

# Chapter 1

## The Critical Perspective in Law-Psychology Research

### New Directions in Citizen Justice and Radical Social Change

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#### OVERVIEW

*The law-psychology movement emerged in the 1960s with a steadfast commitment to humanizing the law and legal decision making, guided by psychological values and insights. Many observers note that the movement has mostly failed to meet its objectives, unable to produce social change in any radical or otherwise substantial way. One explanation for these disappointing results is that no systematic and thorough attempt has been made to explain what the radical agenda embodies, especially in relation to identifying its core assumptions. Relying on several insights as developed within critical (criminological) theory and as appropriated by radical law-psychology scholars, this chapter describes five, cutting-edge approaches to contemporary psycholegal inquiry. These include the perspectives of: (1) political economy; (2) feminist jurisprudence; (3) anarchism; (4) postmodernism; and (5) chaology. Individually, these orientations provide a clearer portrait of what radical scholarship in the academy has come to represent. Collectively, these approaches suggest a new and much needed direction in law-psychology research, especially in relation to advancing the aims of justice in the legal sphere.*

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## INTRODUCTION

The law-psychology movement emerged in the late 1960s, and was institutionalized with the 1968 founding of the American Psychology-Law Society (AP-LS). The expressed purpose of the movement and organization was to restore the place of justice in psycholegal matters (Fox, 1999; Arrigo, 2001), and to “transform a prevailing ‘judicial common sense’ that had been used to keep the disenfranchised down so long” (Haney, 1993, p. 375). Unfortunately, most observers note that the law-psychology field has been largely remiss in its ability to produce radical social change (e.g., Fox, 1993a, 1991; Melton, 1992, 1990; Roesch, 1995; Ogloff, 2000). Accordingly, the place of justice in directing psycholegal affairs has become so diverted and ineffectual (Fox, 1997) that legal psychologists (e.g., clinicians, researchers, policy analysts) routinely practice with “blinders on when they look at the law and the legal system” (Melton, 1991, p. 1).

One explanation for the lack of meaningful, sustainable change in the law-psychology arena can be traced to the movement’s inability to articulate a comprehensive and uniform theoretical statement about the vision of social transformation and citizen justice proponents seek to establish. Indeed, as Ogloff (1994) observes, “the vast majority of [extant] research . . . only provides a description of what happens in the law, rather than providing any explanation of why or how the phenomenon exists. [Legal psychologists have] failed to employ or develop theories to explain the phenomena they study (p. 4; Small, 1993). Thus, while values such as “dignity,” “person-hood,” “human welfare,” “autonomy,” “compassion,” “self-determination,” and “equality” are wedded to the radical agenda (e.g., Tapp & Levine, 1977; Finkel, 1995; Prilleltensky & Fox, 1997), regrettably their meanings remain obscured, misunderstood, or ignored notwithstanding the applied research sympathetic to the radical critique (e.g., Dallaire, McCubbin, Morin, & Cohen, 2000; Arrigo & Williams, 1999a; 1999b; McCubbin & Weisstub, 1998). Indeed, although these studies considerably advance our understanding of the social, political, and economic landscape of alienation and oppression to which mental health consumers are all too frequently subjected, we learn little about the conceptual justifications on which their otherwise noteworthy and compelling analyses are based.

Moreover, when efforts to establish a broad-gauged theoretical approach to transformative and empowering decision making in the law-psychology field are rigorously espoused, they lack sufficient conceptual clarity (Cohen, 1991; Ogloff, 1992), succumb to disciplinary subspecialization (Fox, 1993b; Arrigo & Williams, 1999a), or describe justice in its absence (Shklar, 1990; Simon, 1995; Cohen, 1989). These initiatives, while certainly promising in their own right, produce discouraging results. For example, the diffusion of perspectives leaves some to conclude that it may not be possible

to reach consensus on what justice is or about how to eradicate its abuses (Fox, 1999; Simon, 1995). In addition, failed attempts at crafting a macro-theoretical position concerning emancipatory practices in the psycholegal arena suggest that the task is not only daunting but perhaps unrealizable. As a consequence, several scholars lament the discipline's inability to make real the call for radical social transformation. As Haney (1993) observes, "I believe we are beginning to lose a sense of shared purpose in psychology and law. I speak about a sense of the waning of collective effort, a loss of common goals, and an abandoning of a sense of mission—the mission of legal change" (pp. 378–379).

Mindful of the liberatory promise that spawned the AP-LS and cognizant of the movement's shortcomings to date, this chapter examines what radical law-psychology inquiry signifies by describing the epistemological assumptions of several critical<sup>1</sup> (criminological) theories underpinning this critique (for some preliminary comments along these lines see, Arrigo, 2002). The relationship between radical law-psychology scholarship and critical (criminological) inquiry is significant. As this chapter discloses, much of the radical application work engaged in by researchers thus far draws heavily from various strains of critical theory and/or critical criminology (for a discussion of the similarities and differences between these two domains of conceptual exegeses see, Arrigo, 1999). Thus, turning to critical (criminological) theory as a basis to explain the assumptions of radical law-psychology scholarship and as a starting point to rethink how the law-psychology movement can realize its call for systematic and widespread change, seems only logical.

In addition, the emphasis on epistemological assumptions is deliberate. Not only does the focus on critical (criminological) inquiry reveal the knowledge claims at the center of the radical agenda giving meaning to the psychological values identified above, it discloses something more about the nature of "justice" law-psychology proponents seek to establish. Thus, the emphasis on presuppositions directs our attention to where and "how the law can be revised, when necessary, to better reflect the reality of human behavior" (Ogloff, 2000, p. 472). As such, when examining presuppositions not only do we learn something more about critical (criminological) theory's relationship to law and psychology, we begin to discern how meaningful prospects for justice can be attained through future (and redirected) psycholegal theory, research, and policy.

