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THE POLITICS OF REASON: CRITICAL LEGAL THEORY AND LOCAL SOCIAL THOUGHT

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INTRODUCTION

In this essay I pursue two different and potentially incompatible goals. In the first part of the Article I try to give a sense of the types of theory that are commonly lumped together under the label "critical legal scholarship"¹ and thus to describe and, to some extent, explain the body of writings produced by the lawyers, law students, and law teachers associated with the Conference on Critical Legal Studies (CLS).²

¹ Most articles describing critical legal theory are more or less straight, discursive accounts of a supposedly unified body of work about doctrinal indeterminacy, legitimation, and political action. See sources cited *infra* note 2. In this essay I have tried to come at the problem from the other end. Instead of searching for a "unified body of work," I offer a fragmentary set of accounts about critical legal theories. Most of the theories are drawn from the publications of those associated with the Conference on Critical Legal Studies (CLS); some are developed from my own teaching and writing. Then, rather than limiting myself to description, I analyze a constitutive tension that runs through critical legal thought and that can be used to understand and to *create* everyday social theory. I run two major risks by pursuing this descriptive/prescriptive strategy. First, I am stereotyping a body of scholarship that tends to wriggle out of any classificatory structure, and thus I put my friends and colleagues in the Conference into categories with which they are at least unfamiliar and at worst unhappy. Second, I am adopting a structure for the Article that is itself implicated in the dichotomies it discusses: Can one discuss a romantic, avowedly irrationalist phenomenology as an ideal-type? I offer sincere apologies, pleading lack of ability and a Scottish love of both system and contradiction. See, e.g., D. HUME, *A TREATISE OF HUMAN NATURE* (1888). I hope my good intentions, if not my results, will provide an excuse for all of this.

² For a general exposure to critical legal theory, see *THE POLITICS OF LAW* (D. Kairys ed. 1982), and in particular, Robert Gordon's excellent essay, *New Developments in Legal Theory*, in *id.* at 281, which inspired much of this Article. A further exposure to critical legal thought can be gleaned from the book reviews of *The Politics of Law*. In particular, see Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229 (1983); Forbath, Book Review, 92 YALE L.J. 1041 (1983); Levinson, *Escaping Liberalism: Easier Said Than Done* (Book Review), 96 HARV. L. REV. 1466 (1983). It would be *lèse majesté* to ignore Note, 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship, 95 HARV. L. REV. 1669 (1982), which does for critical legal studies what lettuce did for Peter Rabbit. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983), provides a rare programmatic vision for critical legal theory. See generally Kennedy & Klare, *Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). For an application of some of the ideas developed in this article to theories of personality, see Boyle, *Modernist Social Theory: Roberto Unger's Passion* (Book Review), 98 HARV. L. REV. 1066 (1985).

My argument is that all of these theoretical projects share at least a certain assumption about the politics of reason: the social power of apparently rational discourse. In the second part of the Article, I try to explain why someone would find it interesting or even liberating to produce this kind of theory or to think this way. Having examined, and rejected, the claim that critical legal theorists can be usefully divided into a rationalist and an irrationalist camp, I offer an alternative heuristic tool: the tension in critical legal thought between the subjectivist, personal, phenomenological strand and the structuralist, patterned, impersonal strand. I am happy to say that this tension is absolutely useless for classifying or categorizing theorists. It does seem, however, to offer some insights on *how to theorize*. The unifying aim of the Article is to develop a way of thinking that helps us both to confront the standard problems of social thought and to act: to deal with the most mundane exercises of power in the workplace as well as the baroque structure of liberal state theory. Consequently, it differs from much of the recent writing about CLS in that my aim is to develop a toolkit for an ongoing project rather than to chronicle the rise of an academic movement.³

One can describe the scholarship produced by those associated with the Conference on Critical Legal Studies in a number of ways. In fact, the multiplicity of theoretical entry points is both a strength and a weakness: the former because of the richness and depth that the scholarship has acquired and the latter because of the corresponding increase in inaccessibility, paradox, and self-referential obscurantism.

From the outside, critical legal scholarship appears to be a strange blend of legal realism, the New Left, and literary criticism. It oscillates between wildly esoteric European philosophy and painstaking descriptions of the fine texture of mundane social interaction. It is left-wing, yet it is deeply critical of Marxism. It is avowedly against hierarchy, yet it is often accessible only to those at the top of the educational pyramid. It is generally criticized as being too theoretical, yet its protagonists seem to believe that it informs an immediate and concrete type of political action, both within and outside the law school. Finally, it is antiformalist, yet it probably takes doctrine more seriously than any other contemporary school of legal scholarship. I do not seek to unravel all of these paradoxes in this essay, since that task is probably both undesirable and impossible. Instead, my strategy in the first part of the Article will be to describe some of the intellectual ancestors of critical legal scholarship and then to give a rough typology of that scholarship

³ See, e.g., *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984).

itself. In attempting to pursue these aims simultaneously, without becoming either too simplistic or too obscure, I have adopted a method that deserves some brief explanation.

While developing a summary of each of the bodies of thought that are collectively known as critical legal theory, I have tried to draw out a number of "traces" or "loose ends," which I weave together in the second part of the Article through a discussion of the difficulties involved in "doing" social theory. Such a method may not *solve* the paradoxes that I have mentioned, but I hope that it will minimize them. In particular, I hope that it will allow those who seek an introduction to CLS to skim off the exegetical sections, while allowing those who are more interested in the blueprint for theory to uncover the "archaeology" of the suggestions that I put forward.

Let me give a hint of the point towards which I am heading so that the trajectory of my argument will be easier to follow. Critical legal theory has reacted against a set of claims about the naturalness, the neutrality, the objectivity, and the apolitical quality of various discourses. I use the vague term "discourse" because the critiques that form much of the substance of critical legal thought have been mounted against a diverse range of ideas and social practices. There are critiques of formalism,⁴ of the liberal theory of the state,⁵ of "essentialism,"⁶ of a belief in the neutral expertise of policy scientists,⁷ of law and economics,⁸ of the hierarchy of classroom interaction,⁹ and of the "mass psychology of the new federalism."¹⁰ But in each case the substance of the critique has been to deny the authority and the immutability that the appeal to naturalness or neutrality confers on the practice in question.¹¹

Critical legal theory thus asserts that "things could be other-

⁴ See, e.g., R. UNGER, *LAW IN MODERN SOCIETY* (1976); Kennedy, *Legal Formality*, 2 J. LEGAL STUD. 351 (1973).

⁵ See R. UNGER, *KNOWLEDGE AND POLITICS* (1975); Boyle, *Ideals and Things: International Legal Scholarship and the Prison House of Language*, 26 HARV. INT'L L.J. 327 (1985).

⁶ See R. UNGER, *supra* note 5, at 1-32.

⁷ See Note, *Legal Theory and Legal Education*, 79 YALE L.J. 1153, 1172-78 (1970).

⁸ See, e.g., Baker, *The Ideology of the Economic Analysis of Law*, 5 J. PHIL. & PUB. AFF. 3 (1975); Horwitz, *Law and Economics: Science or Politics?*, 8 HOEFSTRA L. REV. 905 (1980); Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769; Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

⁹ See Kennedy, *Legal Education as Training for Hierarchy*, in *THE POLITICS OF LAW*, *supra* note 2, at 40.

¹⁰ See Gabel, *The Mass Psychology of the New Federalism: How the Burger Court's Political Imagery Legitimizes the Privatization of Everyday Life*, 52 GEO. WASH. L. REV. 263 (1984).

¹¹ See Gordon, *supra* note 2, at 289-92.

wise,"¹² and in working out the reasons *how* or *why* "things could be otherwise" it has had to grapple, albeit unconsciously, with the fundamental questions of contemporary social and philosophical thought. One way of describing these fundamental questions is to say that they center around the politics of reason: the extent to which our ideas of rationality are themselves incoherent, authoritarian, or politically tilted. Yet this grappling with concepts of rationality goes on subtextually. Sometimes it is literally subtextual, as when the names of European philosophers are invoked in the footnotes to signal a commitment to one position or another;¹³ sometimes positions can be inferred, as when an attempt to provide a small-scale critique of the politics of the classroom seems to imply a rejection of large-scale rationalist theories about the relationship of law and society.¹⁴ Thus debates about the politics of reason are not limited to the *objects* of the CLS critique, such as rule formalism. These debates are also carried on *inside* critical legal thought with respect to its own methodology; indeed, every critical legal studies conference seems to feature a discussion between the rationalists and the irrationalists.¹⁵ One of the principal aims of this essay is to bring to the surface some of these epistemological issues in critical legal theory, by tracing their progress in the intellectual traditions on which

¹² One can trace critical legal theory's stress on the contingency of all societal arrangements—its claims that we need not see societal arrangements as external *things* that we are powerless to change—and its insistence on the necessity of choice, to a large number of sources. See, e.g., M. ABRAMS, *THE MIRROR AND THE LAMP: ROMANTIC THEORY AND THE CRITICAL TRADITION* (1953); J. ANOUILH, *Antigone*, in *FIVE PLAYS* 3 (L. Galantière trans. 1958); R.D. LAING, *THE POLITICS OF EXPERIENCE* (1967); H. MARCUSE, *AN ESSAY ON LIBERATION* (1969); H. MARCUSE, *COUNTER-REVOLUTION AND REVOLT* (1972); J. SARTRE, *CRITIQUE OF DIALECTICAL REASON* (A. Sheridan-Smith trans. 1976); J. SARTRE, *THE REPRIEVE* (E. Sutton trans. 1947).

¹³ See, e.g., Kennedy, *The Structure of Blackstone's Commentaries*, 28 *BUFFALO L. REV.* 205, 210 n.2 (1979) (citing authors who most influenced development of article—for example, Lukacs, Levi-Strauss, Piaget, Kohler, Mannheim, Marx, and Hegel).

¹⁴ See, e.g., Kennedy, *How the Law School Fails: A Polemic*, 1 *YALE REV. L. & SOC. ACTION* 71 (1970); Kennedy, *supra* note 9, at 40; see also D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983).

¹⁵ The rationalist/irrationalist split has been one of the central discussions in CLS. Rationalists are supposed to work according to the model of 19th century social thought; in other words, they make far-reaching claims about what is *really* going on. M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977) has been held up as an example of rationalist critical legal theory. Irrationalists, on the other hand, are supposed to be relentlessly nihilistic, trashing everything because they know that no "positive" claim can be defended. See, e.g., Kelman, *Trashing*, 36 *STAN. L. REV.* 293 (1984). Duncan Kennedy's quasi-structuralist depiction of liberal legal theory is hailed as one of the central irrationalist texts. See Kennedy, *supra* note 13; see also Dalton, *supra* note 2, at 234-48 (arguing for irrationalist position, and stressing role of "fundamental contradiction" developed in Kennedy).

that theory draws.

The thematic development of my argument in this piece can be summarized as follows: In the first half of the Article, I concentrate on description. First, I claim that the politics of reason must attract our attention if we are interested in the distinction between justified authority and arbitrary power. Second, I examine particular theories produced by critical legal scholars, ranging from arguments about the semiology of legal discourse to criticisms of Marxist theories of law and state. While doing so, I study the ways in which critical legal thought has been or could be divided into opposing camps of rationalists and irrationalists. Finally, I argue that the rationalist/irrationalist division is simply not a useful one. In the second half of the Article, I offer an alternative tension in critical legal thought: that between the subjectivist and structural strands. After using this tension to unify the traces developed in the first part, I suggest a method for social and legal theory.

I. THE LINEAGE OF THEORY

A. *Introduction*

Critical legal theory has a complicated lineage both within and outside traditional legal thought. If we look inside legal thought the most obvious point of departure is legal realism,¹⁶ and, as is generally the case, the very fact that the connection is obvious tends to lead to a reductionist picture of both of the phenomena connected. To mitigate this coarsening reductionism, I begin by discussing legal realism and then move to a parallel discussion of linguistic theory and its influence on legal thought. I call it a parallel discussion because I attempt to present the same ideas and progressions in a different context. Finally, I discuss the difference between critical legal thought and Marxist legal theory.

B. *Legal Realism*

1. Introduction

It is a commonplace that to understand critical legal thought one must first understand legal realism.¹⁷ This is not as easy as it might

¹⁶ See Note, *supra* note 2.

¹⁷ Legal realism is much misunderstood as an intellectual movement. See Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459, 459-60 (1979). A large part of this misunderstanding is predicated on the apocalyptic fears of its rivals and detractors. See E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM & THE PROBLEM OF VALUE*

seem. When I recently asked a group of students what they knew about legal realism their response was that "the realists were the people who told us that judges put on their trousers one leg at a time, just like everybody else."

If I understand this slightly sexist statement correctly, it refers to the ineradicable subjectivity brought to the legal system by the very fact of the judge's humanity. This kind of argument has been a favorite of off-the-cuff jurists and after-dinner legal theorists for quite some time. They can quickly adduce examples of rough (but fair) commonsense justice and its negative counterpart, irresponsible judicial meddling. But the realists actually went far beyond this type of postprandial legal theory by developing a set of ideas that seemed to imply the impossibility of separating law from politics, not merely because of the judge's subjectivity but also because of the impossibility of constructing a set of rules that could be applied in a neutral or objective manner. Indeed, the vision of the realists that emerges from critical legal studies could be summarized in the following imaginary intellectual biography:

Legal Realists b. 1900(?) d. 1940(?). Much misunderstood group of legal scholars who are remembered as having made vulgar conspiracy-theory charges about bias in the judiciary but who actually did something much more important. The realists started off by pointing to the vacuity, circularity, and medieval silliness of legal reasoning and by stressing the role of policy rather than rules in judicial decisions. (Some of them had a naïve faith in the power of social science and advocated a legal elite made up of enlightened technocrats). The implications of their critique were more corrosive than they imagined, however, and seemed to undermine belief in the "rule of law" and thus to destabilize the whole legitimating story on which the liberal state depended. At that point the realists backed off, abandoning a treasury of critical and argumentative tools that were rediscovered by bright, young radicals in the early 1970's. This was the beginning of CLS.

159-78 (1973). For an example of such a misunderstanding, and of its rebuttal, see Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931); Llewellyn, *Some Realism about Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222 (1931). My own understanding of legal realism is particularly dependent on K. LLEWELLYN, *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* (1962), and on J. FRANK, *LAW AND THE MODERN MIND* (1930). Interestingly, the latter text represents an early working-out of ideas concerning the politics of rationality in the context of the judicial system. For a brief but comprehensive introduction to the diverse intellectual approaches subsumed under the term "legal realism", see Note, *supra* note 7, at 1157-72.

The best way to get a sense of the importance of the realists to critical legal theory and at the same time to develop several of the traces that are woven together in the last section of this piece is to work through an example of realist scholarship. In his beautifully crafted article, *Transcendental Nonsense and the Functional Approach*,¹⁸ Felix Cohen mounts a typical realist attack on the apartheid that classical legal thought set up between law on the one hand and politics, ethics, or empirical data on the other. After dealing with corporate law, trademarks, fair market value, and due process, he continues with a section entitled "The Nature of Legal Nonsense," which makes clear the background claims about language and the implicit vision of the social world on which his argument depends:

It would be tedious to prolong our survey; in every field of law we should find the same habit of ignoring practical questions of value or of positive fact and taking refuge in "legal problems" which can always be answered by manipulating legal concepts in certain approved ways. In every field of law we should find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy. *Corporate entity*, *property rights*, *fair value*, and *due process* are such concepts. So too are *title*, *contract*, *conspiracy*, *malice*, *proximate cause*, and all the rest of the magic "solving words" of traditional jurisprudence. Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Moliere's physician's discovery that opium puts men to sleep because it contains a dormitive principle.¹⁹

Cohen is making two basic points that are central to an understanding of critical legal scholarship. First, he is pointing out that law is a separate semiological²⁰ system, a system of discourse that takes the

¹⁸ Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935). I have chosen Cohen's article because of its clarity and its encapsulation of so many of the realist themes, and because it anticipates so much in later social theory. In teaching a jurisprudence class, I used Cohen's arguments as the starting place from which to develop my own ideas.

¹⁹ *Id.* at 820.

²⁰ There is a large, and largely fruitless, literature devoted to the correct usage of the terms "semiology," "semiotic," "semiotical," and so on. See, e.g., T. HAWKES, *STRUCTURALISM & SEMIOTICS* 123-50 (1977); T. SEBEOK, *CONTRIBUTIONS TO THE DOCTRINE OF SIGNS* 47-58 (1976). I use the term "semiological system" to mean a

"real" phenomena of the social world²¹ (a woman called Mrs. Palsgraf suffering an injury in a railway station) and translates them into a formalized realm of abstract concepts, with defined functional properties ("torts," "plaintiffs," "defendants," "foreseeability," and so forth). Cohen is arguing that since we created these abstract concepts for a purpose, we should look to that purpose²² and the factual and political phenomena related to it when a legal dispute arises. We should not attempt to settle the dispute by defining or interpreting words. For example, if we wish to decide whether a corporation is liable for certain acts done in a particular state we should look at the "policies" and "purposes" involved in imposing liability rather than attempting to "deduce" the result from a definitional analysis of whether the corporation has entered into the jurisdiction.²³ Cohen's demonstration of these points can be reduced to the idea that the "legal world" is an autonomous system of concepts and that arguments within that system will therefore be circular, unlike arguments that refer back down to the "real world" of social facts. Critical legal scholarship has accepted some parts of this critique and rejected others. To understand which parts were accepted, and why, we must look to the second premise of Cohen's argument, a premise that is not as well worked out as the first.

The standard realist attack on the meaningfulness of traditional doctrinal analysis, argumentation, and interpretation depends on a certain view of language. Cohen's point about the circularity of arguments in the closed system of legal concepts is simply not true if language can

collection of signs that, through their patterns of relationship and difference, are capable of transmitting messages. Thus, semiology is the general study of the systems of signification through which human beings attempt to communicate. See R. BARTHES, *ELEMENTS OF SEMIOLOGY* (A. Lavers & C. Smith trans. 1968).

²¹ I put "real" in quotation marks because any discussion of rationality and social theory must grapple with the question of the "reality" of phenomena. This is neither a verbal nor a metaphysical quibble. After all, our experience of Mrs. Palsgraf's injury can be perceived or understood only as part of an enormously complex pretheoretical, intellectual construct through which we interpret the social world. The ideas of "person," "injury," and "suffering" are all abstractions from, and filters on, experience. Maintained by ideological, epistemological, and social power, they and their kin literally *constitute* our world. Divergent ways of viewing (or creating) "reality" will at least cause us difficulty in communicating and at worst may lead others to brand us as "deviant" or "insane." How, then, can we say that the legal world is any more an artificial construct than the social world? Both are "systems of thought" that were (and are) created by people but that appear to be thing-like—immune to human intervention. Both, in a sense, create the world they purport to describe. In the text I brush over these objections since I want to save them for the second part of the Article. See also *infra* text accompanying notes 108-110; see generally P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1967).

²² See *infra* notes 88-89 and accompanying text (discussing Lon Fuller and purposive legal thought).

²³ Cohen, *supra* note 18, at 809-10.

act as a bridge, as a connection, between the "real world" of social life and the "legal world" of what he disparagingly refers to as "transcendental nonsense."²⁴ If I wish to find out whether a particular group of individuals pursuing some joint enterprise is in fact a corporation and I can only look within the world of legal concepts for my answer, then Cohen is right; the process would be necessarily circular. As he says, it would be the same as saying that "opium puts men to sleep because it contains a dormitive principle."²⁵ But if the term "corporation" could be defined authoritatively by a court in such a way as to translate its abstract legal properties into the concrete phenomena of the "social world," then it seems that Cohen's point would be invalid. To use the opium example again, it is as if we had defined the "dormitive principle" of opium in physical or chemical terms.²⁶

Yet Cohen denies the possibility that legal concepts are defined in nonlegal terms.²⁷ In part, this denial arises from the case studies that precede the section on which I am focusing. But it seems to me that Cohen's denial ultimately rests on a simple but corrosive belief: that language is not neutral.²⁸ There is no objective translation of social phenomena to legal phenomena, no neutral interpretation of unambiguous doctrine.²⁹ At each stage of the legal process a subjective and essentially political act of interpretation is required. This political choice is involved in the wording of rules, in the construction and maintenance of the "legal world," and it is involved in the process of "decoding," in the application of the legal system of signs to "reality." This idea will be more fully explained in the next section, but we have now reached the point where we can begin to draw out the traces that will be woven together in the conclusion of this essay. One could think of these traces as distinctions between legal realism and critical legal theory that may serve to illuminate both and that also express some of the tensions over the politics of reason to which I alluded in the introduction.

²⁴ *Id.* at 811.

²⁵ *Id.* at 820.

²⁶ *Id.*

²⁷ See *id.* at 820-21.

²⁸ I deal with this idea more fully later. The basic work that informs my discussion of language is the ubiquitous L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G. Anscombe trans. 1958).

²⁹ Cohen's argument is that the dogma of objectivity that is maintained by the formalistic use of language in legal reasoning serves to obscure the fact that judicial opinions arise from a matrix of social and political forces. Rather than advocating the purification of a formalism infected with foreign elements of subjectivity, Cohen's conclusion is that we should study the ways in which these social and political forces impinge on judicial decisionmaking. Thus, he seems to assume that subjectivity is an inevitable concomitance of language, no matter how carefully language is used. See Cohen, *supra* note 18, at 842-47.

2. First Trace: Neutral Law and Legitimation

First, Cohen is less concerned than critical legal theorists have been with the *reason* for the construction of this legal world, this set of signs that is apparently so divorced from the social reality we all experience every day.³⁰ It could be argued that in terms of liberal political theory it is in some sense necessary that we translate the struggles, conflicts, and politically contentious values of everyday life into the supposedly neutral semiological system of the law.³¹ The restraint of a potentially coercive state power and the defense of individual freedom both seem to require a set of neutral rights existing "above" the Hobbesian appetites that liberal theory imputes to us.³² In this view, law must be neutral *twice*. First, law must be neutral in the process of *translation*. Otherwise we would politically "distort" Mrs. Palsgraf's accident simply by turning it into "a tort case." Secondly, it must be neutral in the process of *decision*. In other words, once translated, the confused situation in the hot railway station, the radically different sets of values that could be applied, our empathy for the victim as opposed to the railroad—all of this is turned into an equation made up of formal, operational symbols.³³ And, because of this translation, we can deduce a neutral and correct answer, or balance the policies, and come out with an

³⁰ It seems that this point remains to be answered even if we decide that I am correct in suggesting that there is no qualitative difference between the conceptual framework that gives us the "real world" on the one hand and the framework that produces the world of "transcendental legal nonsense" on the other. See *supra* note 21.

³¹ For the germinative expression of this idea, see R. UNGER, *supra* note 5, at 88-103.

³² See Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1206-07 (1981).

³³ For an excellent description of this process in the Palsgraf case, see J. NOONAN, *PERSONS AND MASKS OF THE LAW* 111-51 (1976). Noonan's basic position seems to be a sort of humanistic post-realism. His ideas seem to depend on two basic assumptions: that no objective decision is possible, and that even the most rigid rule will have problems of formal realizability. Consequently, he argues that the legal profession should adopt a practice of benevolent and empathetic humanism. I believe that this is an important and, in many senses, admirable attitude, but I am more interested in the way that the legal system embodies the *general* practice of social reification: the process by which choice can be denied because the political judgment is hidden within the reified concept itself. Seen in this way the problem that Noonan identifies (the depersonalization of Mrs. Palsgraf by legal categories) is linked to all the other examples of social reification, ranging from the maintenance of sexist stereotypes of men and women to the feeling of constraint when one is urged to "think like a lawyer." In each case the role becomes more important than the person. The political or moral choice is hidden away inside the golden calf of an alienated social construct. Thus we are only required to provide acquiescence and adulation; the responsibility for our actions has been taken out of our hands by our own creations. This is the connection between idolatry and reification. See R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* 25-26 (1984); Boyle, *supra* note 2; Gabel, *Reification in Legal Reasoning*, in 3 RESEARCH IN LAW AND SOCIOLOGY 25 (S. Spitzer ed. 1980).

objective result.

So the first point we could make, the first trace we can draw out of legal realism, is that Cohen and the realists generally were not nearly as interested as critical legal scholars in the role that "transcendental legal nonsense" has in maintaining the picture of "a government of laws not men" and thus in supporting the legitimacy of the liberal state.³⁴ Much critical legal scholarship consists of a series of complicated and erudite explanations of the idea that law cannot be interpreted neutrally and thus that the law/politics distinction and the legitimating story on which the liberal state depends must inevitably collapse. Other critical legal theorists have turned away from a focus on the failure of neutrality in the interpretation of law and toward a focus on the politically "tilted" way in which legal doctrine *re-presents* social reality.³⁵ As Peter Gabel put it in a recent symposium, "The objective of the Supreme Court is to pacify conflict through the mediation of a false social-meaning system, a set of ideas and images about the world which serve today as the secular equivalent of religious ideology in previous historical periods."³⁶ This move from the politics of legal interpretation to the politics of legal imagery is continued by the CLS work that concentrates on other, "nonlegal" social meanings and belief clusters—a point to which I will return later.

3. Second Trace: Technocracy and Legitimation

The second difference between legal realism and critical legal theory is intimately related to the first. The realists were obsessed with the fact that judges were "making policy;" they wanted them to admit that fact and so to make "better policy." Sometimes this belief in better policy was shored up by an appeal to supposedly objective social science data.³⁷ Truth no longer resided in the law school; it had moved next door into the economics department. Yet the choices that were to be made using these data remained just as politically loaded as they had always been. No amount of "balancing" reified "interests" and no amount of pro/con policy argumentation would put the Humpty Dumpty of legal neutrality back together again. In place of the formalists' claim to have identified the natural legal language of the marketplace, some of the legal realists substituted an equally questionable

³⁴ See Kairys, *Law and Politics*, 52 GEO. WASH. L. REV. 243, 248-49 (1984).

³⁵ See, e.g., Gabel, *supra* note 33, at 36-37; Gordon, *supra* note 2, at 288.

³⁶ Gabel, *supra* note 10, at 265.

³⁷ See Schlegel, *supra* note 17, at 463.

claim to neutral expertise in social engineering.³⁸ Both of these claims had the effect of removing politically contentious disputes from the public realm of political debate and putting them into the hands of a small elite, who, as a matter of sociological fact, would generally have been white, middle-class males.³⁹ It does not seem as though one needs a sophisticated anti-positivist critique of "value free social science" to see that there was a potential "legitimacy-deficit."⁴⁰ Yet critical legal scholars *have* tended to draw from anti-positivist writing, and by doing so they have been able to expose the choices that are suppressed by positivist rhetoric. This is particularly clear if one looks at the elitist personal imagery promoted by the legal realist's metaphoric statement that the lawyer should act as a "social engineer":

The danger in such a metaphor is its definition of the social function of reason as prediction and control; it "substitute[s] a technocratic slogan for what ought to be a reasoned moral choice . . . [and] assume[s] the bureaucratic perspective within which—once it is fully adopted—there is much less moral choice available."⁴¹

As the quotation points out, when reason is defined as prediction and control, the moral and political choices that constitute "practical" knowledge⁴² are squeezed out by the apparent neutrality of technical knowledge. "[P]olitics," as Jürgen Habermas writes, "now takes on a

³⁸ See e.g., THE POLICY SCIENCES viii (D. Lerner & H. Lasswell eds. 1951); Lasswell & McDougal, *Legal Education and Public Policy: Professional Training in the Public Interest*, 52 YALE L.J. 203, 205 (1984).

³⁹ But cf. Johnson, *Do You Sincerely Want to Be Radical?*, 36 STAN. L. REV. 247, 280 n.88 (1984) (claiming that a similar argument that points to the fact that judges are "mostly white, male, professional, and relatively wealthy" is true but misleading. The legal elite is a group in which one finds enthusiastic support for feminism and affirmative action, as anyone who teaches at a prestigious law school cannot help but be aware.") (quoting Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 771 (1982)). Johnson's point actually has a certain plausibility if you compare judges to members of the electoral political elite, as he is doing in this excerpt. I would point out, however, that the women and minorities in these "prestigious law schools" have tended to disagree (for example, the Third World Coalition at Harvard). A vulgar empiricist's head count of tenured women and minority faculty tends to back up the assertion that the "enthusiastic support" mysteriously disappears around hiring time. In any event, a Burkean trusteeship of policy scientists is even less attractive than one of judges.

