Cornel West, Meet Richard Posner: Towards a Critical-Neoclassical Synthesis

Francisco E. Guerra-Pujol

Follow this and additional works at: http://scholarship.law.berkeley.edu/blrlj

Recommended Citation

Link to publisher version (DOI)
http://dx.doi.org/https://doi.org/10.15779/Z384361

This Article is brought to you for free and open access by the Law Journals and Related Materials at Berkeley Law Scholarship Repository. It has been accepted for inclusion in Berkeley La Raza Law Journal by an authorized administrator of Berkeley Law Scholarship Repository. For more information, please contact jcera@law.berkeley.edu.
Cornel West, Meet Richard Posner: Towards a Critical-Neoclassical Synthesis

Francisco E. Guerra-Pujol*

Do not ask who I am and do not ask me to remain the same . . . Let us leave it to our bureaucrats and our police to see that our papers are in order.

I.
INTRODUCTION

Imagine Harvard professor Cornel West stuck in the same elevator with Judge Richard A. Posner. One is an African-American, a progressive champion of racial and economic equality, and a critical scholar of race, politics, and culture, while the other is of Jewish descent, a libertarian champion of free markets, and the intellectual godfather of 'law and economics'. Both scholars have published a prolific corpus of writings and are at the forefront of two great intellectual movements: critical theory and law and economics. So what on Earth would these two leading public intellectuals say to each other? At the risk of sounding a bit irreverent, permit me to quote my favorite cartoon character: jay carumba!

I mention Judge Posner and Professor West in particular to personify the deep intellectual divide between neoclassical economics (of which 'law and economics' is an offshoot) and critical theory. Indeed, this gulf is readily apparent in many of the papers published in this LatCrit X Symposium issue. Furthermore, this distrust is mutual. Just as most critical scholars share a profound antipathy towards orthodox economics, many neoclassical economists and mainstream lawyer-

* Associate Professor, Catholic University of Puerto Rico School of Law. I am grateful to the many critical scholars who helped me develop the ideas in this paper. I am especially indebted to the organizers of the LatCrit X conference held in San Juan, Puerto Rico in October 2005, who invited me to present a rough sketch of this paper.

2. 'Prolific' is probably an understatement. At last count, Professor West has written or co-authored over seventeen books, many of them best-sellers, while Judge Posner has fathered a plethora of books, judicial opinions, and scholarly papers. A complete bibliography of Posner's academic publications appears at www.law.uchicago.edu/faculty/posner-ri/publications.html.
3. With all due respect to Matt Groening, the creator of 'The Simpsons', the correct spelling of carumba in Spanish is caramba, an interjection meaning 'good heavens!' or 'good grief!' See, RAQUEL LÓPEZ VARELA, DICCIONARIO ESPAÑOL-INGLES 78 (Editorial Everest) (2002).
4. Critical theory includes feminist scholarship, critical race theory, and 'LatCrit' theory, amongst other things. In theory, the gulf between critical theory and economics should be less narrow in the legal academy. After all, their counterparts in legal theory—critical legal studies and 'law and economics'—both evolved from a common ancestor, American Legal Realism. Angela Harris, Lecture at LatCrit X Conference (Oct. 9, 2005). Nevertheless, like Darwin's finches, it appears that both legal movements have evolved into radically different species.
5. See, for example, the papers by Carmen González, and Steven Ramirez in this issue.
economists in turn disdain progressive critical theory and its heterodox variants in economics. There is thus no love lost between critical theory and orthodox economics.

Perhaps these mutual misgivings are warranted. After all, unbridled markets do tend to produce gross inequalities in the distribution of wealth and power\(^6\) while unbridled governmental intervention tends to exacerbate discrimination, corruption, and political oppression (just as central planning has yet to produce a single, workable ‘workers’ paradise’).\(^7\) While this mutual distrust may be understandable it is certainly not productive. At the risk of sounding like an intellectual masochist, I sincerely wish the Cornel Wests and Richard Posners of the world would start talking to each other more often.\(^8\) In lieu of such a fictional conversation, however, I have decided to put in my own two cents' worth by writing this conceptual paper.

