at 204-05 (discussing how the Olin Foundation's support for Law and Economics shifted elite law schools' culture to the right despite some diffusion of ideological fervor).

⁵⁹ One notable exception is Yale Law Professor and feminist scholar Reva Siegel, who received an Olin fellowship as a Yale student but whose work is not affiliated with Law and Economics, perhaps suggesting the relatively liberal or independent nature of Yale's program. *Id.* at 190.

⁶⁰ NYU Law, Jacobson Leadership Program in Law and Business, Apply for the Kauffman Fellowship,

<http://www.law.nyu.edu/leadershipprogram/kauffmanfellowship/howtoapply/index.htm> (last visited Aug. 9, 2010).

⁶¹ Radcliffe Institute for Advanced Study, Fellowship Program,

prominent legal scholars (including Elizabeth Warren and Lucinda Finley), but it does not target scholarship in law. Recently, the Feminism and Legal Theory Project's Visiting Scholar Program at Emory Law School directed by Martha Fineman has provided non-funded short term residency programs for research and career development by feminist legal scholars.⁶²

Two newly established opportunities stand out as the rare and perhaps only sources of paid research for extended time on scholarship related to feminist legal theory. Beginning in 2010, the Center for Reproductive Rights is sponsoring a two-year fellowship (in conjunction with Columbia Law School) for aspiring law professors specializing in reproductive rights and human rights (paying \$55,000 a year).⁶³ The Williams Institute of UCLA School of Law (established in 2002) also has provided a one-year teaching fellowship for aspiring academics focusing on sexual orientation law, and has recently added a fellowship for public policy research on sexual orientation.⁶⁴ Though Georgetown University Law Center's longstanding Women's Law and Policy Fellowship Program also has helped produce many aspiring feminist legal leaders, its focus is primarily on advocacy work rather than on legal theory and scholarship.⁶⁵

Many feminist scholars have nonetheless launched their careers with substantial help from general paid fellowships offered by individual law schools, such as the University of Chicago's Bigelow Fellows program.⁶⁶ Leadership and mentoring from senior feminist faculty has sometimes helped make some of these general fellowship programs especially fertile ground for feminist scholars. For example, Columbia University Law School's Associates in Law program attracted a number of aspiring feminist scholars (including myself) when Martha Fineman's Feminism in Legal Theory Project was based at that institution. Positions targeted to advancing scholars of color, such as Wisconsin's William H.

http://www.radcliffe.edu/fellowship_program.aspx (last visited Aug. 9, 2010).

⁶² Emory Law, Feminism and Legal Theory Project, Visiting Scholars Program, <http://www.law.emory.edu/academics/academic-programs/feminism-legal-theory/visiting-scholar-program.html> (last visited Aug. 9, 2010).

⁶³ Center for Reproductive Rights-Columbia Fellowship Application, Center for Reproductive Rights, <http://reproductiverights.org/en/document/center-for-reproductive-rights-columbia-fellowship-application-0> (fellowship for 2012-14) (last visited Aug. 12, 2011).

⁶⁴ See The Williams Institute, Sexual Orientation Law Teaching Fellowship, <http://www3.law.ucla.edu/williamsinstitute/Fellowships/TeachingFellow.html> <http://www.law.ucla.edu/williamsinstitute/pdf/TeachingFellowshipAnn2011.pdf> (last visited Aug. 9, 2010).

⁶⁵ See Georgetown Law, Women's Law and Public Policy Fellowship Program, <http://www.law.georgetown.edu/wlppfp/USProgram/index.html> (last visited Aug. 9, 2010).

⁶⁶ Harry A. Bigelow Teaching Fellowships, <http://www.law.uchicago.edu/bigelow/apply> (last visited Aug. 12, 2011).

Hastie Fellowship program,⁶⁷ have also produced a number of graduates who have been influential in feminist legal theory. Despite the benefits of these general fellowships to feminist scholars, the more targeted fellowship programs have the advantages of creating a supportive institutional setting likely to be relatively insulated from institutional change and from changes in individual faculty availability. Targeted fellowships also can more systematically and effectively connect fellows to a ready-made pipeline of specialized outside resources, scholars and opportunities.

B. Funding for Individual Participation in Scholarly Events

Feminist scholars are also disadvantaged by highly unequal access to direct support for individual faculty involvement in scholarly events. Conferences and workshops provide valuable opportunities for learning about theoretical developments, getting feedback shaping ideas and conclusions, and cultivating references and reviews for tenure and other job opportunities as well as citations to scholarship. Many academic events require law faculty to pay their own way, while some provide reimbursement for travel expenses for invited speakers in particular, and a much smaller number provide honoraria on top of expense reimbursement. In this context, targeted funding to individual scholars for their participation in scholarly events is likely to have an impact on faculty choices about which scholarly interests to pursue and on whose ideas and work gains substantial attention and influence.

The Searle Center on Law, Regulation, and Economic Growth at Northwestern University School of Law (focused on studying the impact of regulation on business) has been particularly generous in paying scholars for conference attendance and papers. For example, a 2008 call for papers for a “Research Symposium on Insurance Markets and Regulation” offered law faculty participants a \$6,000 honorarium on top of travel expenses, plus an additional \$1,000 for publication in a law review symposium.⁶⁸ More recently, a Searle Center event offered a \$1,200 honorarium to law faculty participants, from which they were expected to cover travel expenses.⁶⁹ In the 1970s, the Olin Foundation “invested” heavily in Henry Manne’s Economics Institute for Law Professors, which funded law professors’ expenses to attend intensive summer seminars

⁶⁷ University of Wisconsin Law School, William H. Hastie Fellowship Program, http://www.law.wisc.edu/grad/fellow_hastie.html (last visited Aug. 9, 2010).

⁶⁸ Call for Papers, Research Symposium on Insurance Markets and Regulation, The Searle Center at Northwestern University School of Law, April 14 & 15, 2008 (on file with author).

⁶⁹ Call for Papers, Searle Center –Third Annual Research Symposium on the Economics and Law of the Entrepreneur, <http://www.ssrn.com/update/lisn/lisnann/ann10002.html> (inviting papers for 2010 conference held at Northwestern School of Law) (last visited Aug. 12, 2011).

(initially lasting several weeks) promoting conservative economic ideas.⁷⁰ Over several decades since that time, numerous law school centers on Law and Economics have provided funding for conferences or workshops, and presumably this support has included substantial funding for individual faculty expenses as well as some honoraria.

Funding for participation in feminist scholarly events is far more limited, depending mainly on general university support and individual faculty resources. During times when general law school funding for faculty conference travel is squeezed by tight budgets, disparities in funding for involvement in scholarly events is likely to have particular impact on the direction and tenor of scholarship. Martha Fineman's Feminism and Legal Theory Project, now at Emory University, stands out for its longstanding, regular support of scholarly workshops and other events building feminist legal theory, but this project generally depends on participants to fund their own travel expenses. Similarly, LatCrit, along with the Society of American Law Teachers, has a well developed annual workshop for junior faculty to cultivate scholarship on race, gender, and sexuality but generally requires that participating faculty obtain support from their own travel budgets or salaries.⁷¹

III. Money for Scholarly Institutions

Funding for scholarly institutions can influence legal theory more broadly and deeply than direct funding for individual scholars' work product, time or conference participation. Although many law schools have a number of research centers focused on a variety of subjects, these rarely have the resources and range of programming typical of Law and Economics centers. Furthermore, although law schools typically host numerous organizations that provide extracurricular educational and scholarly activities on a variety of subjects, the Federalist Society overshadows other groups in its extensive resources and national presence. Even when law schools support individual faculty members' work in feminist legal theory, the relative lack of institutional centers to specifically support this work locates feminism at the margins of most of U.S. law schools.

⁷⁰ MILLER, *supra* note 54, at 66; TELES, *supra* note 2, at 104-08 (discussing the early years of the Institute).

⁷¹ See LatCrit: Latina and Latino Critical Legal Theory, Inc., LatCrit/SALT Junior Faculty Development Workshop, <http://web2.uconn.edu/latcrit/juniorfacultydevwork.php> (last visited Aug. 12, 2011).