Accordingly, this chapter enumerates five leading approaches for engaging in radical or critical law-psychology research. These include the perspectives of: (1) political economy; (2) feminist jurisprudence; (3) anarchism; (4) postmodernism; and (5) chaology.<sup>2</sup> Each of these orientations tells us something quite distinctive about how to decenter psychology and displace the legal status quo, such that radical and wide-ranging alterations in the law-psychology sphere can occur. Several application chapters delineated within

this anthology rely on the conceptual insights of these theories to establish a compelling and thought-provoking basis for a sustained psycholegal critique. Although the application chapters include additional theoretical perspectives not examined here (e.g., (neo)Freudian theory), and although this chapter presents some conceptual exegeses not utilized elsewhere in this book (e.g., feminist jurisprudence), readers should note that these circumstances merely demonstrate the breadth of theoretical scholarship thus far undertaken in the interest of advancing radical reform at the crossroads of law and psychology.

Admittedly, mainstream liberal or progressive researchers began this process of reform. Indeed, efforts to humanize the law through principles of procedural justice (Thibaut & Laurens, 1975; Sydeman et al., 1997) therapeutic jurisprudence (Wexler & Winick, 1996; Winick, 1997) and common sense justice (Finkel, 1995) while certainly disparaging of the prevailing status quo, do not seek change by radically reconfiguring the operation of the psychiatric and legal systems (e.g., Sarason, 1982; Smith, 1990). As Haney (1980) noted, “[p]sychologists have been slow to decide whether they want to stand outside the [legal] system to study, critique, and change it, or to embrace and be employed by it” (p. 152). Thus, for example, proponents of therapeutic jurisprudence who insist that these sort of interventions “can at least potentially lead to legal change in line with their own and society’s strongly held normative values” (Winick, 1997, p. 200) legitimize, knowingly or not, the very structures of hegemony that need wholesale dismantling (Arrigo, 1997a). Indeed, eliminating oppression, exploitation and marginalization entails “structural rather than individual solutions” (Haney, 1991, p. 190), and these injustices can only be eradicated through “radically-inspired social and political changes” (Albee, 1982, p. 1044).

Collectively, then, the critical (criminological) theories previously identified and their corresponding assumptions advance the progressive agenda of reform by embodying a new, different, and necessary direction for doing law-psychology research. Given this novel approach, and following the collection of application chapters demonstrating the usefulness of the critical agenda in psychological jurisprudence, this anthology therefore concludes by discussing the implications and lessons of this paradigm for future theoretical, applied, and policy investigations in the field. Consistent with the call for fundamental and widespread change articulated in chapter 1, the concluding chapter concretely highlights the potential contributions of the radical critique for citizen justice and legal reform.

Preliminarily, I accept as given the position articulated by Fox (1993a):

[O]nly fundamental structural transformation can effectively counter trends toward hierarchy, isolation, inequality, and so forth; reduce racism, sexism, homophobia, and other forms of oppression;

and bring about a humane, egalitarian, just society consistent with psychological and societal well-being. (p. 234)

This very sentiment was explicitly conveyed in Roesch's (1995) AP-LS presidential address: As he explained:

changes in the justice system will never be sufficient to create a just society, nor will within system changes by themselves ever have much of an impact on individuals who come into conflict with the law. The problems inherent in our justice system cannot be resolved simply by addressing problems within that system. We can make changes that will make the system more fair or more effective in dealing with individuals within the system, but, in the long term, I believe that this will not be enough because it will not change the fundamental inequalities in our society at large. (p. 329)

Thus, what has yet to be assessed systematically and extensively is how critical (criminological) conceptual analysis can help effectuate the outcomes envisioned by Fox and Roesch. Indeed, as Ogloff (2000) observed, in support of such theorizing and in search of such change: “[o]nly by applying [sophisticated] theory to the law in an attempt to explain causal relationships between [it] and human behavior will [researchers and analysts] be able to advocate for valid legal reforms, and to finally have a meaningful impact on the law” (p. 473). In addition, however, it remains to be seen what prospects for justice at the law-psychology divide will amount to, given the theoretical assumptions of these various radical formulations. I contend that both of these matters (i.e., the significance of critical inquiry and the focus on justice) return the AP-LS to its original purpose, offering guidance as to how the mission of meaningful, sustainable reform can be achieved.

## CRITICAL PERSPECTIVES IN LAW AND PSYCHOLOGY

In this section five approaches for doing radical psycholegal research, informed by critical (criminological) inquiry are discussed.<sup>3</sup> Both the theory and its application in the pertinent literature are described. The presentation of each critical lens and its employment in the relevant applied research is not exhaustive. Rather, of particular interest are the distinct epistemological assumptions lodged within each perspective. The incorporation of applied scholarship into the overall conceptual analysis serves three functions. First, it helps ground the otherwise dense philosophical material. Second, the illustrations legitimize the utility of the theoretical perspective

in question, especially as a sustainable basis by which to engage in thought-provoking and critical law-psychology analysis. Third, reference to the application studies draws attention to protean areas of noteworthy scholarship ripe for future theoretical explorations, empirical investigations, and policy formulations.

### Political Economy

The political economy perspective is rooted in the philosophy of Marx (e.g., 1974/1867; 1984/1859) and neo-Marxian revisionists (Pashukanis, 1978; Althusser, 1971). Although Marx did not develop a detailed theory of law or of judicial decision making, much of his work has been appropriated as a worthwhile backdrop for describing “a unique perspective on law” (Milovanovic, 1994, p. 61) and the society of which it is a part. More pointedly, Marxist jurisprudence “manifest[s] the legitimizing functions of law as a contributor to ideological distortion and as a solidifier of the political status quo . . . , unmasking . . . law’s . . . participation in domination and oppression” (Bellioti, 1995, p. 3).