Scholars in both traditions appear to have disregarded Foucault's dictum, quoted at the top of my paper, clinging on to one identity (as critical theorists) or the other (as orthodox economists or lawyer-economists, as the case may be). In this paper, however, I shall disregard these labels and attempt to establish a tentative synthesis between neoclassical economics and critical theory. Though such a synthesis might appear quixotic, impracticable, and counter-intuitive, the two intellectual movements are not necessarily as far apart as commonly believed, for my thesis is that the basic ideas of orthodox economics are, in principle, consistent with the progressive anti-subordination and community-building goals of critical theory.

Before I proceed, it is imperative that I distinguish my approach from the intellectual movement known as ‘socio-economics’, which in turn is part of a broader movement referred to as ‘heterodox economics’.\(^9\) My proposal is not the same thing as ‘socio-economics’ or heterodox theory. In fact, it is radically different. Socio-economics, in essence, challenges the basic premises and assumptions of neoclassical economics and thus attempts to replace neoclassical theory with an entirely new paradigm.\(^10\) My project, on the contrary, takes the basic neoclassical concepts at face value and attempts to incorporate them wholesale into critical analysis. My position is that critical theory has nothing to fear from economics and a lot to gain, for I aim to persuade the reader that critical theory can beat orthodox economics at its own game.

---


7. By the same token, it has also been said that 'under capitalism, people exploit people, whereas under socialism, it's the other way around!' DAVID P. BARASH, THE SURVIVAL GAME 243 (2003).

8. Perhaps the organizers of this conference (LatCrit X) may want to consider extending an invitation to both West and Posner to speak at a future conference.


II. 
THE DIMENSIONS OF NEOCLASSICAL ECONOMICS

The first step in my analysis is to identify the various dimensions of neo-classical economics. Historians of economic thought generally consider the great British economist Alfred Marshall (1842-1924) the father of neoclassical economics.\(^\text{11}\) His brilliant opus, *Principles of Economics* (1890), illustrates the central tenets of neoclassical theory. Among other things, Marshall developed the *ceteris paribus* technique of economic analysis, formulated the general law of demand, discovered the concept of consumers’ surplus, refined marginal analysis, and devised a formula for measuring the price elasticity of demand. All these things are considered mainstays of neoclassical theory, and yet today neoclassical economics is often reduced to rational choice theory.\(^\text{12}\) In reality, as the breadth of Alfred Marshall’s genius attests to, neoclassical economics is about more than just rational choice.

Furthermore, at a fairly high level of abstraction, economic analysis entails a wide variety of assumptions, methodologies, and premises. Consider the following schema set forth in Table 1 below:

<table>
<thead>
<tr>
<th>Methodology</th>
<th>Theoretical assumptions</th>
<th>Policy</th>
</tr>
</thead>
<tbody>
<tr>
<td>Positivism</td>
<td>Rational choice</td>
<td>Distributional issues</td>
</tr>
<tr>
<td>Unit of analysis</td>
<td>Efficiency criterion</td>
<td>Markets and property rights</td>
</tr>
<tr>
<td>Empiricism</td>
<td>Wealth maximization</td>
<td>Other politico-legal goals</td>
</tr>
</tbody>
</table>

I have purposefully grouped the various aspects of economic analysis under three broad dimensions: methodological issues, theoretical assumptions, and policy goals. Of course, any classification system will be somewhat arbitrary and no listing of themes will be entirely complete. Professor Ian Macneil of Northwestern University, for example, identifies a number of additional themes in economics in his insightful essay describing ‘the many worlds of law and economics’.\(^\text{13}\) Nevertheless, my classification system by and large contains the major dimensions in economics and should thus serve as an adequate starting point for my analysis.

In summary, neoclassical economics typically claims great formal predictive power, seeks to promote efficiency and wealth maximization, tends to ignore distributional effects, favors market solutions, and has a strong individualist bias. One commentator has used the term ‘Posnerian economics’ in describing this approach.\(^\text{14}\) But Posnerian economics is not the only neoclassical game in town.