A. The Olin Foundation: Institutionalizing Law and Economics

The John M. Olin Foundation's funding for Law and Economics from the mid-1970s through 2005 is perhaps the consummate example of how the flow of money into academia can have diffuse but substantial impact on legal ideas. A sympathetic study of the Olin Foundation identified its "heavy investment" in that approach as perhaps the Foundation's most significant project, noting that the total value of that organization's grants for Law and Economics totaled over \$68 million.⁷² In an earlier (but much more meager) example of philanthropic support that shaped legal theory, the Russell Sage Foundation provided roughly \$5 million dollars from 1961-1976 to promote the social sciences in legal scholarship, helping to initiate the Law and Society movement.⁷³ That movement was also aided by a related grant program for law and social science in the late 1960s and early 1970s by the National Science Foundation (NSF).⁷⁴ Despite the importance of NSF funding for the Law and Society movement, legal scholars largely have remained a marginal part of NSF funding, and the NSF support has had little institutional impact on legal academia.⁷⁵ Analyzing the effect of the Russell Sage funding, John Henry Schlegel concludes that although it helped shape the interests of "a surprising number" of Law and Society scholars, it shaped the long term institutional culture of only one law school (Wisconsin).⁷⁶

⁷² MILLER, *supra* note 54, at 62.

⁷³ JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE* 248-49 (1995) (listing a grant of \$600,000 to the University of Wisconsin; \$465,000 to Northwestern, \$765,000 to a number of schools, followed by a later period of about \$3 million for residencies to promote interdisciplinary training by law scholars).

⁷⁴ *Id.* at 251.

⁷⁵ *Id.* at 252.

⁷⁶ *Id.* at 251. Some of the scholars initially funded by Sage or the National Science Foundation probably did indirectly contribute to an institutional focus on Law and Society later in the 1970s at other law schools. For example, the University at Buffalo's hiring of Marc Galanter, who received funding from the National Science Foundation, contributed to a growing focus of law and social science at that school in the 1970s, but Buffalo as an institution did not receive any systematic outside funding for this focus. Conversation with Professor John Henry Schlegel, June 17, 2010. Nonetheless, the faculty interest in such work contributed to the 1978 establishment of an endowed institutional program for such research from an individual alumni bequest, the Baldy Center for Law and Social Policy. See The Baldy Center for Law and Public Policy, <http://www.law.buffalo.edu/baldycenter/about.htm#history> (last visited Aug. 9, 2010). Law and development research in the 1960s and early 1970s is another example of funding for law scholarship that indirectly fueled left-leaning critiques but that lacked institutional longevity. See Richard Bilder & Brian C. Tamanaha, *Book Review and Note*, 89 AM. J. INT'L L. 470, 473-75 (1995) (discussing *LAW AND DEVELOPMENT, VOL. 2, LAW AND CULTURES* (Anthony Carty ed., 1992), and *LAW AND CRISIS IN THE THIRD WORLD* (Sammy Adelman and Abdul Paliwala, ed., 1993)).

1. *Political intent and impact of law and economics centers*

Olin Foundation's funding stands out among other funding initiatives not just for the far greater amount of money it provided, but also for its wide-ranging impact on numerous legal institutions. Beginning in the mid 1980s, the Olin Foundation launched a major effort to reshape legal academia, expanding its investments far beyond its initial focus on individual fellowships, law faculty seminars, and conservative think tanks.⁷⁷ Over the next two decades, Olin's funding was designed to institutionalize Law and Economics as a central, enduring feature of elite law schools.⁷⁸ For example, in the late 1990s, the foundation gave \$6 million to Harvard; \$1.9 million to Yale Law School, and \$2.5 million to the University of Chicago to enhance Olin centers for Law and Economics at those schools.⁷⁹ Following these grants with even larger donations, in 2003 the Foundation gave \$10 million to Harvard's Law and Economics program, one of the largest single grants in that wealthy school's history.⁸⁰ Also in 2003, Olin gave a million dollars or more to several other elite law schools, along with six-figure donations to Chicago, Columbia, Georgetown, George Mason, Northwestern, University of Southern California, the University of California at Berkeley, and Cornell.⁸¹ After the Olin funding terminated in 2005 (a strategy designed to preserve tight ideological control),⁸² other funders with conservative interests have stepped in to continue support for the Olin funded programs and to build new institutional centers with similar ideologies. For example, the Kauffman Foundation announced a \$10 million "investment" in Law, Innovation and Growth in late 2008.⁸³ Microsoft recently has targeted not only individual faculty fellowships but also broader support for law school programs on technology, such as its one million dollar gift to the Berkeley Center for Law and Technology for a "unique partnership" between the company and the law school, including sponsoring two faculty research projects and organizing discussions between faculty and Microsoft experts.⁸⁴

⁷⁷ TELES, *supra* note 2, at 187-88.

⁷⁸ TELES, *supra* note 2, at 188-190; 200.

⁷⁹ Jon Hanson & David Yosifon, *The Situation: An Introduction to the Situational Character, Critical Realism, Power Economics, and Deep Capture*, 152 U. PA. L. REV. 129, 273-74 (2003).

⁸⁰ See *Olin Gift Expands Law & Economics at HLS*, Harvard Law Bulletin, Summer 1998, available at <http://www.law.harvard.edu/news/bulletin/backissues/summer98/article7.html>. (last visited August 12, 2011).

⁸¹ See Martha T. McCluskey, *Thinking with Wolves: Left Legal Theory After the Right's Rise*, 54 BUFF. L. REV. 1191, 1231 & n.188 (2007) (citing 2006 Olin Foundation web site posting).

⁸² MILLER, *supra* note 54, at 196-201(explaining Olin's plan to limit the fund to the lifetimes of his appointed trustees to ensure strictly adherence to his ideological mission).

⁸³ See Kauffman Foundation press release, *supra* note 55.

⁸⁴ See Berkeley Law, Campaign for Boalt Hall News, *supra* note 50. In response to criticism of Microsoft's funding of the Google Book Settlement Project of New York Law School's Institute

The Olin initiative in Law and Economics also stands out among outside funders of law schools for its explicit (though often strategically couched) purpose of advancing a conservative political movement.⁸⁵ The Olin Foundation consciously adopted this distinctively ideological and instrumental approach to philanthropy when its founder, the chemical industry executive John M. Olin, became outraged at militant student protests demanding African American studies at his alma mater, Cornell University, during the late 1960s.⁸⁶ Olin then decided to channel his ample resources away from general university donations to instead actively target and produce scholars and activists promoting free market capitalism against what he saw as the threat of socialism and other egalitarian movements.⁸⁷ His foundation was designed as a response to a “call to arms” in defense of “capitalism.”⁸⁸ The Olin Foundation’s goal was not to promote economics as an intellectual discipline but to advance a conservative business-oriented ideology.⁸⁹ Executive Director Piereson explained that the Foundation focused on Law and Economics because “it seems neutral but isn’t in fact,” maintaining a “philosophical thrust in the direction of free markets and limited government.”⁹⁰ Piereson also noted the Foundation’s investment choice was based on recognizing that law school deans would be likely to reject funding for conservative approaches to constitutional law, but would be more open to the idea of Law and Economics.⁹¹ The Olin Foundation also embraced Law and Economics because of its potential as a new and far-reaching approach that could take attention and interest away from more left-leaning theoretical approaches such as critical legal theory.⁹²

Continuing this approach, the recent funders of Law and Economics similarly appear to see their mission as fundamentally political rather than academic. The benefactor of Northwestern’s Searle Center embraced the Olin model, designing his major philanthropic project to similarly maintain a strongly conservative political focus with the goal of reducing government regulation of

for Law and Information Policy (headed by a former Microsoft employee) on the grounds that Google is a leading competitor, a company lawyer explained that this funding is simply one of a series of grants to legal academics and that the company does not control the outcome of research funded under such grants. Steven Levy, *Who’s Messing with the Google Book Settlement? Hint: They’re in Redmond, Washington*, *Wired*, March 31, 2009, available at <http://www.wired.com/epicenter/2009/03/whos-messing-wi/> (last visited June 24, 2010).

⁸⁵ TELES, *supra* note 2, at 188.

⁸⁶ MILLER, *supra* note 54, at 31.

⁸⁷ *Id.* at 32-33.

⁸⁸ James Piereson, Opinion, *You Get What You Pay For*, *WALL ST. J.*, July 21, 2004 at A10.

⁸⁹ TELES, *supra* note 2, at 187-191, 199.

⁹⁰ *Id.* at 189.

⁹¹ *Id.* at 188-189; MILLER, *supra* note 54, at 81 (explaining that in contrast to the subjectivity of constitutional law, “law and economics is seen as a more objective discipline”).

⁹² TELES, *supra* note 2, at 199.

business.⁹³ In contrast, while funding from the Russell Sage Foundation and the National Science Foundation contributed to Law and Society scholarship that often had liberal-leaning political implications, the primary focus and practice of these programs was academic, driven by an overarching vision of neutral social science rather than overt political or ideological advocacy.