The assumptions of Marx’s theory are generally of two sorts: those that relate to his views on economics (i.e., the material nature of society); and those that relate to his views on human nature (i.e., the psychological state of our existence) (Lynch & Stretesky, 1999).<sup>4</sup> The joint effect of these presuppositions represents an elaborate system of thought; one with profound implications for understanding a crucial, though underexamined, focus of law-psychology research and prospects for justice at its crossroads. For purposes of this theoretical excursion, the specific assumptions to which I briefly draw attention include Marx’s views on class, alienation, exploitation, and false consciousness.

#### *Marx’s assumptions about material society*

In stark contrast to Hegel’s (1977/1807) idealism and theory of history as thought (popular among both philosophical and political circles at the time), Marx articulated a position of general social development based on real class relationships. He called this his “materialist conception of history” (Marx, 1984/1859, p. 19), and it was to form the basis of his economic theory. Marx (1984/1859) succinctly described his position as follows:

In the social production of their existence, people inevitably enter into definite relations, which are independent of their will, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society,

the real foundations, on which arises a legal and political superstructure and to which correspond definite forms of social consciousness. The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of people that determines their existence, but their social existence that determines their consciousness. (pp. 20–21)

What is significant about this statement is how Marx anchored social relationships in class. Consequently, it is the material force of class that fundamentally defines how people relate to one another and informs the manner in which conflicts between people of different social standings unfold. This logic has been adopted by critics of psycholegal practices, especially in their assessment of power disparities between clients and psychiatry (McCubbin & Cohen, 1996), the body debilitating and mind altering side effects of tardive dyskinesia (Cohen & McCubbin, 1990), the treatment-control regimen at the root of civil commitment determinations (Dallaire, McCubbin, Morin, & Cohen, 2000), and the ethic of proxy decision making for incompetent mentally ill patients (McCubbin & Weisstub, 1998). In instances such as these, “the interests of clients diverge from the interests of other actors involved in the mental health system . . . [and] the personal and political power of clients to advance their interests is small compared to the power wielded by other actors” (McCubbin & Cohen, 1996, p. 1). According to Marx, what lurks behind these situations of differential or unequal power is class position, making it “one of the most important organizational features of society and a construct that would have to be addressed in any study related to human society” (Lynch & Stretesky, 1999, p. 18).

Marx defined class based on an individual’s (or group’s) relationship to the mode and means of production. The former refers to the kind of economic system around which a given society is organized (e.g., slavery, feudal, mercantile, capitalist, communist). This economic organization makes it possible for a society to produce and distribute commodities. The latter refers to how production occurs in a society (e.g., manual labor, machine-based, technological). Thus, how people (or groups) relate to the means of production determines their class position (Marx, 1984/1959). In other words, for example, a critical investigation of the real power psychiatric patients possess to influence the course of their hospital care and treatment and to direct the involvement of the justice and mental health systems providing it, requires careful scrutiny of the role of class and one’s relation to the mode and means of producing contemporary psycholegal services and interventions. Indeed, “a more complete political economy analysis . . . would identify the interests, powers, and activities of all important actors . . . including other health professions, families, public and private institutions, and drug companies” (McCubbin & Cohen, 1996, p. 1).

For purposes of this assessment of psychology and law, political economy, and Marxist assumptions, what is significant is how class position indicates the amount of monetary and material power an individual (or group) possesses. More important, however, I note that “economic power has always translated into political power, and the group that controls or owns the means of production also controls the rules and often the rulers (if they are not the rulers themselves!)” (Lynch & Stretesky, 1999, p. 19; see also Jost, 1995; Haney, 1997). Quinney (1974), sympathetic to the radical agenda, vehemently expressed this sentiment in his critique of law and the legal order. As he observed:

[the] state is organized to serve the interests of the dominant economic class, the capitalistic ruling class. . . . [L]aw is an instrument of the state and ruling class to maintain and perpetuate the existing social and economic order. . . . [C]ontrol in capitalist society is accomplished through a variety of institutions and agencies established and administered by a governmental elite, representing ruling class interests . . . , [where] the subordinate classes remain oppressed by whatever means necessary, especially through coercion and violence of the legal system. (p. 16)

It follows, then, that those who exercise political and economic power in the mental health and justice systems establish the form, frequency, and duration of citizen justice and social well-being found within the psycholegal domain. Although Marx’s economic theory is useful for explaining how people live (i.e., class position) and the manner in which work is organized in a given society (i.e., mode and means of production), it remains to be seen whether his materialist conception of history is useful for prosocial development. In order to assess this matter adequately it is necessary to review his assumptions about human nature.

*Marx’s assumptions about human nature*

Perhaps the most revealing suppositions underlying Marxist thought are those involving his position on human nature (e.g., Marx, 1964/1844). Marx believed that people were creative, social beings, produced, in part, by their physical and interpersonal environment. For Marx, a distinguishing feature of human sociability and creativity was productivity, especially personal labor. Indeed, “[h]uman fulfillment is intimately connected with the imaginative, unshackled use of productive capacities. Labor is a distinctively human activity and possesses central normative significance” (Bellioti, 1995, p. 4). According to Marx, not only does work allow one to engage in creative self-expression, it establishes a basis for meaningful social interaction (Elster, 1986; Schmitt, 1987). Thus, free, innovative “human labor [i]s the median



between individuals and the material world in which they live" (Lynch & Stretesky, 1999, p. 20), ensuring that people "realize unalienated being" (Bellio, 1995, p. 4).