---

11. See, e.g., LANDRETH & COLANDER, supra note 9, at ch. 10.
14. Id. at 694.
Many other scholars and lawyer-economists working within the neoclassical tradition are often willing to relax these hardcore Posnerian assumptions, favoring, for example, 'bounded rationality' over perfect rationality or incorporating Coasean transaction costs into their analysis. Nevertheless, for purposes of my analysis, I shall proceed as if there were a single, monolithic, 'essentialist' neoclassical theory and take the hardline Posnerian approach as my paradigm case. I shall thus use the terms 'neoclassical theory' and 'Posnerian economics' interchangeably throughout the remainder of this paper.

III.

A CRITICAL-NEOCLASSICAL SYNTHESIS

Having identified the various dimensions of neoclassical economics, I shall now attempt to show how these elements are relevant and actually helpful to critical theory. When we look closely at the various dimensions of neoclassical economic theory, we see that the hardline Posnerian approach is not necessarily antithetical to the anti-subordination and community-building goals of critical theory. For brevity and clarity, my analysis shall follow the spectra of dimensions set forth in Table 1 above.

Methodological issues

First, let us consider the methodology of neoclassical economics, and let us for good measure adopt the hardline Posnerian position that one should focus on positive prediction (hard positivism), that the appropriate unit of analysis should be the individual (methodological individualism), and that one's scholarship should be empirical rather than exclusively doctrinal or formal (empiricism).

As I see it, critical theory is already fully capable of meeting all these strenuous methodological requirements. Consider the issue of positivism, or 'science as prediction'. Although most critical scholarship is explicitly normative in nature, critical scholars need not relinquish positive prediction to the economists. Critical theory does not always need to be completely normative. After all, discrimination, wealth inequality, racial profiling—in short, almost all forms of oppression and subordination—are conditions and practices that can be measured and quantified empirically. Thus, why not borrow the tools of economics to build models that predict the future subordination effects of various economic and political policies and to retrospectively analyze the subordination effects of past policies as well?

By the same token, critical theory need not be anti-empirical. In fact, I dare say that critical scholarship is already much more empirical than a great deal of economics. Critical scholars have already produced volumes of descriptive work, documenting for example the tragic legacies of the slave trade and colonialism and

---

15. Notice that the anti-essentialist stance of critical theory ironically applies to economists themselves since, in reality, there is no essential or unitary neoclassical theory along all the dimensions found in Table 1.

have contributed a rich tapestry of personal narratives, case studies, historical surveys, sociological research, and statistical analyses to academia. By contrast, much of the work in economics today is purely theoretical and increasingly mathematical in nature.\(^{17}\)

With respect to the unit of analysis, the traditional view is that neoclassical theory uses the individual while critical theory uses the community. However, this traditional dichotomy is not entirely useful. Consider the anti-subordination principle of critical theory. Both individuals and groups are often subordinated, and thus both forms of subordination must be analyzed. Furthermore, even when the unit of analysis is the group (African-Americans, indigenous peoples, gays and lesbians, etc), all groups are composed of individuals and the effects of discrimination are not the same for all individuals. Ultimately, it is flesh-and-blood individuals who suffer the effects of subordination, oppression and exclusion. To artificially limit the unit of analysis to groups, while sometimes helpful (by showing the systemic effects of racism, sexism, colonialism, etc.), can also sometimes be counter-productive. By the same token, neoclassical theory is not always limited to the individual. Neoclassical economics often studies the behavior of households, firms and even entire industries. Thus critical theory should be pragmatic and open with respect to the unit of analysis.

Notice that one’s methodology need not determine one’s normative values. Critical scholars can build rigorous models and engage in empirical work without abandoning our anti-subordination and community-building ideals. Even the founders of the Chicago school of ‘law of economics’ held strong normative views (often in line with critical theory).\(^{18}\) Henry Simons was the first economist to join the law school of the University of Chicago, when he was appointed in 1939, and it is said that he worked ‘from an intensely normative perspective’.\(^{19}\) For example, although he was opposed to the growth of labor unions, he favored state intervention in the national economy to protect competition and to equalize incomes.\(^{20}\) Specifically, he advocated strong enforcement of the antitrust laws and massive income redistribution through the income tax system.\(^{21}\)

My point, then, is that critical scholars can embrace positive, predictive work—collecting data, building rigorous models, and testing hypotheses—and still be critical scholars engaged in critical scholarship. My position is thus a pragmatic one. Any methodology that helps us identify and understand the root causes of subordination and oppression and helps to predict what policies will reduce these evils should be part of the critical toolkit.