⁴⁰ For an account that explains the role of technocracy in depoliticizing "the public realm," see J. HABERMAS, *The Scientization of Politics and Public Opinion*, in TOWARDS A RATIONAL SOCIETY 62 (J. Shapiro trans. 1970); J. HABERMAS, *Technology and Science as "Ideology,"* in *id.* at 81.

⁴¹ Note, *supra* note 7, at 1165 (footnote omitted) (quoting C.W. MILLS, THE SOCIOLOGICAL IMAGINATION 131 (1959)).

⁴² For a definition of "practical" knowledge, see *infra* note 49.

peculiarly negative character. For it is oriented toward the elimination of dysfunctions and the avoidance of risks that threaten the system: not, in other words, toward the *realization of practical goals* but towards the *solution of technical problems*.⁴³ By appearing to be neutral to ends, or by merely offering means to reach pre-selected ends, the ideology of technocracy actually buttresses the status quo. Cost-benefit analysis in law and economics provides an excellent example.⁴⁴

The post-Coasean revolution⁴⁵ proved that anything can be factored in as a cost, including psychic upset or the wishes of future generations, and that all initial distributions of entitlements can generate efficient solutions, assuming the absence of transaction costs. Once the analyst starts juggling the figures these facts will be obscured, but the basic point remains. The analyst is not taking the existing entitlements as fixed and trying to replicate the operation of a perfectly efficient market because, given transaction costs, the replication of an efficient market often involves changing entitlements. Nor is the analyst putting all entitlements "up for grabs," factoring in social alienation, the "hidden injuries of class," and the kitchen sink.⁴⁶ Instead, the analyst takes

⁴³ J. HABERMAS, *Technology and Science as "Ideology,"* *supra* note 40, at 102-03.

⁴⁴ For the best description of the problems with this kind of theory, see Kennedy, *supra* note 8. While Kennedy claims to be criticizing only *liberal* law and economics, I would agree with Mark Kelman's argument that his critique also bears on the "wealth-maximization" principle that conservative economists like Posner use to make the initial distribution of entitlements. See Kelman, *supra* note 15, at 294 n.7. But see Posner, *Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 281, 291 (1979):

If one starts with a system in which a single man owns all of the wealth in the society, the allocation of resources that is efficient in the light of that distribution will probably be different from what it would be if one had started with a more equal distribution; nevertheless, both allocations are efficient. Thus, if the common law simply takes for granted the initial distribution of wealth and assigns rights and duties in such a way as to optimize resource use given that distribution, the resulting allocation of resources will be efficient.

⁴⁵ Coase's theorem states that in the absence of transaction costs, and assuming rational economic behavior, given any initial distribution of goods in a society the goods will be traded, bought, and sold until the utility-maximizing solution is reached. See Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁴⁶ The classic example of this indeterminacy is Duncan Kennedy's ironical "proof" that capitalism is inefficient:

I would like to propose the following assessment of the efficiency of capitalism: (1) Take the allocation of resources that would occur under the existing definition and distribution of entitlements, in the absence of transaction costs, and given perfect competition. (2) Value the subjective experiences of envy, frustration and rage that would be generated by the resulting distribution of welfare, using as a basis what it would cost to "buy out" the right to be free from these experiences. (3) Value the benefits to the poorer half of the population of bringing them to the median level of

a middle ground that conceals her choice of *which* entitlements to change. This strategy confers the legitimacy of science on a technique that actually operates in exactly the same way as the (more vulnerable) post-realist judicial opinion. Both techniques use the same metaphors and the same rhetorical structure. Both abstract certain reified entities from social life, be they "interests" or "externalities," and, having arbitrarily *created* these entities, they pretend to neutrality by subsequently "balancing" them. But whereas the value choice in a balancing test is fairly obvious, cost-benefit analysts can smuggle in their preferences and thus give their tinkering with the existing distribution of wealth the sham rigor of scientific rationality.

Thus, technocratic consciousness manages to defend the status quo without basing its policy choices on some utopian vision of the good and just life. This apparently "ideal-less" quality makes it different in an important way from other contemporary systems for the justification of power. Liberal legal thought, for example, legitimates social reality by pretending that Exxon and the street-person are both equal, free, legal persons pursuing rational private goals. Much of the power of scientism lies in its claim to be free of any such utopian vision; instead, technocratic thought claims merely to provide us with a means to an end. While creating the fantasy that a prior, full, and frank debate about which ends are to be pursued has already taken place, technocratic thought actually helps to destroy the possibility of any such debate occurring. The depoliticization of a social reality "only understood by experts" is subtle but far-reaching. It leads us along a road that transforms the old ideological images into cooler, less passionate ones. "Public opinion," "the public sphere," and "public decisionmaking" give way to "public opinion research," "public relations," and "publicity."⁴⁷ Finally, we are presented with the irony that the *presence* of the

health, clothing, housing, education, nutrition, power in the workplace and security about the future. Again, the basis of valuation is how much it would cost to buy out all of these welfare positions if they were legally defined as rights. (4) Value the losses to the richer half of the population from the interferences with the market entailed in redefining rights as in 2 and 3 above. The basis of valuation is what the losers could pay the gainers, *after* the change, to get back to their original positions. (5) Add 2 & 3 and subtract 4. (6) If the sum is positive, capitalism is inefficient, even given perfect competition and costless bargaining, and economic science demands its abolition.

D. Kennedy, A History of Law and Economics 99-100 (Sept. 1978) [unpublished manuscript on file with the *University of Pennsylvania Law Review*]. Kennedy immediately goes on to point out that "[a]ll of this is a mistake. If there is one thing economic science cannot possibly demand, it is the abolition of capitalism." *Id.* at 100. But the mistake is *the same one* that devotees of law and economics are making all the time.

⁴⁷ See J. HABERMAS, THEORY AND PRACTICE 25-26, 77-78, 104-05 (J. Viertel

scientific analytic technique actually ensures the *absence* of the value decision on which the technique is supposedly premised. By privileging "means" we create a vacuum around the choice of "ends," a vacuum that is immediately filled by the uncritical assumptions of the existing power structure. And since there is no legitimating picture of the good and just life woven into the technocratic ideology, it cannot even be held up to its own standards in the way that liberalism, for example, can.

It is for these reasons that Jürgen Habermas,⁴⁸ one of the most influential anti-positivist social theorists, claims that the ideology of technocracy violates our "anthropologically deep-seated interests" in two particular types of rationality—our practical interest in understanding ourselves and each other in social interaction, and our emancipatory interest in freeing ourselves from social constraints or belief structures that are no longer necessary (if they ever were) to individual or group survival.⁴⁹ By subordinating both these interests to our

trans. 1973); T. MCCARTHY, *THE CRITICAL THEORY OF JÜRGEN HABERMAS* 11-15, 381 (1978).

⁴⁸ Habermas is one of the leading lights of the Frankfurt school of philosophy. His works are supposed to support the rationalist position in CLS, presumably because of their broad sweep and their extensive foundational claims. *But cf.* Kennedy, *supra* note 13 (making an "irrationalist" claim about the *essence* of every legal dispute). Introductory works on Habermas have burgeoned recently. Unfortunately, the most lucid, popular, and widely quoted one is also the most misleading and inaccurate. *See* R. GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* (1981). Geuss misunderstands Habermas's view of science, misstates the role of the ideal speech situation, tries to apply a crude correspondence theory of truth to social consciousness, and generally resorts to a sort of philosophical Bowdlerization in order to accomplish his objective of translating continental social philosophy into the familiar language of English analytic thought. For a less readable but more accurate introduction to Habermas's ideas, see G. KORTIAN, *METACRITIQUE* (1980), and particularly the introductory essay, Montefiore & Taylor, *From an Analytical Perspective*, in *id.* at 1-21. A comprehensive summary of Habermas's ideas is given in T. MCCARTHY, *supra* note 47, and the recent debate between Habermas and his critics provides important material on the development of his ideas, *see* HABERMAS: *CRITICAL DEBATES* (J. Thompson & D. Held eds. 1982). I would strongly recommend three of Habermas's books: J. HABERMAS, *TOWARDS A RATIONAL SOCIETY* (J. Shapiro trans. 1970); J. HABERMAS, *LEGITIMATION CRISIS* (T. McCarthy trans. 1975); J. HABERMAS, *THEORY AND PRACTICE* (J. Viertel trans. 1973). The first develops critical theory in the context of the student movements of the sixties; the second traces both a history of social legitimation and a theory of contemporary crisis tendencies; and the third connects Habermas's concerns to the more familiar agenda of classical politics. Habermas's most recent work, 1 J. HABERMAS, *THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* (T. McCarthy trans. 1984), reworks these themes to bring them in line with his recent tendency to use language rather than work as the most fundamental trope in his epistemological armory.

⁴⁹ "Practical" is used here in the Greek sense of practical knowledge that is concerned with living morally and participating in the political life of the community. *See, e.g.,* A. MACINTYRE, *AFTER VIRTUE: A STUDY IN MORAL THEORY* 161-62, 222-25 (2d ed. 1984) (defining practical reason in terms of virtues achieving the good for the individual and for the community). This practical interest can only be satisfied through

interest in expanding the power of technical control, scientism transcends previous ideologies that justified the oppression of one class by another. It actually justifies our oppression of ourselves by ourselves.⁵⁰

4. Third Trace: Contemporary Legal Scholarship and the Concept of Reason

There is a third trace that comes from the realists and forms part of the context for contemporary critical legal theory. Legal realism has provoked a response in the legal thought succeeding it.⁵¹ Most of that reaction seems to have taken the form of a compulsive attempt to sublimate, deny, trivialize, or reinterpret the conclusions about the "subjectivity" of legal decisionmaking that the realists had reached. This attempt has involved the search for new sources of objectivity such as Wechsler's "neutral principles,"⁵² Posner's wealth-maximizing "effi-

communication and understanding, both within and between cultures, as well as by the individual's understanding of herself. It is this interest in undistorted communication that provides the epistemological orientation behind the historical, hermeneutic, or interpretive methods of gathering knowledge. These methods try to capture the meaning of a situation for the actor concerned rather than reducing the situation to a network of stimuli and responses, as scientific theories of society tend to do. The emancipatory interest, the idea that reason contains within itself the will to be free of dogma, depends on the methods of self-reflection, such as psychoanalysis or critical social theory, that we have developed to rid ourselves of false necessity. The idea of belief structures that were once necessary to group survival but are now merely empty and repressive traditions has definite Freudian overtones. See S. FREUD, *CIVILIZATION AND ITS DISCONTENTS* 33-92 (J. Strachey trans. 1961). It has also received strong, if historically unconvincing, support from such neo-conservative sociologists as Daniel Bell. See D. BELL, *THE CULTURAL CONTRADICTIONS OF CAPITALISM* 59-60 (1976) (Puritan values, restrictive sexual mores, and community discipline are no longer "functional" today but were needed in pre-revolutionary America when small towns were cut off from communication with others and surrounded by a potentially hostile world). Habermas's own explanation of the cognitive interests is given in J. HABERMAS, *supra* note 47, at 191-213.

⁵⁰ For writers in the Marxist and Weberian traditions this proposition reveals a major problem. Critical theory is normally dependent on the idea of an historical subject (for example, women, or the working class) whose interests are being suppressed and to whom the critique of existing institutions is addressed. Habermas, however, has to address his critique to the whole human race by appealing to political values that are also epistemological; he is claiming that a form of life (decentralized democracy in which history is made with will *and* consciousness) is being suppressed under a form of knowledge (technocracy and the fetishism of science). In doing so he is carrying on the Weberian tradition that explored the "iron cage" of the rationalized social world, every corner of which has been rearranged to reflect the "logic" of productive relations. See, e.g., H. MARCUSE, *Industrialization and Capitalism in the Work of Max Weber*, in *NEGATIONS: ESSAYS IN CRITICAL THEORY* 201 (1968); T. MCCARTHY, *supra* note 47, at 382-86; M. WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 27 (T. Parsons trans. 1958). See generally M. WEBER, *ECONOMY AND SOCIETY* (G. Roth & C. Wittich eds. 1968).

⁵¹ See Tushnet, *Post-Realist Legal Scholarship*, 1980 WIS. L. REV. 1383.

⁵² See Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L.

ciency,"⁵³ or Michelman's Rawlsian reinterpretation of rights.⁵⁴ It also manifests itself in the attempt to turn disputes about substance into disputes about process (Ely and Choper)⁵⁵ or about process and jurisdiction (Hart and Sacks).⁵⁶ But whatever the nature of the particular manifestation, one thing is clear: the contemporary modes of legal thought that express the views of the political right and the political center (law and economics and liberal natural law, respectively) are devoted to the task of finding an objective basis for legal decisionmaking.⁵⁷

There are a number of ways in which one could explain the fact that left-wing scholars wish to analyze the "subjective" side of law while centrists and conservatives wish to ignore that subjectivity or to search for new sources of objectivity. The simplest explanation would be the one raised in discussing the first and second traces: only by ap-

REV. 1 (1959).

⁵³ See R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977). For a discussion of the distinction between positive and normative economic analysis, see Posner, *supra* note 44, at 284-87. For a Kafkaesque example of policy-oriented economic studies analysis, see Landes & Posner, *The Economics of the Baby Shortage*, 7 J. LEGAL STUD. 323 (1978) (arguing for sale of babies from natural to adoptive parents). But see Posner, *supra* note 44, at 286 (arguing that policy recommendations based on economic analysis do not "raise inescapably the issue of the adequacy of economics as a normative system"). For critiques of the normative functions of economic analysis of law, see R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 97-98 (1977); Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Michelman, *A Comment on Some Uses and Abuses of Economics in Law*, 46 U. CHI. L. REV. 307 (1979); Michelman, *Norms and Normativity in the Economic Theory of Law*, 62 MINN. L. REV. 1015 (1978). For general critiques of the politically "tilted" nature of both positive and normative economic analysis, see Baker, *supra* note 8; Horwitz, *supra* note 8; Kelman, *supra* note 8; Kennedy, *supra* note 8; Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 477-81 (1974).

⁵⁴ See Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973). Michelman's cultured attempt to apply an abstract moral theory to constitutional law actually does grapple with the questions of political "tilt" and subjectivity. The most fascinating successor to legal realism is Ronald Dworkin. Dworkin claims there are clear, unambiguous, and coherent political rights that pre-exist law and that judges enforce. Since the legal system's need for neutrality is premised on the unstable, conflicting, and indeterminate nature of non-legal value judgments, Dworkin's move is breathtaking in its audacity and implausibility. It is almost as if contemporary philosophers of science had answered skepticism about scientific objectivity by claiming to have received their knowledge directly from God. See R. DWORKIN, *supra* note 53, at 81-130.

⁵⁵ See J. CHOPER, *JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS* (1980); J. ELY, *DEMOCRACY AND DISTRUST* (1980); see also Parker, *The Past of Constitutional Theory—and Its Future*, 42 OHIO ST. L.J. 223 (1981) (criticizing process theory).

⁵⁶ See H. HART & A. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 3-6 (tent. ed. 1958).

⁵⁷ For a description of the way in which this has happened, see Tushnet, *supra* note 32, at 1210-14; Unger, *supra* note 2, at 574-76.

pearing to be objective could law appear to be separate from politics. Leftists have traditionally seen this search for objectivity as merely another way to reify the current arrangements of society so that they appear to be both natural and neutral, and thus to remove social and political choice from individuals.⁵⁸ Centrist and right-wing scholars, on the other hand, have always nursed dark, Hobbesian fears of the slippery slope to anarchy or fascism, a slippery slope that is at present walled off by a fragile belief in a government of "laws not men."⁵⁹ It is these fears that form the anxious counterpoint to their paeans of praise for the rule of law.

On this view critical legal scholars recognize, while other scholars deny, minimize, or ignore, the "politics of law." Thus the tension in today's legal theory can be understood simply by looking to the liberal political vision that sets the stage for this conflict by insisting on a Hobbesian view of human nature,⁶⁰ a subjective theory of value,⁶¹ and a vision of "neutral law" to reconcile the two.⁶² But if we go still further "into" the liberal world view, we can say that the tension in legal scholarship is not so much that between law and politics as it is between reason and passion, or reason and will.⁶³ After all, politics is seen as the clash of passions, while law has long been identified with reason, artificial or not. Our explanation might claim that the post-Enlightenment epistemological paradigm⁶⁴ had promoted a politically factional notion of reason, a notion of instrumental rationality based on prediction and control.⁶⁵ Such a view of rationality would define itself by opposition to the transcendental, superstitious, or mythical view of the world that it spent most of its time attacking. Consequently, it would be blind to the way that a demystified, rationalized society could constrain its citizens in exactly the same way that a barbarous and superstitious world had done:

⁵⁸ See Gabel, *supra* note 33, at 28-29.

⁵⁹ See Wechsler, *supra* note 52, at 12.

⁶⁰ See MacPherson, *Introduction* to T. HOBBS, *LEVIATHAN* at 9-63 (1968).

⁶¹ See R. UNGER, *supra* note 5, at 88-103.

⁶² See *id.* at 167-70.

⁶³ See Forbath, *supra* note 2, at 1043, 1048-49 (mentioning tension in legal scholarship between reason and will and concluding that element of reason in law has radical transformatory potential that could be redeemed by critical legal scholarship and political action); see also *infra* note 106 and accompanying text.

⁶⁴ For the role played by paradigms in the evolution of scientific research, see T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 10-22 (2d ed. 1970).

⁶⁵ The idea that reason has become reified as prediction and control is only one of the critiques of rationality. I bring it out here because of its connection to the second trace—the critique of technocracy in legal decisionmaking. For a discussion of the other critiques of rationality, see *infra* notes 99-100 & 141-44 and accompanying text.

In the enlightened world, mythology has entered into the profane. In its blank purity, the reality which has been cleansed of demons and their conceptual descendants assumes the numinous character which the ancient world attributed to demons. Under the title of brute facts, the social injustice from which they [sic] proceed is now as assuredly sacred a preserve as the medicine man was sacrosanct by reason of the protection of his gods. It is not merely that domination is paid for by the alienation of men from the objects dominated: with the objectification of spirit, the very relations of men—even those of the individual to himself—were bewitched. The individual is reduced to the nodal point of the conventional responses and modes of operation expected of him. Animism spiritualized the object, whereas industrialism objectifies the spirits of men. Automatically, the economic apparatus, even before total planning, equips commodities with the values which decide human behavior. Since, with the end of free exchange, commodities lost all their economic qualities except for fetishism, the latter has extended its arthritic influence over all aspects of social life. Through the countless agencies of mass production and its culture the conventionalized modes of behavior are impressed on the individual as the only natural, respectable and rational ones.⁶⁶

If, as Horkheimer and Adorno suggest, the very concept of reason assumes a political tilt, then scholarship that searches for objectivity may merely be conferring an extra authority on social practices whose contingent character is obscured by the very reasons used to support them. Thus to understand the projects undertaken by critical legal theorists we need to understand more than the liberal ideal of “a government of laws and not men.” We need to understand the metaphysics of twentieth-century thought and the politics of reason itself. How ironic that this conceptual explosion should be provoked in legal thought by a group of scholars, some of whom merely wished to replace the “artificial reason” of a formalistic common law with the “predictive reason” of an enlightened policy science.

5. Summary

Legal realism provided critical legal scholars with many of their

⁶⁶ M. HORKHEIMER & T. ADORNO, *DIALECTIC OF ENLIGHTENMENT* 28 (J. Cumming trans. 1972).

arguments and the CLS project was made easier because the legal elite had already been "infected" with realism. Critical legal studies, however, has transcended realism in three ways, each of which provides a trace to be taken up again in the second part of this Article.

First, critical legal scholars have pushed beyond realism into a social-theoretical analysis of the politics of law. They have done this in two ways: by analyzing the role that the myth of "neutral law" plays in legitimating legal discourse and by examining the way that the legal system translates a politically loaded social reality into a world of depoliticized operational signs or ideological chimeras. In other words, a realist looking at a case like *Lochner v. New York*⁶⁷ would see class bias and bad logic; critical legal theory would also uncover the repression of a set of contradictions that beset the liberal view of the state.⁶⁸ At the same time critical legal theorists have argued that the semiological system of the law must be analyzed as merely one of many "belief-clusters" that function to "close" the social world by making it seem natural or neutral.⁶⁹

Second, critical legal theorists have rejected the legal realists' attempt to reconstitute the neutrality of the legal system around policy argument, balancing of interests, or the supposedly objective expertise of policy scientists trained as lawyers.⁷⁰ In particular, CLS writers have brought a varied set of critiques to bear on the current law and economics scholarship to expose the way in which that scholarship masks politically contentious proposals with the supposedly neutral legitimacy of microeconomic analysis.⁷¹ The aim of these critiques has been to show that an appeal to "wealth maximization" is just another invocation of a set of signs designed to convert power into authority, another appeal to false necessity. In this sense the critical arguments are the

⁶⁷ 198 U.S. 45 (1905).

⁶⁸ See Kennedy, *Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, in 3 RESEARCH IN LAW AND SOCIOLOGY 3 (S. Spitzer ed. 1980) (arguing that examination of *Lochner* demonstrates how classical legal consciousness provided specific framework for conceptualizing, and thus limiting, contradictions and tensions that the legal elite were likely to perceive in legal systems).

⁶⁹ See Gordon, *supra* note 2, at 281, 287-92.

⁷⁰ See R. UNGER, *supra* note 5, at 88-103. As Unger described it:

The characteristic predicament of the modern lawyer is to argue constantly about policy, as if rational choice among competing values were possible, yet to remain faithful to the idea that values are subjective and to the political doctrine of which that idea is a part. The purposive doctrine of adjudication is simply the theoretical statement of this everyday contradiction.

Id. at 95.

⁷¹ See, e.g., *supra* note 8 (sources criticizing law and economics scholarship).

same as those directed against the ideology of neutral law. However, the particular characteristics of technocratic as opposed to formalistic argument demand more localized sources of theoretical inspiration. Jürgen Habermas's work on cognitive interests seems to be a good starting place.

Third and finally, among the descendants of legal realism, only critical legal scholars are attempting to deal with the politics of reason. They alone appear to be concentrating on the idea that is the common obsession of feminist theorists,⁷² literary critics,⁷³ and philosophers of science,⁷⁴ language,⁷⁵ and art:⁷⁶ that the very concept of rationality has become problematic. This may seem to be a very abstract and philosophical preoccupation for legal scholars, particularly those supposedly concerned with political action. Yet our three "traces" have already given us one good reason to believe that such a focus is both necessary and desirable. After all, the ideas that CLS carries on from legal realism are those that deal on a very mundane level with rationality and the social construction of knowledge. The two central legal realist arguments depended upon a *critique* of essentialist rationality in linguistic interpretation and a *defense* of the essential rationality of science. Thus the judge was supposed to give up playing with words and to begin

⁷² See, e.g., C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703 (1982).

⁷³ For an example of literary criticism questioning the concept of rationality, see generally DECONSTRUCTION AND CRITICISM (G. Hartman ed. 1979).

⁷⁴ See P. FEYERABEND, REALISM, RATIONALISM, AND SCIENTIFIC METHOD (1981); MacIntyre, *Epistemological Crises, Dramatic Narrative, and the Philosophy of Science*, in PARADIGMS AND REVOLUTIONS 54, 55-59 (G. Gutting ed. 1980).

⁷⁵ I draw ideas about the breakdown of rationality in the study of linguistic philosophy from an interpretation of Wittgenstein's later works, an interpretation that Wittgenstein did not seem to share. See L. WITTGENSTEIN, *supra* note 28. Other contemporary understandings of a-rationalism in the philosophy of language draw more heavily on J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1976); M. FOUCAULT, THE ORDER OF THINGS (1970); M. FOUCAULT, LANGUAGE, COUNTER-MEMORY & PRACTICE (D. Bouchard ed. 1977). In fact, it seems that the success that such writers as Foucault and Derrida have had in Britain and the United States is partly due to the particularly corrosive effect that the post-Wittgensteinian view of language has had on all the academic discourses within those countries. Paradoxically, philosophers of language seem to be largely unaware of the role that an anti-essentialist linguistic theory plays in "decentering the subject." In a forthcoming essay, I attempt to deal with the breakdown of essentialist theories in jurisprudence, science, art, and mathematics. In all of these areas, one could say that the anaesthetic hold of essentialism is broken at precisely the moment when it is realized that the question "What is law, art, science, etc.?" is literally meaningless. Wittgenstein's outstanding contribution was that he flushed the medieval fascination with essences from its most secure hiding-place—right under our noses—in the everyday objectification of linguistic meaning.

⁷⁶ See, e.g. D. BELL, *supra* note 49, at 46-54; Bullock, *The Double Image*, in MODERNISM 1890-1930, at 58, 62-64 (M. Bradbury & J. McFarlane eds. 1978); see also S. SPENDER, THE STRUGGLE OF THE MODERN 189-206 (1963).

playing with policy science. The realists did not consider the possibility that the same corrosion might be eating away at *both* language and science at the same time, although science gave less indication of this fact.

If this is true then the latter-day realist and the law-and-economics devotee will try in vain to shift the intellectual foundations of their discourse from language to technocracy. Or worse still, they will appear to succeed, establishing a new natural law of unquestionable truths supportive of the status quo. On either of these analyses critical legal scholarship must confront the question of the politics of reason—whether in terms of language, of science, of literary theory, or in terms of the fine network of mini-ideologies that sustain the hierarchies of everyday life. With this in mind I turn first to the question of language and linguistic philosophy.

C. *Linguistic Theory*

1. Introduction

People who “do” law spend a lot of time arguing about the meanings of words, so it is hardly surprising that linguistic philosophy is important to legal theory. At the moment legal thought, like most areas of human knowledge, is slowly assimilating the post-Wittgensteinian view of language. This is actually not a fancy set of ideas; very few fifty-cent and practically no seventy-five-cent words are needed to explain it. The difficulty in understanding it lies, rather, in the fact that such a simple idea has so many ramifications. In this short essay I could not even hope to summarize the maze of arguments and counter-arguments that surround this area of semantic theory. Instead I try to show how a particular vision of language has influenced legal theory, leaving to another article the task of defending that vision.

Enough prologue; here is the view to which I have referred, expressed in its four most simple forms:

- (1) Words do not have “essences.”⁷⁷
- (2) Words do not have “core meanings.”
- (3) Language is, or *can* be, used in an infinite number

⁷⁷ For a recent debate proving that essentialism undergoes a perpetual renaissance, see Kripke, *Naming and Necessity*, in *SEMANTICS OF NATURAL LANGUAGE* 253 (D. Davidson & G. Harman eds. 1972); N. CHOMSKY, *REFLECTIONS ON LANGUAGE* 36-77 (1975). In particular, see *id.* at 51-53. Despite his criticism of Kripke's essentialism, Chomsky finds Katz's positivistic (and apparently essentialist) “semantic markers” unobjectionable, see *id.* at 42, which seems rather strange. See J. KATZ, *THE PHILOSOPHY OF LANGUAGE* (1966); J. KATZ, *SEMANTIC THEORY* (1972).

of ways: it is a malleable instrument for communication.⁷⁸

(4) That a word is most commonly used to mean X does not mean that X is the "core," or "plain," or "essential" meaning of that word. To look to the "plain meaning" of a word as its "real meaning" is a special type of reification, since it ignores the purpose for which the word is actually being used.⁷⁹

⁷⁸ The caveat that language *can* be used this way is necessary because there is another side to the story. One of the continuing incentives to understanding the way in which language is dependent on intention is the persistent experience of reification, the conversion of words into things. This obviously has political as well as epistemological importance. For example, the ordinary language meaning of "woman" may contain sexist assumptions. Contentious political arguments can be concealed in a definitional ascription of value: "America needs patriots, not traitors—Support the Draft." But if one creates a theory that concentrates on the possibility of linguistic freedom from these encrustations of political meaning, does this *deny* the equally important experience of reification that gave rise to the theory in the first place? In our desire to assert the possibility of using language with will and consciousness, we may be running the danger of contradicting, or at least underplaying, the structured, patterned, and hypostatized nature of our linguistic actions. Even the people who think about words for a living have not dealt with this tension in an interesting way.