In capitalistic societies, however, human labor is problematic because it produces both estrangement and exploitation (e.g., Beirne & Quinney, 1982). Mindful of the previous comments on Marx's historical materialism, the labor that one produces (and all the creative, intangible forces of productivity associated with it) are regulated by those who make the rules about working. These rules are codified, legitimized, and enforced by the legal apparatus which "works like a blind, insensate machine . . . [doing] the bidding of those whose hands are on the controls" (Friedman, 1973, p. 14). According to Marx (1974/1867), the economic conditions wherein labor is sold in the marketplace is inherently alienating because it denies people "a significant activity that makes [them] human" (Lynch & Stretesky, 1999, p. 21). As Bellio (1995) observes,

In sum, capitalist social and economic institutions prevent the actualization of [one's] potential and thereby disconnects workers from [themselves] because they stifle workers' voice, creativity, and imagination; transform labor power itself into a commodity; . . . and fail to mediate the social aspect of labor by cooperation and solidarity. . . . In this fashion, . . . capitalism nurtures workers' desperation for material possessions, not their sense of creative expression. (p. 4)

Some law-psychology researchers have drawn critical attention to various practices and policies that produce and/or minimize alienation for individuals employed in the psychiatric and justice systems. For example, Arrigo (1993a), relying in part on a Marxist-based framework, demonstrates historically how the value of paternalism in mental health law is a commodity that sustains the alienation and victimization of psychiatric patients. Nelson, Lord, & Ochocka (2001), incorporating the narratives of psychiatric consumers/survivors, explain how expressions of empowerment are retrievable in community mental health settings. McCubbin & Cohen (1999), drawing on the analytical perspective of general systems theory, describe a value-based approach to reforming the mental health system wherein patients are acknowledged as "policy *agents* rather than as policy *objects*" (p. 67). These and similar studies expose the manner in which marginalizing forces (e.g., cost and fiscal factors in deinstitutionalization, the disease model of psychiatry, the interiorization of power), embedded in the political economy of the medical and legal system, significantly impede prospects for citizen justice and social well-being at the law-psychology divide.

Related to Marx's position on alienation is his theory of exploitation. Left to their own devices, people would work as much as they needed in order

to meet their basic human needs. In a capitalist system, however, workers must sell their labor in order to survive. One's labor becomes a commodity that has value set, not by the worker or seller, but by the capitalist or the buyer (Lynch & Stretesky, 1999). What is significant in this exchange is that the buyer is able to extract surplus value from one's work (i.e., the added labor beyond what the worker needs to subsist for which the laborer is not compensated), giving rise to exploitation. As Belliotti (1995) explains,

[E]xploitation occurs when one class, the proletariat, produces a surplus whose use is controlled by another class, the capitalists. . . . [T]his kind of exploitation occurs absent the use of explicit duress, physical threat, or other non-economic forces. It is through the capitalists' vastly superior economic bargaining power over workers, their ownership of the means of production, and the lack of real alternatives for workers that exploitation flourishes in a capitalist regime. (pp. 4–5)

Thus, surplus value is the source of profit for the capitalist or the group controlling the means of production, and it is a commodity for which the laborer toils, experiencing victimization in the face of inadequate compensation.

Exploitation is endemic to the overlapping and interdependent operation of the medical and legal systems (e.g. Isaac & Armat, 1990; Prilleltensky & Gonick, 1996; U'Ren, 1997). For example, critics have challenged the surplus power mental health decision brokers appropriate from psychiatric patients, devaluing and exploiting them in the process (Prilleltensky & Nelson, 2002), have described the contradictions, crises, and changes in the psychiatric consumer empowerment movement in the United States (McLean, 1995), and have chronicled the abusive and marginalizing mental-health-care policies from the asylum period to the community treatment era (Grob, 1991). While these and related law-psychology investigations rely somewhat tangentially on political economy assumptions for systematic theoretical support and guidance, it is clear that they draw on Marxist thought because the latter "makes explicit connections to sociological and psychological phenomena . . . providing a philosophical basis for the . . . study of . . . oppression and domination" (Jost, 1995, pp. 399–400; see also, Newnes, Holmes, & Dunn, 1999).

The final epistemological assumption relevant to this critical foray of psychological jurisprudence is Marx's position on false consciousness. False consciousness or "fabrications of justice" (Cohen, 1989, p. 33) refers to a practice wherein subjugated or disenfranchised groups, knowingly or not, "adopt the dominant prevailing ideology and perceptual prism [even though] these dominant ideas do not truly correspond to the experience of the oppressed" (Belliotti, 1995, p. 9). Marx recognized that false consciousness was integral to the operation and maintenance of the capitalist status quo. It functionally

legitimated the monopoly of power capitalists wielded against workers by intimating that existing economic disparities (e.g., haves versus have nots) were the result of “natural, appropriate, and inevitable labor dynamics” (Schmitt, 1987, p. 54). In this process of reality construction, the interests of the ruling classes are held out as general human interests, synonymous with the needs of subordinate collectives (Lynch & Stretesky, 1999). Indeed, the material force of such reality construction fosters the interiorization of powerlessness (Prilleltensky & Gonick, 1996) to which oppressed citizens are (unconsciously) subjected. Over time, however, the depth and magnitude of these ideological distortions can (and do) erode as members of or advocates for the subjugated masses experience the injustices administered in the service of the prevailing political and economic order.