Olin's Law and Economics initiative was carefully structured to ensure the long run impact of its original conservative intent. Adopting a "venture capitalist" model of philanthropy, the Olin Foundation's staff and trustees actively monitored and adjusted Law and Economics "investments" to ensure "productive" results consistent with the Foundation's conservative agenda.⁹⁴ By providing not just individual grants but a series of major gifts to specific law schools, and by closely reviewing the political implications and impact of each gift in the series, the Foundation maintained pressure against straying too far from the Foundation's political goals. For example, the Olin Foundation withdrew funding from Duke University Law School's John M. Olin Program in Law and Economics after law faculty director Jerome M. Culp criticized what he saw as "white supremacy" in law.⁹⁵ In his discussion of Olin's conservative influence on law schools, Teles describes how Foundation staff reviewing a proposed Olin grant for Georgetown negatively weighed the law school's attempt to discipline a student for revealing some data on admissions criteria for minority law students.⁹⁶

This ideological control has not meant Law and Economics centers operate in lockstep with their funders or with each other. But while some centers have become known for focusing on developing exceptions or modifications to neoclassical economics (like behavioral economics) these represent only a small slice of the full range of economic thought. Despite occasional exceptions, work on gender remains largely absent from Law and Economics programs, and no center has emerged as a leader in scholarship on race, gender, labor, consumer protection, social insurance, or poverty (and, as mentioned above, the Olin Foundation blocked one director's attempt to focus on racial inequality). Consistent with funders' intent, scholarship supported by existing Law and Economics centers has been overwhelmingly sympathetic to or compatible with free-market ideology, providing just enough variation, debate and diversity in policy positions to also uphold the funders' goal of constructing this ideological vision as a neutral or even scientific academic enterprise.

⁹³ See John J. Miller, *Daniel C. Searle, R.I.P.*, NATIONAL REVIEW, Nov. 8, 2007; Kim Dennis, *Commentary, Daniel C. Searle, 1926-2007*, PHILANTHROPY MAGAZINE, 35 (Jan.-Feb. 2008).

⁹⁴ TELES, *supra* note 2, at 187.

⁹⁵ MILLER, *supra* note 54, at 80. Miller asserts the withdrawal of funding was not directly connected to these words but that Culp's views on race were "the symptom of a larger problem" and that the foundation was disappointed in Culp's "racial politics." *Id.*

⁹⁶ TELES, *supra* note 2, at 203.

Furthermore, U.S. legal scholars affiliated with Law and Economics centers appear overwhelmingly white and male.⁹⁷ For example, George Mason's Law and Economics Center lists a number of programs featuring exclusively male speakers or experts,⁹⁸ and no women on a list of experts for its Searle Civil Justice Institute.⁹⁹ Also in 2010, Columbia's Center for Law and Economics Studies lists two women out of twenty-three affiliated faculty¹⁰⁰; Harvard's John M. Olin Center lists one woman out of seventeen closely affiliated faculty¹⁰¹; Chicago's Law and Economics program lists three woman out of twenty-five affiliated faculty;¹⁰² Stanford's John M. Olin Program in Law and Economics center lists one woman out of fourteen affiliated faculty¹⁰³; and Yale Law School's John M. Olin center lists three women out of sixteen faculty concentrating in Law and Economics.¹⁰⁴ Although gender identity should not be taken as a direct reflection of scholarly ideology or interest, lack of gender diversity in workplaces and educational institutions is likely to foster harmful gender stereotypes due to implicit cognitive bias, as Christine Jolls and Cass Sunstein have analyzed.¹⁰⁵ This underrepresentation risks fostering an academic climate prejudiced against

⁹⁷One legal scholar elaborated on this general perception by quipping that the Law and Economics movement has produced a "a generation of Smart White Guys wielding terms like "Pareto optimality" who were uninterested in history, culture, subordination, sociology, psychology, and anything having to do with "distribution." See, e.g., Angela Harris, *Reality-Based Economics*, Posting on SALT Blog, May 20, 2010, <http://www.saltlaw.org/blog/2010/05/20/reality-based-law-and-economics/#more-730>.

⁹⁸ See, e.g., Economics Institute for Judges (scheduled for September 2011), <http://www.masonlec.org/events/economics-institute-for-judges-september> (last visited Aug. 12, 2011) (6 male speakers); "EconFest for Judges!" (scheduled for October 2011) (16 male speakers) <http://www.masonlec.org/econfest-for-judges-2/> (last visited Aug. 12, 2011).

⁹⁹ <http://www.masonlec.org/program/searle-civil-justice-institute/experts/> (listing 8 affiliated experts) (last visited Aug. 12, 2011).

¹⁰⁰ Columbia Law School, Center for Law and Economic Studies: Affiliated Faculty, http://www.law.columbia.edu/center_program/law_economics/affiliated_fac (last visited June 25, 2010).

¹⁰¹ Harvard Law School, The John M. Olin Center: Faculty, http://www.law.harvard.edu/programs/olin_center/faculty/ (visited July 19, 2010).

¹⁰² The University of Chicago, The Law School, The John M. Olin Program in Law and Economics, Faculty, <http://www.law.uchicago.edu/node/984> (last visited Aug. 9, 2010).

¹⁰³ SLS, John M. Olin Program in Law and Economics, <http://www.law.stanford.edu/program/centers/opile/#faculty> (last visited Aug. 9, 2010).

¹⁰⁴ Yale Law School, Administrative Law and Public Policy Faculty <http://www.law.yale.edu/academics/adminlawfaculty.htm> (listing faculty also described as Law and Economics faculty) (last visited Aug. 9, 2010).

¹⁰⁵ Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 981-982 (2006) (summarizing social science research). See also Stephen Benard, In Paik, & Shelley J. Correll, *Cognitive Bias and the Motherhood Penalty*, 59 HASTINGS L.J. 1359, 1363 (2008) (summarizing status characteristics theory explaining how cognitive bias linked to race or gender identity leads to unequal performance evaluations).

feminist scholars or feminist scholarship, particularly in the context of the institutional pervasiveness, prominence, and superior funding for Law and Economics centers, combined with their ideological tendency to promote the idea that market success or failure normally reflects merit. It is doubtful that this underrepresentation is a simple result of lack of women or feminists with interest in economic policy and theory, though it is likely a product of ideological bias against feminism as well as gender bias. When law schools hire faculty to support their Law and Economics programs, for example, they do not appear to have tapped into the well-established pool of feminist economists, where they might find (for instance) scholars like Nancy Folbre (MacArthur “genius grant” winner writing on welfare, family, and education policy) to balance out perspectives of economists whose work focuses primarily on the legal interests of corporations.

The conservative economic ideology, lack of overt gender focus, and overwhelmingly white and male identity in Olin-spawned Law and Economics programs have negative effects beyond simply bypassing feminist scholarship. In addition, these institutional centers also tend to undermine feminist legal scholarship, despite occasional convergences and despite a tendency toward agnostic or even accepting attitudes toward feminism in the abstract.

First, the Law and Economics movement has helped to define overall societal welfare in terms of economic growth presumptively inconsistent with government action focused on promoting equality, leading to the view that most law reforms directed at gender equality are suspect, exceptional, or even anti-intellectual. This general presumption has reached far beyond faculty specializing in commercial law or technical economic analysis. For example, a criminal law scholar, who graduated from law school after Law and Economics had become well established, explained in a 2008 blog discussion of “social justice” that the term refers to a preference for promoting “equitable distribution of wealth” over “maximum growth of wealth.”¹⁰⁶ He then noted that “Any mature person realizes that those are both laudable goals that cannot, unfortunately, be simultaneously realized.”¹⁰⁷ Although this framework creates a “laudable” place for preferring gender equity, that place is constructed as a costly and partial special interest, given the corresponding definition that a preference for economic growth produces universally beneficial and ultimately more cost-effective results in the long run. Furthermore, this informal comment suggests how the Law and Economics framework constructs much of feminist scholarship as intellectually inferior to the extent it is ambitious: the more scholars present gender equity as beneficial to the long run welfare of society as a whole, not just the temporary

¹⁰⁶ Posting of Orin S. Kerr to the Volokh Conspiracy, Dec. 11, 2008, <http://volokh.com/posts/1228966651.shtml>.

