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### The Problem of the Subject

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# Papers

## The Problem of the Subject

Pierre Schlag\*

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\* Professor of Law, The University of Colorado. This Article was presented at the University of Toronto legal theory workshop. I am grateful to the participants for their helpful comments. In addition, I wish to thank Jamie Boyle, Toni Grey, Debbie Maranville, Bob Nagel, Jeremy Paul, Jack Schlegel, Steven Smith, Mark Tushnet, and Steven Winter for their comments.

This Article is part of a larger enterprise—an attempt to understand the character and status of contemporary normative legal thought. For other installments, see Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991); Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Schlag, “*Le Hors de Texte, C’est Moi*”: *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990).

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"Subjectivity was not waiting for philosophers . . . . They constructed, created it, and in more than one way. And what they have done must perhaps be undone."

—Maurice Merleau-Ponty<sup>1</sup>

Sometimes it seems as if there is only one story in American legal thought and only one problem. The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it's never been part of the story.

\* \* \*

Until now.

Now, the problem of the subject is fast becoming part of the story. But in the beginning it was not so. For instance, in the celebrated case of *McCulloch v. Maryland*,<sup>2</sup> Chief Justice Marshall wrote, "[W]e must never forget that it is *a constitution* we are expounding."<sup>3</sup> In that sentence, Marshall emphasized the terms "*a constitution*" as the locus of significance. By contrast, the "we" who do the expounding, the "we" who must "never forget" were relegated to relative unimportance.

Marshall's objectivist emphasis on the constitution and his corresponding forgetting of the subject, the "we," is neither odd nor surprising to us. On the contrary, this forgetting of the subject is an echo of the foundational rhetoric of *Marbury v. Madison*<sup>4</sup> itself. Indeed, it was precisely the "we" who do the expounding that Chief Justice Marshall made a point of forgetting (over and over again) as he crafted his magnificent, captivating, perfectly circular arguments in *Marbury*.<sup>5</sup>

In his systematic and foundational forgetting, Marshall established an extremely important precedent for American legal thought. This for-

1. M. MERLEAU-PONTY, *Everywhere and Nowhere*, in SIGNS 153 (1964).

2. 17 U.S. (4 Wheat.) 316 (1819).

3. *Id.* at 407 (emphasis in original).

4. 5 U.S. (1 Cranch) 137 (1803).

5. For discussion of the circularity of Marshall's arguments, see Van Alstyne, *A Critical Guide to Marbury v. Madison*, 1969 DUKE L.J. 1.

getting of the "we" who do the "expounding," this bracketing of the "I"—in short, this eclipse of the problem of the subject—became a vital, pervasive, constitutive characteristic of American legal thought. Indeed, American legal thought has been conceptually, rhetorically, and socially constituted to avoid confronting the question of who or what thinks or produces law.

In a nutshell, then, this is the problem of the subject. Notice that it has already become at least two problems. One problem is that we are missing any convincing accounts of who or what it is that thinks or produces law. Another problem is that apparently we and our legal rhetoric have been constituted to avoid inquiry into this question of who or what produces law.<sup>6</sup> Hence, rather than sharing a rich matrix of intellectual or cultural understandings that would help us inquire into the character of the subject, we share a rich matrix of intellectual and cultural understandings that enables us to avoid inquiry into the character of the subject (over and over again).<sup>7</sup>

6. If the problem of the subject already manifests a dual structure, by the end of this Article the problem will have become thoroughly pluralized. Here's one way of stating the problem: Just who or what is it that thinks about or produces law? Here's another way: What must be true or potentially true about the character of the agents that construct law, in order for law to be a legitimate or viable enterprise? Here's yet another way to pose the question: What conception of subject-object relations is implicit in the rhetorical and social forces that are constructing us?

Now, in one sense, these questions are somewhat startling. They are startling, I think, because the problem of the subject has been kept off the stage of legal thought for a very long time. We are simply not accustomed to asking these kinds of questions, much less answering them.

7. Nonetheless, some of us have begun to explore, in different idioms, the various ways in which the legal and social formation of subjects contributes to the production of law and legal thought. See Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991); Coombe, *Room for Maneuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69 (1989); Coombe, "Same as It Ever Was": *Rethinking the Politics of Legal Interpretation*, 34 MCGILL L.J. 603 (1989); Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135 (1988); Minow, *Identities*, 3 YALE J.L. & HUMANITIES 97 (1991); Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987) [hereinafter *Fish v. Zapp*]; Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEXAS L. REV. 1195 (1989) [hereinafter *Missing Pieces*]; Schlag, "Le Hors de Texte, C'est Moi": *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990) [hereinafter "Le Hors de Texte"]; Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167 (1990); Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801 (1991) [hereinafter *Politics of Form*]; Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990) [hereinafter *Bull Durham*]; Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441 (1990) [hereinafter *Indeterminacy*]; Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963 (1991) [hereinafter *Contingency and Community*].