Critics have long been vocal in their assessment of how psychology and law jointly operate, adversely affect people, and produce ideological distortions. For example, Fox (1999) suggests that one important access point for the study of psychology and law is the focus on injustice which “makes false consciousness easier to find” (p. 12; see also Finkel, 1998). Relatedly, in his assessment of morals, politics, and the status quo in psychology, Prilleltensky (1994) observes that “unless individuals become reasonably aware of the ideological deception of which they are victims, it is unlikely that they will be able to engage in any process of social change” (p. 189). And, in his critique of common sense justice, capital punishment, and ideological distortions, Haney (1997) notes that “popular views of legal issues and principles and law-related social realities are sometimes highly dependent on messages and lessons that are communicated from legal sources (and their proxies in the media) that serve as agents of socialization” (p. 305). These are sources that disseminate “false or inaccurate beliefs that are contrary to one’s own social interests and which thereby contribute to the maintenance of the disadvantaged position of the self or the group” (Jost, 1995, p. 400).

## Feminist Jurisprudence and Sociolegal Inquiry

Feminist legal criticism distinguishes itself from studies on gender and the law. Rather than examining the behavior of women “within the legal system” or “the role [that] gender plays in different [legal] phenomena” (Frazier & Hunt, 1998, pp. 1, 7), feminist jurisprudence exposes the taken-for-granted ideology embedded within the very construction of law (Smith, 1995). Pivotal to this critical analysis is the conviction that conventional and progressive legal theory (including the wisdom of the Critical Legal Studies Movement), inadequately account for the lived experience of women.

The feminist prescription for radical reform emerged in the late 1980s (e.g., MacKinnon, 1987, 1989; Menkel-Meadow, 1988; Rhode, 1989).

Although mainstream liberal feminists successfully challenged the ideology inherent in patriarchy that subordinated women (e.g., Brownmiller, 1975; Dworkin, 1981), critical scholars drew attention to the ideology inherent in the law, finding it even more problematic for the condition of women in society. Exploring this dilemma, Goldfarb (1992) noted that “[m]any feminists have identified patriarchy as an ideology more threatening to their lives than legal ideology, and have directed efforts at undermining the former even through the use of the latter” (p. 704; see also Walby, 1990). In this scenario, the dominant ideology of the law is legitimized, and, according to radical feminist legal critics, it is *this* perspective that insidiously dismisses women’s ways of knowing, feminine ways of being. MacKinnon (1989) makes this point sharply:

Liberal legalism is thus a medium for making male dominance both invisible and legitimate by adopting the male point of view in law at the same times as it enforces that view of society. . . . Through legal mediation, male dominance is made to seem a feature of life, not a one-sided construct imposed by force for the advantage of a dominant group. To the degree that it succeeds ontologically, male dominance does not look epistemological: control over being produces control over consciousness. . . . Dominance reified becomes difference. Coercion legitimated becomes consent. In the liberal state, the rule of law—neutral, abstract, elevated, pervasive—both institutionalizes the power of men over women and institutionalizes power in its male form. (pp. 237–238)

With this focus on the marginalizing and oppressive force of legal logic and, by extension, judicial decisions, practices, and institutions, it is not surprising that this brand of legal criticism is “heavily influenced by feminist work in philosophy, psychoanalysis, semiotics, history, anthropology, post-modernism, literary criticism, and political theory” (Milovanovic, 1994, p. 105). Indeed, by focusing on the ideology inherent in the law (i.e., the legitimized power of the male-dominated status quo), radical feminist theory challenges certain mainstream legal assumptions about prospects for gender equality and sexual difference in society (Frug, 1992). These presuppositions include a critique of knowledge, identity, and the legal method. It is to these matters that I now briefly turn.

*The critique of knowledge*

The statement, “the personal is empirical” (McDermott, 1992, p. 237), characterizes the liberal feminist approach to knowledge. Women’s experiences can be retrieved, recorded, and counted; they are statistical variables that can be used, among other things, to convey clearly and compellingly “the magni-

tude and implications of any gender difference[s]” (Frazier & Hunt, 1998, p. 8; see also Eagly, 1995) found in a given data set. However, as Arrigo (1995a) cautions in his assessment of mainstream legal thought, the *empirical is personal*; it is “the site of power and therefore [it] may also advance the subordination of those who experience differently” (p. 461). Thus, for example, radical scholars of feminist jurisprudence question the values embedded within the logic of quantitative law and social science inquiry (Bartlett & Kennedy, 1991). Some have argued that it is so phallogocentric (male-dominated) that “any issue brought before the court that substantially deviates from this body of knowledge is less likely to attain a hearing and a favorable resolution” (Milovanovic, 1994, p. 105). Interestingly, this position squarely challenges the logic of many psycholegal scholars who assert that explanatory rationales concerning the law should be based on “the values that make up conventional knowledge of the community of scientific psychology” (Wiener, Watts, & Stolle, 1993, p. 93).

The presence of masculine imagery and logic steeped in legal texts, doctrines and institutions is not to be dismissed (Smart, 1989; MacKinnon, 1987; Smith, 1995). Expressions such as burdens of *proof*, a demand for *factual evidence*, *actual* legal intent, *expert* testimony, and *causes* of crime are values steeped in masculine reasoning and sensibility (Arrigo, 1992, 1995a). This approach to legal decision making “celebrates the logical, rational, sequential, and, by its proponents’ own deductive reasoning, therefore reliable and ethical form of judgements” (Arrigo, 1995b, p. 89). These claims to sense making are veiled statements about power (Smart, 1989), conveying circumscribed truths that dismiss or neglect other ways of experiencing and knowing, including the perspective of women. As Bottomley (1987) concludes, the question is not whether the law

oppresses women’s styles of existence and conversely privileges those of men, but whether the very construction. . . . of legal discourse [and the] representation of the discourse in the academy . . . [are] the product[s] of patriarchal relations at at the root of society. (p. 48)