¹⁰⁷ *Id.*

special interests of a few, the more it appears immature.¹⁰⁸ A study of the impact on first year law students of faculty emphasizing economic approaches rather than “humanist” or “critical legal” perspectives found that economic approaches led students to be more selfish and to define fairness in terms of cost-benefit calculations of “efficiency” rather than equity.¹⁰⁹

Second, the Law and Economics movement has undermined legal feminism despite appearing to sidestep it because – as its funders intended -- it has provided seemingly scientific cover for a broader conservative cultural agenda opposed to gender equality. Law school institutions and faculty focused on legal economics tend to be associated with libertarian perspectives that are skeptical or even hostile to the overt moral conservatism that more openly opposes feminist legal views. However, cultural conservatism often has been advanced by more technical economic arguments against government-funded social welfare programs and government regulation of business. Indeed, the Olin Foundation designed its funding to further this two-pronged attack on feminism (and other egalitarian movements), consistent with its leaders’ purpose of directing corporate profits to “non-egalitarian scholars and writers.”¹¹⁰ In the early 1980s, after a period of strategic planning, Olin Foundation leaders concluded that free-market ideology and policy is dependent on conservative morality and culture.¹¹¹ Alongside its Law and Economics initiative, the Olin Foundation devoted major funding efforts to scholars and institutions specializing in overt attacks on feminism and feminist law reforms. For example, the Olin Foundation has supported individual critics of feminism such as Christina Hoff Sommers, author of *Who Stole Feminism? How Women have Betrayed Women* (1994) and

¹⁰⁸ Commenting on the success of Law and Economics, former Olin Fellow and George Mason law faculty member David Bernstein notes that it has changed the frame so that any discussion of public interest in the law is likely to be confronted by an economic (public choice) critique about the underlying problematic special interests. David Bernstein, *The Influence of the Olin Programs in Law and Economics and Otherwise*, Posting to the Volokh Conspiracy, Feb. 26, 2008 9:11 am (discussing TELES, *supra* note 2), http://volokh.com/archives/archive_2008_02_24-2008_03_01.shtml#1204019661. However, by distinguishing “efficiency” from other socially beneficial goals, the Law and Economics frame tends to insulate certain (usually conservative) policy positions from such critiques. See McCluskey, *supra* note 81, at 1246-47; Martha T. McCluskey, *Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State*, 78 IND. L.J. 783, 786-89 (2003) (explaining and critiquing this framework).

¹⁰⁹ Raymond Fisman, Shachar Kariv, and Daniel Markovits, *Exposure to Ideology and Distributional Preferences*, (July 19, 2009), available at http://emlab.berkeley.edu/~kariv/FKM_II.pdf.

¹¹⁰ William E. Simon, the Foundation’s longtime director, argued that corporate profits should “rush by the multimillions” to provide intellectual refuges for non-egalitarian scholars and writers. WILLIAM E. SIMON, *A TIME FOR TRUTH* 231 (1978).

¹¹¹ MILLER, *supra* note 54, at 104, 114-15.

conservative cultural advocacy groups such as the Independent Women's Forum and the Center for the Study of Popular Culture.¹¹² Although legal scholarship has not been the primary focus of this explicitly anti-feminist initiative, legal scholars' more "objective" and technical economic arguments against feminist law reforms likely have had more resonance and credibility in a cultural context inflamed by Olin-funded direct attacks on feminism.

2. Benefits of institutionalizing law and economics

The Olin Foundation's funding of Law and Economics has had a major impact on legal theory not just because of its size, scope and political focus, but also because it was designed to go beyond individualized support to focus on building specialized academic institutions. By institutionalizing its ideological vision in law schools, the Olin Foundation provided a wide range of resources to scholars likely to advance its goals. Consider the 2010 description of Harvard Law School's John M. Olin Center for Law, Economics and Business.

The purpose of the center, which is supported by a grant from the John M. Olin Foundation, is to further student understanding of law and economics, promote faculty research in the area, and help make the bar and the public better aware of the economic approach. The center supports a variety of activities including fellowships for students at Harvard Law School, research assistantships, prizes for the best student papers in law and economics, a seminar series in which invited speakers present works in progress to students and interested faculty, curriculum development, conferences, empirical and theoretical research, and the Harvard Law School Discussion Papers in Law and Economics. The center also includes a special-purpose program, the Program on Corporate Governance.¹¹³

In early 2010, this Center's web site listed seventeen affiliated Harvard Law School faculty, and reported thirty-four scholarly papers in its 2009 "faculty discussion" series, as well as a dozen more in a "fellows' discussion papers" series for 2009; about fifteen course offerings, a previous Law and Economics

¹¹² Jennifer L. Pozner, *Rally 'Round the Boys*, FAIR (Freedom and Accuracy in Reporting) News, Sept./Oct. 1999.

¹¹³ Harvard Law School, The John M. Olin Center for Law, Economics and Business, http://www.law.harvard.edu/programs/olin_center/ (last visited March 4, 2010).

Seminar bringing in weekly outside speakers such as Sunstein and Posner for presentations and discussions with faculty and students.¹¹⁴

Stanford Law School's John M. Olin Program in Law and Economics notes on its home page self-description that it "plays a very active role in the Law School—and more generally in the university—in promoting interest in the law and economics movement."¹¹⁵ That program lists 15 affiliated law faculty, and boasts that, since its inception, it has had 75 distinguished scholars presenting to the monthly Law and Economics Seminar, and 257 working papers distributed through the Olin Program Working paper series.¹¹⁶ The John M. Olin Program in Law and Economics at the University of Chicago Law School listed twenty-five affiliated faculty in 2010,¹¹⁷ and also notes that it produces two journals, a working paper series, a workshop series featuring several presentations a month by outside scholars, a lecture series, and several conferences a year.¹¹⁸ The Searle Center on Law, Regulation and Economic Growth reports that over 1,200 scholars, judges, and others attended its programs in 2008-09.¹¹⁹

These lavishly funded Law and Economics centers have shaped the substance of legal theory, first, by systematically educating faculty in one paradigm, encouraging and training them to adopt and develop specific assumptions, methods, and interests and to focus attention on problems particularly salient to conservative or free-market economic interests and ideologies.

These Centers have ensured that new law faculty could become conversant with Law and Economics with minimal individual effort, and that they could take advantage of mentoring opportunities not otherwise available.¹²⁰ Unlike scholars

¹¹⁴ *See id.* (visited March 4, 2010).

¹¹⁵ SLS, John M. Olin Program in Law and Economics, <http://www.law.stanford.edu/program/centers/opile/> (last visited Aug. 9, 2010).

¹¹⁶ SLS, John M. Olin Program in Law and Economics, Recorded & Past Events, http://www.law.stanford.edu/program/centers/opile/#recorded_past_events (last visited Aug. 9, 2010).

¹¹⁷ *See* The University of Chicago, The Law School, The John M. Olin Program in Law and Economics, Faculty *supra* note 101.

¹¹⁸ <http://www.law.uchicago.edu/lawecon/events/conferences> (last visited Aug. 9, 2010); <http://www.law.uchicago.edu/lawecon/events> (last visited Aug. 9, 2010).

¹¹⁹ Geoffrey J. Lysaught, Senior Director Policy, Research, and Communications and Chief of Staff, introduction to the Searle Center (video),

<http://www.law.northwestern.edu/searlecenter/about-us/> (visited June 23, 2010). In June 2010 the executive director and senior staff of the Searle Center moved to George Mason Law School. David Bernstein, Searle Center Directors and Programs Move from Northwestern to George Mason, Posting to the Volokh Conspiracy, June 2, 2010, <http://volokh.com/2010/06/03/searle-center-moves-from-northwestern-to-george-mason/>.

¹²⁰ *See* TELES, *supra* note 2, at 107 (interview with Yale Law Professor Michael Graetz, explaining how early law and economics seminars reduced the "transaction costs" of becoming competent readers and producers of law and economics scholarship).

in other disciplines, law faculty typically do not begin their careers after long periods of graduate study under leading legal scholars, making on-the-job mentoring particularly important.

Second, these institutions likely have encouraged individual faculty interest in economic analysis by providing funding for attractive social and emotional benefits such as generous food and drink at workshops. By creating and supporting a comfortable community of faculty discussing similar ideas and topics, these centers provide support and recognition for faculty to take positions that might otherwise be construed as uninteresting, simplistic, radical, or offensive. Sunstein explains that scholars are more likely to take “extreme” positions after discussions in groups of like-minded colleagues than as individuals or in contexts of diffuse and diverse views.¹²¹ Henry Manne, whose faculty seminars in Law and Economics fueled the movement in the 1970s and early 1980s, understood the importance of community support in scholarly development by requiring faculty to attend the seminars in groups of at least two from the same law school.¹²² As Law and Economics has become institutionalized with centers in virtually every leading law school, scholarship that might otherwise be considered marginal has become normalized, legitimated, and associated with elite professional status, as the Olin Foundation intended.