Both Anglo-American and Continental linguistic philosophers have been either unable or unwilling to deal with a phenomenon that is at once structured and malleable, intentional and constrained. The French structural linguists have focused on the reified and constraining aspects of language. See, e.g., R. BARTHES, *supra* note 20; J. CULLER, FERDINAND DE SAUSSURE 48-50 (1976). The ordinary language philosophers have done the same, but without the element of political disapproval, while also focusing upon the role of purpose in language use. See, e.g., J. AUSTIN, *HOW TO DO THINGS WITH WORDS* 24-38 (2d ed. 1975); C. MUNDLE, *A CRITIQUE OF LINGUISTIC PHILOSOPHY* 78-90 (1970); Austin, *The Meaning of a Word*, in *PROBLEMS IN THE PHILOSOPHY OF LANGUAGE* 151 (T. Olshewsky ed. 1969); Austin, *A Plea for Excuses*, 57 *PROC. ARISTOTELIAN SOC'Y* 1 (1956). Wittgenstein straddled the boundary between the structuralist and intentionalist aspects of language, providing conceptual tools to both sides. See C. MUNDLE, *supra*, at 158-65. Derrida has reiterated the phonetic, Saussurean argument that it is the differences between words that allows for the possibility of linguistic meaning (bat vs. pat). See J. DERRIDA, *supra* note 75, at 27-73. He has placed this claim next to Levi-Strauss's argument that it is epistemological *differentiation* that allows for the construction of social meaning (male vs. female, raw vs. cooked, mind vs. body, natural vs. artificial). *Id.* at 101-40. However, he has provided no connection *between* these arguments that would deal with the political act by which the signifier is joined to the signified. In fact, he seems to think that such a connection is neither possible nor desirable. See *id.* at 50. It is exactly this tension that we will meet throughout critical legal theory.

⁷⁹ The "plain meaning" doctrine in legal interpretation has a very rough analogue in the work of the so-called ordinary language philosophers. Although these philosophers seem to recognize that the use of an utterance in context predetermines its meaning, they often speak of a "normal" usage. See, e.g., J. SEARLE, *SPEECH ACTS* 74 (1969). The basic criticism I would make of their insistence on common usage is that they frequently move from claims about "normal" usage to claims about normatively *correct* usage without realizing the extent to which this involves them in the naturalistic fallacy. See *infra* notes 154-57. Stanley Fish puts the same point in a different way. See Fish, *How Ordinary is Ordinary Language?*, 5 *NEW LITERARY HIST.* 41, 45 (1973) ("Once you've taken the human values out of the language, and yet designated what

As I said, the working out of the implications of these ideas for legal theory is a slow task. On the most basic level this view of language seems to undermine the picture of the neutral interpretive function of the judiciary.⁸⁰ Let us start with a little background. Formalist theory conceptualized the judge as merely a conduit through which the "General Will" of statutory law flowed to reach the case at bar.⁸¹ Alternatively, she was an objective logician who merely deduced the common law from a few uncontentious, aprioristic features of society, such as the existence of a free market system.⁸² Finally, if directly bound by precedent, the judge was once more viewed as the neutral conduit through which the words of the precedential rule were channeled into the case at hand. Of course, as cynical moderns, our reaction to all of these claims is appropriately leery. It is not clear, however, exactly what other vision we have to replace the formalistic one, a point to which I will return later. Critical legal thought has claimed that the cynical modern response is, in part, a consequence of the popularized version of the post-Wittgensteinian view of language to which I referred, but that the full implications of that view of language have not been realized.⁸³

Some CLS scholarship has asserted that liberal political theory has as one of its central tenets the idea that there are no moral essences.⁸⁴ Such a view makes all value judgments subjective and arbitrary—"purely a matter of taste." How, then, could the legal system give the kinds of neutral decisions expected of it? The formalists had tried to get around the problem that this posed for the legitimacy of the judicial role by covertly relying on another kind of essence—the essential meaning of words.⁸⁵ The judge was not imposing her values, or anyone's values, but was merely interpreting the words of the law. Yet the more closely one looked at law or at language, the more the formalistic idea of interpreting the core meanings of words seemed to fall apart. The realists imagined that we could easily desert a narrow for-

remains as the norm, the separated values become valueless, because they have been removed from the normative center. That is to say, every norm is also a morality, and whatever is defined in opposition to it is not merely different, but inferior and inessential.").

⁸⁰ For the most cogent discussion of how the subjectivity of language affects the objectivity of judicial interpretation, see R. UNGER, *supra* note 5, at 92-94.

⁸¹ See B. DE MONTESQUIEU, *THE SPIRIT OF THE LAWS*, bk. XI, ch. 6, at 159 (T. Nugent trans. 1949) ("[J]udges are no more than the mouth that pronounces the words of the law, mere passive beings, incapable of moderating either its force or rigor.").

⁸² See Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW*, *supra* note 2, at 18, 23-26.

⁸³ See R. UNGER, *supra* note 5, at 92; Tushnet, *supra* note 51, at 1388.

⁸⁴ See R. UNGER, *supra* note 5, at 76-81.

⁸⁵ See *id.* at 88-103.

malism once we realized that there was no real meaning of a word. Instead we would simply look to purpose more often. There was, however, a gradual realization that "looking to purpose" did not seem to fit very well with the role of apolitical decisionmaking that the liberal theory of the state had supposedly assigned to law.⁸⁶ This realization was fatal to the separation of law from politics. Thus the line between legal and social theory no longer seemed self-evident—one more factor tending to collapse all discussions of legal doctrine into arguments about the myriad conflicting visions of the "good life" that were prefigured in legal rules and concepts.

As I suggest in the preceding discussion, legal thought has assimilated this corrosive view of language in two main stages. I will now try to sketch out those stages—the move to purposive interpretation and the collapse of the law/politics distinction—and then develop the traces relating to the politics of reason, which will be woven together at the end of the piece.

As I pointed out earlier,⁸⁷ an insistence on purposive interpretation lay behind many of the realist critiques. It was by insisting that one always needed to look to purpose in order to interpret even the plain meaning of words that the realists unfroze rules, shattering their brittle reified form and dissolving them back into their constituent policy goals. The standard example was provided by an exchange between H.L.A. Hart and Lon Fuller. Hart had tried to inoculate legal thought against realism.⁸⁸ As with a medical inoculation, the patient was going to be given a weakened form of the disease—linguistic indeterminacy—in order to acquire a resistance to it. Hart's attempt at inoculation theory accepted that words were sometimes indeterminate but insisted that there was a "core meaning" to every word and, provided the judge only dealt with cases that fell in the "core," no subjectivity or discretion was involved. Thus the rule of law was safe, if weakened, and the judge need only have recourse to political factors such as policy argument in the "penumbra" of legal rules.

The example that Hart used to support his argument seemed the simplest and most unproblematic of rules: "No vehicles are allowed in the park." Surely if a quasi-formalism could be defended, this was the ground most favorable for its defense. All of the problems of conflicting rules, policies, and principles, all of the problems of indefinite language in other cases, and all of the difficulties involved in analogizing from one case to another seemed to be avoided. In fact, it seems that one

⁸⁶ See *supra* text accompanying notes 30-33 & 58-59.

⁸⁷ See *supra* text accompanying note 22.

⁸⁸ See H. HART, *THE CONCEPT OF LAW* 121-32 (1961).

could argue that Hart's example would prove nothing, since it ignores all of the factors with which we would expect a theory of judicial decision to deal. But one thing seems obvious. If the formalistic picture of adjudication cannot be defended in the application of a rule forbidding vehicles in the park, then it cannot be defended at all. Yet it was on this example that Lon Fuller based his counterattack.

Fuller's argument⁸⁹ was really quite simple. He challenged Hart's theory of the plain meaning of words by pointing out the contextual and purposive elements of language use. His basic point could be explained by saying that if we wished to decide whether an electric golf cart can enter the park, we would not look for the "plain meaning" or the "penumbra" of the word "vehicle," but would rather find out whether the city council was worried about noise, pollution, or knocking people down. What is more, Fuller argued, if we are sure that an automobile should be denied entrance, it is not because "automobile" is clearly within the "core meaning" of the word "vehicle" but because, *whatever the purpose behind the rule*, an automobile would appear to be prohibited. Fuller's argument cannot be marginalized by claiming that it is just another technique for judicial decisionmaking. He claims that his theory describes the way linguistic meaning actually works. If he is right, then a judge who applies the "plain meaning" of the word is committing the fallacy of reification⁹⁰—abstracting a meaning from its context and purpose and treating it as though it were an external thing, capable of value-free investigation.

Once the step to purposive interpretation had been taken, it appeared that there was no going back. "Purposes" and "intentions" were obviously just as conceptually reified as "plain meanings." Who knows what Congress intends? What if there are conflicting viewpoints? Can we not take policies apart into smaller, more localized aims? In other

⁸⁹ See Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630, 661-69 (1958).

⁹⁰ Reification or objectification is the fallacy of regarding an abstraction as a material thing. This is endemic in legal thought on the most mundane level. For example, a rule can be regarded as a series of reified policies, a policy can be regarded as a reified political conflict, and the reification of words is a lawyer's stock in trade. In social thought the idea was best developed by Marx. See Marx, *Economic and Philosophic Manuscripts of 1844: Selections*, in THE MARX-ENGELS READER 52 (R. Tucker ed. 1972). In these manuscripts, Marx describes the process by which the actions of objects come to rule the producers, instead of being ruled by them. Cardozo and Humpty-Dumpty both pointed out that the word starts out being a slave to thought and ends up its master. In doing so, they were expressing the unity that binds together the fetishism of commodities and essentialism in language, the *power* exercised by objectification. See *Berkey v. Third Ave. Ry.*, 244 N.Y. 84, 94, 155 N.E. 58, 61 (1926) (speaking of metaphors); L. CARROLL, *Through the Looking-Glass*, in THE ANNOTATED ALICE 269 (M. Gardner ed. 1960).

words, this view of language subverts the possibility of a method of adjudication that is separable from political argument in general, since the court must go beneath the words into the political struggles producing them. This argument is basically a caricature of the much more subtle thesis put forward by Roberto Unger in *Knowledge and Politics*.⁹¹ It appears to challenge the fundamental basis of the law/politics distinction and the liberal theory of the state. It also appears to leave critical legal thought at a crossroads—a choice between two kinds of theory, commonly referred to as rationalist and irrationalist. The first trace that I develop here deals with the tensions within the argument that brought critical legal theory to this crossroads. It concentrates on the conflicts between Roberto Unger's view of language and his view of liberalism. The second and third traces could be understood as attempts to justify the taking of one road rather than another. Whereas the second trace concentrates on the so-called irrationalist side of critical legal thought, the theory developed in the third trace seems to rely on the apparently rationalist notions of undistorted communication and the unalienated subject.

2. First Trace: The Two-Edged Sword of Anti-Essentialism

I have just outlined one of the standard arguments in critical legal thought. The argument is that the theory that justified the liberal state had a specific role for law to play, and that if words did not have essences law could not play that role. Law, in other words, had a certain *essential* role in liberal theory. But what was liberal theory and how could one make an anti-essentialist claim about words and an essentialist claim about law having to be neutral, objective, and so on? Let us look to the most sophisticated version of this critique.

Roberto Unger's book *Knowledge and Politics*⁹² claims to describe the "deep structure" of liberal thought, a structure that subsumes the problems with which liberal thought is concerned, the methods "it" uses to solve them, and the experience of the world within which those problems and methods became intelligible. Such a structure limits the number of philosophical positions available and determines their relationships to the system as a whole.⁹³ Unger's purpose in attempting to describe this structure is to achieve a "total critique" that is not undermined by the latent assumptions of the status quo that inevitably suf-

⁹¹ R. UNGER, *supra* note 5.

⁹² *Id.*

⁹³ *Id.* at 8.

fuse any *partial* criticism.⁹⁴ The power and scope of the ideas developed in the book are breathtaking; the experience of empowerment that comes from applying its insights is undeniable. Yet by postulating a "deep structure" Unger sometimes seems to be relying on a metatheoretical essentialism to make liberalism "hold still" while the corrosive skepticism of *nonessentialist* linguistic theory is poured on it. Can one both use and deny "essences" in the same work? Unger is aware of these problems and attempts to overcome them. He rejects the easy claim that he is simply developing an "ideal type," or that he is engaged in structuralist or dialectical analysis.⁹⁵

When we proceed in such a manner . . . we easily delude ourselves into thinking we are masters of a method that is in fact still little more than a mystery. In exchange for the meretricious expedients of the dialectic, we sacrifice the chaste and powerful weapons of logical analysis.

. . . The dismal consequence for the study of society has been whim masquerading as revolution, for what is it that the dialectic will not show? *No wonder social theory stands discredited in the eyes of the friends of reason.*⁹⁶

Instead Unger proceeds by "analogizing the relationships among the doctrines of liberalism to logical entailments and the conflicts among them to logical contradictions, with an awareness that the analogy is a crutch to be cast off as soon as we start to walk."⁹⁷

It would be an overstatement to say that the argument in the book "never does learn to walk," but equally untrue to say that it completely avoids the black hole of irrationalist social theory that its quasi-Spinozan style seeks to fence off. Unger is quite right to argue that any discourse on the theory of knowledge is also a discourse on politics, and that any discourse on politics cannot limit itself to the social world in which it is imbedded. Thus he is also quite right to oscillate between the "here and now," which is expressed by the antinomies of liberal thought (theory and fact, self and others, rule and value, reason and desire), and the "there and then" of a tentative utopia—a different social world and a different mode of knowing. Yet given his "freezing" of liberalism, his analogical method, and the contingency of his oscillation between liberalism and the theory of organic groups, he cannot hope to avoid moving beyond the ideas with which "the friends of reason" are

⁹⁴ See *id.* at 1-3.

⁹⁵ See *id.* at 14-15.

⁹⁶ *Id.* at 15 (emphasis added).

⁹⁷ *Id.*

comfortable.

So when we come to the tiny portion of Unger's argument that I describe here, we must deal with a paradox. If we are rejecting essences, we cannot claim to have discovered *the* canonical, essential structure of thought from which liberal theorists depart at their peril. Thus we cannot claim that the structure of liberal thought contains a sort of San Andreas fault within its jurisprudential section, rendering the whole edifice unstable. On the other hand, Unger's critique is extraordinarily powerful; the experience of those who have applied it testifies to that.⁹⁸ So what status does Unger's deep structure of liberalism have and what does it tell us about the politics of reason? I will leave those questions largely unresolved for the moment, hoping to answer them better when I pull all of the traces together at the end of the Article.

3. Second Trace: Varieties of Irrationalism

Leaving aside the tensions within the argument that brings critical legal thought to a crossroads, it appears that, having gotten to this point, theorists could go in one of two directions. The irrationalists, those people who stress the incoherent and politically repressive nature of reason, believe the breakdown of the law/politics distinction to be emblematic of a general disintegration. One line of argument that could be made would emphasize the way that the law/politics distinction mirrors the other oppositions central to the liberal view of things, such as the public/private and the reason/passion distinction.⁹⁹ Thus the collapse of these boundaries could be seen as part of an inevitable descent into a passionate, modernist view of the world from which reason is banished. After all, the categories that were considered basic to our theory of knowledge appeared to revolve, or could be made to look as though they revolved, around dichotomies. Without essences (whether of words, personality, or science), how can reason justify the lines that it must draw between each side of these dichotomies? Deprived of a world where law was separated from politics, form from substance, art from science, public from private, and self from other, it seems as though we must challenge not only liberal legalism but our very notion

⁹⁸ See, e.g., Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291 (1985) (favorably contrasting Unger's critique of liberalism to MacIntyre's).

⁹⁹ This argument is derived from conversations and discussions at the annual CLS conferences and from occasional lines in articles. It is intended as an ideal-type, and in order that this ideal-type does not also become a stereotype I would like to point out that no one article typifies it.

of rationality.

An alternative line of irrationalist argument saw all of the boundaries and distinctions as examples of conceptual repression developed in an unconscious attempt to mediate a "fundamental contradiction," such as that between Self and Other.¹⁰⁰ In liberal legal thought and political theory the state appears to mediate this contradiction. The institution of civil society will enable the state to separate the good connections that I have with other people (contracts, gifts) from the bad connections (crimes, torts).¹⁰¹ The state will step in to allow the former and forbid or discourage the latter. It will create a set of entitlements—let us call them "rights"—to invoke state power, hand them out to citizens, and proceed to enforce them between citizen and citizen and between citizen and state. Thus, by limiting itself functionally, the state attempts to look as though it occupies a neutral intermediate position between Self and Others.

The trouble is that the development of the mediations becomes progressively more difficult. How can we prevent the state from having all of the threatening aspects of the Other? How can the state merely be seen as allowing or enforcing good interactions, such as contracts, when it must constantly go beyond the will of the parties to rewrite terms, imply intent, or make agreements void for public policy reasons? When the state is penalizing bad interactions, such as torts, how can it separate the decision about causation of harm from a decision about who *ought* to be liable? How can the state maintain its image as the protector of pre-existing property rights when it also creates, defines,

¹⁰⁰ The fundamental contradiction—that relations with others are both necessary to and incompatible with our freedom—is not only intense. It is also pervasive. First, it is an aspect of our experience of every form of social life. It arises in the relations of lovers, spouses, parents and children, neighbors, employers and employees, trading partners, colleagues, and so forth. Second, within law, as law is commonly defined, it is not only an aspect, but the very *essence* of every problem.

Kennedy, *supra* note 13, at 213. See also Dalton, *supra* note 2, at 234-48 (placing fundamental contradiction at heart of irrationalist position within CLS); Kennedy, *supra* note 53, at 1725-37, 1776-77 (discussing individualistic and altruistic modes of rhetoric in private law adjudication); David Kennedy, *Theses about International Law Discourse*, 23 GERMAN Y.B. INT'L L. 353, 361-64 (1980) (claiming that international legal discourse is structured by a fundamental contradiction between egotistic and cooperative aspects of state sovereignty). But see Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 15-16 (1984) ("I renounce the fundamental contradiction. I recant it and I also recant the whole idea of individualism and altruism, and the idea of legal consciousness . . . I mean these things are absolutely classic examples of 'philosophical' abstractions which you can manipulate into little structures."). At a later stage in the Article I will claim that this renunciation can be seen as an attempt to create a new balance between subjectivism and structuralism. The recanted ideas continue to play a major role in critical legal thought despite their "orphan" status.

¹⁰¹ I take this formulation from Gordon, *supra* note 2, at 288.

and regulates property rights? In all of these examples the neutrality, or naturalness, or intermediate quality of the state's action becomes problematic.¹⁰² The mediating devices that deal with these problems are diverse and richly textured: constitutionalism and the rule of law, will theory, reliance theory, and the doctrine of objective causation¹⁰³—all of these concepts attempt to safeguard the state's role as a neutral mediator between Self and Other. Yet once we are aware of the unity of purpose underlying all of the doctrinal mediations, any particular mediation is bound to seem less convincing. Just as an overuse of special effects in a film actually functions to destroy the suspension of disbelief, so each new doctrinal "resolution" actually *affirms* the existence of the contradiction.

If we apply these ideas beyond the boundaries of legal thought we could argue that the fundamental contradiction functions as the driving force behind *all* of reason's constructs and thus as the driving force behind the construct of reason itself. In this view reason is engaged in a Sisyphean task, perpetually plugging holes in the walls of our discourses, only to see the omnipresent awareness of the fundamental contradiction burst through somewhere else. People have all but been removed from the stage and the fundamental contradiction "thinks itself through" using us as its instrument. Liberal theory begins to sound like a gigantic and insoluble chess problem, an endless maze of set gambits and responses, while the theorists seem to be relegated to the position of the functionaries who move the pieces—a Blackstone to make "the rights move," an Austin to try "utilitarian formalism." This is the famous "dehumanizing" tendency of structuralist thought,¹⁰⁴ a tendency that is balanced by an insistence that the contradiction can only be understood by focusing on the personal experience of the actual people

¹⁰² See R. UNGER, *supra* note 5, at 88-100 (the threat of personal domination in the "neutral" liberal state).

¹⁰³ See Horwitz, *The Doctrine of Objective Causation*, in *THE POLITICS OF LAW*, *supra* note 2, at 201.

¹⁰⁴ See R. de George & F. de George, *Introduction to THE STRUCTURALISTS* xii (R. De George & F. De George eds. 1972). Despite his disavowals of structuralism, Michel Foucault is the "author" of the most famous statement about the decentering of the subject. It seems to apply by analogy to the general tradition on which the "fundamental contradiction" scholarship draws:

One thing in any case is certain: man is neither the oldest nor the most constant problem that has been posed for human knowledge. . . . As the archaeology of our thought easily shows, man is an invention of recent date. And one perhaps nearing its end.

If those arrangements were to disappear as they appeared, . . . then one can certainly wager that man could be erased, like a face drawn in sand at the edge of the sea.

Foucault, *The Human Sciences*, in *THE STRUCTURALISTS*, *supra*, at 256, 285.

concerned.¹⁰⁵

4. Third Trace: Reification in Legal Reasoning

Another possible position in these arguments over rationality is to view the collapse of boundaries, like that between law and politics, as merely the collapse of a particular view of the world and thus of reason. In order to support this position one can argue that reason is not monolithic and that there are strains of rational thought and of legal doctrine with profoundly emancipatory potential.¹⁰⁶ By understanding the processes of reification, the way in which the social world is "closed," we can resist the inevitable limiting of possibilities that results. On this view, the move away from a belief in the core meanings of words parallels the rejection of a reified and alienating social world. In his article *Reification in Legal Reasoning*, Peter Gabel provides a beautiful example of this kind of rejection:

An example relevant to the development of "legal reification" can be found in any first grade classroom. It is 8:29 and children are playing, throwing food, and generally engaging in relatively undistorted communication. At 8:30 the teacher (who is replacing the father and who, in later years, will be replaced by the judge) calls the class to attention: it is time for the "pledge of allegiance." All face front, all suffer the same social rupture and privation, all fix their eyes on a striped piece of cloth. As they drone on, having not the slightest comprehension of the content of what they are saying, they are nonetheless learning the sort of distorted or reified communication that is expressed in the legal form. They are learning, in other words, that they are all abstract "citizens" of an abstract "United States of America," that there exists "liberty and justice for all," and so forth—not from the content of the words but from the ritual which forbids any rebellion. Gradually, they will come to accept these

¹⁰⁵ When I pull together the traces that I have been developing, I hope to show the tension between the experiential/personal and the structural/impersonal sides of this kind of theory. For the moment, I apologize for presenting this argument without dealing with the specific attempts made by the authors I cite to resolve this tension in their theorizing. The general tendency, if there is one, seems to be toward the experiential side of the picture. However, the focus on structure and the blind workings of contradiction certainly de-emphasizes the human part in all this.

¹⁰⁶ For an example of at least the latter point, see Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-41*, 62 MINN. L. REV. 265 (1978); see also Freeman, *Antidiscrimination Law: A Critical Review*, in *THE POLITICS OF LAW*, *supra* note 2, at 116.

abstractions as descriptive of a concrete truth because of the repressive and conspiratorial way that these ideas have been communicated (each senses that all the others "believe in" the words and therefore that they must be true), and once this acceptance occurs, any access to the paradoxically forgotten memory that these are mere abstractions is sealed off. And once the abstractions are reified, they can no longer be criticized because they signify a false concrete.¹⁰⁷

Although it may caricature Gabel's position to look at it this way, it seems as though we must have some notion of *undistorted* communication before we can label something as "distorted" communication. Admittedly, "playing and throwing food" hardly fits into a Cartesian rationalist's notion of undistorted communication. Yet in his focus on alienation, on the lack of connectedness in our society, and on the production of social myths that deny both of these phenomena, Gabel is working from a conception of the unalienated subject, which, in one sense, reflects the Enlightenment notion that reason is grounded in the search for emancipation.¹⁰⁸

Gabel's quandary is this: On the one hand, he believes that any legal theory must contain a phenomenology, a set of accounts that decode the meaning of the situation as the subject experienced that situation, instead of converting it into the reified form required by some frozen social role. His account of the pledge of allegiance reveals the subjective feelings that would be ignored and suppressed by more formal discourse, such as a presidential announcement that silent school prayer and increased time for civics classes would "take America back to its roots." Similarly, we should not repress the judge's feelings of alienation from her office, or the professor's feeling that she has to act in a particular authoritarian manner, because "that's the way 'it' is done." These are all parts of social life that are excluded because the discourse in which we deal with that aspect of social reality has no space for them. Gabel's project is to end this political exclusion of subjectivity. On the other hand, "the method must also be more than this; lest it fall back upon the illusions of a pure and ahistorical subjectivism."¹⁰⁹

By creating a dialectical analysis that relies heavily on Sartre's *Critique of Dialectical Reason*,¹¹⁰ Gabel tries to capture both the objec-

¹⁰⁷ Gabel, *supra* note 33, at 26-27.

¹⁰⁸ See, e.g., M. HORKHEIMER & T. ADORNO, *supra* note 66, at 3-5.

¹⁰⁹ Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601, 602 (1977).

¹¹⁰ J. SARTRE, *supra* note 12.

tive structures of apparent necessity and the subjective moments shaped by those structures:

A whole grasp of the legal moment cannot be forged from a mechanical materialism that speaks of the law as merely a "form" "reflecting" the rigors of necessity, nor from an intuitive apprehension sitting smugly outside of history, ignoring the weight of its structured direction. It is this intervalence toward which each movement in the theoretical investigation must tend.¹¹¹

It is within this context that we must understand his account of distorted communication or reification in legal reasoning. It seems to me that such an account tends more to the rationalist than the irrationalist side of critical legal thought, but that to put it in either category is to restrict its meaning. Instead, I believe his work reflects, more acutely than most, the importance to critical legal theory of the tension between structuralism and subjectivism. I shall return to this point in part II.¹¹²

5. Summary

The rise of the anti-essentialist view of language was originally seen as merely a threat to the formalistic picture of legal rules. Yet by ushering in an age of purposive interpretation, linguistic relativism seems to have undermined the pre-reflective notions about purposes and policies that were necessary for purposive interpretation to be credible. Indeed, the theorists who advocated purposive interpretation were not the only ones to underestimate the two-edged quality of such a view of language, a point that was amply demonstrated in the traces of this section.

The critique of essentialism was originally conceived of as a tool left lying around in the post-medieval linguistic deconstruction kit, which did wonderful things when you plugged it into the liberal theory of law and state. But the tool had a nasty way of turning on its users. After all, essentialism does not happen only in language. People want to believe that objects, events, science, social classes, genders, races, history, as well as words—that *all* of these things have essential qualities. When we challenge the belief in essences we do more than change the direction of legal theory. We open ourselves up to the fragility of the stories we tell, the contingent, could-be-otherwise character of the film of meaning that we project onto the social world.

¹¹¹ See Gabel, *supra* note 109, at 602-03.

¹¹² See *infra* notes 150-269 and accompanying text.

In this section I derived three traces from the interaction between this anti-essentialism and the critiques that originally depended on it. The first trace concentrated on the idea that the absence of essences of words implied the collapse of the liberal theory of adjudication, and thus the legitimating theory of the modern state. Yet this idea itself seemed to depend on a sort of essentialism; after all, it did invoke the "deep structure" of liberalism. Thus the status of the linguistic critique of liberal legalism appears to be in doubt. Is it an attack on a dominant mode of justificatory rhetoric? Is it a critical tool to open up space in classroom dialogue that will not be immediately filled by uncritical liberalism? Or is it a claim to have really undermined *the* legitimating theory of liberalism? I attempt to answer these questions in part II.

The second trace was an analysis of the way in which the anti-essentialist critique appears to support a number of attacks on reason itself. One possible attack relies on the argument that, without essences, all of the current categories of reason must collapse. Another variant of the irrationalist attack claims that reason is simply the massive pile of intellectual detritus left by the collapse of prior attempts to mediate a fundamental contradiction. Rather than being the musings of a Cartesian ego, reason is to be understood as a series of stories told by a schizophrenic Hegelian world spirit, "full of sound and fury but signifying nothing."

The third trace developed in this section tried to put forward a picture of something that might be called rationalist critical legal theory. Peter Gabel's *Reification in Legal Reasoning*¹¹³ represents an analysis of distorted communication that has a close analogy, if not direct philosophical roots, in the critique of essentialism and objectification in language. In its presupposition of an unalienated state where we have broken free from the mythical constructs that we use at present to suppress rage, it provides a completely different picture than that provided by the potentially depersonalizing irrationalism of "fundamental contradiction" scholarship.¹¹⁴ Yet the rationalist "feel" seems more to do with its concentration on the individual subject than with any epistemological belief in trans-historical reason.

D. *Marxist Thought*

1. Introduction

Marx did not produce a large amount of legal theory and much of

¹¹³ Gabel, *supra* note 33.