### *The critique of identity*

Radical proponents of feminist jurisprudence acknowledge that working within the legal apparatus can produce some positive change (e.g., Williams, 1987; Cook, 1990; Crenshaw, 1988). However, juridical categories reinforce the “legitimacy of the legal apparatus, the rule of law ideology, and, in the end, the rule of men” (Milovanovic, 1994, p. 106). This condition has led some feminist legal critics to consider whether women are formally equal to men under the law, wherein they receive identical rights. However, the issue of identical rights is itself problematic for women. “Equality doctrine requires

comparisons, and the standard for comparison tends strongly to reflect societal norms. Thus, equality for women has come to mean equality with men—usually white, middle class men” (Bartlett & Kennedy, 1991, p. 5; see also Naffine, 1990). Smith (1995) succinctly captures this dynamic. As she explains:

[the question is] whether women, being different, should argue for equal rights or for special rights. Equal rights (i.e., identical rights) . . . disadvantage women sometimes (e.g., as to pregnancy benefits) . . . and special rights accommodate women’s special needs and circumstances. [However], only equal (i.e., identical) rights should be claimed because any special needs or differences acknowledged by women are always used to limit women in the long run, and special rights will be viewed as special favors that accommodate women’s deficiencies. The problem is that if that is the way the issue is formulated, then women lose either way because the (unstated) norm is male. After all, who is it that women are different from? Whose rights (if equality is the standard) should women’s rights be equal to? And if women’s rights should sometimes be different from men’s, why is it women’s rights that are characterized as special? Why not formulate rights in terms of women’s needs and characterize men’s rights as special? One way makes as much sense as the other. The question is, who is the norm? (p. 281, n 16)

The problem identified above is intensified when race is factored into the equation (Harris, 1991; Crenshaw, 1988). In other words, for example, does a Latina woman use the standard of white women for reasonableness in arguing her battered women’s syndrome defense in a case where she is accused of murder (e.g., Bartlett, 1991; Russell, 1998)? Would it matter if the Latina woman was a third-generation Brazilian-American, fully acclimated to the social norms of life in the United States? Questions such as these draw attention to one of the most contentious issues facing radical feminist legal theory today. In short, the concern is that of essentialism and the “underlying basis of the legal subject” (Milovanovic, 1994, p. 107). Is there something to which we can turn that constitutes an “essential ‘woman’ beneath the realities of differences between women” (Harris, 1991 p. 242; see also MacKinnon, 1991, pp. 81–91)? Or would it be more consistent with feminine ways of experiencing to acknowledge the multiplicity of a woman’s existence, implying, then, that “differences [between them] are always relational rather than inherent” (Harris, 1991, p. 250; Collins, 1990).

This latter approach, popular among several critical feminist legal scholars, produces knowledge that is “situated, contingent, and partial” (Bartlett,

1991, p. 389). In this model, identity is a function of epistemological standpoints (e.g., Currie, 1993). Describing the subject in law entails locating “where and how women and minorities with their differential statuses in society continue to experience exclusion in . . . legal practices” (Arrigo, 1995a, p. 455), and then privileging these statuses because they “give [us] access to oppression that others cannot have” (Bartlett, 1991, p. 385).

*The critique of the legal method*

The radical feminist critique of knowledge and identity in legal thought gives way to a sustained assault of the juridical reasoning process (e.g., MacKinnon, 1982; Dahl, 1987; Arrigo, 1992, 1995b). “Law’s truth outweighs other truths . . . [and] the principal culprit in this realization is the legal method” (Arrigo, 1995b, pp. 92–93). It is at this juncture that we can begin to discern the manner in which studies in psychology and law have thus far contributed to the advancement of the critical agenda. Moreover, I note that this particular line of inquiry forms a pivotal basis for future radical scholarship at the intersection of gender, justice, law, and society. The contours of the legal method include boundary definition (e.g., scope of what’s admissible), defining relevance, and case analysis (MacKinnon, 1991). However, missing from this tightly scripted masculine construction is feminine consciousness (e.g., Coombe, 1989, 1992); that is, “the often silenced voice, the voice of the excluded” (Milovanovic, 1994, p. 108). In order to retrieve the voice of and way of knowing for woman in legal analysis, it is necessary to look “beneath the surface of the law to identify the gender implications of rules and assumptions underlying them and insisting upon applications of rules that do not perpetuate women’s subordination” (Bartlett, 1991, pp. 373–374).

Critical application studies in psycholegal scholarship embracing radical feminist theory have drawn on the insights of Gilligan (1982) and Gilligan, Lyons, & Hanmer (1990) to articulate a radical vision of gendered justice (Fraser, 1997). Selected works describe how the law can embody the unique concrete experiences of woman in juridical reasoning (Arrigo, 1992), in the articulation of sexual violence, including rape (Arrigo, 1993b) and their psychiatric labeling (Stefan, 1994), and in the development of psychological theories of equality (Squire, 1989). In addition, researchers, persuaded by the work of MacKinnon (1983, 1989), have appropriated the psychological values of consciousness-raising, narrativity, and interpersonal truth (e.g., Mossman, 1986; Littleton, 1987; Lahey, 1985; Smart, 1995) to establish a feminist legal method. As Arrigo (1995b) observes, these investigations reframe our understanding of woman in juridical thought and, consequently, in legal practice. Indeed, the model of feminist (psycholegal) thought envisioned here calls for the reconstitution of human social interaction and the communities that we all inhabit.