\(^{17}\) See, e.g., RONALD H. COASE, ESSAYS ON ECONOMICS AND ECONOMISTS ch. 11 (1994).

\(^{18}\) The Chicago school of law and economics is, in turn, a stepchild of the neoclassical ‘Chicago school of economics’ founded by such scholars as Frank Knight, Milton Friedman, George Stigler, and Gary Becker, among others.


\(^{20}\) Id.

\(^{21}\) Having said this, it should also be noted that Simons is remembered today not so much for his normative views, but rather for being the first to show that economics was relevant to law.
Theoretical assumptions

Next, let us consider some of the major theoretical assumptions of neoclassical economics. The hardline Posnerian position is that people are by and large rational actors and that efficiency trumps justice. Even though rationality and efficiency seem to be entirely at odds with critical theory, if we are to build a synthesis between critical and neoclassical theory, what are we to make of rational choice and the efficiency criterion (or its 'evil twin', wealth maximization)? These assumptions are the bête-noir of critical theory and heterodox economics generally. Nevertheless, although my position is counter-intuitive, I shall explain why critical scholars should not reject these assumptions out of hand.

Let me begin with rational choice. The rational choice paradigm takes center stage in neoclassical economics. In the words of Richard Posner\textsuperscript{22}, for example, 'economics is the science of rational choice in a world—our world—in which resources are limited in relation to human wants'. But at the same time, no aspect of neoclassical theory has been more maligned, subjected to greater abuse, and held in higher contempt than the model of rational choice. Critical scholars are especially critical of rational choice since rationality seems to imply a world of self-interested actors, each one looking out for his or her own interests, in contrast to the more egalitarian, communitarian, and progressive world that critical scholars are trying so desperately to build.

This attitude is understandable, but it is not helpful. Put aside for the moment the Byzantine academic debate over the meaning of rationality and ask, how are we to explain the persistence of discrimination and subordination in the first place? Ironically, the rational actor model of economics does a better job of explaining these injustices than other theories do. After all, why have people with wealth and power historically gone to great lengths to perpetuate subordination, oppression, and discrimination? Because the wealthy and powerful often perceive subordination to be in their self-interest. Rational choice thus also helps to explain why so many people continue to oppose even remedial measures such as affirmative action. Ironically, then, rational choice (i.e. self-regarding behavior) provides a compelling explanation for why we see so much subordination throughout history: people with wealth and power do not want to relinquish their privileges, and they are thus willing to pursue rent-seeking behavior and subordinate other groups of people in order to preserve and enhance their own wealth and power.

Furthermore, people do respond to incentives. At the end of the day, even critical scholars implicitly recognize the fundamental importance of incentives. For example, when Cornel West states that he has 'the warranted suspicion that good will and fair judgment among the powerful does [sic] not loom as large toward women and people of color'\textsuperscript{23}, he is really saying that the wealthy and powerful will not begin to share their wealth and power unless they have some external incentive to do so. And that is what I am saying as well. Therefore, if we want to build 'post-subordination' communities, then we need to put the proper incentives in place to bring about this result. This is why critical theory should not reject rational choice out of hand. The rational choice model can help us identify what the right incentives

\textsuperscript{22} See Posner, supra note 12, at 3.

\textsuperscript{23} See West, supra note 6, at 97.
are, and economics can help us identify the most cost-effective methods for putting them into place.

Now, let us turn to wealth maximization and the efficiency criterion. Critical scholars should not be so quick to condemn or reject these Posnerian assumptions for at least two reasons. First, the efficiency criterion is not necessarily incompatible with the anti-subordination and community-building principles of critical theory. Second, the more social wealth (i.e. social welfare) a community is able to produce, the more public goods and meaningful opportunities it can afford to provide to its members, and the more resources it can devote to protecting the environment and solving other pressing collective action problems.