¹¹⁴ But see Gordon, *supra* note 2, at 288-89.

what he did produce sounded like either vulgar conspiracy theory or mechanistic determinism.¹¹⁵ Of course, a far richer seam can be uncovered if one traces the influences of Marxist theory through a host of other theorists, Weber and Pashukanis being the two outstanding examples that come to mind.¹¹⁶ That is not my intention in this Article. Instead I wish to give some sense of the degree to which critical legal theory has moved away from Marxist thought and to trace the conflicts implicated in this movement.¹¹⁷

2. First Trace: From Conspiracy Theory to Relative Autonomy (and Back Again?)

The initial straw person against which radical legal theory defines itself is often, perhaps usually, the conspiracy theory view of law. In this vision powerful groups control the state and legal system, and the law simply promotes their aims:

Through the emancipation of private property from the community, the State has become a separate entity, beside and outside civil society; but it is nothing more than the form of organization which the bourgeois necessarily adopt both for internal and external purposes, for the mutual guarantee of their property and interests. . . .

Since the State is the form in which the individuals of a ruling class assert their common interests, and in which the whole civil society of an epoch is epitomized, it follows that the State mediates in the formation of all common institutions and that the institutions receive a political form. Hence

¹¹⁵ Admittedly, part of the problem was the scarcity of references to law in Marx's works. Marxist legal scholars have the option of giving a scholastic interpretation of every word or using the text as a Rorschach blot into which anything can be read. See Marx, *The German Ideology: Part I*, in THE MARX-ENGELS READER, *supra* note 90, at 110, 118, 151-152. However, there are elements of Marx's thought about law that seem much less deterministic. See Marx, *On the Jewish Question*, in *id.* at 24; Marx, *The Economic and Philosophical Manuscripts of 1844: Selections*, in *id.* at 52; see also K. MARX, THE GRUNDISSE 70-73 (D. McLellan ed. 1971). For a thoughtful discussion of Marxist theory by a prominent member of critical legal studies, see Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSP. 96 (1978); see also H. COLLINS, MARXISM AND THE LAW (1982); Tushnet, Book Review, 68 CORNELL L. REV. 281 (1983) (reviewing H. COLLINS, MARXISM & LAW (1982)).

¹¹⁶ See, e.g., PASHUKANIS: SELECTED WRITINGS ON LAW AND MARXISM (P. Beirne & R. Sharlet eds. 1980); M. WEBER, ON LAW IN ECONOMY AND SOCIETY (M. Rheinstein ed. 1954); Cain, *The Limits of Idealism: Max Weber and the Sociology of Law*, 3 RESEARCH IN L. & SOC. 53 (1980); Trubek, *Max Weber on Law and the Rise of Capitalism*, 3 WIS. L. REV. 720 (1972).

¹¹⁷ For an excellent introductory discussion of the tension between the "Marxist" and "anti-positivist" strains in critical legal studies, see Gordon, *supra* note 2.

the illusion that law is based on the will, and indeed the will divorced from its real basis—on free will.¹¹⁸

But a vulgar Marxist conspiracy theory is incapable of making sense out of law. Its naïve instrumentalist view of legal discourse renders it blind to the other aspects of the legal system: the complex totality of action and interaction within a normatively meaningful discourse of power. This deficiency provides the impetus for the second standard position in Marxist legal thought. This is the move away from a focus on the *wishes* of the individuals who make up the ruling class and toward a focus on the *objective structural interests* of that class.¹¹⁹ This view sees the economy as a kind of primal calculator and the legal system as the printout. There are different accounts of the process by which the economic substructure determines the ideological superstructure of law, morals, religion, and aesthetics, but all tend to stress the one-way nature of the relationship. Economy determines law and not vice versa. "Religion, family, state, law, morality, science, art etc., are only *particular* modes of production, and fall under its general law."¹²⁰

One response to these theories of law has been to say that they underestimate the extent to which law is relatively autonomous from the economic base.¹²¹ Followers of this type of theory argue that the economic substructure does not completely determine law. According to them, in fact, law would not have as important a role in legitimating state power if it did not occasionally run counter to the interests of the ruling class.¹²²

This response produces several possible visions, one of which is that law is a sort of Frankenstein monster. While it was created by the Dr. Frankenstein of the economic substructure, it nevertheless has a life

¹¹⁸ Marx, *The German Ideology: Part I*, in THE MARX-ENGELS READER, *supra* note 90, at 110, 151. Of course, divergent interpretations can be put on this passage.

¹¹⁹ The Althusserian structuralist school of Marxism now seems to have revived the claims of Marxism as "true science." See L. ALTHUSSER, FOR MARX 182-93 (B. Brewster trans. 1969). Instrumentalist theories of law, which see law as the instrument of a class or form of domination, often waver between conspiracy theory language and abstract economic determinism. See generally R. MILIBAND, THE STATE IN CAPITALIST SOCIETY (1969).

¹²⁰ Marx, *supra* note 90, at 71.

¹²¹ See, e.g., I. BALBUS, THE DIALECTICS OF LEGAL REPRESSION (1977); Balbus, *Commodity Form and Legal Form: An Essay on The Relative Autonomy of the Law*, 11 LAW & SOC'Y REV. 571 (1977); Trubek, *Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law*, 11 LAW & SOC'Y REV. 527 (1977). M. HORWITZ, *supra* note 15, seems to straddle the relative autonomy and instrumentalist positions by providing a "thick description" of modes of legal rhetoric and their use by an ascendant, as opposed to an entrenched, class.

¹²² See Gordon, *supra* note 2, at 286.

of its own and its creator only controls it within very broad parameters.¹²³ Other visions see more of a dialectical interaction between superstructure and substructure, with the bourgeois ideologies of universality and neutrality forcing certain structural requirements on law, while law in turn may influence economic development because the unplanned configurations of some legal form (a corporate structure or a rule on patents, for example) pushes production in a certain direction.¹²⁴

Several caveats might be addressed to this relative autonomy theory. The first caveat comes from critical legal theory's fascination with the indeterminacy of legal doctrine. If our understanding of legal realism and of linguistic theory shows us that legal rules are wildly indefinite and incapable of precise application, how can the legal system be tilted (even to a relative extent) in favor of any group or form of economic organization? The second caveat is of a more serious nature, and seems to entail a transformation in the theory itself. In an article to which I have referred throughout this essay, Robert Gordon gives a fascinating account of the anti-positivist tendencies in critical legal thought.¹²⁵ Instead of the vulgar Marxist picture that there is one layer of reality, the economy, that is the most real and the most determinative, he suggests that reality is socially constructed.¹²⁶ "[W]hat we experience as 'social reality' is something that we ourselves are constantly

¹²³ See, e.g., G. LUKACS, *Reification and the Consciousness of the Proletariat*, in *HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS* 103 (1977).

¹²⁴ See D. HAY, P. LINEBAUGH, J. RULE, E.P. THOMPSON & C. WINSLOW, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND* (1975); E.P. THOMPSON, *WHIGS AND HUNTERS: THE ORIGIN OF THE BLACK ACT* 258 (1975). I use Thompson more as an example of a Marxist theorist who turned against the simplistic notion of determinacy than as a believer in "relative autonomy," which, in English historical circles at least, was taken to mean merely an interaction between the two levels of base and superstructure. Thompson attacked this notion with characteristic elegance and vitriol:

I found that law did not keep politely to a "level" but was of every bloody level; it was imbricated within the mode of production and productive relations themselves (as property rights, definitions of agrarian practice) and it was simultaneously present in the philosophy of Locke; it intruded brusquely within alien categories, reappeared bewigged and gowned in the guise of ideology; it danced a cotillion with religion, moralizing over the theatre of Tyburn; it was an arm of politics and politics was one of its arms; it was an academic discipline, subjected to the rigor of its own autonomous logic; it contributed to the definition of the self-identity both of rulers and of ruled; above all, it afforded an arena for class struggle, within which alternative notions of law were fought out.

E.P. THOMPSON, *The Poverty of Theory or an Orrery of Errors*, in *THE POVERTY OF THEORY AND OTHER ESSAYS* 1, 62 (1978).

¹²⁵ See Gordon, *supra* note 2.

¹²⁶ See *supra* note 21.

constructing; and this is just as true for 'economic conditions' as it is for 'legal rules.'"¹²⁷ The economy ceases to have the appearance of fateful objectivity that a Marxist theory attributes to it. History and world become the creation of social subjects acting collectively, rather than being the result of impersonal structural determinants.

Inspired by the insights of phenomenology, existentialism, and the discoveries of comparative history, anti-positivist social theorists see the Marxist efforts to locate "the engine of history" as merely another attempt to deny contingency, to take choice out of human hands and to put it into the hands of some external, implacable force.¹²⁸ The thing-like, immovable quality that the social world assumes and that Marxist and other determinist theories attempt to express must in the last instance stem from the actions of individual subjects. If all attempts to demonstrate the logic of capitalism have failed, if efforts to link the form of legal rules with the form of the market seem to be synthetic, definitional, and circular, rather than analytic, empirical, and scientific, then surely we must accept the fact that history dissolves back into the beliefs and actions of individual people. If one is convinced by the argument so far, then one can see the truth in the idealist position that a change of these belief-clusters will be an actual change of the world.

It is from this point of tension between subjective belief and objective determinacy that I will develop the second and third traces in this section: the former being an account of "irrationalist" thought, the latter being an attempt to chart the legal profession's consciousness at a particular historical moment and thus to explore the interaction of consciousness and determinism.

3. Second Trace: The Irrationalist Approach—*Sturm und Drang*, *Mush*, and *Zap*.¹²⁹

The irrationalist finds legal rules too marginal in their effects and too indeterminate and incoherent in their content to be instrumentally necessary for any particular social formation. Doctrine embodies contradictory ideals of freedom for the self and security from the other so that any right to be free from social regulation violates a right to be free from

¹²⁷ Gordon, *supra* note 2, at 287.

¹²⁸ See *id.* at 285-86.

¹²⁹ *Sturm und Drang* (storm and stress): "[A] late 18th century German literary movement characterized by works containing rousing action and high emotionalism that often deal with the individual's revolt against society." WEBSTER'S NEW COLLEGIATE DICTIONARY (1980). *Mush and Zap*, 20th century legal movement, ditto.

social harm. Nothing in the content of the rules dictates which side of the liberal contradiction between community and autonomy will prevail in any particular instance. Rather, legal "rationality" is based on underlying structures of meaning, the cultural codes of "common sense" which limit the play of analogy by categorizing similarity and difference. Legal reasoning is ultimately irrational because there is no way to justify these categories for perception and communication; it's just a metaphor that property is something in the world with necessary traits. . . . "Rationality" in general refers only to a felt necessity once particular structures for categorizing the world have become frozen. The irrationalist wants to unfreeze the social structure of meaning, to free up the possibilities for new ways to think and act in the world.¹³⁰

In this quotation, Gary Peller makes many of the arguments said to constitute the irrationalist position within CLS. He also demonstrates the way in which the irrationalist label can be misleading. This passage contains arguments about the effect, the content, and the contradictory, irrational, and oppressive nature of legal doctrine. But the foundation for all of these arguments is a profoundly *rationalist* critique, or at least, so it seems to me. The basis for the argument is that there is no way to justify the way that reason or law divides up the world. To use another of his examples, it is only rational to believe that selling bonds on Wall Street and being evicted from a housing project are, in some sense, *the same*, if you accept the fact that the legal metaphor of property links both situations.¹³¹ Can this belief be rationally grounded? In his insistence that rationality would have to be based on an aprioristic meta-metaphorical system if it were to be able to play the role claimed for it as a neutral medium in which the operation of social power is justified, Peller is, in one sense, carrying on the rationalistic project that has been neglected since Kant. To make this argument clearer, I shall try to develop it in the context of the concrete assertions in his piece.

Peller's claim is that legal reasoning is not a logical system for deducing propositions from within the system of legal concepts. Rather, it is a process of analogy and metaphor in which the grounding or the

¹³⁰ Peller, *Debates About Theory Within Critical Legal Studies*, 1 LIZARD 4-5 (1984) [on file with the *University of Pennsylvania Law Review*].

¹³¹ G. Peller, *The Metaphysics of American Legal Thought* 94 [unpublished manuscript on file with the *University of Pennsylvania Law Review*]; see also Gordon, *supra* note 2, at 287-88 (providing similar example).

basis of the acceptable arguments and convincing analogies comes from our pre-theoretical and politically constraining conceptions of the social world.¹³² Carried to its logical conclusion this argument becomes, in a sense, an extension into the *social* world, and thus into the very structure of rationality, of Cohen's comments about the circularity of arguments within the closed system of *legal* concepts.¹³³ Such arguments, he pointed out, will be meaningless precisely because they are circular. Yet if we look closely at the social world could we not say exactly the same thing? We have no way of grounding or justifying the validity of the conceptual map that produces our perception of the world except within that world itself. Yet any such grounding is circular. Absent a Cartesian or Kantian aprioristic premise that links our conceptual structure to some transcendental base (just as Cohen wants to link our discussion of corporate liability to the real world of social fact),¹³⁴ we remain trapped in the so-called "hermeneutic circle."¹³⁵ Consequently, any exercise of political power founded on the closure of metaphors (as the legal system is) is vulnerable to the critique that "things could be otherwise."

Whether one calls this picture of constraining metaphors in both legal and social worlds a rationalist or an irrationalist argument, there is something about it that seems to contradict the idea that doctrine is marginal in effect and indeterminate in application. If the frozen metaphors truly do *constrain* our understanding of texts or our vision of political possibilities, how can doctrine be perceived as *indeterminate*? It would seem that the objectified categories of thought either do or do not limit the boundaries of acceptable argument. The constraint we are now describing looks like the missing ingredient that would turn doctrine into the system of precise application that it is supposed to be. Yet the ideas of subjective indeterminacy and structural constraint are simply counterposed here, a point to which I will return in part II.

4. Third Trace: Consciousness and Closure

Any critical legal theory that purports to explain the process of legal argument and decision has to deal with the intersection of the critiques given above and the anti-essentialist picture of language. The words of the law themselves cannot be politically tilted in the abstract;

¹³² See G. Peller, *supra* note 131, at 32-33, 172.

¹³³ See *supra* notes 23-28 and accompanying text.

¹³⁴ See *supra* text accompanying note 21.

¹³⁵ For a definition of this term, see R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 131-39 (1983).

our understanding of language has shown us that. Yet viewed on its own this analysis seems to be meaningless, since it implies that a rule saying "Capitalists should always win any legal dispute" would not be tilted. There is a confusion that must be avoided here. Law has no interior rationality; nothing in the rules themselves dictates any particular result. But content enters law through the back door, not through the pure linguistic connections envisaged by formalist theory but through the limitations imposed by a deeply political set of assumptions about the social world.

To put it another way, the Marxist picture of law had two tiers, a determining substructure and a determined superstructure. When we add in an intermediate tier, the collective consciousness of the interpreting community, then we can begin to understand what counts as an acceptable legal argument or analogy. In other words, we have to understand the socially constructed reality that filters the infinite meanings we could derive from a text. This reality is composed of two interlocking cultural codes, one social and one legal. By limiting the possible meanings of a text, these codes provide us with something we see as the *actual* meaning. The social/legal "mind-set" acts as the bridge between indefinite words and closure of a finite, albeit fuzzy, social world. Now it seems likely, as Gary Peller puts it, that we cannot justify the set of categories through which we interpret the legal or the social world.¹³⁶ Thus they are "a-rational" in the Enlightenment sense of rationality. But this does not mean that doctrine interpreted through these categories will be experienced as indeterminate or that its effects will be as marginal as the irrationalist position suggests.¹³⁷

The scholarship that has dealt with this question has focused mainly on the legal "mind-set" rather than the social one in which it is embedded.¹³⁸

"Legal consciousness" . . . refers to the particular form of consciousness that characterizes the legal profession as a social group, at a particular moment. The main peculiarity of this consciousness is that it contains a vast number of legal rules, arguments and theories, a great deal of information about the institutional workings of the legal process, and the constellation of ideals and goals current in the profession at a given moment.

¹³⁶ See G. Peller, *supra* note 131, at 153.

¹³⁷ See, e.g., Fish, *Interpreting the Variorum*, 2 CRITICAL INQUIRY 465, 484 (1976) (discussing the relative stability of interpretive communities).

¹³⁸ A significant exception is provided by G. Peller, *supra* note 131, which deals with the interlocking metaphors of the social and the legal world.

A subsystem within legal consciousness is a kind of structure . . . that arrange[s] relatively large numbers of elements; e.g. the Madisonian equilibrium theory of federalism.

. . .

A subsystem integrates some number of the elements in a legal consciousness . . . Such an arrangement has a *horizontal dimension* and a *vertical dimension*. A description of the horizontal dimension tells us how many of all the rules in consciousness are within a particular subsystem and the manner in which they are related to one another. A description of the vertical dimension tells us how the more and less abstract elements in a doctrinal area are related. . . .

One of the functions of a structure within consciousness, and particularly of a subsystem, is the *mediation* of the *contradictions of experience*. The sense of contradiction arises from the persistent existence within consciousness of elements which seem mutually exclusive. These can be inconsistent facts, conflicting emotions, or operative abstractions whose implications contradict one another. Mediation is the reduction of the sense of contradiction by an arrangement of elements that makes one problem less salient.¹³⁹

The point I am trying to make, and with which this description of legal consciousness attempts to deal, is that the irrationalist approach cannot simultaneously claim that our objectified picture of the social world radically curtails our freedom and that this objectification actually does not limit the indeterminacy of doctrine as it is experienced by lawyers and judges. As a general matter irrationalists seem to be aware of this. The problem is that in order to understand that limitation, we have to investigate patterns of historical legal consciousness. Yet by doing so we seem to risk exactly the same kind of essentialism that I discussed in the context of Roberto Unger's attempt to analyze the "deep structure" of liberal thought.¹⁴⁰ We would have to say, "This is the decisive structure of legal consciousness producing the illusion that there is manifest certainty immanent in legal texts." But we do not seem to be able to say this without abandoning the anti-essentialist side of the story. This seems to me to be a crucial tension in critical legal theory—perhaps a productive tension, perhaps not. I will return to this

¹³⁹ Kennedy, *supra* note 68, at 23-24. But see Gabel & Kennedy, *supra* note 100, at 15-16 (disavowing legal consciousness because, as a concept, it is too structured, abstract, and manipulable).

¹⁴⁰ See *supra* text accompanying notes 93-99.

issue in part II.

5. Summary

As I suggested in discussing the first trace, Marxist theories of law, whether of the conspiracy theory, structural determinist, or relatively autonomous varieties, all seem to be vulnerable to a critique of the primacy given to economic phenomena. Paradoxically, Marx himself is, in no small part, responsible for this critique. After all, Marx, more than anyone else, heightened our awareness of the social nature of knowledge: the lack of a clear window through which "a person" can see "the real world" and thus the way in which our ideas of "the person" and "the world" are both parts of the *same interpretive structure*. Yet by doing this he tended to undermine the status of his theory, or at least one version of his theory. How can we imagine that there is an *objective* set of descriptive/prescriptive historical laws that act on the *subjects* of those laws, if "object" and "subject" are both socially, that is intersubjectively, produced categories? This switch from structural determinism to social creation will be further discussed in part II.

The second trace in this section took its starting point from these ideas, while portraying both legal doctrine and common sense as fundamentally irrational ways of thinking by which we close off possibilities for transformation of the social world. In discussing the third trace I pointed out the need to map out the legal consciousness that produces this closure if we wish to understand the felt necessity that makes doctrine appear to be determinate. In other words, this trace works from the tension between the claim that legal reasoning and common sense restrict political and social possibilities, and the claim that legal doctrine is indeterminate and applied in wildly fluctuating ways. This tension is not fatal to the theoretical project, but it does make us want to study "legal consciousness," and such a study appears to be rendered problematic by the critique of essentialism and objectification.

E. Conclusion

Throughout this part I have frequently referred to the crisis of rationality. The corrosive skepticism of the modernist era, the breakdown of our metaphysical foundations, the decline of essences as credible trumps in the game of argumentation—all of these have been portrayed as epistemological ravens, croaking "Nevermore" over the corpse of reason.¹⁴¹ At the same time the rationalist project has been assailed

¹⁴¹ For the purpose of clarity I simply make this assertion in the text. For those

from within; subjugated knowledges have risen in rebellion against the

who are interested in the context of these suggestions, I offer this caricatured intellectual history complete with ritual disclaimers. One way to explain this swan song of reason is to break it down to its constituent intellectual or philosophical themes and then to work out the variations between them. I believe that although this form of explanation is important as a type of conceptual shorthand it tends to reduce social history to a debate between dead people's texts. In this footnote I have unashamedly taken advantage of the shorthand quality of such an account by offering a summary of what I take to be the "standard story" about the collapse of reason and the standard procedure of invoking theorists' names as signifiers for a particular conceptual twist. I try to minimize "the fallacy of intellectual history" by pointing out the more glaring problems with such a method but, due to the limitations of space, the name-as-concept type of explanation is all I can offer here. Being ethnocentric I start with Hume.

Hume's guillotine cut the logical links between descriptive and prescriptive arguments, at the same time that his critique of causality cut the links between scientific observation and general scientific laws. One could not go from facts to truths, nor from facts to norms. See generally D. HUME, *supra* note 1. For the most famous attempt to get around Hume's critique, see B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 659-674 (1972) (arguing that we must accept induction as independent logical principle or science is doomed). But see E. NAGEL & J. NEWMAN, GÖDEL'S PROOF 23-25 (1958) (undermining Russell's logicism in mathematics and disposing of the logico-empiricist attempt to circumvent Hume). In continental philosophy, the most famous attempt to refute Hume's skepticism was Kant's "critique of pure reason." Rather than simply tacking on a resigned empiricism to the skeptical project, as Hume had done, the Kantian and neo-Kantian philosophies attempted to create an aprioristic epistemology on which knowledge could be constructed. But the aprioristic categories were unconvincing, and the resort to pure logic seemed to renounce not only contingency, but also content or usefulness. See, e.g., I. KANT, THE CRITIQUE OF PURE REASON 43-45 (N. Smith trans. 1965); W. WALSH, REASON AND EXPERIENCE (1947). Nietzsche's rhetoric linked this failure to the decline of Christianity as both a moral and a metaphysical/philosophical system. His biting maxims made explicit the connection between epistemological critique and social life; in fact, the feeling of modernity that has sustained his popularity seems to come from the feeling that both personality and society have lost their veil of naturalness. See, e.g., R. HOLLINGDALE, NIETZSCHE: THE MAN AND HIS PHILOSOPHY (1965) (general review of Nietzsche's life and work); F. NIETZSCHE, BEYOND GOOD AND EVIL 19-30 (W. Kaufmann trans. 1966); F. NIETZSCHE, *Thus Spake Zarathustra*, in THE PORTABLE NIETZSCHE 103 (W. Kaufmann trans. 1968); F. NIETZSCHE, *Twilight of the Idols*, in *id.* at 463. But Nietzsche's writing also points out the moral dilemmas of a thoroughgoing irrationalism, as the following gnomic comment indicates: "'Knowledge for its own sake'—that is the last snare of morality: with that one becomes completely entangled in it once more." F. NIETZSCHE, BEYOND GOOD AND EVIL, *supra*, at 79. In this remark Nietzsche manages to explain the threat that relativism was going to pose for the epistemological, social, and moral projects of the time.

Two of the most important ingredients of the era of "relativism" were Marx's account of the economic basis of consciousness and a popularized version of the Freudian vocabulary. See D. BELL, *supra* note 49, at 62-64 (describing importance of Freudian vocabulary); M. BIDDIS, THE AGE OF THE MASSES 58-60, 202-220 (1977) (describing impact of Marxist and Freudian ideas on popular consciousness). See generally S. FREUD, A GENERAL INTRODUCTION TO PSYCHOANALYSIS (J. Riviere ed. 1953); Marx, *supra* note 90. But this relativism was not solely the preserve of radicals, artists, and other undesirables; in fact, it was eventually carried into the best-defended citadels of rationality by such intellectual developments as Wittgenstein's later linguistic theories, Gödel's mathematics, and the physics of Heisenberg and Einstein. See generally B. HOFFMAN, THE STRANGE STORY OF THE QUANTUM (1963); E. NAGEL & J. NEWMAN, *supra*; L. WITTGENSTEIN, *supra* note 28.

The modernist movement in art took these ideas and wove them into the fabric of culture by breaking down the "forms" of rationalistic beauty, such as representational painting or the 19th century novel. In the place of these "forms" and their conceptual claims to represent the underlying essence of beauty, it put the "unconscious art" of surrealism, the instinctual liberation of Dadaism, and the unstructured poetics of free verse. Virginia Woolf's writing shows the epistemological revolution that this artistic shift implies; the "stream of consciousness" has come to replace the calm objectivities of an untroubled narrator. *See, e.g., V. WOOLF, TO THE LIGHTHOUSE* (1955). Perhaps the best known example of this process is James Joyce's *Ulysses*, which deconstructed the rationalist notions of both the self and the novel. *See J. JOYCE, ULYSSES* (1961). *See generally A. BARR, FANTASTIC ART: DADA, SURREALISM* (1936); D. BELL, *supra* note 49, at 45-84 (general discussion of literary and artistic modernism as well as popular culture); M. BERMAN, *ALL THAT IS SOLID MELTS INTO AIR* (1982) (discussion of modernist literature, political theory, and urban architecture); M. BIDDIS, *supra*, at 275-312 (discussion of turn-of-the-century artists); A. BRETON, *MANIFESTOES OF SURREALISM* (1969) (programmatic statement by the "founder" of the French Surrealist movement in literature); W. JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 146-87 (1952) (discussion of stream-of-consciousness in psychology); E. LUNN, *MARXISM AND MODERNISM* (1982) (examination of the "meeting" between modernism and Marxism through a discussion of the work on modernism by Lukacs, Brecht, Benjamin, and Adorno); *MODERNISM 1890-1930, supra* note 76 (overall discussion of modernism, with an emphasis upon the literary movements).

After 1945 everything is portrayed as a mopping-up operation—weeding out pockets of scientific resistance and attempting to make the connections from this general epistemology to social life. Sartre and Camus, Heidegger and Hamsun—these are only a few of the apostles of contingency, those who realize that there is no *reason* that things should be the way they are. *See generally A. CAMUS, THE MYTH OF SISYPHUS* (1955) (collection of essays on Camus's existentialist philosophy); K. HAMSUN, *HUNGER* (1920); M. HEIDEGGER, *BEING AND TIME* (J. Macquarrie & E. Robinson trans. 1962); J. SARTRE, *BEING AND NOTHINGNESS* (1956); J. SARTRE, *NAUSEA* (1965) (Sartre's novelistic presentation of his philosophy of contingency). Thomas Kuhn's seductive paradigms ensure that historical relativism is finally accepted into the philosophy of science, but the price of admission is a watered down "truth community" idea: science is what scientists say it is, and Kuhn believes they are worthy of our trust. *See T. KUHN, supra* note 64 (undermining the idea of the "essence" of science and replacing it by "paradigms"—historically and sociologically derived community definitions or mind-sets that guide scientific research); *see also PARADIGMS AND REVOLUTIONS, supra* note 74 (collection of essays assessing the effect of Kuhn's theory upon various disciplines). In the field of anthropology Levi-Strauss shows that "primitive" cultures use conceptual tools that are as complicated as differential equations. *See, e.g., C. LEVI-STRAUSS, THE SAVAGE MIND* (1966); C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (C. Jacobson & B. Schoepf trans. 1963). Thus the standard-bearers of Western rationalism, science, and the teleological notion of "Civilized Progress" no longer seem to possess the transcendental impressiveness that has supported them up to now. It is almost inevitable that the late Michel Foucault, searching for a new apocalypse, should go one better than Nietzsche's cry that "God is dead" and proclaim the death of man instead. *See Foucault, supra* note 104, at 256. By "man" he means that the conceptual subject around whom our discourses are constructed rather than the actual physical incarnation of subject-ivity, but the result is held to be just as fatal to rationalism. Derrida's playful dogmatism recreates the whole story of philosophy as being an attempt to privilege speech over writing, and thereby effectively legitimates the hegemony of literary criticism even more than the cry "*il n'y a pas de hors texte*" had done. *See J. DERRIDA, supra* note 75, at 6-26. *See generally F. DALLMAYR, TWILIGHT OF SUBJECTIVITY* (1981); P. FEYERABEND, *supra* note 74; R. RORTY, *CONSEQUENCES OF PRAGMATISM (ESSAYS 1972-1980)* (1982) (essays on contemporary philosophical problems and philosophers, such as Derrida).

conventional view of mind and world.¹⁴² Feminist theorists showed that the accepted stages of moral development were actually the stages of male development.¹⁴³ Instrumental rationality has been attacked as a factional and depoliticizing mode of thought.¹⁴⁴ The reason/passion distinction suddenly appeared to be the organizing principle for a regime of conceptual apartheid, rather than an unproblematic division of self-evident spheres. In fact, the general story line sounds like the prolegomenon to a philosophical apocalypse.