My sense is that much of these recent efforts to inquire into the problem of the subject are at once influenced by and a reaction to earlier treatments of the legal subject in critical legal thought. This earlier work includes D. KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1984); R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984); Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979) [hereinafter *Blackstone's Commentaries*]; Kennedy, *The Political Significance of the Structure of the Law School Curriculum*,

So far I've stated the problem in epistemic terms: "we are missing convincing accounts of . . .". But the problem could be posed in political terms: how can the agencies of social action or social transformation be activated? It could be posed in cultural terms: what is the current state of our capacities for constructing or reproducing our social world? These are very sweeping ways of asking about the problem of the subject. And it is doubtful that many legal thinkers would want to approach the problem on such a sweeping scale.

Nonetheless, in more concrete, local ways, the problem of the subject is fast emerging on the scene of contemporary American legal thought as the locus of inquiry for a variety of jurisprudential approaches. In this Article, my aim is to try to reveal the various ways in which the problem of the subject arises within several important contemporary modes of legal thought including rule-of-law, critical legal studies (cls), neopragmatism, and cultural conservatism. Because these various modes of legal thought are differently situated and advance different intellectual agendas, the problem of the subject arises in different ways for each of them.

It is important to attend carefully to these differences, but it is also important not to overdo it. In our postmodern context, so marked by the celebration of difference and the exaltation of pluralism, it is unlikely that differences in the appearance of the problem of the subject will be missed. It may well be the recognition of sameness that has become the more difficult enterprise. Moreover, because so many of us, as legal thinkers, are engaged in disagreements whose very sense and meaningfulness depend upon distinguishing rule-of-law from cls from neopragmatism from cultural conservatism from . . .,<sup>8</sup> it may be very difficult for us to appreciate the ways in which all these ostensibly opposed jurisprudential modes nonetheless share and reproduce a certain sameness.

And yet they do. As will be seen, there is *a recurring sameness to the ways in which the problem of the subject arises within each of these modes of contemporary legal thought*. That is because, in their very rhet-

14 SETON HALL L. REV. 1 (1983); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151 (1985).

Much of the recent work is also (consciously or not) influenced by and a reaction to the work of Stanley Fish who rarely mentions the subject or the self by name, yet in a sense speaks of little else. S. FISH, *DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES* (1989) [hereinafter *DOING WHAT COMES NATURALLY*]. See Lippucci, *Surprised by Fish*, 63 U. COLO. L. REV. (forthcoming 1991); Schlag, *Fish v. Zapp*, *supra*.

8. . . . all the other modes of thought that comprise the contemporary jurisprudential field. For a helpful articulation of the various kinds of legal thought that currently comprise the jurisprudential landscape, see Radin & Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019 (1991).

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oric, all of these modes of contemporary legal thought establish, depend upon, and eclipse a quintessentially liberal individual subject—what I have elsewhere called the relatively autonomous self or the relatively autonomous subject.<sup>9</sup> As this subject emerges from its eclipsed condition, we will see that it emerges as a problem for each of these modes of contemporary legal thought.

The enterprise here is to reveal and articulate the problem of the subject as a problem for rule of law, cls, neopragmatism, and cultural conservatism. It is to reveal this problem in all its vitality and import for each of the modes of legal thought discussed—to reveal it as a problem for each of them.<sup>10</sup> The effort here is to retrieve a whole set of critical inquiries from their presently concealed condition so that we might begin to think about them.

Now, of course, since “problems” are generally viewed negatively in our (legal) culture, what follows could easily be understood as a kind of “critique” in the nontechnical sense of “criticism” or “argument against” the various modes of legal thought. To the extent possible, I would like to caution against such a reading. The conclusion to be drawn here should not be that these modes of thought are wrong, flawed, bad, incorrect, mistaken, intellectually weak, or anything of the sort.<sup>11</sup> Rather, I hope that the conclusion will be that each of these modes of thought has a serious problem, a recursive problem, and that it is in some senses the same problem—the problem of the subject.