A third, and particularly important way in which such institutional centers for Law and Economics indirectly shape legal theory is by supporting systems for distributing scholarship, such as working papers series, seminars, conferences, and prestigious peer-reviewed journals. With increased requirements for scholarly production by law faculty, and numerous student law reviews publishing that work, legal academia is awash in writing that is rarely read or cited. Centers that provide funding and staffing for circulating and publicizing scholarship can therefore have substantial impact on the recognition and feedback given to particular publications and works in progress. For example, the Searle Center at Northwestern Law School emphasizes its “communication strategies” designed to bring its research to those who make policy as well as to scholars. Its Research Director and chief of staff explains the Center staff goes “to great lengths to ensure that our work product is distributed through a variety of different channels, including press conferences, policy briefings, and online communications.”¹²³ Furthermore, the academic impact and prestige of these centers is likely enhanced by and interrelated with the concurrent funding by Olin and other activist conservative foundations for the Federalist Society, which has

¹²¹ See Sunstein, *supra* note 3, at 1258-60 (discussing what he calls the lesson of group polarization).

¹²² TELES, *supra* note 2, at 107.

¹²³ Lysaught, *supra* note 118.

extensively supported law school events and scholarly networking systems promoting free market ideas in legal scholarship.¹²⁴

Finally, the institutional approach to Law and Economics funding has helped sustain that movement through changes in individual faculty and administration. Teles describes how the Olin Foundation actively negotiated with law schools to ensure their programs would be well integrated into the institutions, rather than dependent on the interest and availability of individual faculty and deans. For example, the Olin Foundation procured written assurances from Stanford Law School's former Dean Kathleen Sullivan, as well as an agreement from that university's president, that subsequent deans would continue support for the program, with the dean and faculty director also pledging to match a multimillion dollar Olin grant with their own fundraising.¹²⁵ Similarly, in 2000, Olin Foundation staff reported that it had gained the assurance of Yale Law School's administration that it would raise an endowment to make the Olin programs a permanent feature of that school after the termination of Olin funding.¹²⁶

In addition, a number of law school centers have boards of non-academic advisors, primarily drawn from individual businesses and corporate law firms. The extent to which these non-academic boards have the power to influence the content of programming or individual funding decisions is typically obscure. This lack of transparency blurs the lines between independent academic institutions and interest groups. At the same time, outside boards are likely to help such centers avoid internal pressures for dilution or distortion of the donors' original mission, such as efforts to divert funding to pet projects of Deans or faculty, or efforts to shift resources to a broader range of scholarly approaches or to general law school operating expenses.

Finally, funding for long-term institutionalization of Law and Economics has also taken the form of creating an entire law school. The Olin Foundation provided George Mason Law School with "a long string of six-figure gifts"¹²⁷ to transform into an institution specializing in Law and Economics with sharp control at least initially on the interests and composition of the faculty.¹²⁸ Wealthy religious conservatives similarly have founded and developed several law schools specializing in fundamentalist Christian legal ideas in recent years.¹²⁹ Needless to say, no law school advertises a similar focus primarily on women,

¹²⁴ See *infra* Part II(B).

¹²⁵ TELES, *supra* note 2, at 202.

¹²⁶ TELES, *supra* note 2, at 190.

¹²⁷ MILLER, *supra* note 54, at 69.

¹²⁸ TELES, *supra* note 2, at 209-211

¹²⁹ See McCluskey, *Thinking with Wolves*, *supra* note 80, at 1222 (discussing Regents University and Ave Maria School of Law).

gender, or feminist ideas. While some of these schools are relatively marginal within legal education, George Mason has done well in national “rankings” and also has successfully advanced the careers of new scholars focused on conservative Law and Economics.

3. Comparison to law school programs for feminist scholarship

Although feminists have organized admirable systems for distributing, recognizing, and recruiting legal scholarship, these efforts have received far less institutional and material support than the systems for distributing Law and Economics scholarship. Law school centers explicitly targeting feminist legal scholarship are rare. The longstanding Feminism and Legal Theory Project, now at Emory Law School, is one of the few law school institutions aimed at broadly advancing feminist legal theory. Like the Law and Economics centers, this project holds regular workshops and sponsors outside speakers. It has produced a number of book-length collections of feminist legal scholarship that have helped define the field, expand its reach, and disseminate its ideas.¹³⁰ And like the Law and Economics centers, it has created a social and emotional community as well as a professional mentoring network that helps attract, encourage, and sustain scholarly interest. Unlike the Law and Economics centers, however, it does not identify any major sustained outside funding stream and it probably commands far less in terms of general law school resources.

Another rare example of institutionalized support for feminism in law schools is Columbia Law School’s relatively new Center for Gender and Sexuality Law, which supports a wide range of events for scholars and students similar to Law and Economics centers, listing eleven affiliated faculty in 2010.¹³¹ The Center works with the Columbia Journal of Gender and the Law to publish some scholarship from the Center’s events,¹³² it sponsors a new online journal

¹³⁰ See, e.g., *AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* (Martha A. Fineman and Nancy Sweet Thomadsen, eds., 1990); *FEMINISM, MEDIA AND THE LAW* (Martha A. Fineman & Martha T. McCluskey, eds., 1997); *FEMINISM CONFRONTS HOMO ECONOMICUS* (Martha Albertson Fineman & Terence Dougherty 2005). It also circulates drafts of workshop papers among participants and other interested faculty, and posts workshop programs on its web page and newsletter.

¹³¹ See Columbia Law School, Center for Gender and Sexuality Law, http://www.law.columbia.edu/center_program/gendersexuality (last visited Aug. 9, 2010). The Columbia Center advertises its program as the first and only program with this subject focus in U.S. law schools, which even if not an entirely fair representation underscores the relatively scarce institutional presence of feminist theory or gender studies in law schools compared to law and free-market economics.

¹³² A 2010 symposium on the work of Judith Butler is one example. Gender and Sexuality Law Blog, Columbia Law School, <http://blogs.law.columbia.edu/genderandsexualitylawblog/files/2009/10/Butler-Flyer.pdf>.

specifically for student scholarship,¹³³ and a blog written by its faculty directors includes comments on scholarship connected with the Center.¹³⁴ Although valuable in feminist circles, these distribution systems generally lack the resources, prestige and visibility of the faculty-run and professionally staffed journals affiliated with Chicago's Law and Economic Center, for example, or the professionally staffed public relations system of the Searle Center. Furthermore, these existing organized efforts to circulate feminist scholarship are disadvantaged compared to similar efforts by Law and Economics centers, simply because the relatively large number of Law and Economics centers (along with Federalist Society programs discussed below) create a ready-made national audience that facilitates repeated presentations of the same paper to numerous elite law school faculty.

Feminist legal theory also has an institutionalized presence in some law schools through centers focusing on particular subject areas related to gender and law. Nonetheless, these tend to be targeted especially to policy advocacy and to legal practitioners rather than to legal scholarship and theory. For example, the WorkLifeLaw Center at U.C. Hastings advances research and advocacy particularly oriented to litigation and legislation on work and family issues.¹³⁵ Cornell Law School's Avon Global Center for Women and Justice holds events and supports student research and an (unpaid) fellowship particularly aimed at judges and practicing lawyers.¹³⁶ Finally, some law school institutes covering a broad range of scholarly subject areas have provided support for feminist research, but these general funding streams tend to be limited to occasional conferences or individual research projects and are not geared to long-term support for developing a particular strand of legal theory and practice.¹³⁷

In contrast to Law and Economics centers, feminist programs tend to lack substantial staffing beyond individual law faculty, other than basic clerical support. Northwestern Law School's Searle Center, for example, has supported a former law professor as full-time executive director along with three other senior

¹³³ Gender and Sexuality Law Online, <http://blogs.law.columbia.edu/gslonline/about-2-2/>. (last visited June 24, 2010).

¹³⁴ Gender and Sexuality Law Blog, Columbia Law School, <http://blogs.law.columbia.edu/genderandsexualitylawblog/>.

¹³⁵ WorkLife Law, A Center of UC Hastings College of Law, <http://www.worklifelaw.org/AboutUs.html> (last visited Aug. 9, 2010).

¹³⁶ Cornell University Law School, Avon Global Center for Women and Justice at Cornell Law School, <http://www.lawschool.cornell.edu/womenandjustice/aboutus/> (last visited Aug. 9, 2010).