In one sense this vision explains the CLS *oeuvre* very well. It seems undeniable that at any given historical period, reason is going to exclude certain forms of knowledge as irrelevant or irrational, and that this exclusion will have bad political consequences. Sexism and racism, for example, have long been defended on the grounds that the excluded Other lacked the essential components of reason. This tendency towards

I think it is fair to say that the progression that I have just sketched out is a recognizable version of the standard story about the decline of rationalism. See, e.g., D. BELL, *supra* note 49, at 45-84; M. BIDDIS, *supra*, at 315-56. Bell and Biddis differ, both with each other and with me, but it seems that they give a roughly equivalent account to the one I offer here. Of course, convergence does not guarantee truth. Nor, for that matter, does it insulate a description of this type from its own blatant methodological faults. Some of the most glaringly obvious problems with such an account are: its arbitrary selectivity, its Western bias, its failure to explain when, or why, an idea will "take," its complete denial of social context, and its reduction of passionate human striving to the dry taxonomies of the epistemological historian. Nevertheless, I believe that it *does* convey the philosophical background against which social thought and moral action at present proceed. This obviously does not mean that most people go around with this cluster of names inside their head, and it certainly does not mean that rationalism has ceased to exercise social power. What it does mean, I think, is that there is an ambiguous, but general, awareness that "correct knowledge" does not come from an essentialist cosmic discourse, but from the judgment of human actors. In order to stave off the nihilistic implications of relativist skepticism, efforts seem to have been made on both a popular and a philosophical level to move the criteria of validity away from an abstract essentialism toward the informed judgment of "those who should know." "Truth" has passed from Science to scientists, from Art to artists, from the Essential Meaning of Words to ordinary language usage, from Rules of Law to predictions about judges, from the Novel to the author, to the readers, and then alas, to the critics. Of course, there are problems with these ideas too. As a criterion for truth, the "informed judgment of professionals" is not much more defensible than the knowledge of Platonic Guardians, and it can be just as much of a definitional stop as "the Eternal Verity." Nevertheless, the closed wall of rational discourse has been breached, and even if the foppish obscurantism that has burst through the gap seems unsatisfying, or the recourse to truth-communities seems unbelievable, we do not have the luxury of returning to an innocent natural state.

¹⁴² Michel Foucault is the originator of this useful anthropomorphic rephrasing of the sociology of knowledge. See M. FOUCAULT, *POWER/KNOWLEDGE* 79-84 (C. Gordon ed. 1980).

¹⁴³ See C. GILLIGAN, *supra* note 72; see also N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978); Chodorow, *Mothering, Male Dominance and Capitalism*, in *CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM* 83 (Z. Eisenstein ed. 1979).

¹⁴⁴ See *supra* text accompanying notes 41-50.

closure and exclusion is the basis on which many of the CLS critiques are founded. By exploring the connection between the accepted categories of rationality and the conventional vision of politics, critical legal theorists have sought to fuse social theory and political practice. This is not an entirely new approach. Georg Lukacs has written about the way that reification obscures the interdependency of epistemology and politics.¹⁴⁵ Karl Mannheim's studies in the sociology of knowledge deal with the same sort of topic; he explores the ways in which group life and the background of cultural meaning come to shape the topographical contours of our mental world.¹⁴⁶ Gramsci's writings on hegemony provide yet another example. His work investigates the process by which the dominant common sense of a ruling class creates the boundaries of acceptable rational thought.¹⁴⁷ But critical legal theory is novel in two respects. First, it is *legal* thought, and, secondly, it is supposed to have practical implications. Thus these ideas are being applied to a field traditionally resistant to all but the most mainstream of intellectual techniques, and they are linked to an insistence that theory should have relevance for everyday life.

In order to explore the implications of these novelties and to provide a toolkit for theorizing, I believe that we have to move away from the rationalist/irrationalist dichotomy in critical legal thought. There are three main reasons for this. First, the terms "rational" and "irrational" have become so reified that once you move beyond the kind of analysis I have been doing up until now, they would impede rather than aid the inquiry. It is one thing to try to demonstrate that technocratic decisionmaking gains political power from its implicit and explicit claims to scientific rationality. It is quite another thing to argue whether rationalism or irrationalism is involved in Duncan Kennedy's account of the fundamental contradiction. Is rationality supposed to refer to the accepted arguments in a particular historical period (for example, the sexist belief that women are irrational), or is it supposed to refer to some trans-historical (and unidentifiable) essence of thought? We seem in danger of moving away from the relatively concrete claims made by, for example, policy scientists about the neutrality of their methods, toward a vague game of "theorist-labelling."

Second, to the extent that rationalist and irrationalist *do* have any

¹⁴⁵ See G. LUKACS, *supra* note 123.

¹⁴⁶ See K. MANNHEIM, *IDEOLOGY AND UTOPIA* (L. Wirth & E. Shils eds. 1936); see also P. BERGER & T. LUCKMANN, *supra* note 21.

¹⁴⁷ See A. GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Q. Hoare & G. Smith eds. 1971); J. JOLL, *GRAMSCI* (1977); Greer, *Antonio Gramsci and "Legal Hegemony,"* in *THE POLITICS OF LAW*, *supra* note 2, at 304.

useful meaning when referring to critical legal thought, they might be expected to correspond to something like constructive and deconstructive. Yet while all of critical legal theory is in one sense deconstructive, few liberal theorists have made claims that are so generalized and integrated as those involved in Roberto Unger's work.¹⁴⁸ To use another example, Duncan Kennedy's theory of the fundamental contradiction supposedly rests at the heart of the irrationalist position within critical legal studies. Yet he goes so far as to make claims about the essence of every legal problem.¹⁴⁹ If irrationalists are supposed not to make any positive claims, then such a theory can hardly qualify.

Third, the rationalist/irrationalist dispute simply does not explore the constitutive tensions in a theory. At best it provides for an *ex post facto* classification in one or other of two reified categories. It tells us little or nothing about how to theorize, or about the central problems of social thought. Consequently, it is of little use in pulling the traces together or in providing the model for social theory that I promised in the introduction. Thus although the subject of this Article is the politics of reason, we are faced with the apparent paradox that, as explanatory categories, rationalism and irrationalism do not get us very far.

All is not lost, however. Our method is to be found, not in the abstract realm of rationalism and irrationalism, but in the concrete details of the traces that I developed in each section. If we turn back to these traces we can see that they all exhibited some form of conflict. Roberto Unger relies on a *non-essentialist* vision of language to disrupt the *essence* of liberalism. Marxist theories seem to cover up one problem only to have another one appear, and each of the problems seems in some way related to the tension between economic determinism and the conscious actions of social subjects. Duncan Kennedy produces an existentially based theory that sounds as if it squeezes out the possibility of personal experience. Peter Gabel attempts to balance a subjective and an objective account of the legal moment. Legal doctrine is presented as though it is both infinitely manipulable and firmly constrained by the reified metaphors of common sense and legal consciousness. The key to the second half of the Article is the claim that all of these conflicts can be usefully understood as in some sense *the same*, and that it is by understanding the way in which the traces postpone or resolve such conflicts that we will be able to develop a theoretical toolkit, a way of thinking about social theory and moral action in an age of inherently political reason.

¹⁴⁸ See *supra* text accompanying notes 91-98.

¹⁴⁹ See *supra* note 100.

II. LINKING UP THE TRACES

A. *Introduction*

In this part of the Article I draw together the traces that I developed in the first part. I do this in two interdependent ways. First, I try to show how these fragments of critical legal theory could relate to anything so grandiose as the politics of reason or anything so mundane as everyday moral choice, workplace activity, or political action. Second, I argue that all of the traces are animated by a core tension between the subjectivist and the structuralist strands in critical legal thought. Apart from helping us to understand or use critical legal theory, this tension is important for three other reasons. It throws light on the infamous discussions of "tilt" or "rationalism versus irrationalism" that I mentioned earlier.¹⁵⁰ It is, moreover, a useful link between critical legal thought and other social theory because it represents a tension that all social theory must confront. Finally, it reminds us that these theoretical problems and philosophical contradictions are only relevant in so far as they reflect (and reflect back upon) our basic experiences of social life.

To deal with the question "Why the politics of reason?" I am going to start with the naïve experiential story of how someone might come to think about this question and then work my way up (?) to critical legal theory.

It is fairly easy to get anyone to agree that there are no aprioristic or transcendently neutral principles on which our knowledge or our social practices are based. Easy, that is, if one keeps the claim to an abstract level. If one gets more concrete and claims that there are no neutral principles on which the Supreme Court can base its decisions, or that there is no objective justification for the degree and extent of power wielded by a partner in a law firm, a teacher in a classroom, or by white, middle-class males in society as a whole, then the abstract agreement that everything is contingent is likely to be withdrawn. In its place appears a "metaphysics of the second-best": a grab bag of justificatory devices, each appropriate to a different (and artificially delineated) sphere of action.

Workplace hierarchies, for example, can be explained by a combination of arguments from "functional necessity," "market imperatives," "implied consent," "property rights," and "time-honored custom." The possible contradictions among or between these arguments—and the re-

¹⁵⁰ See *supra* note 15 and accompanying text. The tension also shows the truth as well as the falsity in the arguments of those who have attacked the project of deconstructing doctrine.

lation that they hold to the initial concession that there are no uncontentious neutral principles—are not appropriate subjects for discussion.

This metaphysics of the second-best may convince those whose subordinate position is being justified, but there are always flashes of denial, traces of counter-hegemony. In the abstract, at least, its complacent, apologetic quality should have little appeal to those of us who were reared on the theme that morality, political action, and the quest for truth are inseparably intertwined. The obvious counter-strategy that it suggests is one of “immanent critique.”¹⁵¹ Every day, in every way, you try to point out to the people around you that things do not have to be the way they are. As a tactic, this seems fairly respectable. After all, it is *the* message of Western rationalism since the Enlightenment.¹⁵² It offers a coherent moral position vis-à-vis the world and seems to have the edge over the Burkean conservative thesis that things should remain the same.¹⁵³ Somehow it even seems more attractive than the alternative task of developing one’s cynical ennui the way other people develop their suntans. Best of all, it works.

If one takes this general belief in immanent critique and connects it to a supposedly impractical set of ideas such as social theory, a strange thing happens. The more one “does” social theory and reads hard books, the more one comes to believe that it is actually useful and liberating to find out about the philosophical structures behind the richly textured justifications for “the way things are” in every area of social life. Even when this belief is discounted by the inexorable tendency to rationalize the worth of one’s own activities, an unmistakable feeling of empowerment remains. To use an example that interests me a great deal, the moves by which the ordinary language philosophers tried to defend their scholarly project¹⁵⁴ are routinely to be found in

¹⁵¹ Immanent critique, or internal critique, seeks to take the constraining assumptions of an argument, a theory, or a way of life and to point out their internal inconsistencies, with the aim of opening up new possibilities for thought and action. Because it seeks to blow the argument apart from within, it *seems* to be less contentious than more expansive, or positive theories. *But see infra* text accompanying notes 162-63.

¹⁵² See, e.g., G. BRYSON, *MAN AND SOCIETY: THE SCOTTISH INQUIRY OF THE EIGHTEENTH CENTURY* (1945); E. CASSIRER, *THE PHILOSOPHY OF THE ENLIGHTENMENT* (F. Koelln & J. Pettegrove trans. 1951); J. STAROBINSKI, *THE INVENTION OF LIBERTY 1700-1789*, at 10-12 (B. Swift trans. 1964).

¹⁵³ Or, more accurately, that things should stay the same *or* change to the extent necessary to maintain the stability of the system. In its purest form this doctrine is even emptier than the purest of radical exhortations to constant revolution, since the nature of the system is unknowable, except *ex post facto* when history can be retold to produce a retrospective essentialism. True Burkean conservatism knows what is to be conserved only after it *has been* conserved. See Tushnet, *supra* note 32, at 1215 n.38 (similar comments about Burkeanism, with a slightly different conclusion); see also E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1968).

¹⁵⁴ The ordinary language philosophers tried to establish a secure basis for au-

court decisions,¹⁵⁵ in workplace disputes,¹⁵⁶ and even in presidential announcements of "covert" wars in Central America.¹⁵⁷ Knowing these argumentative moves helps one in a limited but important way to be more morally responsible as well as more politically effective in all of these arenas of social power. In one sense it is the constantly repeated experience of this kind of empowerment that explains an interest in the politics of reason far better than a tale spun from the dry thread of epistemology and embroidered with the appropriately impressive names of "famous dead Europeans who once wrote about ideology."¹⁵⁸

From what I have said so far, it seems as though the lack of ultimate rational grounding for our ideas is compatible with the Enlightenment vision of reason: a reason that is used to break down the illusion of necessity and that is thus "tilted" towards a love of freedom.¹⁵⁹ The

thoritative linguistic meaning by concentrating on ordinary patterns of language use. See *supra* notes 77-78. Their argument was that the everyday usage of English words was not just a fact; it was normative for what can, or should, be said. This seems a trifle bizarre. Whose ordinary usage is to become the master-speak? Why should the "fact" of prior usage constrain the "ought" of future usage? As an argument, this seems to embody the same naturalistic fallacy as the claim that our absence of wings means we should not fly. In its conversion of what has been said into what can be said, it exemplifies reification—the freezing of possibilities that results when a concept becomes a thing.

¹⁵⁵ The judicial tendency to reify words is almost too well known to require explanation. The definitional stop, so beloved of ordinary language analysts, is frequently used to close off or obscure the political choices involved in a decision. "Commerce succeeds to manufacture, and is not a part of it," says the Supreme Court, happily eviscerating the antitrust statutes. *United States v. E.C. Knight Co.*, 156 U.S. 1, 12 (1895) (Fuller, C.J.). The argument that a monopoly of 97% of all the sugar produced in the country does not affect commerce can seem reasonable only to those who see words as things, forged by the collective fiat of ordinary language users and unchanged by purpose, context, or even "common" sense.

¹⁵⁶ A dispute about whether or not a woman was right to get angry about sexual harassment in the workplace can be "closed" by the statement, "Well, that's a woman for you." It is precisely because the ordinary language understanding of "woman" is *nothing like* "a person of female gender" that the statement can end the discussion by appealing to sexist stereotypes while appearing to state a fact.

¹⁵⁷ President Reagan could publicly discuss whether to announce the covert war against Nicaragua, because "covert" had become a "thing" separate from secrecy or disclosure; in the Orwellian language of White-House-speak, it refers us away from the present conflict to an absent time when the formal ideals of liberal democracy did not allow overt admission of such acts. Reagan can speak to us from his public (informal) role and ask for our (informal) prognostications about what our (formal and citizen-like) reactions will be. The roles have been emptied of real significance and the resulting vacuum has sucked out the meanings of the words that surrounded them, leaving an ordinary-language meaning that entrenches the political status quo within language itself. This is the same process evoked by Orwell's less audacious prophecy for the same year, "War is Peace." See G. ORWELL, 1984, at 7 (1949).

¹⁵⁸ I owe this phrase, and much more besides, to Andy Lichterman.

¹⁵⁹ See I. KANT, *What is Enlightenment*, in KANT ON HISTORY 77 (L. Beck ed. 1963). McCarthy sums up Kant's position as follows: "Thus the idea of Reason encompassed the will to be rational, the will to achieve *Mündigkeit*, autonomy, and responsi-

ideas are compatible because you can break down a claim to correctness, naturalness, or neutrality without asserting that you have the pure truth yourself. Put more simply, you can claim that someone else is wrong without claiming that you, yourself, are right.

If we assumed that this way of thinking was the basis of critical legal theory, then it would be fairly easy to link up the traces and to explain the importance of the politics of reason. Under this assumption the traces could all be seen as examples of deconstruction, which seek to show how the perceived rationality of justificatory structures exercises a political function.¹⁶⁰ By criticizing those justificatory structures we "open up space to think and act in the world."¹⁶¹ This method is powerful because there is legitimating rhetoric surrounding everything from the liberal state or the social power of science, to the most mundane work place hierarchy. But it is not only powerful, it is also far-reaching because it tends to suggest that "being political" should not involve a fixation with large-scale manifestations of power, such as the state, but instead that it would involve a merging of the large and the small, the public and the private, international politics and work place cooperation.¹⁶² All of this would spring fairly directly from a modernist conception of knowledge, an existentialist conception of morality, and a belief that "false closure" restricts human potential.

Presented in this way, the idea of political action through immanent critique seems to make sense out of the bewildering variety of critical legal theory (and thus unify the traces) as well as to explain how the theory has been constructed (and thus provide the "toolkit" I promised). Nevertheless I am going to suggest that things are a little more complicated and that in order to understand critical legal thought, its relationship to other social theory, and the fights over the politics of reason within CLS, one must come at critical legal theory from another angle. In the end, this angle may lead us back to the idea of immanent critique, but it will do so in a very different manner.

So far I have presented the idea of immanent critique as a powerful tool for teaching, thinking, writing, and for moral and political action. I now want to present again the same idea, but this time, instead of using it as the starting point of our discussion, I am going to show how it can be seen as a mediation of a prior tension: that between

bility in the conduct of life." T. MCCARTHY, *supra* note 47, at 77. But, as McCarthy points out, this is inconsistent with Kant's other ideas. *Id.* Habermas has attempted to get rid of this contradiction with his ideal speech situation. *See infra* note 186.

¹⁶⁰ See Kelman, *supra* note 15.

¹⁶¹ Peller, *supra* note 130, at 5.

¹⁶² See D. KENNEDY, *supra* note 14, at 76-119.

subjectivism and structuralism. I do this not to devalue it, although some people may think my argument has that effect, but to show the rich and complex set of choices suppressed or unified beneath the monolithic fronting of legitimation theory. One way of doing so is to go back through the argument that I presented in the first part and to point out the places where that argument suppresses its own mediating role.

The starting point remains the same: in the absence of a coherent set of neutral or aprioristic premises, reason seems inescapably political. If we think of reason as comprising all of the arguments that claim to be correct, the modes of discourse that claim to be privileged, then it seems that we must acknowledge that reason has a political effect. That effect may be one of conscious justification or legitimation, or—perhaps more importantly—of an unconscious justification that closes off sets of possibilities before any judgment is made. A political practice founded on immanent critique or trashing tries to expose both the political effect and the incoherence of these legitimating belief structures. One way to explain the astonishingly consistent success of these critiques is to reiterate the point from which we started—there is no transcendental grounding—and thus all rational constructs can be deconstructed. *Yet if this is true, how does the critical legal theorist defend her own construct?* Of course, she might claim merely to be doing an immanent critique of a pre-existing belief structure, but how can she prove that the belief structure she attacks is actually the one supporting or justifying the social practice in question? Legitimizing ideologies do not come to us ready-labelled as such, and thus all deconstructive efforts must be based on a prior construction of the phenomena to be taken apart. In fact, this problem is simply one manifestation of the latent tension in the critical project between the constructive and the deconstructive sides of the endeavor.

This tension has bedeviled most radical social theory. In each new theoretical project it appears in a different incarnation, and it is the local incarnation, rather than the abstract and ahistorical picture of an essential tension, that interests me. In critical legal thought the contradiction between construction and deconstruction is manifested as a tension between what I will call a structuralist strand and a subjectivist strand. Of course, these are only two of the infinite number of binary oppositions that could be used to explain or understand critical legal theory. I am not claiming that they constitute the “real” opposition or anything like that. My thesis is simply that these two strands represent a good way of “getting at” what seem to me to be some of the most important philosophical issues and some of the most important existen-

tial experiences with which social theory and political action have to deal.¹⁶³

On the philosophical level, the subjectivist strand stresses the importance of the individual's subjective experience. It develops its picture of the social world through phenomenological descriptions of that experience.¹⁶⁴ A phenomenological account of a cockfight, for example,

¹⁶³ In order to avoid a morass of definitions and methodological disclaimers, the text drastically simplifies the constituent methods within each strand. For those who are interested in the intellectual genealogy of these ideas, I offer an abbreviated account in the footnotes.

¹⁶⁴ Phenomenology is the knowledge of phenomena as opposed to that of being (ontology), but this definition is more confusing than helpful unless it is placed in context. My understanding of the worth of phenomenology to the theoretical project draws on Husserl, Heidegger, Merleau-Ponty, Sartre, and Schutz. See generally F. DALLMAYR, *BEYOND DOGMA AND DESPAIR* 97-98 (1981).

The original philosophical method, developed by Brentano and Husserl, was remarkable mainly for its claim that philosophy could be based on a precise form of introspection: an analysis of cognitive processes that "brackets out" wider questions of cause, implication, or consequence. See, e.g., E. HUSSERL, *IDEAS* (1931). Through the work of Heidegger and Sartre, this method came to be seen as a principal component of existentialist philosophy; it was the everyday framework within which questions of choice, morality, and good or bad faith were resolved. See J. FELL, HEIDEGGER AND SARTRE 1-30 (1979); M. HEIDEGGER, *THE BASIC PROBLEMS OF PHENOMENOLOGY* (A. Hofstadter trans. 1982); R. WATERHOUSE, *A HEIDEGGER CRITIQUE* (1981) (general introduction to Heidegger and a critical discussion of his works). Merleau-Ponty explored the mental importance of immediate subjective perception, before that perception had been cleaned up by the filters that social convention puts on re-presentation. See, e.g., J. MERLEAU-PONTY, *THE VISIBLE AND THE INVISIBLE* (1968). In addition, Sartre's ontological metaphysics made phenomenological negation a primary constituent of being. See, e.g., J. SARTRE, *BEING AND NOTHINGNESS*, *supra* note 141. A shorthand way to describe what this means is to say that, in place of Descartes's "I think therefore I am," Sartre had erected a system of methodological *doubt*. As human beings we are to find the source of both our knowledge and our morals in the power of negation, the ability to negate and to reimagine existing phenomena, physical and social. This stress on the individual subject and on personal choice was balanced in Sartre's work by a Marxist counterstrand that concentrated on the objective, external structures of social life. See, e.g., J. SARTRE, *CRITIQUE OF DIALECTICAL REASON*, *supra* note 12. Thus *freedom* from the overwhelming facticity or givenness of the world is presented as a basic component of *being*, and the abstract concept "facticity" is given content by the specific historical description contained in Marxism.

In the hands of Alfred Schutz, the Husserlian method underwent a further transformation. See, e.g., A. SCHUTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* (1967). In a parallel development to Karl Mannheim's investigation of the sociology of knowledge, Schutz used phenomenological techniques to build up a picture of "common sense": the inarticulate major premises that defend and reproduce the status quo in social life by putting certain topics out of the circle of possibilities.

Out of this potpourri of phenomenologies comes the method in which I believe and that I have "read into" critical legal studies. It has been my experience that we feel flashes of incongruity, rebellion, and Kafkaesque humor even in those situations where we consider ourselves to be most completely the puppets of an abstract social role.

After the faculty meeting, "we" all joke about the way that "we" stopped ourselves from actually being anything like "us." The collective production and maintenance of personas that we collectively recognize to be artificial and, in some sense, deformed, leaves traces of rebellion that can be pulled together by a phenomenological

would give us not one cockfight, but many. In fact, such an account would give us as many different cockfights as there were people in the room. The different perspectives of owner, bettor, visiting anthropologist, the old, the young, and so on would literally constitute a set of parallel universes, congruent narratives from which no master narrative could be drawn. Added to, and reinforcing, this philosophical preference for phenomenological accounts is the idea of personal liberation. By "personal liberation" I mean the vision of an individual who expresses and affirms her personhood by bursting free of the constraints imposed by the reified structures of social life. In one sense, the attraction of phenomenology is that it allows us to get at the momentary flashes of rage or denial that exist in the moment before our experience of a situation is reformulated into the "appropriate" way of thinking. Phenomenology thus links up our experiences of constraint or bad faith so as to negate them in the act of liberation. And this philosophical depiction of liberation is in turn only meaningful insofar as it manages to evoke the actual experience of freedom, the feeling of the transcendence of constraint—not in its ethereal idealist form, but as a minor flash of empowerment in a factory, or a hospital, or a law school.

Conversely, the structuralist strand focuses, unsurprisingly, on structures. I use "structuralist" in a broader sense than its technical usage to mean a focus on clusters of beliefs, ideas, or economic forces that supposedly have their own internal logic and that somehow organize, explain, or are reflected in the subjective experiences of those who are affected by them.¹⁶⁵ To return to the example I used earlier, Clif-

account. It is this phenomenology that allows us to regain the naive position from which we originally asked, "Why do things have to be this way?" This apparently trivial example reveals the elements of the phenomenological method that I consider to be vital: its ability to negate and reimagine, its approach to collective social contexts through the eyes of participating subjects (rather than through the lens of some prior, determining structure), and its archaeological power in unearthing the artifacts of yesterday's forgotten rebellion. See Gabel & Kennedy, *supra* note 100, at 3 (advocating "small-scale, microphenomenological evocation of real experiences in complex contextualized ways"); Peller, *Cultural Terrorism and the Faculty Cocktail Party*, 2 LIZARD 3 (1984) (example of phenomenologically based account of the politics of social situations).

¹⁶⁵ The more esoteric sense of structuralism implies a commitment to the methods developed by such writers as Barthes, Levi-Strauss, Lacan, Piaget, and Althusser. In a work in progress I deal with the particular problems, epistemological and political, that this kind of structuralism implies for social theory. After having written the first draft of this Article I was lucky enough to see the proofs of Tom Heller's excellent piece on a closely related subject. See Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984). Heller's method is to analyze the tension between esoteric structuralism and post-structuralism. One of the central themes of his article is the decentering of the subject that a focus on structure implies, a theme that he links to post-modernist deconstructive efforts. I tend to disagree with his arguments about the breakdown of the self, but I have reserved those disagreements for a later article. In this piece I have at-

ford Geertz's famous description of a Balinese cockfight provides a reading of the event that may have been far from the individual feelings of the participants and yet that purports to capture *the* cultural meaning of the fight.¹⁶⁶ In a similar way, a Marxist description of a legal dispute, or a feminist description of a classroom interaction, or Duncan Kennedy's account of the fundamental contradiction all offer a picture of "what went on" that draws on the participant's awareness and yet transcends it. By uncovering "what is really going on," the structuralist strand in critical legal studies tries to expose the constraining quality of the structures of everyday life, which are embedded in legal decisions, standard arguments, or in the unproblematic assumptions on which a discussion is based. And this philosophical description of structure is only meaningful insofar as it manages to evoke the actual experience of constraint—the profane feeling of limitation by the illusion of necessity.

Notice that even to explain what the structuralist strand is, I have to postulate some *subject* to whom the knowledge of structural con-

tempted to bring out the constitutive nature of the tension between subjects and structures on a less esoteric level, partly because I want to offer a toolkit for theory to those with little experience (or interest) in the convoluted tropes of French literary criticism, and partly because I believe that an analysis rooted in the categories of literary theory tends to undervalue the importance of existentialist phenomenology. *But see id.* at 135-38 & 136 n.15. On structuralism, see generally T. HAWKES, *supra* note 20; C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY*, *supra* note 141; P. PETTIT, *THE CONCEPT OF STRUCTURALISM: A CRITICAL ANALYSIS* (1977) (theoretical discussion of the extension of the structuralist model to fields other than linguistics); J. PIAGET, *STRUCTURALISM* (C. Maschler trans. 1970) (account of structuralism in the broad context of developments in linguistics, mathematics, biology, among other disciplines); *THE STRUCTURALISTS: FROM MARX TO LEVI-STRAUSS*, *supra* note 104. On post-structuralism and its (arguable) relationship to other "post-isms," see generally J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982) (general review of the literary movement of deconstruction); J. DERRIDA, *supra* note 75; I. HASSAN, *POSTmodernISM: A Paracritical Bibliography*, in *PARACRITICISMS: SEVEN SPECULATIONS OF THE TIMES* 39 (1973) (a somewhat idiosyncratic review of post-modern movements); J. KRISTEVA, *DESIRE IN LANGUAGE* (L. Roudiez ed. 1979) (representative work of postmodern psychoanalytical criticism); Heller, *supra*, at 155-98. The post-structuralist critiques that Heller explains are in one sense similar to the subjectivist revolts against structuralism that I describe later in this Article. *See, e.g., infra* text accompanying notes 234-54. Heller's post-structuralism, however, explicitly rejects the connection of subjugated knowledges to the self and to personal experience, and thus refuses to put the same reliance on phenomenologically unearthed traces of denial. *See Heller, supra*, at 156-57.