My first argument is that the efficiency criterion is not necessarily inconsistent with critical theory. Consider, for example, the following definition of economics: ‘Economics is science which studies human behavior as the relationship between ends and scarce means which have alternative uses’. Notice how this neoclassical definition of economics does not define what our goals in life should be. It leaves the selection of ends entirely open to debate. Our goals can include such things as helping the poor, ending oppression, or protecting the environment, but whatever goals we choose, we must use our scarce resources efficiently.

Specifically, efficiency simply refers to the ratio of inputs to outputs (in the production of private or public goods) and not to what types of goods should be provided in the first place. Thus efficiency does not rule out a community’s collective decision to end oppression or to provide greater opportunities to all its members. In fact, the concept of efficiency is, in principle, entirely neutral with respect to ends, that is, with respect to the choices the community should make regarding the proper mix of private and public goods. The lesson of efficiency, then, is simply a pragmatic one: whatever our social goals are, we should consider the ratio of inputs to outputs when designing policies for achieving our goals (e.g. if our goal is to feed the hungry, we want to select to the most cost-effective manner of achieving this goal).

My argument regarding wealth maximization is also a pragmatic one. Simply put, the more wealth a community is able to produce, the more private and public goods and meaningful opportunities it can afford to provide to its members. Like efficiency, wealth maximization simply refers to the notion that laws and public policy should be designed to produce the greatest amount of social wealth. Wealth maximization is thus another term for social welfare, and I see no reason why critical scholars couldn’t follow Amartya Sen’s example of incorporating social welfare into our analysis.

Of course, we may want to trade off our social wealth in order to accomplish other worthy goals, such as protecting the environment, providing assistance to the poor, and so on. Judge Guido Calabresi, who along with Ronald Coase, is considered one of the founders of the ‘law and economics’ movement, puts


26. See, e.g., POSNER, supra note 12, at 10-16.

27. See, e.g., AMARTYA SEN, ON ETHICS AND ECONOMICS (1988).
this point this way: 'there are other things which count more in our society than the allocation of resources and . . . we will gladly forego the best allocation of resources if by doing so some more important policy is served'. How much social wealth should we be prepared to give up or trade off in order to protect the environment, feed the hungry, etc.? This is a politico-moral question, one for the relevant community to decide. Again, economics is, in principle, entirely neutral with respect to these questions. The role of economic analysis is not to choose our goals or values for us.

Of course, critical theory can help us choose what the proper goals of the community should be, but then, after we make this choice, critical theory should also incorporate economics into its analysis to show that such goals can be carried out efficiently. The theoretical assumptions of rational choice and efficiency can thus be fully incorporated into critical theory without 'corrupting' or distorting it. On the contrary, critical scholars could use these very same assumptions to beat economics at its own game.

Policy goals

Thus far we have seen that a critical-neoclassical synthesis is feasible. Critical theory can benefit from borrowing the methodologies of economics, while at the same time, the rational choice and efficiency assumptions of neoclassical theory are not incompatible with the goals of critical scholars. But when it comes to policy, no real synthesis appears to be possible. Posnerian economics and critical theory are just too far apart on matters of policy: the pro-market, free trade policies of neoclassical theory are radically different from the collectivist and communitarian policies of critical theory. In fact, while there are some irreconcilable differences, especially over distributional issues, in this section I hope to show that the divergence over policy is more apparent than real.

Most commentators tend to automatically associate neoclassical theory with a particular set of politico-legal policies, specifically, the primacy of markets and free trade and the sanctity of private property. This 'guilt by association' is certainly understandable. Neoclassical economists frequently employ their theories and models to justify pro-market solutions to social problems.

In reality, however, neoclassical economics is actually quite pragmatic and instrumental when it comes to policy. For example, neoclassical theory admits the possibility of 'market failures' and recognizes that, in such cases, markets and property rights may not necessarily produce the greatest amount of social wealth. Accordingly, if it can be shown that collective ownership of a particular resource (such as a public park or a lighthouse) is more efficient or cost-effective than private ownership, then neoclassical theory, in principle, favors the collective solution. Even Oliver Wendell Holmes, a champion of Social Darwinism, eugenics, and laissez-faire economics, recognized this point: 'I have no a priori objection to socialism any more than to polygamy. Our public schools and our post office are socialist, and whenever it is thought to pay I have no objection'.

captures the pragmatic nature of neoclassical policy.\(^{30}\)

Notice that the same pragmatic analysis also applies to such broad concepts as property rights, political freedom, and individual liberty. People often have the misconception that neoclassical theory is about economic freedom and property rights. But neoclassical economics is not absolutist; it does not value freedom or private property for its own sake. There are times when liberty and property rights must be restricted for the greater good. For example, there can be no doubt that compulsory seat-belt laws or compulsory vaccinations restrict people’s freedom. But if it can be shown that these freedom-reducing policies are a cost-effective and practical way of reducing accident costs and the spread of dangerous epidemics, then the economic approach will not object to the reduction in freedom in these cases.