¹³⁷ See, e.g., the Baldy Center for Law and Social Policy, University at Buffalo Law School; the University of Wisconsin Law School's Institute for Legal Studies, and Yale Law School's Oscar M. Reubhausen Fund.

directors, each supervising a team of other staff.¹³⁸ The Feminism and Legal Theory Project at Emory and the Columbia Center for Gender and Sexuality both appear to rely on one or two law faculty members to manage those programs on top of their general faculty responsibilities, which typically would include not just teaching and scholarship but general law school administrative service. In general, without substantial external funding and internal staffing, institutional support for feminist scholarship is likely to primarily depend on the extraordinary volunteer efforts of individual feminist faculty likely to be already heavily burdened by other work and personal demands.¹³⁹

This relative lack of specialized staffing particularly disadvantages dissemination of scholarship from feminist and general scholarly centers. Planning and running scholarly events can require substantial sacrifices in faculty members' individual scholarly production or personal time. Although the internet has in some ways increased the possibilities for low-cost dissemination of scholarly ideas, maintaining blogs and websites well also takes substantial time and skill. The Feminist Law Professors blog run by Ann Bartow and Bridget Crawford,¹⁴⁰ and the reproductive rights blog for law professors run by Caitlin Borgmann,¹⁴¹ depend largely on uncompensated work by law faculty on top of their regular faculty responsibilities with little institutional support or direct reward. In contrast, Northwestern's Searle Center team of paid staff produces regular email reports on its sponsored scholarship and events, and develops multimedia presentations for distribution not only to academics but to media outlets.

Finally, law school institutions promoting feminist scholarship tend to lack comparable insulation from individual and institutional change. Without ongoing outside funding and monitoring from ideologically focused donors and advisory boards, scholarly centers are likely to be highly vulnerable to the shifting interests and resources of law school faculty, deans and university administrations. As law schools in general become more dependent on attracting wealthy donors and on

¹³⁸ Northwestern Law, Searle Center on Law, Regulation and Economic Growth, Center Leadership, <http://www.law.northwestern.edu/searlecenter/about-us/index.cfm?ID=10> (last visited June 23, 2010); see also Bernstein, *supra* note 118 (reporting the leadership's move to George Mason).

¹³⁹ Adding to the relative time pressures on institutional service, feminist law faculty are probably less likely than other law faculty to rely on a full-time homemaking spouse or partner for their personal and family care needs. See Mary Anne Case, *How High the Apple Pie? A Few Troubling Questions About Where, Why and How the Burden of Care for Children Should be Shifted*, 73 CHI-KENT. L. REV. 1753, 1763-64 & n.30 (2001).

(noting that she was the only one of her school's five junior faculty without an at-home wife).

¹⁴⁰ See *supra* note 1.

¹⁴¹ Reproductive Rights Prof Blog, http://lawprofessors.typepad.com/reproductive_rights/ (last visited Aug. 9, 2010).

promoting their reputation among prominent judges, deans or law firms, some may tend to decrease internal support for programs likely to appear controversial, radical, or peripheral to the concerns of business.

B. The Federalist Society: Organized Conservatism in Law Schools

The Federalist Society represents a second major institutional funding initiative that has had major impact on U.S. legal academia and scholarship over the decades since its beginning in 1982 as a law student group. The Federalist Society now has student chapters in every accredited U.S. law school, along with lawyers' groups across the country, and (since 1999) a faculty division; together these groups served over twelve thousand dues-paying national members in 2009.¹⁴² The Federalist Society's unabashedly ideological and political purpose is to prioritize and restore "traditional values" and "individual liberty" through "a conservative and libertarian intellectual network."¹⁴³ Though this purpose may overlap with some forms of feminism, the group's mission, theory, and practice generally works against many of the critiques and policy reforms advanced by feminist legal scholarship.

Like Law and Economics programs, the Federalist Society has reshaped legal theory by institutionalizing support for conservative intellectualism. It has infused well over \$40 million¹⁴⁴ since the mid-1980s in building what founder and longtime chairman Steven Calabresi explains as a "conservative university without walls."¹⁴⁵ Far exceeding the resources of feminist or left-leaning student or faculty groups, leading conservative foundations helped the group amass an annual budget of over a million dollars within four years of its founding.¹⁴⁶ In the 1990s, its annual spending more than doubled and then continued to increase to more than seven million dollars by 2005¹⁴⁷ with revenue reaching ten million dollars in 2008.¹⁴⁸ Underscoring the connections between Law and Economics and more overtly conservative ideology, the Olin Foundation developed a close relationship with the group's leaders¹⁴⁹ and gave the Federalist Society over \$5.5

¹⁴² Fed. Soc'y 2009 Ann. Rep., *supra* note 44, at 36.

¹⁴³ See The Federalist Society for Law and Public Policy Studies, About Us: Our Purpose, <http://www.fed-soc.org/aboutus/> (last visited Aug. 9, 2010).

¹⁴⁴ TELES, *supra* note 2, at 148, figure 5.1.

¹⁴⁵ TELES, *supra* note 2, at 164.

¹⁴⁶ *Id.* at 148; Jason DeParle, *Debating the Subtle Sway of the Federalist Society*, N.Y. TIMES, Aug. 1, 2005 (crediting support from the Olin Foundation as vital to the Federalist Society's success).

¹⁴⁷ TELES, *supra* note 2, at 148.

¹⁴⁸ Fed. Soc'y 2009 Ann. Rep., *supra* note 44, at 36 (showing a slight decline to about nine million in 2009).

¹⁴⁹ TELES, *supra* note 2, at 151.

million, including support not just for its namesake fellowships but also for the group's initial start-up costs and general operating expenses over several decades.¹⁵⁰

Reaching far beyond individual fellowships, the Federalist Society (like the Law and Economics programs) is grounded in an understanding of *community* as the foundation of giving power to ideas.¹⁵¹ The longstanding and generous funding for law student chapters' operation and programming has ensured that conservative ideas and policy positions are a familiar part of legal education at virtually all law schools. Moreover, the lavish resources for student group organizing combined with parallel resources for organizing lawyers and judges has meant that conservative ideas and arguments are tied to concrete material rewards for students, from dinners and study materials to a jobs pipeline linked to leading institutions of government, the judiciary, and the private bar.¹⁵² While other law school organizations typically are dependent on limited general law school funding for outside speakers' time and travel, the Federalist Society spends generously (over one and a half million dollars in 2009)¹⁵³ to bring conservative speakers to law schools, with over 1,150 law school events in 2008-09 reaching over 70,000 people and highlighting several Supreme Court justices (among other prominent leaders). One study attributed Harvard Law School's rightward shift over the last several decades to the Federalist Society's "veritable empire" shaping the political and intellectual culture of that school.¹⁵⁴ During 2004-05, for example, Harvard's Federalist Society organized fourteen events with outside speakers, monthly colloquia on current legal issues, eleven student-faculty lunches, and the Federalist Society's annual National Student Symposium.¹⁵⁵ In addition to these more scholarly events, Harvard's student chapter in the mid-2000s typically organized a barbeque for new students, monthly parties, a women's dessert party, an alumni reception, community service activities, career development panels, and a system for sharing course outlines.¹⁵⁶ The national organization's ample funding also focuses on rewarding and training students to become chapter leaders, bringing over two hundred law students to an annual summer leadership session in Washington, D.C., where they not only learn skills

¹⁵⁰ MILLER, *supra* note 54, at 93, 201.

¹⁵¹ TELES, *supra* note 2, at 164, (quoting comments by founders and ongoing officers Steven Calabresi and Gary Lawson).

¹⁵² George W. Hicks, Jr., *The Conservative Influence of the Federalist Society on the Harvard Law School Student Body*, 29 HARV. J. OF L. & PUB. POL'Y 623, 707 (2006).

¹⁵³ Fed. Soc'y 2009 Ann. Rep., *supra* note 44, at 33.

¹⁵⁴ Hicks, *supra* note 151, at 707.

¹⁵⁵ *Id.* at 707-08.

¹⁵⁶ *Id.* at 707-08.

and develop their peer networks but also enjoy social events with national leaders such as Supreme Court Justice Clarence Thomas.¹⁵⁷

As the Federalist Society's faculty brochure explains, its extensive resources for student events ensure a wealth of opportunities for legal scholars to disseminate and develop their work.¹⁵⁸ For example, University of Pennsylvania Law Professor Stephanos Bibas presented a paper on originalism and formalism in criminal procedure to student chapters at twenty-eight different law schools.¹⁵⁹ Further opportunities for publicizing scholarly ideas come from the group's well-supported Lawyer's Division, which spent over six hundred thousand dollars in 2009¹⁶⁰ to reach over 26,000 lawyers with events that often featured law professors.¹⁶¹ This division includes a special chapter for Congressional staff, connecting them with law faculty and other conservative legal experts for special educational seminars funded with help from the Heritage Foundation.¹⁶²

In addition to tailoring services to students and the legal profession, the Federalist Society has accelerated its structural support for conservative legal theory through its Faculty Division. By scheduling the Division's main annual conference in conjunction with the annual meeting of the Association for American Law Schools (AALS), this Division helps individual faculty participants save travel costs and time. This event includes not just the usual scholarly panels, lectures and debates along with networking and socializing, but also the opportunity for feedback on individual works-in-progress as well as a special competition allowing selected junior faculty to have their work featured and reviewed by a panel of leading scholars.¹⁶³ In addition, the Faculty Division recently expanded its programming to feature a series of national colloquia on particular subject areas, a separate national conference for mentoring junior faculty, a national job talk workshop to groom prospective faculty members, and an academic career program for law students.¹⁶⁴

Finally, the Federalist Society devotes extensive resources to publicizing individual faculty scholarship far beyond standard academic and professional

¹⁵⁷ Fed. Soc'y 2009 Ann. Rep., *supra* note 44, at 3; *see also* Amy Bach, *Moving on Up with the Federalist Society*, THE NATION, Sept. 13, 2001 (describing a first year law student drinking with Federal Circuit Court Judge Alex Kozinski, known for screening future clerks for Supreme Court Justice Kennedy).