[A] rediscovery of ritual, not law, constituted by neighbors, not judges, informs this “village” aesthetic as personally meaningful. The metaphors of experience and storytelling displace the language of rules and facts. A communal gathering of residents preempts the calculated courtroom trial. The concerned search for “authentic” justice replaces the mental exercise of legal manipulation. (Arrigo, 1995b, p. 91)

## Anarchism

Approaches to anarchist thought vary considerably (e.g., Marshall, 1992). Interestingly, however, the perspective that has generated the most attention and controversy is the mutual aid strain of criticism as developed by Peter Kropotkin (e.g., 1902, 1912). What makes this orientation so provocative are its “scathing and sophisticated attacks against the state and its apparatus of legal control” (Ferrell, 1999, p. 94). This critique is not merely a condemnation of institutionalized authority through destructive political efforts for the sake of negation or chaos alone. Instead, the anarchist assault on legal and state-sanctioned regulation is merely “a transitional phase in which the old [is] destroyed so that the new might emerge, [leading to] a better social order” (Schatz, 1972, p. xii). In this regard, anarchism is a positive doctrine (Williams & Arrigo, 2001), defying the status quo and resisting calcified social arrangements wherein the “concern for humanity [displaces] a respect for authority” (Ferrell, 1999, p. 94).

The method by which this new, more humane order materializes is significant not merely for studies of anarchist thought in general but for understanding the perspective’s assumptions in relation to advancing a critically-informed psycholegal theory in particular. As Kropotkin (1912) explained,

[an anarchist] society is one in which all the mutual relations of its members are regulated, not by laws, not by authorities, whether self-imposed or elected, but by *mutual agreement* between the members of that society. . . . [Those relations are] not petrified by law, doctrine, or superstition, but [are] continually developing and readjust[ing], in accordance with the ever-growing requirements of free life . . . a continual evolution—such as we see in Nature. (emphasis added) (p. 68)

To be clear, the anarchist focus on mutual agreement substantially displaces society’s reliance on manufactured law and legal decision making, dramatically reorienting our frame of reference concerning the human condition



and interpersonal conduct. In short, anarchists value fluid and evolving social relations where identities “are never finished products but always projects under construction within a broader process of inventing and reinventing ourselves and others” (Ferrell, 1999, p. 96). Indeed, proponents of the theory maintain that anarchism is “a way of life and organic growth, of natural order within society, and of peace between individuals” (Woodcock, 1992, p. 19). According to the theory’s advocates, the anarchist approach therefore fosters a more just and liberatory society than those based on coerced, mandated, or otherwise artificially induced compliance (e.g., Sonn, 1992; Morland, 1997).

Based on the foregoing comments, it is easy to see how the anarchist agenda has “much to say about the social psychology of law, social organization, and the centralized state” (Fox, 1993b, p. 98). In order to understand the perspective and its utility for radical law-psychology inquiry, it is necessary to review the theory’s underlying epistemological assumptions. As a general proposition, these assumptions represent a loose and evolving assemblage of the theory’s acknowledged conceptions. These suppositions include the belief that reason and truth are forever uncertain, that change, ambiguity, and difference are to be celebrated, and that mutual aid and shared responsibility are integral to the social fabric of our existences. Comprehending these matters dramatically reframes the law and human behavior relationship, suggesting an entirely different set of psycholegal questions to explore in theory, research, and policy.

#### *The uncertainty of reason and truth*

Anarchists reject the notion that any one person, institution, or system “should embody and enforce final knowledge, certainty, or truth” (Ferrell, 1999, p. 95). The finality of reason and logic produces closure to possibilities, ensures the delegitimation of alternative perspectives for knowing and experiencing reality, and impedes prospects for meaningful reform (Ferrell, 1997). The law’s complicity in this process is profound. As Fox (1993b) contends, the “law prevents social change through a variety of substantive, procedural, and ideological techniques in addition to the use of coercion” (p. 106). Indeed, the law functions to codify certain truth claims by dismissing other points of view, declaring them to be unfounded, lacking scientific rigor, or outside the scope of reasonably accepted practices (Morland, 1997; Ferrell, 1997; Sonn, 1992). This juridical tendency (i.e., bias) reduces the capacity for people to chart the course of their own affairs, “forcing complex human interactions into an artificial legal framework, creating unhealthy dependency on legal authorities” (Fox, 1993a, p. 238).

To combat this proclivity toward legal ossification and sedimented reasoning, anarchists endeavor to “create situations in which a variety of viewpoints can coexist” (Ferrell, 1999, p. 95). The key to unlocking the potential of these multiple vantage points in ongoing human affairs and civic life is

*epistemic uncertainty* (Williams & Arrigo, 2001). Epistemic uncertainty defies the wisdom implied in law-focused solutions that seek to control, regulate, and “routinize social relations” (Kinsie, 1979, p. 6; Morland, 1997). Epistemic uncertainty means that people (as opposed to government) directly confront the social and human problems impacting the communities in which they live, without reliance on statutory guidelines or state-mandated directives (e.g., Marshall, 1992; Sonn, 1992). The logic of uncertain truth and reason, assumed in the anarchist critique, recognizes that “solutions to problems emerge as the problems themselves emerge” (Ferrell, 1999, p. 99). Consequently, the authority of law with its cataloging of rules and regulations is anathema to and disastrous for the pursuit of citizen justice and social change. As Kropotkin (1992/1885) proclaimed:

when there is ignorance in the heart of a society and disorder in people’s minds, laws become numerous. [People] expect everything from legislation and, each new law being a further miscalculation of reality, they are led to demand incessantly what should emerge from themselves. . . . [A] new law is considered a remedy for all ills. (p. 145)

By privileging rules, regulation, and control, law, then, becomes the panacea for all social maladies (i.e., disorder), “plac[ing] outside of oneself the importance of everyday decisions . . . construct[ing] the automatic [self]” (Bankowski, 1983, p. 281). Indeed, following the anarchist critique, the displacement of fixed notions of truth, knowledge, reason, and justice, entails a necessary and dramatic reconfiguration of the individual and of society (Fox, 1993b). The reconfiguration of the individual involves assessing the value of ambiguity in human conduct. The reconstitution of society requires investigating the psychological sense of community. Both assumptions inform the anarchist agenda and are suggestive for advancing the aims of radical social change at the law-psychology divide.