¹⁶⁶ C. GEERTZ, *Deep Play*, in *THE INTERPRETATION OF CULTURES* 412 (1973). I chose this example to emphasize the fact that I am using the term "structuralist" very broadly. Geertz's "thick description" is normally thought of as the opposite of the structuralist abstractions. However my interest here lies in the claim to have penetrated to the most basic level of what is going on. Consequently, I used the Geertz example to emphasize that even a thick descriptive phenomenology will have to face the tension between subjectivism and structuralism and deploy mediating devices to defer it, if "thick description" is coupled with an attempt to produce the lowest common denominator of subjective accounts.

straint will be useful. Similarly, to describe the subjectivist strand I had to rely on the vision of transcending or breaking through a repressive *structure*. Yet the subjectivist strand seems to devalue structural theories by the primacy it gives to immediate personal experience and the associated existentialist idea that, given the contingency of all philosophical and social arrangements, personal choice is the only lodestone. The structuralist strand takes the opposite path. By offering a convincing account of knowledge, power, and life that is largely independent of the "intentionally acting subject," it seems to undermine the central role that the subjectivist strand has held in the Western epistemological and political tradition.¹⁸⁷ Each strand, in other words, both contradicts and relies on the other.¹⁸⁸ Each contains the dangerous supplement, the trace, of its opposite.¹⁸⁹

¹⁸⁷ At the very least one could say that the individual will be de-emphasized by a focus on ideological structures rather than on the "subjects" who purportedly create them, or the "objects" that they purportedly represent. In this Article I am not going to go beyond this point into the debate about "the death of the subject." *But see* F. DALLMAYR, *supra* note 141; M. HEIDEGGER, *Letter on Humanism*, in MARTIN HEIDEGGER, *BASIC WRITINGS* 193 (D. Krell ed. 1977); C. LEMERT, *SOCIOLOGY AND THE TWILIGHT OF MAN* (1979); W. PERCY, *LOST IN THE COSMOS* (1983); Heller, *supra* note 165, at 147-51; *see also supra* note 104.

¹⁸⁸ In practice, all critical legal theories seem to me to contain both of these strands. Thus the question is not whether a particular theory is subjectivist or structuralist. Instead, the differences between the theories depend on the question of which strand is given *priority*, either epistemologically or temporally. By "epistemological priority," I mean that the theorist tilts the balance of importance towards one strand rather than another; for example, a theory that claims to expose a deep structure of legal ideology that determines the consciousness of the legal elite is obviously giving epistemological priority to the structuralist strand. By "temporal priority," I mean only that the theorist begins her analysis by focusing on one strand and then works toward the other; for example, an analysis of the ideology of law schools that is developed out of a phenomenological depiction of classroom experience from a student's perspective gives temporal priority to the subjectivist strand. The question of temporal priority is simply the question of the starting place for an analysis. The question of epistemological priority is the question of which strand of the theory is supposed to be philosophically more fundamental.

¹⁸⁹ *See* J. CULLER, *supra* note 165, at 85-225; J. DERRIDA, *supra* note 75, at 242-57, 269-316. Derrida's term "dangerous supplement" injects a vaguely anthropomorphic metaphor into the concept of an antinomy—two propositions that both contradict and depend on each other. The supplementarity is "dangerous" because the truce lines between the two concepts are never permanently settled. We cannot define "male qualities" except with reference to "female qualities," but thus we incorporate a trace of female within the male—a dangerous supplement that is always threatening to revolt against its marginalized status. Lawyers are familiar with dangerous supplementarity in the context of dichotomies such as public/private, form/substance, administration/adjudication, and interpretation/application. For an example of legal scholarship that uses the idea of dangerous supplementarity, see Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276, 1288-92 (1984). For examples of scholarship that deals with these dichotomies *without* the Derridian metaphors, see Kennedy, *supra* note 53; Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Olsen, *The Family and the Market: A Study of Ideology and*

Earlier I said that all social theory was faced with some version of this antinomian relationship and that immanent critique or legitimation theory was the conceptual tool by which the tension was most often mediated in critical legal theory. I hope it has now become obvious why this is the case. Critical legal thought offers accounts of *structures* of thought with the aim of liberating *subjective* potential. These structures are postulated by the theorist and then criticized or exploded. Yet the critical weapons employed in the second stage could just as well be used to undermine the first, structure-creating stage. In order to immunize the constructive part of the endeavor from its own deconstructive sequel it seems as though we might have to imagine that there are self-proclaiming structures of ideology immanent in legal texts. The theorist, therefore, would not be creating the repressive belief structure; she would merely be describing a pre-existing structure. But this idea of "self-revealing structures" appears to be paradoxical, given critical legal theory's opposition to analogous ideas such as the "plain meaning of words" or the "obvious functional requisites of institutional competence." I believe that this paradox cannot be understood as an abstract philosophical mistake, but instead that it must be examined in the context of the traces that I developed in my discussion of critical legal thought. By taking each trace and dealing with it in (different degrees of) detail, I hope to fulfill my promise to link up the traces in a second and more profitable way and at the same time to deal with some of the most persistent criticisms of critical legal theory.

If we look back at all of the traces that I developed in the first part of this Article, it becomes obvious that all of them share a particular set of metaphorical devices for mediating the opposition between subjectivism and structuralism. At the same time, each theory is unique in the way that it actually tries to resolve this tension. Consequently, the traces present us with a number of blueprints for "doing" political theory, writing legal history, or taking apart the social world. In order to get the advantages of comprehensive "blueprint-explanation" without the disadvantage of excessive length I will concentrate on the most representative traces within each section and will merely summarize the mediating strategies in the remaining ones.

B. Legal Realism

1. Introduction

In the first trace drawn out of the legal realist section,¹⁷⁰ I discussed the contentions that law is neither a neutral system of signs for representing reality nor a neutral system of rules for settling social disputes. The realists tried to offset the legitimacy deficit left by these critiques with their advocacy of technocratic decisionmaking. Yet, as I tried to show in my discussion of the second trace,¹⁷¹ there is a powerful set of arguments to the effect that the prestige of science and the narrowness of means-end rationality tend to depoliticize social reality in a manner reminiscent of dogmatic theological systems. These themes of rationality, politics, and legitimation were repeated in the third trace,¹⁷² where I argued that one of the main splits in contemporary legal scholarship is between those who wish to revamp the concept of objective, neutral legal thought and those who deny that such a revamping is either possible or desirable.

In each of these traces the subjectivist and the structuralist strands are in tension. Two mediating concepts are used in each trace to make the tension disappear. The first is the idea of immanent critique. Put another way, the theorist claims to be merely describing a pre-existing delusion. The second is the idea that by making a belief structure visible one can destroy its power over the subjects concerned. We lack an English word for this idea so I will use Brecht's term, "*Verfremdung*."¹⁷³ So *Verfremdung* (exegesis) and immanent critique (deconstruction) link together the individual feelings of oppression that

¹⁷⁰ See *supra* text accompanying notes 30-36.

¹⁷¹ See *supra* text accompanying note 37-50.

¹⁷² See *supra* text accompanying notes 51-66.

¹⁷³ *Verfremdung* (or more properly, *Verfremdungseffekt*) and its Russian counterpart, *Ostranenie*, both signify the sudden feeling of alienation when one becomes aware of the artificiality or unreality of a context. Thus Brecht's plays are full of events that suddenly force the audience out of the thrall of suspended disbelief by referring to the fact that *it is only a play*. See F. JAMESON, *THE PRISON-HOUSE OF LANGUAGE* 58-59 (1972). By analogy, the description of an ideological structure to the subject "affected" by that structure is supposed to render opaque what had previously been transparent, and thus make the subject aware that there is an element of choice suppressed beneath the prereflective understanding that "this is the way things are." See W. BENJAMIN, *What is Epic Theater*, in *ILLUMINATIONS* 147 (H. Arendt ed. 1969); T. HAWKES, *supra* note 20, at 62-63. With its associated ideas of alienation, self-referential deconstruction, the playful deformation of basic assumptions, the making visible of the invisible, the revolt against form, and the dissolution of the barriers that separate life from art, *Verfremdung* is perhaps the paradigmatic modernist idea. See generally D. BELL, *supra* note 49, at 46-52. For a work that could be understood to have made *Verfremdung* the basis of an entire social theory, see R. UNGER, *supra* note 33.

we had previously been able to grasp only in isolated phenomenological accounts. What is more, the "linking up" of these subjective, individual feelings of oppression is supposed to happen on the level of political organization as well as that of conceptual explanation. Theory and practice are not merely connected to each other by the mediation, they are, to an important extent, *fused*. For example, suppose I try to explain the individual experiences of first-year law students by a structural account of the politics of law. I might claim that the paranoia, loss of self-esteem, and roller-coaster oscillations of the first year are, in part, caused by the structural contradictions of an elite conception of law that on the one hand insists that legal doctrine is infinitely manipulable mush, and on the other hand offers a picture of the rule of law as being both apolitical and nondiscretionary. By exposing the contradictions in such a conception *and* the way in which these contradictions are presented in the inscrutable mixed messages of those large first-year classes, I link up individual experiences of oppression, hurt, and incomprehension and, supposedly, clear a space for political action in the dark, tangled underbrush of the ideology of law schools. Structural explanation envelops subjective alienation: theory generates practice.¹⁷⁴

In order to understand the operation of these mediating concepts I will go through each of the traces developed in the section on legal realism and examine how the tension between subjectivism and structuralism is lessened, if not resolved.

2. First Trace: Neutral Law and Legitimation

The Cohen article¹⁷⁵ that I used as an example of legal realism is mainly concerned with deconstruction rather than construction. It aims to show that the comforting structure of formalist legal thought is actually illusory, that its arguments are circular, and that it forces fact patterns that are "subjectively" very different into the same narrow conceptual box. Critical legal theory allows one to take this deconstructive argument and turn it into the foundation of two constructive or *structuralist* projects. First, from a mass of subjective experiences and little phenomenologies (conversations, treatises, newspaper editorials, classroom experiences, and so on) one can extract a structure of legitimating rhetoric and political theory that seems central to the liberal vision of law and society. Having built a structuralist account on a subjective grounding, one can then claim that the legitimating structure is undermined by the awareness that law is not in fact neutral. This postulated

¹⁷⁴ For the classic example, see D. KENNEDY, *supra* note 14.

¹⁷⁵ Cohen, *supra* note 18.

structural failure can then be turned back on the world of subjective experience. For example, it helps one to explain, uncover, and build upon people's actual reactions to the assertion that law is inescapably political, if one has some idea that such an assertion does not stand on its own but that it is conceptually linked to a whole cluster of other ideas. Depending on the way in which it is presented, the idea of political law may either evoke the cynical-modernist cluster ("we've known that for years") or the apocalyptic-liberal cluster ("you are advocating the destruction of Western civilization as we know it"). Without a structuralist understanding, these wildly oscillating reactions would simply appear to be the symptoms of advanced mental illness.

In a similar manner the second structuralist project emanating from realist deconstruction uses the metaphor of language to show the artificiality and contingency of the process of translation from "real world" to "legal world." Mrs. Palsgraf's accident¹⁷⁶ is not neutrally represented when we describe it as a tort case. The subjective experience of an industrial dispute cannot be converted into the "labor relations case" that supposedly signifies it by any apolitical transmutation. And although we have, in a sense, "always known that this was the case," the political nature of the translation seems to make it much harder for us to compartmentalize our "legal life" and our "real life." The metaphor of translation strips the legal system of the dense fog of familiarity that surrounds and protects it. Like languages, the systems do not "exist" apart from our collective construction and reconstruction of them. "We" are the ones who recreate the "legal world" and the "real world" every day. Consequently, we cannot use the thing-like quality of these "worlds" to deny the set of political choices that we are constantly making in order to reproduce them. The linguistic trope allows us to systematize subjective experiences in a way that actually changes the nature of those experiences. A structural exegesis that purports merely to describe "the way things are" reintroduces an element of individual moral and political choice that had been excluded by the closure of social reality.

So the first trace resolves the tension between the subjectivist and structuralist strands by using the idea of immanent critique and the idea of *Verfremdung* with the hope that, once revealed, structures lose their anaesthetic "grip." But, like all mediations, these concepts do not solve the problem; they merely defer it. Even as I am convinced of the rightness of these ideas, I am aware of their hidden limitations, their postponed aporias. What about all the other structures that could be

¹⁷⁶ See *Palsgraf v. Long Island R.R.*, 248 N.Y. 339 (1928).

used to explain or construct the subjective reality of the legal world? To return to the example I used earlier, could we not explain the alienation and depoliticization of law school education as being the result of the fact that the first-year curriculum must continually deny the politically "tilted" nature of market economics? One could claim that the whole structure of bourgeois law is based on the obfuscation of the way in which surplus value is "skimmed off,"¹⁷⁷ and then use *this* immanent critique to explain the same subjective experiences that I explained earlier as part of the false ideology of neutral law. In other words, how do we know our structure is *the right structure*?¹⁷⁸ Is it to be defended by conventional rationalist argumentation? By appeal to the experiences of the group to which it is addressed? Or are we to renounce altogether the possibility of producing a kind of theory that can be "privileged" as more correct than any other theory?

The questions about the privileging of theory are not the only ones raised in this trace by the tension between subjectivism and structuralism. So far I have argued that the principal conceptual devices used to lessen this tension are the ideas of immanent critique and *Verfremdung*. Both of these can be understood as products of the sociology of consciousness or the analysis of ideology. Like Marxism or feminism, or Freudian social analysis, they seem to postulate general delusional ideologies rooted in some basic feature of social life, which are reflected in mass consciousness. As such they seem to fit neatly into the mold of large-scale social and legal theory. Yet there are considerable problems if we understand them this way. For example, one obvious application of the post-realist insights about the political quality of legal rules would be a study of the way in which the facade of neutrality in a particular doctrinal area legitimated a set of social practices. In labor

¹⁷⁷ Surplus value is the difference between the value of work and the value paid for it. Marx assumed that all things are valuable in proportion to the amount of labor invested in them. Thus profits are made because workers infuse products with (true) labor value but are only paid according to the (false) market value of their labor. According to Marx, the systematically created differential between these two values is the fuel of capitalism and the cause of exploitation. See Marx, *Capital: Selections*, in THE MARX-ENGELS READER, *supra* note 90, at 191, 232-64. It is this economic measure of suffering that formed the basis of the vulgar and scientific forms of Marxism. See Engels, *Socialism: Utopian and Scientific*, in *id.* at 605, 622. On this reading of Marx, the function of law is the same as the function of all other bourgeois ideologies: to obscure the skimming-off of surplus value. Critical legal scholars have been averse to this kind of legal theory for the reasons given earlier. See *supra* text accompanying notes 115-39.

¹⁷⁸ Tom Heller describes the general problem as follows: "[The] multiplicity of structuralisms quickly reveals a massive overdetermination (the apparent determination of a single practice by multiple structures, each of which purports to offer a sufficient explanation) of any specific phenomenon and tears apart the presumptive value of each individual structural explanation." Heller, *supra* note 165, at 157 (footnote omitted).

law, for instance, the legal rigidification of a set of bargaining arrangements and practices might seem to defuse radical energies because of the apparently apolitical character of law.¹⁷⁹ And, as I said, this fits the classical idea of the sociology of consciousness—we analyze the power of certain kinds of discourse (such as law) in affecting the political attitudes of those who are presented with those discourses. But are union members or union leaders sufficiently *aware* of the way in which labor law is interpreted for it to have any credible legitimating force? Is there a danger that in following the pattern of large-scale legitimation theories, we may be attributing too much general social impact to the ideology of neutral law? Tony Chase makes a similar point in his criticism of CLS writing about labor law. "Entirely without fanfare, Klare's and Kennedy's 'demobilized' working class has become an ideologically mesmerized ensemble of lawyers and law professors."¹⁸⁰

So if this kind of critical legal theory is to be seen as an equivalent of the large-scale analysis of ideology performed by nineteenth-century social thought, we need some kind of convincing link between the structural analysis of doctrine and the actual subjective consciousness of political actors other than lawyers and judges. If the ideology of neutral law is to be seen as important in diverse socio-legal interactions on a concrete level, then people have actually to know what judges are doing (or what they *say* they are doing). Whereas the first set of questions was raised by the privileging of theory, by the *epistemological* connection between the structuralist and the subjectivist strands, the second set of questions is concerned with a related but more mundane question of connection: namely, did anyone actually *have* the subjective experiences of mystification that the structural analysis purports to explain?¹⁸¹ I try

¹⁷⁹ See Kennedy, *Critical Labor Law Theory: A Comment*, 4 INDUS. REL. L.J. 503 (1981); Klare, *Critical Theory and Labor Relations Law*, in *THE POLITICS OF LAW*, *supra* note 2, at 65; Klare, *supra* note 106; Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450 (1981).

¹⁸⁰ Chase, *A Challenge to Workers' Rights*, 8 NOVA L.J. 671, 684 n.46 (1984) (criticizing Note, *Subjects of Bargaining under the NLRA and the Limits of Liberal Political Imagination*, 97 HARV. L. REV. 475 (1983)). As I understand Chase's criticism, he is not saying that labor law ideology is irrelevant to the demobilization of the working class. Instead, he is saying that the claims of demobilization are merely tacked on to a post-modernist legal theory as an afterthought, *id.* at 684, that there are other more relevant factors to be considered, *id.* at 680-81, and that, if the critical legal theory *does* accurately represent anyone's structural delusions, it is those of lawyers and law professors, *id.* at 684 n.46.

¹⁸¹ For critiques of CLS methodology that bear on this question, see Chase, *supra* note 180; Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379; F. Munger & C. Serron, *Critical Legal Studies vs. Critical Legal Theory: An Examination of the Role of Empirical Research in the Conference on Critical Legal Studies* (July 21, 1983) [unpublished paper on file with the University of Pennsylvania

to answer these questions, as well as the ones raised in the subsequent traces, in section F.¹⁸²

3. Second Trace: The Critique of Technocracy

I introduced the critique of scientism by commenting on the realists' metaphor that the lawyer should act as a "social engineer."¹⁸³ I tried to make the point that the technical interest in prediction and control was not the only, and certainly not the sovereign, form of reason. What is more, I suggested, by withdrawing political questions from the public sphere and giving them over to expert decisionmaking, technocratic rationality actually diminishes the possibility of democratic debate over ends, in the name of an improved analysis of means.

The basis for my analysis was a reading of Jürgen Habermas's theory of cognitive interests.¹⁸⁴ Although I did not try to spell out the details of this argument, I hope that it was fairly clear that the foundation of most objections to scientism is the idea that the empirical-analytic form of knowledge is being expanded beyond its appropriate sphere, reducing debates about values to equations about methods. Even in this necessarily curtailed and caricatured form, one can see that Habermas's analysis depends on the notion of social needs for certain forms of knowledge, the "anthropologically deep-seated interests" in prediction and control, in individual and group understanding, and in freedom from the illusion of necessity.¹⁸⁵ These technical, practical, and emancipatory interests form a sort of epistemological trinity that acts as a mediating device between the subjectivist and structuralist strands in Habermas's thought.

Habermas is presenting a profoundly democratic political theory. The basis for his epistemological, historical, and political researches is the "ideal speech situation," a utopian vision of democratic discussion in which individual subjects decide their destiny unconstrained by internal neurosis or external oppression.¹⁸⁶ This vision is used as a bench-

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¹⁸² See *infra* text accompanying notes 255-69.

¹⁸³ See *supra* text accompanying note 41.

¹⁸⁴ See *supra* notes 43-50 and accompanying text.

¹⁸⁵ See *infra* note 189 and accompanying text.

¹⁸⁶ [S]tructure is free from constraint only when for all participants there is a symmetrical distribution of chances to select and employ speech acts, when there is an effective equality of chances to assume dialogue roles. In particular, all participants must have the same chance to initiate and perpetuate discourse, to put forward, call into question, and give reasons for and against statements, explanations, interpretations, and justifications. Furthermore, they must have the same chance to express attitudes, feelings, intentions and the like, and to command, to oppose, to permit, and to

mark or standard against which we can judge contemporary institutions. Yet Habermas is also presenting a theory that implies that individuals in contemporary society are actually diverted from their human interests by the effects of large-scale, structural "disturbances to communication"—the ideologies of consumerism, sexism, racism, and technocracy being examples of such "disturbances."¹⁸⁷

In order to mediate the tension between this structural-ideological element and the vision of subjects making history "with will and consciousness," Habermas uses two complicated intellectual maneuvers. First, he postulates the "anthropologically deep-seated interests" in technical control, practical political discourse, and in emancipation from the illusion of necessity.¹⁸⁸ These interests have a "quasi-transcendental status" rooted in species history and in the basic experiences of work and interaction.¹⁸⁹ They govern both our modes of knowing

forbid, etc. These last requirements refer directly to the organization of interaction, since the freeing of discourse from the constraints of action is only possible in the context of pure interaction. In other words, the conditions for the ideal speech situation must insure not only unlimited discussion but also discussion which is free from all constraints of domination, whether their source be conscious strategic behavior or communication barriers secured in ideology and neurosis. Thus, the conditions of ideal discourse are connected with conditions for an ideal form of life; they include linguistic conceptualizations of the traditional ideas of freedom and justice. "Truth," therefore, cannot be analyzed independently of "freedom" and "justice."

McCarthy, *Introduction* to J. HABERMAS, *LEGITIMATION CRISIS*, *supra* note 48, at xvii.

¹⁸⁷ See J. HABERMAS, *THEORY AND PRACTICE*, *supra* note 47, at 12-13.

¹⁸⁸ *Id.* at 8; see *id.* at 7-32.

¹⁸⁹ See *supra* notes 48-50 and accompanying text; see also T. MCCARTHY, *supra* note 47, at 53-91. McCarthy provides the most succinct explanation of the cognitive interests:

Habermas classifies processes of inquiry (*Forschungsprozessen*) into three categories: *empirical-analytic sciences*, including the natural sciences and the social sciences insofar as they aim at producing nomological knowledge; *historical-hermeneutic sciences*, including the humanities (*Geisteswissenschaften*) and the historical and social sciences insofar as they aim at interpretive understanding of meaningful configurations; and the *critically oriented sciences*, including psychoanalysis and the critique of ideology (critical social theory), as well as philosophy understood as a reflective and critical discipline. For each category of inquiry he posits a connection with a specific cognitive interest: "the approach of the empirical-analytic sciences incorporates a *technical* cognitive interest; that of the historical-hermeneutic sciences incorporates a *practical* one; and the approach of critically oriented sciences incorporates the *emancipatory* cognitive interest." These connections are to be demonstrated through an analysis of fundamental categories and of the methods of establishing, testing, and applying the systems of propositions proper to the type of inquiry in question. The cognitive interests appear—as Habermas later puts it—as "general orientations" or "general cognitive strategies" that guide the vari-

and our forms of life. Habermas uses this meta-epistemology to justify political choices *between* alternative types of rationality. Without the meta-epistemology these forms of reason would be literally incommensurable—they would “talk past each other”—and thus the structural side of Habermas’s theory would appear to rest on an arbitrary preference for one form of reason, one way of life.

Secondly, Habermas reintroduces the ideal speech situation as being the standard against which we measure how the emancipatory interest is fulfilled.¹⁹⁰ In other words, the emancipatory interest could be said to govern the other two interests; it offers a method for critical reflection about the appropriate harmonization of our need to predict and control and our need to communicate with ourselves and each other.

Perhaps the best way of understanding this mediation between subjectivism and structuralism is to think of the analogy to psychotherapy. Like the analyst, the critical theorist presents both a body of knowledge and a process for discussing that knowledge. If the subjects of the theory deny that they are structurally deluded about their real interests, and if this denial takes place in a situation that is as close as possible to the ideal speech situation, the theorist must *revise the theory*, rather than attempt to overwhelm opposition by some claim to scientific knowledge.¹⁹¹ Of course, the ultimate correction to the bloodily Leninistic tendencies of all structural theories cannot be provided by theory itself; nevertheless, the ideal speech situation does incorporate the possibility for individual subjects to revise the picture of structural delusion with which they are presented. This is the point at which the psychoanalytic analogy must be deserted; the doctor/patient vision is inappropriate because, as Habermas puts it, “[i]n a process of enlightenment there can only be participants.”¹⁹²

4. Third Trace: Legal Scholarship

At the end of an article called *Legal Scholarship: Its Causes and Cure*,¹⁹³ Mark Tushnet, having argued that the main types of legal

ous modes of inquiry. As such they have a “quasi-transcendental” status.

Id. at 58 (footnote omitted) (quoting J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 308 (J. Shapiro trans. 1971)).

¹⁹⁰ See *supra* note 186.

¹⁹¹ See J. HABERMAS, THEORY AND PRACTICE, *supra* note 47, at 1-40. “Stalinist praxis has furnished the fatal proof that a Party organization which proceeds instrumentally and a Marxism which has degenerated into a science of apologetics complement each other only too well.” *Id.* at 36 (footnote omitted).

¹⁹² *Id.* at 40.

¹⁹³ Tushnet, *supra* note 32.

scholarship are unable to get around the realist critique, finishes by discussing the courses of action available to scholars. After suggesting several possibilities that he deems unlikely to be taken up, such as the fusion of legal and social theory, he concludes as follows: "Finally, [scholars] can continue to do conventional legal scholarship, knowing that its premises are unsupported and indeed insupportable, precisely because it makes no less sense than anything else in the world. There is an intellectual tradition here too. For my purposes I can say that it begins with Kierkegaard."¹⁹⁴

This is, in a sense, no less of a social theory than the much grander claims that have been made about liberal legal theory and its role in legitimating the modern state. Tushnet identifies a group of subjects and claims that their actions are conducted within a structural, ideological framework that makes those same actions meaningless. Once again, the mediating devices of immanent critique and *Verfremdung* are used to hold the two strands together. In order for those mediating devices to work, the critique must be truly "immanent." Do legal scholars *believe* in the idea of neutral law that both realists and critical legal scholars have criticized so powerfully? Is their work based on the transcendence of the subjective/objective division in the way that Tushnet's article suggests?¹⁹⁵ If they are revealed to be producing advocacy rather than neutral legal scholarship, will they have the subjective feeling of absurdity and meaninglessness evoked so powerfully by the Kierkegaardian image?

My answer to all of these questions is as equivocal as one might expect, or at least, it must appear to be equivocal until the conclusion of the piece. It is certainly true that there is a reified social role called "legal scholar" and an appropriate "rationality"—an accompanying discourse that "fits" the husk of the professional persona. When we are in that role, it seems to act *through* us, and one of the main determinants of its actions is a sort of watered-down, neo-Lockean, melioristic striving after objectivity. This role and its discourse are in evidence inside and outside the pages of law reviews. There seems to be no doubt that people do experience challenges to the role as being more important than a mere academic critique. Consider the following quotation from the Federalist Society's newsletter:

There is today a growing crisis in the American legal system which is manifested in many ways, most notably in the emergence of the Critical Legal Studies Movement. The

¹⁹⁴ *Id.* at 1223.

¹⁹⁵ See, e.g., *id.* at 1208, 1210, 1222.