Critical theory could thus adopt this same pragmatic approach as a point of departure on matters of policy. Critical scholars must recognize that there are many possible ways of achieving the goals of anti-subordination and community building and that some ways are more cost-effective and more positive-sum than others. Just as neoclassical theory must be open to the possibility of non-market solutions and collective ownership (i.e., when such methods are shown to be more cost-effective than the market for producing social wealth), critical theory must also be open to market exchange and property rights, especially when such methods are shown to be effective methods for diminishing subordination and oppression.

In addition to public policy at the ‘macro’ level, LatCrit guru Francisco Valdés has often talked about the need for ‘performing the theory’ (i.e. putting into practice what we preach).\(^ {31}\) After all, there is no point in talking about anti-subordination if we don’t engage in this behavior ourselves. For instance, as critical scholars, we like to emphasize the larger academic, family, and cultural communities that we belong to. So, one type of policy question that naturally arises is, what type of academic communities do we want to belong to? Don’t we want to build a more nurturing and supportive community of scholars, one embracing a more rich diversity of peoples and viewpoints? In this respect, both critical scholars and economists could learn from the example of Aaron Director, a remarkable scholar who died at the age of 102 in 2004.

Aaron Director is considered one of founders of the Chicago school of ‘law and economics’ (along with Henry Simons, who we met earlier, and Ronald Coase, William Landes, and Richard Posner). After Henry Simon’s untimely death in 1946, Director was appointed to the law school at Chicago, where he taught antitrust and established the \textit{Journal of Law and Economics}, the first of its kind. According to Gary Becker, Director was deeply concerned by the problem of wealth inequality, though he was deeply skeptical of legal intervention in many areas of the economy, such as rent control and minimum wage laws.\(^ {32}\)

But Director’s greatest contribution was the true sense of community he built at Chicago. Instead of publishing articles or remaining aloof from his students and peers, Director established close personal relationships with his students and colleagues, mentoring them, always willing to listen and engage in conversation. It

\(^{30}\) In the interest of full disclosure, however, I should include the remainder of Holmes’s quote: “But I have as little enthusiasm for [socialism] as I have for teetotalism.”

\(^{31}\) Indeed, I think this is one of the most valuable lessons I have learned from critical theory.

\(^{32}\) Gary S. Becker, Lecture at the University of Chicago School of Law (Feb. 8, 2005).
is said that ‘Director was at his best in a conversation with one or a few people’ and that ‘he was an extraordinary conversationalist’. Furthermore, he was noted for his deep thought, wide reading, and careful observation. Although he published very little during his lifetime, because of his conversational style and selfless mentorship he was able to influence two generations of lawyer-economists and build a cohesive ‘law and economics’ community (at a time when free markets were out of fashion). Towards the end of his active teaching days, he would later exert a great influence on a young Richard Posner, one of his last students. In many ways, then, Director could serve as a role model for the type of academic community-building that critical scholars have rightly championed.

IV.
POSSIBLE OBJECTIONS

There are several possible objections to my radical synthesis. I shall consider but two. First, it may be objected that the precepts of neoclassical theory are demonstrably false or even amoral (e.g. people are in fact not always rational, the ‘commodification’ of human relations is morally wrong, and so on). Second, it may also be objected that the purposes of critical theory (anti-subordination, racial and gender equality, etc.) are not amenable to economic analysis. After all, the whole point of critical theory is to move away from price theory, isn’t it? These are powerful objections, and I shall make no attempt to refute them head on. Instead, I shall make a more modest claim. I shall try to show that, in spite of these compelling objections, critical theory would still benefit from incorporating neoclassical economics into its analysis.