¹⁵⁸ The Federalist Society Faculty Division Membership and Benefits (undated brochure on file with author).

¹⁵⁹ Curriculum vitae of Stephanos Bibas listed on University of Pennsylvania Law School web site, <http://www.law.upenn.edu/cf/faculty/sbibas/cv.pdf> (last visited June 23, 2010).

¹⁶⁰ Fed. Soc'y 2009 Ann. Rep., *supra* note 44, at 33.

¹⁶¹ *Id.* at 5.

¹⁶² *Id.* at 8-9.

¹⁶³ *Id.* at 16.

¹⁶⁴ *Id.* at 10.

presentations and journals. A media outreach program connects faculty specialists to the media and to members of the public.¹⁶⁵ As part of an extensive effort to “leverage technology,” the organization’s web site promptly posts scholarly content from its events in downloadable pdf files or in audio and video form, and ensures that all of its publications are available electronically; much of this content also goes on the organization’s YouTube and Facebook sites.¹⁶⁶ In addition, the national Federalist Society supports a scholars’ database providing individual webpages that link to all the publications and recorded events for each scholar.¹⁶⁷ The web site also distributes several special Federalist Society podcast series featuring commentary and debates by scholars and others.¹⁶⁸ Furthermore, the Federalist Society’s publications include a White Paper series on current policy issues, a glossy magazine with three issues a year, an online scholarly journal with three issues a year, as well as several more practice-oriented newsletters.¹⁶⁹

Nothing remotely comparable to this comprehensive scholarly development and distribution system has been available for feminist legal scholarship. The Women in Legal Education section of the AALS is an example of a gender-related national scholarly organization that regularly sponsors panel presentations at the AALS annual meeting, along with an annual breakfast and an occasional newsletter listing recent publications. However, this group has far narrower scope, relies on the volunteer work of individual law faculty, appears to command no outside resources, is not connected to students, local organizations, professionals or politicians, and lacks the overt and unrestrained ideological freedom and focus of the Federalist Society, whose leadership has remained in the hands of a small group of founders.¹⁷⁰ Furthermore, the standard budget allocation for AALS sections is \$900.¹⁷¹

More comparable is the American Constitution Society (ACS), founded in 2001 explicitly as a liberal counterweight to the Federalist Society. The ACS’s vision generally includes strong support for equality and economic regulation, and several influential feminist scholars have been active in the organization (such as Dawn Johnson and Reva Siegel). The ACS sponsors an array of debates, panels and lectures through chapters at most U.S. law schools and a somewhat smaller network of lawyers’ chapters. Like the Federalist Society, the ACS provides

¹⁶⁵ Faculty Division Brochure, *supra* note 157, at 6-7.

¹⁶⁶ Fed. Soc’y 2009 Ann. Rep., *supra* note 44, at 26.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 25-26.

¹⁷⁰ TELES, *supra* note 2, at 161 (reporting that through mid 2000s the group has had the same full-time president and a board of directors comprised of the original founders and early leaders).

¹⁷¹ AALS Section Handbook, Attachment A Section Budget Request for FY 2010-11, available at <http://www.aals.org/documents/sections/SectionAttachments/AttachmentA.pdf>.

impressive social, educational, and career opportunities through a national conference structured to connect law faculty and students with leaders in government and the legal profession, and it supports a web site, journal and other resources to help disseminate scholarship.¹⁷² However, with a substantially smaller budget, it lacks the programming muscle and breadth of the Federalist Society.¹⁷³ It offers no paid fellowships to law faculty, and lacks comparable structures to organize, support, and distribute legal scholarship. It has no separate faculty division, no separate law faculty events or mentoring systems, and no specific programs for aspiring law faculty or junior scholars. Though law faculty are well represented among the group's leaders and speakers, and although the organization distributes a law journal and some books on constitutional principles,¹⁷⁴ the annual convention and chapter activities appear to be largely attended by and focused on practicing professionals and policy makers.

Moreover, because the Federalist Society is one organization among many sponsored by activist conservative foundations as part of a broader strategy to reshape legal academia and public policy, its speakers and events are reinforced by an academic, legal and political culture saturated with critiques of liberal support for affirmative action, government health insurance, workers' rights, abortion, public education, and social welfare. Although the ACS draws on the expertise of many liberal advocacy groups, including some focused specifically on women's rights, these groups typically offer few independent resources for supporting or distributing scholarship. Despite its important resources, ACS has not yet had comparable power to shape legal theory, legal education or the general public debate over law and policy.¹⁷⁵ Similarly, other national law organizations that tend to be supportive of feminism, like the National Lawyers Guild or the American Civil Liberties Union, focus even less on law schools, law faculty, and legal scholarship, though these certainly have contributed to shaping the intellectual debate on many issues over time. No national organization currently focuses specifically on promoting feminism in legal academia in the U.S. In contrast, since 1974, Canadian law students, faculty, and advocates have been organized through the non-profit National Association of Women and the Law, which has successfully advanced a number of major law reforms, in addition to

¹⁷² American Constitution Society for Law and Policy, <http://www.acslaw.org/> (last visited Aug. 9, 2010).

¹⁷³ Lydia DePillis, *Et Tu, Scalia? Dispatch from the American Constitution Society Convention*, SLATE, June 22, 2009 (reporting the ACS had a 2007 budget of \$3 million, compared to \$11 million spent by the Federalist Society).

¹⁷⁴ See, e.g., GOODWIN LIU, PAMELA S. KARLAN, AND CHRISTOPHER H. SCHROEDER, KEEPING FAITH WITH THE CONSTITUTION (2010).

¹⁷⁵ See DePillis, *supra* note 172 (noting that liberal and progressive leaders still discuss the constitution using federalist arguments, despite attempts by ACS to offer alternative principles for constitutional interpretation).

sponsoring working groups, forums, biennial national conventions, and (more recently) research grants for feminist scholarship.¹⁷⁶

IV. What Can Feminists Do?

The pervasive influence of interested money in legal theory challenges us to think about how to create and sustain academic institutions where ideas can compete -- and coalesce -- on a broader, deeper, and different basis than their appeal to those who can pay most extravagantly for intellectual legitimation. Indeed, Steven Teles argues that conservative investments in legal theory have been successful in part by building institutions structured to foster genuine intellectual debate and learning insulated from immediate instrumental interests. Despite this degree of openness, those institutions nonetheless have been carefully controlled to further particular interests over the long run, by cultivating and sharpening conservative ideological commitments and by redefining the standards for legal intellectualism.

A. Challenging Conservative Intellectual Neutrality

The problem of nonacademic money for legal theory is not that ideas tied to nonacademic funding or political movements are necessarily intellectually suspect, or that all views deserve equal resources. Instead, the primary problem is that vastly unequal resources in legal academia has served to entrench questionable conservative premises and commitments as fundamental to “common sense, intellectual seriousness, responsibility, professionalism,” while portraying opposing ideas as “off the wall.”¹⁷⁷ In his study of the conservative legal movement’s successful challenge to liberal control of legal academia over the last half century, Teles concludes that ideas can play a major role in both sustaining and reversing comprehensive political power.¹⁷⁸ Teles underscores the importance of conservative funders’ long term strategy of harnessing law schools’ power to redefine professionalism by changing the boundaries of “the kinds of ideas that are held by respectable lawyers”¹⁷⁹.

Feminists daunted by the barriers of vastly unequal resources can learn and perhaps take heart from Teles’s conclusion that a particular point of vulnerability for dominant regimes is precisely that ability to entrench certain ideas as neutral professionalism. According to Teles, legal conservatism’s

¹⁷⁶ See National Association of Women and the Law, Policy Research Grant Recipients, <http://www.nawl.ca/en/component/content/article/461-grant-recipient-announcement> (last visited Aug. 9, 2010).