Critical Legal Studies Movement, which is neo-marxist and radical in outlook, views the American legal system as a tool of oppression and seeks by its manipulation to effect a revolutionary "utopian" change in American society. Although this movement has had considerable success in its own right, what we as conservatives, libertarians and classical liberals find far more insidious and alarming is the increasingly pervasive acceptance amongst academia of its theoretical underpinnings. Such concepts as the impossibility (and indeed, the undesirability) of the rule of law and the disparagement of the very idea of neutral, non-partisan scholarship are bruited about ever more frequently and meet but rarely with serious challenge. The Federalist Society utterly rejects those propositions, as well as other similar axioms, and in order to more fully reaffirm its commitment to the traditional philosophical bases of the legal system, it is proud to announce its third annual symposium¹⁹⁶

To the extent that Tushnet's critique is aimed at these manifestations of the role of scholar I think that it is fairly accurate. But, on the other hand, there are times when most scholars will also say that they have always known that law is incoherent and totally political, and that their work is only clad in the redeeming robes of neutrality because "that is the way 'it' is done." Many critical legal scholars see this as an even more basic and more dangerous kind of sublimation: an apparent post-realist cynicism, which is actually deeply committed to a new kind of formalism. I do not propose to take either side of the debate because I believe that two claims are being confused here. The first is the claim that there is a justificatory discourse for law and legal institutions that both depends on and denies the objectivity of legal decisionmaking and

¹⁹⁶ *Harvard Symposium to Examine Legal Education*, Federalist Papers, Feb. 1984, at 1, col. 1. The third annual symposium was held in February 1984. Apart from demonstrating a belief in the possibility of truly neutral scholarship, this quotation shows a commitment to the view that the critical legal studies movement is neo-Marxist. Despite the occasional use of neo-Marxist ideas (as in the last section) I would argue that this is, in fact, not true. Certainly, the neo-Marxist position has been repeatedly criticized both in print and at the conferences. See Frug, *supra* note 169, at 1286 (criticizing neo-Marxist legitimation theorists and their opponents for making a distinction between the "real world of bureaucratic organization" and "the law"); Gordon, *supra* note 2, at 285-92 (criticizing large-scale neo-Marxist ideas); Peller, *supra* note 130 (irrationalist position opposed to views that resemble neo-Marxist ideas). For a similar argument about the viability of a distinction between "real world" and "legal world" see *supra* note 21; see also R. UNGER, *supra* note 5, at 15 (criticizing aspects of Marxism); Dalton, *supra* note 2, at 229-45 (same); Kennedy, *supra* note 9, at 49-50 (same).

scholarship. The substance of the critique of this discourse is "You can't have it both ways." The second is the claim that *all* of the social roles that play themselves out through law professors in the legal academy are dependent on the same latticework of logical argument that exists within the justificatory ideology of liberal legalism. I believe that the first claim has considerably more truth than the second.

On the one hand it seems fair, almost morally necessary, to point out the contradictions and the political effects of formalist and neo-formalist ideas. On the other hand, it is ludicrous to imagine that the aporias in this structural ideology play a role in the total existential experience of the people who spend time in law schools that is even vaguely similar to the role of ideologies postulated by large-scale theories of social consciousness, such as Marxism or feminism. Once stated, this seems too obvious to have been worth saying. But, if it is true, we must develop a way of theorizing that allows us to recognize that our mediating devices break down when we expand our theory to a large-scale analysis of social experience. Yet, at the same time, we need to allow for the validity of something like the "total critique" that Roberto Unger directs at liberalism.¹⁹⁷ I will come back to this problem in the final section.

C. *Linguistic Theory*

1. Introduction

In the section on linguistic theory¹⁹⁸ I discussed the modernist or intentionalist vision of language and its corrosive effects on liberal theory and on rationality itself. Thus the organizing theme of the section was a theory of semantics that made subjective intention the true or residual or privileged source of meaning. Consequently, the structuralist side of the story, which concentrates on the importance of ordinary language usage or reified semantic codes, was considerably downplayed.¹⁹⁹

Having explored the paradoxes that this modernist view of language implied for Roberto Unger's theory, I used the general anti-essentialist ideas generated by it as a transition to Duncan Kennedy's description of the fundamental contradiction,²⁰⁰ a description that could almost be seen as the opposite of Unger's approach. Whereas Unger uses a subjectivist, intentionalist theory of meaning to undermine the

¹⁹⁷ See *supra* text accompanying note 94.

¹⁹⁸ See *supra* notes 77-114 and accompanying text.

¹⁹⁹ See *supra* note 78.

²⁰⁰ See Kennedy, *supra* note 13, at 211-13.

deep structure of liberalism, Kennedy argues that, *despite* their subjective perceptions of the meaning of their own efforts, liberal legal scholars are merely mediating a pervasive structural contradiction between Self and Other. Thus the structure of liberal legal thought serves as a medium for scholars, lawyers, and judges to work out their *real* subjective feelings of fear of the Other and as a mechanism of denial by which they can repress the fact that there is a cover-up going on at all.²⁰¹ Finally, in the third trace, Peter Gabel produced a view of a genuine subjectivity that is alienated from itself by the reified structures and collective myths of our society and argued for a Sartrean approach that accepted the necessary dialectic between personal phenomenologies and structural theories of ideology.²⁰²

Each of these traces mediates the tension between subjectivism and structuralism in a different way. Each provides different resources for a theoretical toolkit, and each raises different questions about the building materials that we might use in constructing a legal or social theory.

2. First Trace: The Deep Structure of Liberalism: Total Critique and Faith

The tension in Roberto Unger's argument is evident from the beginning. On the one hand he offers us an intentionalist, subjectivist, and anti-essentialist picture of language. Meaning is dependent on intention; there are no essences of words, nor, one might imagine, of anything else. On the other hand he tries to describe an essentialist deep structure of liberalism, a meta-theory defining the boundaries of liberal argumentation in every discipline. Because of the intensity and obviousness of the contradiction between the essentialist and anti-essentialist sides of the story, the mediating devices are richer and more complex than those we met in the first set of traces, although there are substantial similarities.

In his desire not to sacrifice "the chaste and powerful weapons of logical analysis,"²⁰³ Unger at first appears to be relying on the notions of immanent critique and *Verfremdung* that characterized the traces drawn out of the legal realist section.²⁰⁴ Admittedly, his aim is more comprehensive; he wants a *total* critique that will allow us to get a conception of the whole system of liberal thought.²⁰⁵ Nevertheless, Un-

²⁰¹ *Id.* at 209-14.

²⁰² See Gabel, *supra* note 109; Gabel, *supra* note 33; Gabel & Kennedy, *supra* note 100, at 1-5.

²⁰³ R. UNGER, *supra* note 5, at 15.

²⁰⁴ See *supra* text accompanying notes 92-98.

²⁰⁵ R. UNGER, *supra* note 5, at 7.

ger still appears to be describing the contents of a belief structure held by others—his structuralist strand can be defended as a mere description of what liberals believe. But Unger goes further. He claims to have uncovered *the* deep structure of liberalism, a structure that retains its status, even if particular liberals do not believe all of it.²⁰⁶ In this case, there is no doubt that the structural strand is epistemologically “privileged” over the subjective one. Thus the two questions raised in the last section reappear. First, what status does the deep structure have?²⁰⁷ Is it the deepest stratum in the accumulated sediment of liberal rhetoric? Is it the idealized picture of our contemporary individual experiences of social life?²⁰⁸ Is it the lowest common denominator in the beliefs of great liberal theorists?²⁰⁹ Or is it the World Spirit’s most recent diary entry?²¹⁰ The answer to this question appears to be that it is an amalgam of all of these, which Unger invites us to hold together by faith

²⁰⁶ *Id.* at 8-9 (deep structure is more than the beliefs of particular thinkers since it defines all of the possible variations in theory building).

²⁰⁷ The term “deep structure” reveals little in and of itself. Unger does not use the term in the same way as its originator, Chomsky, does. *Id.* at 296 n.2. And Chomsky himself has warned that “deep” should not be understood in the nontechnical sense of the word—that is, as the antonym of superficial or unimportant. N. CHOMSKY, *supra* note 77, at 82.

²⁰⁸ It would be a dangerous illusion to suppose that a mere revision of our philosophical ideas could suffice to accomplish the objective of giving force to the idea of shared values. The seriousness of the political premises of liberalism is a consequence of the accuracy with which they describe a form of social experience that theory alone cannot abolish. It is the experience of the precariousness and contingency of all shared values in society.

R. UNGER, *supra* note 5, at 103.

²⁰⁹ “The liberal doctrine described in these pages was embraced with varying degrees of fidelity by many of the most revered modern philosophers.” *Id.* at 7.

²¹⁰ In its ideas about itself and about society, as in all its other endeavors, the mind goes from mastery to enslavement. By an irresistible movement, which imitates the attraction death exercises over life, thought again and again uses the instruments of its own freedom to bind itself in chains. But whenever the mind breaks its chains, the liberty it wins is greater than the one it had lost, and the splendor of its triumph surpasses the wretchedness of its earlier subjection. Even its defeats strengthen it. Thus, everything in the history of thought happens as if it were meant to remind us that, though death lasts forever, it is always the same, whereas life, which is fleeting, is always something higher than it was before.

Id. at 1 (seems vaguely similar to progress of Hegel’s World Spirit through stages of history). “Why Spirit has to go through these stages is not clear. One is tempted to suppose that Spirit is trying to understand Hegel, and at each stage rashly objectifies what it has been reading.” B. RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 784 (1972). See also G. HEGEL, THE PHILOSOPHY OF HISTORY 17-79 (J. Sibree trans. 1956) (an explanation of the nature of the World Spirit); Kronman, Book Review, 61 MINN. L. REV. 167, 182 (1976) (claiming Unger uses Hegelian methodology). However, Unger adamantly denies the truth of Kronman’s claim. See letters from Professor Unger to Professor Kronman (Sept. 22, 1976, Oct. 4, 1976), reprinted in Kronman, *id.* at 200-01, 203-04 app.

long enough to have the experience of total critique.

The second question is dependent on the first. As in the last section, we must discover to whom this critique is addressed and to what extent they experience the world through the lens of the structure. The deep structure is partly constructed from the actual experiences of individuals, but otherwise, it does not fit easily into the mold of the classic *Ideologie-Kritik* produced by nineteenth-century social thought.²¹¹ One could not imagine using Unger's structure to make the kind of totalizing claims about subjective experience that Marx used his economic structuralism to make. Once again, we are given reason to believe that critical legal thought may be distorted if we put it into the conceptual boxes provided by the grand style of legitimation theory.²¹²

These two questions, status and experiential content, give rise to a third. Assuming we concede the existence of a structure, what is the relationship among or between its postulates?²¹³ If we believe, for example, that the structure is ultimately a distillation of our experience of social life, how can we separate out the experiences that *constitute* our structure from those that *contradict* it and thus demonstrate its incapacity to justify the way we organize social life?²¹⁴ In order to settle this question one would need to begin the infinite regress into meta-principles, meta-meta-principles, and so on.

The pattern is repeated. Linguistic meaning depends on *subjective*

²¹¹ On the one hand Unger's argument is concerned with our political and psychological ideas, with the basic questions of ethics facing us, and with our vision of a remade social world. On the other hand he deals with these ideas at the level of a philosophical and political argument that is highly formalized and abstract and that does not purport to be a general analysis of social consciousness. Another way of making the same point is to compare Unger's deep structure and its supposed effects on people's feelings to Nancy Chodorow's feminist social psychoanalysis, which deals with mother-monopolized child-rearing and its effect in producing sexist individual attitudes. See N. CHODOROW, *supra* note 143.

²¹² I am not supposing that Roberto Unger claims that his theory is a fundamental account of social consciousness or a legitimation theory. I am pointing out that the standard understanding of social theory may cause his account to be interpreted that way, but that, in fact, it is not, and that, consequently, it uses a different set of mediating devices between the subjectivist and structuralist strands.

²¹³ See R. UNGER, *supra* note 5, at 15 (analogizing relationship between postulates to that of logical entailment, but making the point that the analogy will have to be discarded once the deep structure has been described and the argument has established itself as total critique).

²¹⁴ One way of separating the structure-constituting and the structure-contradicting experiences would be to believe that there are essential qualities immanent in the experience that mark the experience as part of the structure. But such an idea merely brings back the problem of essences. "Were we to make any concession to the doctrine of intelligible essences in our view of natural facts, there seems to be no way that we could keep the doctrine from penetrating into the spheres of language, conduct, and values." *Id.* at 79. But what is true for "natural facts" surely goes in spades for social experiences.

intention, but this picture coexists uneasily with the idea of reified semantic codes, preexisting *structures* of meaning encrusted with political judgments.²¹⁵ Liberalism is presented as having a deep *structure*, a structure that is somehow relatively autonomous from the *beliefs* of liberals. In order to be able to draw an objectively correct line between these conflicting strands we would have to be able to bootstrap our way out of a bog of metaphysics. Yet if we reject Unger's leap of faith, we will never be able to experience the total critique for which he argues so persuasively.²¹⁶

3. Second Trace: Phenomenology, Structuralism and the Limited Sphere

Duncan Kennedy's work on the fundamental contradiction portrays all liberal legal discourse as an attempt to mediate between Self and Other using the state and civil society as intermediary terms.²¹⁷ On the one hand, legal thought, doctrine, and the theory of the state appear to be highly structured, almost along the lines of a classical depiction of the legal system. The patterned nature of the master narrative makes it seem as though the contradiction proceeds by itself, relying on the lawyers, judges, and legal theorists only for its articulation. On the other hand, the contradiction is presented as experiential, rooted in and driven by the cognitive dissonance experienced by individual members of the legal elite on a day-to-day level.²¹⁸ This tension between structuralism and subjectivism is mediated by a kind of reductionist sociology of knowledge. Another way of putting the same point is to say that the essentialist and phenomenological sides of the story are held together by the idea that it is possible to reduce myriad individual feelings of disquiet to the experience of the Self-Other dichotomy. The "psychic click" as an argument seems to fit, the disappointment as an analogy does not seem to work, the dissonance as a doctrinal tension seems irresolvable—all of these can be captured in the conceptual net of

²¹⁵ See *supra* note 78.

²¹⁶ I am aware that despite my disclaimers the reader will end up with a fundamentally flawed idea of my impression of Unger. In this piece I have used his early ideas as an example of mediation between subjectivism and structuralism. Consequently, I have ignored his brilliant insights, his amazing ability to systematize, and the liberating experience that comes from total critique. I believe that *Knowledge and Politics* is one of the great works of social theory produced in the last twenty years. Comparing it to, say, Dworkin's work is like comparing Wordsworth to McGonagall. Compare R. UNGER, *supra* note 5, with R. DWORKIN, *supra* note 53; compare also Wordsworth (good) with McGonagall (not quite so good) (see S. PILE, *THE BOOK OF HEROIC FAILURES* 123-124 (1979)).

²¹⁷ Kennedy, *supra* note 13, at 244, 368-82.

²¹⁸ See *supra* notes 100-05 and accompanying text.

the fundamental contradiction.

Kennedy privileges his reductionist process by using the idea of *local* immanent critique. Talking of the fundamental contradiction, he argues that it is an aspect of our experience of every form of social life. Then, switching to his more structural mode, he claims that "within law, as . . . commonly defined, it is not only an aspect, but the very *essence* of every problem."²¹⁹ The phrase "law, as . . . commonly defined" points to the partial, localized quality of the mediating devices he is using. If the fundamental contradiction were experienced as a conscious antinomy in *all* of the spheres of social life in which law played any role, we could maintain the idea that the theory is merely an immanent critique. But the powerful structuralist claims seem dubious. If everyone is aware of the contradiction's role, how can it be the *concealed* essence of a problem? Conversely, if we concentrate on the structuralist master pattern, then the individual experiences that supposedly give rise to it are devalued. By narrowing the area of inquiry to the social activity of *producing doctrinal arguments*, Kennedy can piggy-back on the formalist idea of law and thus produce both a strong structural explanation of doctrine and a large-scale phenomenology of personal experience.

4. Third Trace: The Sartrean Synthesis

Peter Gabel's work on reification in legal reasoning clearly exhibits the tension between structuralism and subjectivism.²²⁰ In fact, as I pointed out earlier,²²¹ he explicitly raises the tension as being at the heart of a method for critical legal theory.²²² For him the subjectivist strand is represented in the kind of phenomenology that Sartre derived from Husserl and Heidegger and that remained part of all of his political and philosophical writings, despite the waxing and waning of the Marxist, structuralist counter-strand.²²³ Thus it is Sartre's "search for a method" that most directly influences Gabel's attempt to steer a course between blank determinism and a pure subjectivism.²²⁴

²¹⁹ Kennedy, *supra* note 13, at 213.

²²⁰ Gabel, *supra* note 109.

²²¹ See *supra* text accompanying notes 106-11.

²²² See Gabel, *supra* note 109.

²²³ See sources cited *supra* note 164; J. SARTRE, *SEARCH FOR A METHOD* (H. Barnes trans. 1968); see also Gabel, *supra* note 109, at 602 n.1 (citing methodological influences).

²²⁴ I must repeat the caution that I made earlier about Peter Gabel's ideas. His work should be seen as an effort to evoke the possibilities for the transformation of social relations rather than a traditional rationalist attempt to capture the "good life" within a set of structural reformulations or conceptual categories. See Gabel & Ken-

One way of summarizing Sartre's problem in *Search for a Method*²²⁵ is to use his much quoted remark about Marxist analyses of poetry and literature: "Valéry is a petit bourgeois intellectual, but not every petit bourgeois intellectual is Valéry."²²⁶ But it is not just the reduction of the subject to the "effect" of structural determinants against which Sartre is reacting; to say that would be to reduce his work to the eclectic immobility of more cautious writers. Burning throughout his work is the childlike glee he felt when he first discovered that phenomenology would even allow one to philosophize about apricot cocktails,²²⁷ or, one might say, about law school classrooms. The thing that makes political phenomenology so attractive is its insistence that the subjective, immediate moment contains within itself vast possibilities, which are no sooner experienced than they are covered over by the cloying film projected by a "thingified" set of social roles. The multiplicity of these roles and their associated discourses will form the basis for my attempt to provide a toolkit for theory.

D. *Departures from Marxism*

1. Introduction

Earlier in this Article I discussed the ways in which critical legal thought has departed from Marxist theory.²²⁸ The first trace described a progression from "conspiracy theory" through the idea of "objective structural interests" to the concept of "relative autonomy;" it then outlined Robert Gordon's anti-positivist critique of all these notions.²²⁹ The second trace presented an "irrationalist" depiction of both legal discourse and everyday reality.²³⁰ The third offered a detailed project for describing the content of "legal consciousness."²³¹ As I will now show, each trace provides us with evidence about the transformative effects of the tension between structuralism and subjectivism. By transformative effects I mean the internal dynamics of theoretical production—the struggles that the theorist must face before the final amalgam is presented to the reader. Walter Benjamin once said that "the work is

nedy, *supra* note 100, at 2.

²²⁵ J. SARTRE, *supra* note 223.

²²⁶ *Id.* at 56.

²²⁷ See S. DE BEAUVOIR, *THE PRIME OF LIFE* 112 (P. Green trans. 1963); A. MADSEN, *HEARTS AND MINDS* 59 (1977).

²²⁸ See *supra* text accompanying notes 115-39.

²²⁹ See *supra* text accompanying notes 118-28.

²³⁰ See *supra* text accompanying notes 129-35.

²³¹ See *supra* text accompanying notes 136-40.

the death-mask of its conception."²³² My hope is that by using the tension we can also see something of the formative process, the *Bildungsroman* of theoretical development.²³³

2. First Trace: Transformations in Marxist Thought

The historical subject to which Marx's theory is addressed (the working class) could not be captured or closed off within the economic structuralism that he offered. Even within Marx's own work and his own time, subjugated flashes of subjectivity would suddenly rise up, marring the smooth surface of economic determinism. The wonderful description of individual alienation within the *Economic and Philosophical Manuscripts*,²³⁴ the discovery (or invention) of a "humanistic" Marx,²³⁵ the failure of the working class to perform in the way the theory demanded²³⁶—all of these were little earthquakes generated by the slippage between the continental plates of subjectivism and structuralism. In the same way the "moves" in Marxist legal theory can be understood as a series of attempts to deal with the subjectivist/structuralist tension. The transition I described was "conspiracy theory," to "structural requisities," to "relative autonomy," to "socially constructed reality."²³⁷ One could chart this progression and its relationship to the tension as follows.

Does the conspiracy theory of law seem unbelievable because one cannot imagine so many individual subjects accurately perceiving their long-term self-interest and acting in concert to institutionalize it as law? The obvious response is to switch the determining power away from the *individual wills of capitalists* towards the *structural requisites of capitalism*. Does this move, in turn, seem to make the structure too deterministic? Then make law and other ideological systems "relatively autonomous," leaving room for dialectical interaction between multiple sets of structures (economy, law, philosophy, for example) and thus hacking out a space in which one could imagine the possibility of

²³² W. BENJAMIN, REFLECTIONS 81 (1978).

²³³ See DICTIONARY OF WORLD LITERARY TERMS 30 (J. Shipley ed. 1970) (defining *Bildungsroman* as "[a] novel such as Goethe's Wilhelm Meisters Lehrjahre (1796), presenting a person's formative years and awakening").

²³⁴ Marx, *supra* note 90.

²³⁵ See E. FROMM, MARX'S CONCEPT OF MAN, 19-58 (1961).

²³⁶ Marx's economic teleology specifies increased production, exhaustion of markets, cutthroat competition, increasing oppression of labor, polarization of the classes, and finally, revolution. See Tucker, *Introduction to THE MARX-ENGELS READER*, *supra* note 90, at xxvi. But the teleology has not been fulfilled: the subjects of the critique of political economy have not responded in the way that the structural analysis predicts.

²³⁷ See *supra* text accompanying notes 118-27.

free action by historically informed subjects. Yet if our ideas of "the subject" and "the economic structure" are both socially or intersubjectively produced categories, where is the grounding for our critique? If both ideas come from within the social world, isn't the argument circular?²³⁸ When I discussed this point earlier I used a quotation from Robert Gordon: "what we experience as 'social reality' is something that we ourselves are constantly constructing; and . . . this is just as true for 'economic conditions' as it is for 'legal rules.'"²³⁹ Notice that whereas the Marxist theory makes structuralism the dominant or determining strand, this argument reverses the position to make all of social reality an intersubjectively created phenomenon.

So each of these four theories forms a new amalgam of the strands in order to eradicate the fault lines perceived in the last amalgam. The claim that reality is *subjectively* created is dangerously supplemented by our awareness of the apparent *objective* reality of structural constraints and the thing-like quality of social institutions. Similarly, the Marxist claim that our reality is structurally determined is dangerously supplemented by all of the subjective elements I mentioned earlier, such as the importance of individual alienation, the intransigence of the working class as an historical subject, and so on. Any amalgam of the strands will be unstable (in fact, it is their decay that, in some sense, "drives" the theoretical project), and yet we need to amalgamate them in order to create a social theory. What is to be done? Like Lenin, I defer the answer until the end.

3. Second Trace: "Irrationalist" Legal Thought

The second trace in this section takes its *départure* from the same place and thus produces the same set of tensions. Gary Peller²⁴⁰ undermines one set of structural claims (that law is definite, apolitical, or neutral) by appealing to another set of structural determinants ("the underlying structures of meaning, the cultural codes of 'common sense' which limit the play of analogy by categorizing similarity and difference")²⁴¹. He then undermines the second set of structures by pointing out that they are irrational. Thus, if there is an apparent order to legal argument, if there are cases that seem easy or analogies that seem obvious, it is because of an arbitrary set of social assumptions that freeze the possibilities. Having argued that "[r]ationality in general refers

²³⁸ See *supra* note 21; *supra* text accompanying notes 133-35.

²³⁹ Gordon, *supra* note 2, at 287.

²⁴⁰ See Peller, *supra* note 130; see also *supra* note 130 and accompanying text.

²⁴¹ See Peller, *supra* note 130, at 5.

only to a felt necessity once particular structures for categorizing the world have become frozen,"²⁴² he can introduce the deferred subjectivist element, the freedom for "new ways to think and act in the world"²⁴³ that will result once the structures are broken down. This is not simply a description of the workings of legal discourse; it is a polemic against the experience of structural constraint everywhere in social life. Peller is not trying to balance two metaphysical tendencies on some Archimedean point of rhetoric; he is arguing that we are limited, disempowered, denied, frustrated, warped, and deranged by the thing-like quality of our own constructs. If we wish to express this constraint and the corresponding liberty resulting from its negation,²⁴⁴ we seem to be faced by an epistemological contradiction between the two strands I have been describing. It seems to me that the task of surmounting this contradiction is not that of "getting our sums right" in a new set of philosophical mediations, but of describing or evoking the tension in the full knowledge that one's description is partial, nondefinitive, and very likely to be turned into a "cluster of pods"²⁴⁵ by the seemingly inexorable process of reification. I will develop this picture of theory in the final section.

4. Third Trace: Consciousness and Closure

The third trace focused on the analysis of legal consciousness, the communal mind-set or worldview of the legal profession, and the ways in which this consciousness determines the shape of the legal world.²⁴⁶ This theoretical project tries to capture the feelings of contradiction that individual lawyers or judges experience, by tracing the ways in which the collective structural consciousness mediates these experiences. In this respect it is similar to the idea of the fundamental contradiction we examined earlier.²⁴⁷ But whereas the fundamental contradiction can be viewed as the engine driving the process of doctrinal and theoretical creation, the analysis of historical legal consciousness gives us more of a frozen cross-section of legal ideology at one particular time. Like all of the other traces, this theory represents the tension between structuralism and subjectivism. More importantly, it is itself an attempt to re-

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ See *supra* note 164 (dealing with phenomenological negation in Sartre's philosophy).

²⁴⁵ The reference is to the film *Invasion of the Body Snatchers*, Allied Artists (1956), remade by, United Artists (1978). See Gabel & Kennedy, *supra* note 100, at 7, 54-55.

²⁴⁶ See *supra* text accompanying notes 136-40.

²⁴⁷ See *supra* text accompanying notes 100-05.

spond to a prior tension within critical legal theory. As I tried to point out earlier,²⁴⁸ it seems paradoxical to argue that we have a restrictive and reified understanding of the social world and at the same time to argue that doctrine is completely indeterminate, fuzzy, and non-limited. The persistent "thingification" that the first argument criticizes is evidenced precisely by the feeling of constraint that the second argument denies. For those two sets of claims to coexist, as they do in Gary Peller's work, for example, we need an account of the way in which the world *appears to be* thing-like or objective, together with a critique of that appearance. We need, in other words, a version of the structuralist strand that deals with the felt necessity of legal discourse. And, as I argued in the last section, while the analysis of historical legal consciousness appears to fill this need, it seems also to contradict the anti-essentialist, individual, subjectivist side of the story. Once again, the main goals of theoretical creation seem to involve the *mediation of the tension*.

E. *What the Tension Tells Us*

What does all of this tell us? No matter which trace one looks at, the tension between subjectivism and structuralism seems to occupy center stage. It does not matter whether one focuses on the ideology of neutral law or the compatibility of Unger's theory of language with his theory of liberalism. It is immaterial whether one is interested in the internal dynamics of Marxist legal theories or in the conflict between doctrinal indeterminacy and ideological constraint. One can concentrate on the social power of technocracy, the workings of the fundamental contradiction, or the idea of legal consciousness. The tension seems to run through all of these theories, like a geological fault line generating patterns of secondary cracks. But apart from unifying the traces and thus making critical legal theory a little easier to understand, how does this dichotomy help us?

First, it helps to dispel some of the confusion over rationalist and irrationalist modes of theory. As I pointed out earlier,²⁴⁹ the irrationalist theories were far from embodying the relentless, nihilistic critique that was expected of them. Duncan Kennedy's work on the fundamental contradiction has been hailed as the core of the irrationalist position within CLS,²⁵⁰ yet it is distinctly *nonnihilistic* in that it goes so far as

²⁴⁸ See *supra* text accompanying notes 136-40.

²⁴⁹ See *supra* text accompanying note 148.

²⁵⁰ See Dalton, *supra* note 2, at 234 n.23, 235 & n.27.

to make claims about the *essence* of every legal problem.²⁵¹ In fact, its generalized and abstract assertions about the universality of the fundamental contradiction are almost reminiscent of classical legal thought, which supposedly represented the high point of confidence in the power of reason to abstract out the essence of social situations. So by switching the focus over to structuralism and subjectivism, we avoid the conceptual baggage carried by rationalism or its opposite. Thus we can get some idea of what the theorist is actually doing. How much information is explained, or explained away, by the structural side of the theory? Which subjective perceptions constitute the belief structure in question, which ones represent the momentary flashes of "true consciousness," and which are to be dismissed as delusion? What "status" does the theory have? The subjectivist/structuralist tension allows one to get at these questions unimpeded by the accumulated strata of reified connotations that seem unavoidable when one discusses the alternative dichotomy.

Second, the tension provides a connection between critical legal thought and other kinds of social theory, a connection that highlights both similarities and differences and that provides the key to the third advantage: the toolkit of mediations and maxims that the traces reveal when confronted by the subjectivist/structuralist opposition. It is to these issues that I now turn, as I compare the strategies offered by the different traces, and conclude by arguing in favor of a certain vision of the connection of theory to practice.

Subjectivism and structuralism seem to be necessary, almost definitional components of any kind of legitimation theory or consciousness analysis, perhaps of any theory about ideology and the social world. We need to root our theory, on some level, in the experience of subjects in the social world. Yet at the same time we must set up a belief structure that converts those supposedly raw experiences into true and false consciousness,²⁵² constituent parts of the *episteme* and subjugated

²⁵¹ See Kennedy, *supra* note 13, at 213.