*The celebration of change, ambiguity, and difference*

The Russian anarchist Bakunin (1974) extolled the virtues of change, believing that individual freedom and, thus, civic consciousness, were lodged within its liberating grip. As he observed: “Let us put our trust in the eternal spirit which destroys and annihilates because it is the . . . creative source of life. The passion for destruction is a creative passion, too” (p. 58). Anarchists recognize that this “creative passion” produces life-affirming opportunities. The value of change rests in “its unlimited capacity to [establish] new vistas of meaning in work, leisure, religious preoccupation, political action, or other expressions of human social interaction” (Arrigo, 2000a, p. 20). In the philosophy of anarchism, the seamless thread of change is wedded to ambiguity and difference.

Ambiguity or unpredictability “constitute fertile ground for new ideas and identities and, at their best, overwhelm any attempts to achieve final solutions or final authority” (Ferrell, 1999, p. 96). Difference represents a state of existence that “allows people to be who and how they are in their communities, freed from the normalizing and external constraints of regulatory and disciplinary regimes (e.g., the mental health system, the criminal justice apparatus)” (Arrigo, 2000a, p. 12).

Mindful of how the anarchist assumptions of change, ambiguity, and difference underscore individual identity, some law-psychology researchers have drawn attention to the theory’s critical potential for large-scale reform. For example, Fox (1993a) explained how the mainstream emphasis on procedural justice and law’s legitimacy assumes “that the rule of law is always superior to nonlaw [and how it] assumes that the procedurally correct application of general principles is best even when it brings patently unfair results in particular cases” (p. 237). Not only does this logic foster the felt experience of injustice for the sake of law’s omnipotence, it dismisses the uniqueness of individual identities, with all their ambiguities, inconsistencies, anomalies, and differences. As Fox (1993a) therefore urged, espousing the virtues of the anarchist cry for radical change,

[i]n seeking a liberating identity instead, psycholegal scholars should reexamine their assumption that law is sufficiently redeemable and should concentrate on replacing law with nonlegal solutions to human problems. . . . Instead of searching the law for values congruent with our own, we should find our values in our psychological theory, political ideology, and personal and organizational ethics. *Law is simply irrelevant to conceptions of what is psychologically desirable.* (emphasis added) (p. 239)

Anarchism’s investment in a person’s right to exist freely, and its disavowal of the legal apparatus for guidance in the process, stems from the conviction that law’s “distinctive trait [is] immobility, a tendency to crystallize what should be modified and developed day by day” (Kropotkin, 1975/1886, p. 30). For anarchists, however, individual autonomy cannot be realized and celebrated without a sense of community that makes liberating identities possible. The manner in which this psychological sense of place unfolds represents the third and final epistemological assumption embedded in the anarchist perspective.

*The centrality of mutual aid and shared responsibility*

Anarchists accept people as they are. This is not the same as tolerating “people whom others might see as weird or offbeat, as outside the usual frameworks of propriety, or whose ideas or identities challenge our own sense

of who we are; instead, [anarchists] revel in the strange unpredictability of it all" (Ferrell, 1999, p. 97). The different identities borne of anarchism increase prospects for mutual awareness, and it is this mutuality that makes community not only possible but sustainable (Arrigo, 2000a). Indeed, in anarchist communities people are "more free to be themselves, and at the same time, [are] more directly responsible for themselves and others, than they are in situations regulated by external authority" (Ferrell, 1999, p. 97; Marshall, 1992). Thus, the psychological sense of community anarchists envision is one that is based on mutual aid and shared responsibility (Kropotkin, 1902, 1912).

Mutual aid implies localism, regionalism, or decentralization wherein people participate actively and directly in crafting the identity of their neighborhood or locale (Tiff & Sullivan, 1980; Sonn, 1992; Morland, 1997). As an anarchist assumption, mutual aid "grants the best chance of survival to those who best support each other in the struggle for life" (Kropotkin, 1902, p. 115). It follows, then, that shared responsibility entails the recognition that meaningfully living in a community is an intricate tapestry of vital social relations; one that is "woven tightly enough to care for others but loosely enough to preserve [individual] differences" (Ferrell, 1999, p. 97; Sonn, 1992; Morland, 1997).

Proponents of the anarchist perspective recognize that the legal system cannot ensure the optimal quality of individual life and social well-being intrinsic to this radical agenda (e.g., Godwin, 1971/1798; Goldman, 1969; Bankowski, 1983; Sonn, 1992). Moreover, critical psychological researchers, supportive of the anarchist critique, have demonstrated how legal principles or state-mandated practices limit prospects for social justice and thwart basic human needs and values (e.g., Sarason, 1982; Fox, 1991; see also Prilleltensky, 1994, 1999 for related political psychological commentary). For example, Fox (1993b) examined three areas "where legal doctrine seems especially ambivalent from an anarchist perspective" (p. 102). These included the law versus equity distinction, jury nullification, and the Ninth Amendment to the United States Constitution. What makes each of these phenomena ambivalent is the extent to which they more or less function to neutralize law's dominance in the lives of people, as citizens balance their need to exist autonomously and freely against a psychological sense of community. Indeed, on occasion equal treatment among citizens requires an appeal outside the law; at times citizen justice necessitates jury decision making not restricted by courtroom instructions or mandates; and in some instances rights claiming cannot be immediately ascertainable through the Constitution.

The dismantling of state-sponsored authority implied in each of the above cited legal doctrines demonstrates how "trends toward legalism, centralization, hierarchy, and authority are dangerous to human beings who would be better off in a vastly different society" (Fox, 1993b, p. 106). The anarchist assumption of mutual aid and shared responsibility, so integral to