This Article is thus organized around some recognizable descriptions of the various modes of contemporary legal thought—rule of law, cls, neopragmatism, and cultural conservatism. In each section, I describe these modes of thought and trace the ways in which the problem of the subject becomes a problem for them. As you might guess, this effort is not just a completely disinterested, purely altruistic attempt on my part to give various schools of thought something to think about. I have an agenda—and I will explain that agenda in the last section, when

9. Schlag, *Fish v. Zapp*, *supra* note 7, at 42-50; Schlag, “*Le Hors de Texte*,” *supra* note 7, at 1667-73.

Steven Winter has helpfully elaborated some of the intellectual and political implications of the recursive reinscription of this (pervasive) liberal subject. Winter, *Indeterminacy*, *supra* note 7, at 1444-46. And now, in his contribution to this symposium, Jack Balkin joins us as well in recognizing the importance of the social construction of this relatively autonomous subject. Balkin, *The Promise of Legal Semiotics*, 69 TEXAS L. REV. 1831 (1991); See also Balkin, *Ideology as Constraint* (Book Review), 43 STAN. L. REV. 1133 (1991) (reviewing A. ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)).

10. My sense is that the problem of the subject extends well beyond the particular modes of contemporary legal thought discussed in this Article.

11. It is not that such conclusions would themselves be “wrong” or the like. Rather, it is that such conclusions would be askew to the enterprise pursued here.

the problem of the subject returns (explicitly) to trouble my own enterprise.

But before we turn to each of these modes of thought, we must return to the primal scene—Langdellian jurisprudence.

## I. A Brief Survey of the Langdellian Jurisdiction

The very first article written by Christopher Columbus Langdell in Issue 1 of the Harvard Law Review begins with this sentence:

Equity jurisdiction is a branch of the law of remedies; and as it affects, or is affected by, nearly the whole of that law, *it is impossible to obtain an intelligent view of it as whole without first taking a brief view of the law of remedies as a whole*. Moreover, as all remedies are founded upon rights, and have for their objects the enforcement and protection of rights, *it is impossible to obtain an intelligent view of remedies as a whole, without first considering the rights upon which they are founded*.<sup>12</sup>

The same article concludes with these sentences:

*So it seems* that any wrongful extinguishment by the obligee of an obligation which is itself the subject of an equitable obligation, though it is a breach of the equitable obligation is also a tort to the equitable obligee. *So it seems* that the alienation by its owner of any right which is the subject of an equitable obligation, in disregard of such obligation is a tort to the equitable obligee.<sup>13</sup>

Now, between what the Introduction proclaims as necessary for “obtaining an intelligent view” of the matter and what the Conclusion presents as a series of declarative *So it seems*’s, there is never once any explicit articulation, much less discussion, of who it is that will be obtaining the intelligent view or by what mode of thought or reflection he will be enabled to do it.

In Langdell’s universe, things happen, thoughts get thought, and the passive voice gets used a lot: “For example, a debtor becomes personally bound to his creditor for the payment of the debt . . . .”<sup>14</sup> It is as if Langdell had not only read, but decided to simulate the early Stanley Fish: Langdell’s work reads like law’s immaculate conception. When it is law that is produced, the “I” is kept out of sight (and out of mind). Langdell’s law poses as the discourse without an individual subject.<sup>15</sup>

And even when Langdell is confronted with those dicey transitions

12. Langdell, *A Brief Survey of Equity Jurisdiction*, 1 HARV. L. REV. 55 (1887) (emphasis added).

13. *Id.* at 72 (emphasis added).

14. *Id.* at 68.

15. Before there were “interpretive communities” there was “Equity.” (Puns retracted).

where it seems as if the individual subject (Langdell himself) will have to make an appearance, if only in the indicative mode to decide where the text should go next, the individual subject is still kept hidden. Consider, for instance, this close call: "Having thus treated with sufficient fulness of equitable rights, *it remains to speak* briefly of the violation of such rights."<sup>16</sup> Here, with a finesse Stanley Fish could admire, Langdell manages at once to invoke and yet deny the presence of the "I." The individual subject (if there is one) is off center stage—out of sight.

For Langdell this eclipse, this exclusion of the individual subject is perfectly natural. The main event featured on center stage has little to do with the individual subject. On the contrary, occupying the center stage of Langdellian jurisprudence there is the intrinsic, essential order of law—the order of law that is busy being discovered by true science.

We have also constantly inculcated the idea the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, the museum of natural history to the zoologists, the botanical garden to the botanists.<sup>17</sup>

All of this is very tidy. But where's the subject?