²⁵² It is this part of consciousness analysis against which the most heated and, initially, most persuasive forms of liberal criticism are normally directed. The basic argument is that any theory that claims to expose "false consciousness" is inherently tilted towards Stalinism or fascism. The attempt to go beyond individuals' perceptions of their own interests is doomed to end by people being forced to conform to the prescriptions of the theory. In the terms of this debate "negative freedom" (to do what you want to do) is counterposed against "positive freedom" (to do what you ought to want to do), and when it is described this way all of us have a strong preference for the former over the latter. Obviously, I could hardly hope to resolve the debate in a footnote, but there are good reasons to believe the point is moot, at least insofar as we are concerned with the relative worth of liberal political thought versus that of some other kind. I say this because liberal thinking relies on the very notions of "real interests" or "positive freedom" that it purports to deny.

knowledges.²⁵³

The first axis of the tension involves the privileging of one side over the other. The second axis of the tension comes from the need to evoke two opposed experiences: the feeling of freedom when the structure dissolves, and the feeling of constraint when it appears as an objective, external force. On each axis the dominant strand is dangerously supplemented by the recessive one. A work of social theory can only freeze this process of perilous supplementarity by using mediating devices. The theorist may present her work as a scientifically correct legitimization theory, as the description of a pre-existing delusion, or as the reality of intersubjectively produced meaning that is obscured by reified social forms. Yet each of these mediations merely restates the tension, defers its obviousness for one more argumentative move. We come back again to the question I raised at the end of the Marxist section.²⁵⁴ How can we create a moral and political theory that will help us think and act in the social world?

To answer this question we have to look at the mediating devices

One of the most admirable features of liberal political discourse is its strong antipathy toward sexism and racism. In everyday discussion most liberals would agree that sexism and racism are perpetuated by self-oppression as well as by external prejudice. In fact, it is by forcing an individual or a class to internalize and reproduce an image of themselves as being inferior, or politically incompetent, or "not suited" to particular kinds of work, that these ideologies exercise much of their power. But even to *understand* this notion of the structural promotion of self-delusion, one has to move outside the world of rational, atomistic monads postulated by the abstract rhetoric of liberal political theorists.

Consequently, it seems that if "liberal thinking" is made up, even in part, of *what liberals think*, then "liberal thinking" has long ago accepted the premise that the exclusive definition of human interests as being *self-interests* is a definition that makes nonsense out of our experience of the social world. We are still left with the well-grounded fear that "closed" theories will be used to justify the imposition of force to bring subjective experience in line with the structural postulates of the theory. This fear, which has been a driving force in both New Left and liberal thinking, seems to be directly related to the amount of "closure" in a theory—the extent to which opposing views will be denied if they do not fit the theory. Interpreted this way, the question can be seen as to what extent the *structural* strand of the theory is going to be privileged over opposing subjective experience. But, as the racism and sexism examples make clear, both liberals and leftists seem to agree that one cannot have a meaningful political vision based on pure subjectivism or pure negative freedom. Thus the picture seems to be more confused than one would imagine if one looked only at the neat line drawn along the positive freedom/negative freedom division. Conceptual self-denial will not make sense of the world, and "scientific," "closed" political theories will change it for the worse. Seen in this light, the mediation of the subjectivist and the structuralist strands is one of the recurrent issues of political thought and not just a problem in the esoteric theories of leftist law professors. For a different formulation of this issue, see I. BERLIN, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 118 (1969).

²⁵³ The terms come from Michel Foucault. See M. FOUCAULT, *THE ORDER OF THINGS*, *supra* note 75, at xxii (definition of *episteme*); M. FOUCAULT, *supra* note 142, at 79-84 (definition of "subjugated knowledges").

²⁵⁴ See *supra* text accompanying notes 178-81.

actually used by critical legal theorists in the traces I discussed. Are those devices merely there to obscure the contradictions riddling a work of theory, or do they actually fulfill some function beyond mere window dressing? I am going to argue for the absurdly optimistic position that not only do they have some use, but the structuralist/subjectivist tension provides a key to understanding their extensions, perversion, and failures as well as their profitable application and hidden successes.

F. *Dealing with the Tension*

1. Immanent Critique and Local Theory

As I pointed out repeatedly while discussing the traces, the easiest way to mediate the two strands is to say that you are merely criticizing a pre-existing delusion in order to liberate those who labor under it. The idea of *Verfremdung* gives the concept a little extra "spin" by postulating that the most powerful ideological constraints are those that are invisible; people are unaware that they believe anything at all—it appears to them that "things have to be that way." I also pointed out the problems with these devices—the possibility of multiple structures to explain the same beliefs, or of different beliefs being the constituent parts of the "real" structure, or the difficulty of reconciling the picture of the brainwashed cipher before and the Horatio Alger after the structural exegesis, and so on.

Most of the main criticisms of CLS spring from these difficulties. There are two main types of critique. The first claims that the so-called belief structure simply does not exist and thus that the CLS critique is most certainly not immanent.²⁵⁵ The second claims that even if the belief structure does exist, it exists in too few people or the wrong kind of people for it to be of any use as a social theory.²⁵⁶ I believe that both critiques make the same mistake. Overcome by the resemblance that this kind of immanent critique has to large-scale nineteenth-century so-

²⁵⁵ Precisely because this criticism tends to disparage the importance of liberal state theory, or of the neutrality of legal decisions, it is normally found outside the pages of law reviews. See *infra* text accompanying notes 257-58 (arguing that the ideology of neutral law is only important in certain reified social roles). But see Hyde, *supra* note 181, at 389-418 (arguing that the postulated legitimating function of the belief structure criticized by CLS cannot be quantified and may be negligible); Johnson, *supra* note 39, at 248-50 (arguing that the CLS critique contains little that is not already known); F. Munger & C. Serron, *supra* note 181 (arguing that critical legal theorists have not done enough empirical research on existence or effect of belief structures).

²⁵⁶ "Entirely without fanfare Klare and Kennedy's 'demobilized' working class has become an ideologically mesmerized group of lawyers and law professors." Chase, *supra* note 180, at 684 n.46.

cial theory, they expect the deconstruction of law's purported neutrality, the attacks on reification in a particular doctrinal area, or an argument that contemporary scholarship is Kierkegaardian to play the same role as Marx's account of the material foundations of consciousness. Their mistake, in short, is the vice of grandiosity.²⁵⁷ Admittedly, there are plenty of reasons for this mistake, and critical legal scholars frequently talk as though they were doing nineteenth-century social thought, but, to the extent that the CLS project is defensible, I believe it must be concerned with more "modest" tasks. I will give two examples to show what I mean, one relating to the critique that "no one actually believes that law is apolitical," and the other to the critique that "these beliefs are held, but by the wrong people for any deconstruction to be valuable as an exercise in social theory."

Nothing is more certain to enrage a critical legal scholar than the claim that "we are all realists now," or that all lawyers know that law is not neutral. I am going to offer an exaggerated version of the standard responses to this claim, in order to make my point:

- The liberal justification for state power simply cannot stand if law is political. Any argument to the contrary is merely a claim that the emperor is not naked, but that he is wearing a skintight, see-through suit. The separation of law and politics is one of the central beliefs on which all liberal discourse proceeds. Once it is undermined everything depending on it, ranging from the style of student-teacher interaction in the classroom to the private property system, must collapse. It is because the law/politics distinction is a conceptual linchpin to all of these other exercises of social power that it is defended so strongly.

- We are *not* all realists now. Many students, lawyers, and teachers will never be exposed to the details of the realist arguments, let alone the CLS arguments.

- All of your habits, arguments, articles, and ideas depend on some separation between law and political discourse. That you can "believe" that law is political during *this* discussion will not change the way you teach your constitutional law class this afternoon.

²⁵⁷ See Kennedy, *First Year Law Teaching as Political Action*, 1 LAW & SOC. PROBS. 47 (1980) (commenting on vice of grandiosity in picture of preconditions to "worthwhile" politics). The critiques of large-scale social thought offered by Duncan Kennedy, see D. KENNEDY, *supra* note 14, and Robert Gordon, see Gordon, *supra* note 2, were strong influences on the vision of theory offered in this Article.

•You did not seem like a realist last week. In fact, you accused me of undermining Western civilization, simply because I told you that all textual interpretation was arbitrary and that policy argument and rule formalism were equally “political” forms of discourse, etc., etc.

While I believe most of these counterarguments, I think that the first and most general one implies a vision of subjects and of ideological structures that is, quite simply, false. The modernist picture of personality shows us that our beliefs and ideals are not a unified Cartesian system of interlocking and consistent rational arguments. We believe different things at different times; we inhabit multiple discourses, each of which has its own mini-constellation of obligatory beliefs. I pointed out earlier that one will often get violently conflicting reactions from the same person when she is confronted with the claim that law is political.²⁵⁸ But this oscillation from bland acceptance to thunderous denunciation is not the symptom of some deep personality disorder. Rather it is that, within certain reified social roles, it becomes absolutely vital that law be neutral (for example, the teacher who affirms to a class that the only alternative to constitutional liberalism is anarchy), while in other roles the matter is of supreme unimportance (for example, when the same teacher tells worldly-wise stories about the bias of judges and the irrelevance of rules).

The mistake of the large-scale social theories, which is replicated by the mediating devices of immanent critique and *Verfremdung*, is to confuse the coherent structure of formal reasoning in the abstract version of the situation for the reality of myriad, overlapping clusters of belief. This explains why the “law-is-political” story has more bite in the contracts classroom than on the street (or even than in the constitutional law classroom). It even explains why the story can be rendered “harmless” simply by the teacher signalling (with a smile or a shrug) that we have all stepped outside our formal roles (as teacher, student) and their appropriate reified discourses into our “real, cynical selves” (as worldly-wise Fred, ennui-laden Joan) and *their* reified discourses. The amazing thing is not the “let’s pretend” aspect of it, but the collective violence wrought on those who dare to mention the shift, or who simply did not read the signals right. Once the role ceases to speak through us, we no longer have to be threatened by an attack on its mode of discourse; the argumentative shaft misses us because “we” are no longer “there.” It is this experience of the contradictory repressions engendered by myriad social roles that phenomenological theory en-

²⁵⁸ See *supra* notes 193-98.

ables us to grasp, a point that Sartre's philosophical method demonstrates, but does not sufficiently stress.

I am not trying to say that our beliefs *should* be arbitrarily contradictory. Nor am I arguing that social power should be entrenched by allowing its defenders simply to change the social role "speaking through them" whenever the contradictions become too blatant. What I *am* saying is that it is a mistake to confuse the neat Spinozan lattice of an argument about legitimation with the dense tangle of our actual experience of social life. It is ridiculous to believe that one could disrupt the massively entrenched set of power relations and collective fantasies that "constitutes" repression in our society simply by attacking one of the more formalized and abstract fantasies and claiming that the rest are "dependent" on it. The lines of logical entailment are not the threads that hold together the patchwork of social reality. To believe otherwise is to make a tactical as well as a theoretical error.

Of course, the picture of a jurisprudential fault line rendering "liberalism" unstable is more than just a seductive illusion. It *is* true and morally liberating to think this way when one is within those social discourses where the highly formalized picture of liberalism defines the ground rules of discussion. It helps one to understand arguments produced throughout the public sphere of society because of the "trickle down" of formalized liberal discourse. But to claim that the belief in neutral law is a general social ideology like those attacked by feminism or Marxism would be ludicrous. This is the element of truth and of falsity in Anthony Chase's claim that CLS has replaced the "historical subject" of Marxist theories (the working class) by an "historical subject" made up of lawyers and law students.²⁵⁹ The judgment implicit in this kind of criticism—that *any* radical theory must deal with (lots of) subjects who are oppressed according to the measures of the grander social theories—appears at first to be both convincing and demobilizing. It holds us to the standards of a kind of theory that has long seemed to be impossible (and perhaps undesirable) to produce, and thus it offers us no possibility of meeting our own, apparently self-imposed, criteria. By doing so it partakes of the vices of grandiosity²⁶⁰ without its virtues. In its structural meta-theorizing it ignores a very important subjective experience: the experience that it *is* important to do analyses of "the judicial de-radicalization of the Wagner Act" *even if* the only people whose belief structures are shaken up are lawyers, law students, and judges. It is important because these people are social actors too, and

²⁵⁹ See Chase, *supra* note 180, at 684 n.46.

²⁶⁰ See *supra* note 257.

because a local critique couched in the terms of their professional discourse may affect them more profoundly than a general social history of labor law, be it never so scientific. The successful theory, the one holding its subjectivist and structuralist strands together long enough to have critical "bite" on the social world, is likely to be a *local* critique. The greater the claims that we make for our belief structure, the wider its supposed application, the more we will have to "privilege" or "armor" it against countervailing subjective beliefs. The more we privilege it, the more ossified it becomes. From there the road branches into futility and murderousness respectively.

How does all of this affect the other mediating devices that the traces exhibited? I think that the answer is not quite the one we would expect. In fact, it strikes me that it has unusually productive implications. I will recap briefly the mediating devices we encountered and then describe what I mean by "local" critique.

2. Mediation and the Theoretical Toolkit

The variety of mediating devices is striking. I have already described the notions of immanent criticism and *Verfremdung*. The critique of technocracy that I outlined depends on a notion of anthropologically deep-seated interests and ideal speech situations. Unger's theory depends on a leap of faith and a quasi-logical depiction of the deep structure of liberalism to achieve its goal of total critique. Duncan Kennedy can reduce both professional cognitive dissonance and legal theory to the workings of the fundamental contradiction by implicitly relying on the formalist idea of law to localize the focus of his immanent critique. Peter Gabel's work on reification uses the Sartrean notions of phenomenology and personal choice on the subjectivist side and objectivity and constraint on the structural side. Marxist theories have been continuously transformed by the changes in mediating devices. At first, the "engine of ideological production" was depicted as being the concerted activity of the capitalist class. Then it was the objective determinacy of an economic structure that shaped the social world. Next, ideological structures were depicted as relatively autonomous, depending on the substructure only "in the last instance." Finally, these pictures were turned on their head by Robert Gordon, who argued that "in the last instance" everything depends on the individual subject. Gary Peller's description of irrationalism and Duncan Kennedy's account of historical legal consciousness simply counterpose the two strands as contradictory, but basic, features of our experience.

If we accept the desirability of "local" critique, and if we believe that our social theory should not be based on the analysis of large-scale

ideologies, then which of these mediating devices will be useful for a theoretical toolkit? The obvious answer—and, I believe, the wrong one—would be to take “large-scale” and “local” at face value. One could certainly say that Unger’s theory, like Marx’s, is perverted by its urge for totalization. Similarly, the critique of technocracy seems about as large-scale as one could get, postulating, as it does, not only “anthropologically deep-seated interests” but also an ideal speech situation that represents both the conditions of truth and the good society. On the opposite side of things, Robert Gordon’s disavowal of large-scale theories like Marxism in favor of a mapping-out of subjective beliefs appears to embody the kind of localized critique that I advocated. But I think that this set of interpretations of “local” and “large-scale” simply misses the point. Perhaps this rather overlong quotation from Michel Foucault will help the reader to capture the experience I mean to evoke:

I would say, then, that what has emerged in the course of the last ten or fifteen years is a sense of the increasing vulnerability to criticism of things, institutions, discourses. A certain fragility has been discovered in the bedrock of existence—even, and perhaps above all, in those aspects of it that are most familiar, most solid and most intimately related to our bodies and to our everyday behavior. But together with this sense of instability and this amazing efficacy of discontinuous, particular and local criticism, one in fact also discovers something that perhaps was not initially foreseen, something one might describe as precisely the *inhibiting* effect of global, totalitarian theories. It is not that these global theories have not provided, nor continue to provide in a fairly consistent fashion, useful tools for local research: Marxism and psychoanalysis are proofs of this. But I believe these tools have only been provided on the condition that the theoretical unity of these discourses was in some sense put in abeyance, or at least curtailed, divided, overthrown, theatricalised, or what you will. In each case, the attempt to think in terms of a totality has proved a hindrance to research.

So the main point to be gleaned from these events of the last fifteen years, their predominant feature, is the *local* character of criticism. That should not, I believe, be taken to mean that its qualities are those of an obtuse, naive or primitive empiricism; nor is it a soggy eclecticism, an opportunism that laps up any and every kind of theoretical approach; nor does it mean a self-imposed ascetism [sic] which taken by

itself would reduce to the worst kind of theoretical impoverishment. I believe that what this essentially local character of criticism indicates in reality is an autonomous non-centralized kind of theoretical production, one, that is to say, whose validity is not dependent on the approval of the established regimes of thought.²⁶¹

Taken this way, the idea of "local" critique has a distinctly ambiguous aura. On the one hand, it refers to critiques of particular *localities* and their associated discourses: mental hospitals and psychoanalytic theory, law schools and the ideology of law as it appears within law schools—not merely the belief in apolitical legality, but the styles of diction and types of analysis that are rewarded in the classroom, or the implicit messages as to which social problems are amenable to legal amelioration. On the other hand, it can refer to the widest and most totalizing kind of theory, provided one realizes the "limits" within which this theory operates.²⁶² Unger's *Knowledge and Politics*²⁶³ gives us a total critique of liberalism that tells us nothing about sexual harassment in the workplace, racial discrimination in the classroom, or the multiple oppressions of a welfare office. It is a total theory within a fairly narrow locality, narrow because its excellence lies in the way it takes apart the formalized structure behind liberal political discourse, and liberal political discourse *is* narrow. For example, Unger's argument helps to deconstruct the reification inherent in our notions of the public and private spheres. Yet, to be a recognizable critique of liberalism, Unger's work must be in the very same public sphere, the artificiality of which it seeks to demonstrate. If Unger had written a book about workplace relations and the social realities of job assignments, it would not have been seen as a work of political theory, because it would be about the supposedly uncontentious realm of *private* power.

²⁶¹ M. FOUCAULT, *supra* note 142, at 80-81.

²⁶² I certainly am *not* claiming that the problems of theoretical creation can be solved by giving each theory absolute validity within its "sphere;" such an approach would merely cause relativism to migrate from content to boundary-definition. In the rest of this section I try to explain what I mean by "limits"—not firm spatial boundaries, but instead, the shifting patterns of discourse that make sense to people in the different social roles that they assume. Of course, the same dangers are posed by the term "roles" as were posed by "limits." I am not imagining a *pre-existing* set of social categories, each with an instruction manual as to how one should behave. Roles such as "law professor" or "student" come to *seem* like that (hence the power of the critique of social reification), but by even naming them, or "their associated discourses," we run the risk of reinforcing this disempowering appearance. (Notice that this problem could be described as the reappearance of the subjectivist/structuralist tension on the *meta*-theoretical level.)

²⁶³ R. UNGER, *supra* note 5.

So Unger's total critique is best read as *local* critique because it is (and must be) implicated in the artificial categories it helps to explode. Of course, there are many occasions in which people (judges, teachers, editorial writers, politicians, people involved in ethical arguments) produce the mode of discourse that Unger deconstructs. But the claim to "totality" can be misunderstood because of the strong prejudice that emanates from within liberal thought—the prejudice that the deepest and most important level of what is going on is the theory of the state with its attendant moral, psychological, and legal postulates. The point is that such a structural prejudice, and the diminished visibility that it implies for all the other little exercises of power going on in the world, is part of the *problem* and not the *solution*.

In the same way, the other traces that make totalizing claims can be seen to be local critiques provided we rid ourselves of the fantasy that the limited structure of reason completely encloses our subjective experiences of the social world. For example, within the rhetorical paradigm in which science is defended, a critique of technocracy, such as was laid out earlier, can provide invaluable tools for understanding and deconstruction. One of the mediating devices used to constitute that critique was the so-called "ideal speech situation"—a rather good description of one way to test a theory in practice, which certainly avoids the murderous tendencies of Leninistic vanguard theories. But, like all the rest, it is only a partial mediation of the structuralist/subjectivist tension—among other things, it ignores the "Feuerbachian . . . bitter-sweet taste" of Marxism, its concern with "[t]he sensuous, the needing, the feeling human being."²⁶⁴ Even if the ideal speech situation represents something more attractive than the law professor's heaven on earth—endless debate, purged of emotion—it is but one tool to open up the iron cage of a rationalized social world, merely one skeleton key for the prison house of language.²⁶⁵

But just as the supposedly large-scale rationalist structured theories can be used in a local manner, so the avowedly local, irrationalist, and subjective theories can become reductionist, or can surreptitiously seek the kind of "privileging" that they deny to others. For example, Robert Gordon asserts that Marxist inquiries into the objective determinants of social reality are meaningless, precisely because it is *social* reality, that is, a reality constructed by subjects, by us, and not by

²⁶⁴ Heller, *Habermas and Marxism*, in HABERMAS: CRITICAL DEBATES, *supra* note 48, at 22.

²⁶⁵ The phrase comes from a quotation by Nietzsche. See F. JAMESON, *supra* note 173 (epigraph).

structures.²⁶⁶ But, as I argued earlier, this merely *switches* the privileging from the structuralist strand of hidden economic determinism to the subjectivist strand of hidden personal choice.

This switch does not appear to be “a switch,” merely a dissolution into the activity of the primal subject. It does not seem to be an argument *for* a particular kind of knowledge, merely a critique of positivist pretensions to objective truth. As chastened modernists, we might therefore be expected to accept the direction of the progression. If we cannot “get to” objectivity, we must fall back into our subjectivity and its collective constructs. But if there has been one dominant strain in recent philosophical thought, it is that the “subject” is by no means as natural, as obvious, or as basic a term as it appears.²⁶⁷ The subject can appear merely to be the crossroads of time and culture. The “self” can appear to be the artificial construct necessitated by a particular way of viewing the world. We cannot merely sink back into the “residual” category of subjectivity and claim that this view allows us to base our theories on something uncontentious, if limited. So Robert Gordon’s claim that structures are created by social subjects is on the same epistemological level as the claim that subjects are created by social structures. But if this is so, and if he is aware of it (as he obviously is), how are we to understand his description of social theory, his stress on the choosing subject? The wrong interpretation, I believe, would be to imagine that this is the *real* description of social life, a “deeper cut” than that of Marxism or any other theory. Instead I think that his argument, or Peter Gabel’s Sartrean synthesis of radical subjectivity and fateful objectivity, or Duncan Kennedy’s local evocation of the existential foundations of a structured discourse all try to reweight the balance between subject and structure, to capture momentarily our experience of the world in such a way to permit us to act in it.

At this point the usefulness of the subjectivist/structuralist tension runs out. Philosophy is always supposed to take the Olympian view, to give the trans-historical narrative of the oscillations of theory. And we can certainly create such a narrative by watching the oscillation between structuralism and subjectivism. We might even feel a sort of condescending superiority towards the poor theorists who frantically struggle to fix the correct boundary between the two. But that vision of the philosophical enterprise is a pernicious one. We are *in* history. We all need theory, we all already *use* theory, whether as scholars, or lawyers, or students, or activists. The important question is, given the available

²⁶⁶ See Gordon, *supra* note 2, at 287; see also *supra* text accompanying notes 117-27.

²⁶⁷ See *supra* note 104.

tools of our time and our individual situations, how will we manage to "realize the unalienated relatedness that is immanent within our alienated situation,"²⁶⁸ how will we manage to "make the kettle boil?"²⁶⁹ So if the subjectivist/structuralist tension provides us with a toolkit but seems to deny us the possibility of ever constructing a perfect finished product, we should not be dispirited because what we need is makeshift work surfaces, not Platonic tables.

CONCLUSION

I attempted to do two main things in this Article. First, I described and, in part, created a very idiosyncratic kind of critical legal theory. The criteria for inclusion were that the ideas had proved useful to me in my teaching, scholarship, and political action, and that they had some relationship to the people involved in the Conference on Critical Legal Studies. My intention was not to objectify a body of thought called critical legal theory and then cut it open for the edification of some imaginary audience. Instead, I have tried to explain why someone might want to think this way, and if they did, what they might find of use in the ideas associated with CLS. Second, I tried to relate all the issues raised in this Article (critical legal theory, its possible uses, the discourses it deconstructs, the problems confronting social thought) to the politics of reason. In the first part of the Article I concentrated on the so-called rationalist and irrationalist tendencies in critical legal thought. In the second part I rejected this dichotomy in favor of the tension between subjectivism and structuralism, which seems to me to explain the difficulties and successes of social theory better than the emotionally loaded and epistemologically reified rationalist/irrationalist split. After attempting to unify the traces by explaining the experience of the world that gives rise to the kind of theory described in the first part of the Article, I used the subjectivist/structuralist tension to locate and describe the mediating devices and theoretical tools that the traces contained. Finally, I sketched out a vision of "local" theory—a partial, nonprivileged account of particular areas of life that is informed by the mediating devices that the tension had uncovered. Such a theory could make use of immanent critique and *Verfremdung*, total critique and the leap of faith, but it would do so in the realization that these devices do not resolve the tension, they only defer it, and thus that they would never create the closed theory that would take history out of our hands. Here is a summary of my argument by way of an epilogue.

²⁶⁸ Gabel & Kennedy, *supra* note 100, at 1.

²⁶⁹ *Id.* at 5.

Most of the important arguments in legal thought are epistemological in nature. The critique of law and economics scholarship, the debate over neutral principles or pure interpretation, the study of legal language and the controversy over the possibility of apolitical decision-making can all be portrayed as epistemological at base. In other words, legal scholarship, like all of our discourses, revolves around the questions of what it is to be reasonable and how it is that one can "know" something. But it is not only legal theory that produces epistemological arguments; the most important disputes in social theory and some of the most important conflicts in life revolve around the politics of reason.

My claim was that the politics of reason, or the relationship between knowledge and power, is fundamental to any idea of moral and political action. The claim to authoritativeness is often, if not always, linked to a claim to be producing truth or objectivity. Thus our moral and political stance vis-à-vis the structures of power that we confront on an everyday level must be based on an understanding of the techniques for appearing to produce truth. This is true in the classroom as well as the courtroom, in the workplace as well as in the rarified atmosphere of social theory.

But if this is true, we need a mode of thinking about the power of knowledge that avoids the bleak determinism of external structures or the romantic exaltation of the passionate (but isolated) individual, the Faustian, history-creating subject. The tension between these two tendencies is pervasive and inescapable. Everything from a theory of language (intentionality versus reified semantic codes) to a theory of political change (conscious transformation versus unconscious co-optation by the structure) to a theory of doctrine (manipulable mush versus the false closure of legal consciousness) will be affected by it. Yet the pervasive skepticism of a modernist conception of knowledge makes it hard to believe that we have struck the point of essential balance between the two. How did the traces get around this? The answer is that they used a variety of mediating devices, each of which postponed but did not resolve the tension. Perhaps the clearest example of this was the four-fold transformation in Marxist thought, as theorists tried to fine-tune the subjectivist counterweight to structural economic determinism. Finally, the dominant strand was simply "flipped" for the subdominant one and economic structures became the creation of acting subjects.

On one reading, this leaves social thought and moral and political action in terrible shape. But I argued that this was not the case. Certainly it is fatal to the grandiose picture of a totalizing rational theory that will both describe and prescribe social life and that rests on "neutral" features of biology, or human nature, or historical progress. But

for other kinds of theory, it merely brings our expectations into line with what we have been doing all along: making up partial, local maps that sometimes seem to work and sometimes do not. If something "drives" this kind of theory, it is not the progress of the World Spirit, or the "real" implications of the Rawlsian "original position." It is more like the tinkering pleasure of the *bricoleur*,²⁷⁰ the artisan who uses the materials that come to hand to create an artifact that is thus shaped both by intention and by the constraints of circumstance. Critical legal thought is like that; it is shaped by the multiple constraints of class bias, law review style, tenure requirements, and personal ability. It is aimed at the transcendent fantasies of liberal state theory as well as at the mundane objectification of workplace existence; and it evokes our most basic, and most basically opposed, experiences of social life—the personal impoverishment as we kowtow to a structure that we ourselves have made, and the elusive moment of freedom when the feeling of necessity dissolves.

²⁷⁰ A *bricoleur* is somewhere in between a handyman, an artisan, and a jack-of-all-trades. The term "*bricolage*" has been used by structural anthropologists to describe the way in which social reality is "created." See Gabel, *supra* note 33, at 46. It seems apt because the *bricoleur's* expertise is based on the dialectical interaction of the available resources and the tasks to be performed, and this suggests the operation by which we make sense of the world—using the available reservoirs of cultural meaning for purposes that both shape and are shaped by the process in which we are engaged.