¹⁷⁷ *Id.*

¹⁷⁸ TELES, *supra* note 2, at 266.

¹⁷⁹ *Id.* at 267-68.

success shows that powerful regimes remain vulnerable to the clever, committed and persistent activism by individual intellectual entrepreneurs.¹⁸⁰ Henry Manne's summer seminar in legal economics, Richard Posner's sweeping Law and Economics textbook, and John M. Olin's creative approach to corporate philanthropy have each advanced the Law and Economics movement in a somewhat unfavorable intellectual climate by directly and strategically challenging rather than accommodating the central assumptions and norms of liberal legal academia.

Teles's analysis suggests that feminist scholarship similarly should not shy away from ambitious efforts to radically rethink the premises taken as neutral and normal in conservative and centrist law. Furthermore, it suggests the value of scholarship that directly challenges claims that conservative ideas represent objective, uncontested, or universal truth, whether grounded in market forces and supposedly scientific economic principles, in purported constitutional originalism or literalism, or in evolutionary biology or divine creation. In addition, feminists should confront and subject to intellectual scrutiny the presumed neutral professionalism of the institutional structures supporting those ideas by demanding more transparency about outside funding of legal scholarship. Efforts to increase disclosure should extend not only to the amount and criteria of nonacademic funding for individual publications, but also to outside-funded institutions operating within law schools. For example, we should explore whether academic integrity requires more complete and public disclosure of the identities, specific economic interests, and degree of control of outside donors and advisors to academic centers.¹⁸¹ This discussion of transparency should extend to scholarly events sponsored by student groups such as the Federalist Society chapters.

Ironically, feminist legal theory's relative independence from outside funding can make it more likely to be marginalized as narrowly political or insubstantial compared to Law and Economics or even compared to many of the ideas associated with the Federalist Society. Even among nonconservatives, feminism in law may be identified with outcome-oriented advocacy rather than rigorous intellectual inquiry in part because many of the institutions most closely and specifically associated with feminism are primarily practical and political rather than scholarly in focus.

¹⁸⁰ *Id.* at 269-74.

¹⁸¹ Some forms and contexts of disclosure might have costs that should be carefully considered, but which are beyond the scope of this essay's narrower aim of putting the issue on the table for closer analysis. See Katherine Franke, *Public Shaming as the New Revolt of the Homosexual*, Posting to Gender and Sexuality Law Blog, Nov. 1, 2009, <http://blogs.law.columbia.edu/genderandsexualitylawblog/2009/11/01/public-shaming-as-the-new-revolt-of-the-homosexual/> (criticizing same-sex marriage advocates' disclosure names of persons supporting California's Proposition 8).

Teles's emphasis on conservative intellectual activists' power to challenge the previously dominant liberal intellectual regime understates the extent to which their entrepreneurial success depended on extensive material support from powerful and wealthy institutions insulated against ideological change. The history of feminist legal theory reveals plenty of creative and energetic entrepreneurs who have lacked material and institutional support comparable to Law and Economics entrepreneurs. Like Henry Manne in Law and Economics, Martha Fineman has mentored hundreds of developing legal scholars and has created the intellectual vision, community, and institutional framework vital to sustaining a scholarly movement. But unlike Manne, Fineman has not received a specialized law school to run or regular six-figure checks from corporate donors to spend on advancing feminism in legal theory. For another example, Catharine MacKinnon did not secure a tenure track law faculty position until many years after her writings helped establish feminist jurisprudence as an exciting and far-reaching movement.¹⁸² In contrast, before he produced his work galvanizing the Law and Economics movement, Richard Posner had been recruited to the law faculty of the University of Chicago, where the Volker Fund had already institutionalized a "safe space" for conservative Law and Economics through a network of free-market oriented faculty, fellowships and a specialized journal.¹⁸³

The rise of legal conservatism underscores the importance for feminism of strategically focusing both theory and resources on building comparable *institutions* where risk-taking intellectualism can flourish, based on an understanding of theory as the product of organization, access to information, marketing and community as much as individual intelligence and initiative. Several institutional gaps in support for feminist legal theory offer fertile ground for investment of scarce resources.

B. Strengthening Institutions for Feminist Theory

First, Teles attributes conservatives' success in legal academia to their development of organizations where repeated interactions over a long period create relationships fostering trust, commitment, and learning (both intellectual and institutional) among scholars and advocates.¹⁸⁴ Fineman's Feminism and

¹⁸² Frances Olsen, *Feminist Theory in Grand Style* (book review), 89 COLUMB. L. REV. 1147, 1149 (1989); see also Leslie Bender, *For Mary Joe Frug: Empowering Women Law Professors*, 6 WISC. WOMEN'S L.J. 1, 6-7 (1991) (discussing gender inequality in tenured law faculty positions and citing difficulties faced by several leading feminist scholars).

¹⁸³ See TELES, *supra* note 2, at 91-98 (discussing the establishment of law and economics at Chicago); 271 (summarizing how Chicago worked as an "abeyance structure" protecting and nurturing free market thought in a generally hostile academic environment).

¹⁸⁴ See TELES, *supra* note 2, at 272 (commenting on the value of early Law and Economics seminars and conferences as well as the Federalist Society).

Legal Theory project and the LatCrit annual meeting are examples of scholarly organizations that have fostered long term conversations and strong personal and professional connections among a group of scholars large enough to have diverse views and professional connections yet structured to encourage personal connection and shared commitment. However, many other venues for developing feminist scholarship are not so conducive to sustained and strong connections, such as one-time events sponsored by individual law schools, or large gatherings of scholars with diffuse interests and approaches (like the annual meetings of the Law and Society and the AALS). The conservative example suggests that feminist academics might benefit from concentrating resources on scholarly gatherings and exchanges aimed at building longer term communities and lasting institutions, not just individual publications.

Second, conservatives have understood that, over the long run, reshaping legal *theory* is a cost-effective and practical way to improve outcomes on specific law reform projects. Existing national organizations providing long term support for feminism could go further to follow the lead of the Federalist Society and the Law and Economics movement in developing more institutional support for progressive legal *theory*. For example, the ACS could target more programs and events focused on scholarship and on mentoring junior faculty, and it could expand its advocacy to address the conservative institutional pressures in legal academia, including issues such as rankings reforms, transparency about outside funding and public support for education. The Society of American Law Teachers could expand its excellent programs on law teaching, academic freedom, and law school diversity to more specifically target development of progressive scholarship. Advocacy groups focused on particular issues could follow the lead of the Center for Reproductive Rights to support scholarship and to build long term ties with feminist faculty and feminist law school programs.

Third, resources for feminism should be targeted to increase material support for the work of initiating and administering scholarly institutions. The relative lack of institutional and individual resources means that intellectual organizing work is particularly costly for feminist entrepreneurs. Rather than simply focusing on grants for research, a wish list for feminist philanthropy should include grants to support (for instance) institution-building and leadership development for explicitly feminist academic programs.

Finally, the success of conservative legal theory underscores the importance of building institutions for broadly disseminating scholarship not just to academics but to the popular media and to advocacy groups, as well as to political and economic leaders. Feminist academic programs need better funding for professional staff and other resources to use various media to distribute scholarship to diverse audiences, particularly as book publishers cut back on marketing. Teles notes that liberal legal ideas are particularly cut off from

popular discourse and from grassroots activists.¹⁸⁵ Particularly fruitful would be support for a long term internet presence that could widely distribute feminist legal ideas and connect individual scholars, events, and publications through online networks and databases similar to those of the Federalist Society. Feminist academic institutions should also be better structured to bridge hierarchical institutional divides that have often isolated legal theory from the work of the many excellent law school clinics involved in feminist advocacy (in poverty law, domestic violence, and human rights, for example).

Though feminist philanthropists are unlikely to match the wealth of John M. Olin, both small and large donors can follow his lead in targeting money and service to explicitly feminist and progressive rather than to general academic and professional programs. The conservative example shows that intellectual and practical credibility and power does not come from distancing legal theory from ideological commitments, but instead depends on sharpening, animating, and above all institutionalizing strong political passions and perspectives in legal theory. More than conservatism, feminist legal theory tends to be (and should remain) transparent about its commitments and perspectives. Increased nonacademic funding for openly feminist scholarly institutions will tend to contribute to rather than obscure and confine robust intellectual debate. Feminist ideas can go further to upend the power of money and privilege in law if feminist scholars and advocates both harness and challenge the material foundations of intellectual power in law.

¹⁸⁵ See TELES, *supra* note 2, at 278 (contrasting liberal and conservative weaknesses).