Consider the first objection, the claim that the basic precepts of neoclassical economics are false or amoral. My reply to this objection is a pragmatic one. However false or amoral neoclassical economics is supposed to be, the fact of the matter is that neoclassical theory has attracted a larger following and has had a larger impact on public policy than critical theory. For example, from a purely sociological perspective, orthodox economists vastly outnumber heterodox economists. Right or wrong, moral or amoral, neoclassical scholars occupy the mainstream, while critical scholars often find themselves working alone, relegated to the margins of the academy and public life.

Now, I do not wish to be misunderstood. I am not saying that critical scholars should abandon our anti-subordination and community building goals. What I am saying is that we should attempt to beat neoclassical scholars at their own game. Accordingly, we should consider incorporating neoclassical postulates into our analysis—not to displace the goals of critical theory, but rather to show that such goals are in fact consistent with mainstream theory. That is, even assuming the precepts of neoclassical theory to be true, we can show that subordination, oppression, and discrimination do not follow. My aim, then, is not to subvert or destabilize critical theory; my aim is to strengthen it so that it will ultimately have a larger impact on public policy.

33. See Kitch, supra note 19, at 228.
A valid objection to my theory is that the foundational values of critical theory do not lend themselves to economic analysis. The principle of anti-subordination, for example, is a foundational value because it has no ‘price’ and thus is not amenable to economic analysis. The problem with this objection, however, is that moral concepts are by their very nature fuzzy, elastic, and open-textured. The principle of anti-subordination, standing alone as a moral concept or a normative value, is just not that helpful. For example, at what level of generality should such concepts as justice, equality, and liberty be defined? It is not obvious how narrow or broad one’s definition should be, for as soon as one attempts to define a normative value, even a value as praiseworthy as anti-subordination, one will run the risk of drowning in the ‘normative swamp’ of applied ethics, to borrow Art Leff’s apt phrase.35

My ultimate aim, then, is to use the basic ideas of neoclassical theory in order to avoid this level of generality problem that bedevils all progressive projects. I recognize, however, that this is a very difficult undertaking, one that requires a good deal of further study, because orthodox economics emphasizes the basic trade-off between efficiency and fairness, whereas critical theorists tend to value fairness for its own sake. Nevertheless, despite this inherent (and perhaps intractable) tension, this is an avenue worth pursuing, if only to see where it may take us.

V.
CONCLUSION

In conclusion, I concede that my proposed synthesis is still in its conceptual stage and, given the reality of path dependence, is unlikely to find many takers. My attempt to unite critical legal theory with neoclassical economics is thus probably misguided and quixotic at best and possibly dangerous at worst.36 My underlying argument, however, is a modest one: critical scholars should consider using the various tools of neoclassical economic theory in support of anti-subordination and community building. We might even reach a wider audience and build more persuasive and robust arguments if we incorporated more economics into our analysis.

35. Arthur A. Leff, Economic Analysis of Law: Some Realism about Nominalism, 60 VA. L. REV. 451, 482 (1974). In this respect, it is worth noting that Justice Antonin Scalia famously attempted to resolve the level of generality problem in the context of defining fundamental constitutional rights (which also tend to be fuzzy and vague) in Michael H. v. Gerald D., 109 S.Ct. 2333 (1989). According to Scalia, the solution to the problem of defining an abstract right is to refer to ‘the most specific level at which ... the asserted right can be identified’ 109 S.Ct. at 2344 n.6. At the end of the day, however, Scalia’s purported solution is nothing more than wordplay, since there is still no objective or universal metric of ‘specificity’. Cf. LAURENCE H. TRIBE & MICHAEL C. DORF, ON READING THE CONSTITUTION ch. 5 (1991). I mention Scalia not to expose him to ridicule, but rather to show that I must hold critical theory to the same standard that I hold Justice Scalia.

I shall conclude by going back to where I started: in the elevator with Cornel West and Richard Posner. What would they talk about? It would no doubt be a fascinating conversation, but the intellectual divide between them is so large that I cannot imagine them finding much common ground. Without a synthesis of critical and neoclassical theory, we are hopelessly condemned to continue talking past each other.