This is an interesting question—rendered even more so when one considers that Langdell was probably not a precocious antihumanist seeking to decenter the individual subject. We know Langdell. We've worked with Langdell. He's no Stanley Fish. On the contrary, Christopher understood perfectly well that he was an individual subject.<sup>18</sup> And he could use the "I" indicatively and ontologically as well as the rest of us. Indeed, the preface to *The First Edition of A Selection of Cases on the Law of Contracts*<sup>19</sup> is peppered with Christopher's use of the first person singular. Hence Chris begins the preface, "*I* cannot better explain the design of this volume . . . ."<sup>20</sup> Later he tells us, "*I* was called upon to consider directly the subject of teaching . . . ."<sup>21</sup> And so on. Indeed, whenever Chris addresses a matter of pedagogy in his preface, the "I" is all over the place. And yet, quite mysteriously, as soon as the law makes its appearance in the preface, the "I" vanishes.<sup>22</sup> Chris disappears. Dean Langdell is removed. Even you, the reader, begin to experience a certain

16. *Id.* at 71 (emphasis added).

17. *Harvard Celebration Speeches*, 3 LAW Q. REV. 118, 124 (1887).

18. Not that I want to suggest, mind you, that Stanley Fish doesn't understand this.

19. C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (1871).

20. *Id.* at v.

21. *Id.*

22. *Id.* at vi.

ego loss. Could it be God?<sup>23</sup> Is it love? No, it's law—law and science: "Law, considered as a science, consists of certain principles or doctrines . . . ."<sup>24</sup>

### A. *Look Ma No Subject: The Transcendental Object Does It All*

How is it that law comes to occupy center stage in this way—relegating all individual subjects to the periphery of consciousness? What subject-object relations underwrite this grand and sober drama? One way to begin an understanding of the subject-object relations instanced in Langdell's discourse is to take seriously his nineteenth century science metaphors. Tom Grey does:

The heart of the theory was the view that law is a science. Langdell believed that through scientific methods, lawyers could derive correct legal judgments from a few fundamental principles and concepts, which it was the task of the scholar-scientist like himself to discover.<sup>25</sup>

This image of the scientist "discovering" principles and concepts can easily be understood as the self-effacement of the individual subject in the presence of a transcendental order of the object—the order of law.<sup>26</sup> According to this representation, law itself comes to occupy the space of the object, leaving the subject to efface himself so that he might "discover" the objective order of law.<sup>27</sup>

Now, much of Langdell's writing is consistent with such a view. We have already witnessed that when he speaks of law, in contrast to pedagogy or something else, Langdell eclipses the individual subject. The "I" is almost invariably relegated to some implicit space off the rhetorical center stage. Langdell does not write, "*I think* the law is . . . ." Rather, his individual subject formation is much more hesitant, much more modest. "So it seems" he writes, leaving the reader to imagine and at the same time discount the individual subject to whom the "So it seems" might seem.

This depersonalization and deprivileging of the individual subject is an accomplishment of the formal style. Within the formal style of law (or diplomacy or etiquette) the space of the individual subject is narrowly

23. Well, sort of, actually. See K. BURKE, A GRAMMAR OF MOTIVES 355 (1945) ("For a God term designates the ultimate motivation, or substance, of a Constitutional frame.").

24. C. LANGDELL, *supra* note 19, at vi.

25. Grey, *Langdell's Orthodoxy*, 45 U. PITT. L. REV. 1, 5 (1983).

26. Hence, not only is law a science, as Langdell proclaims, but "all the available materials of that science are contained in printed books." *Harvard Celebration Speeches*, *supra* note 17, at 124.

27. One of the best philosophical expressions of this kind of objectivist aesthetic in contemporary legal thought is found in Moore, *The Interpretive Turn in Modern Theory: A Turn for the Worse?*, 41 STAN. L. REV. 871, 881-87 (1989).

circumscribed precisely because any active contribution of the individual subject could only interfere with (not help maintain) the objective order of meaning. In formal diplomatic negotiations or formal marriage ceremonies, for instance, the opportunities for contributions by the individual subject are severely restricted precisely because at the end of the events there can only be one set of meanings; the event's meanings are already choreographed, already scripted, already pre-ordained. The only thing required of the individual subjects is that they play their parts—in the most self-effacing manner possible. Now, it is in exactly the same sense that the formal tone of the Langdellian discourse enables Langdellian law to continue to provide the self-same, invariant, stabilized meanings—meanings that are *contained in* and can thus be discovered *in* a transcendental order of the object.<sup>28</sup>

To understand Langdellian formalism as a rhetoric of a transcendental order of the object before which the individual subject is effaced and marginalized coincides with some of the salient features we typically associate with legal formalism. If the meaning of the law is located in an object-form (*i.e.*, the doctrines and principles) whose operative meaning requires almost<sup>29</sup> no contribution from any individual subject, then law itself is stable, self-identical, foundationally secure and bounded; it is, in other words, just like an object. Moreover, the severe restriction of the rhetorical space of the subject removes a potential threat to the stability, self-identity, foundational security, and closure of Langdellian formalism. First, because the role of the subject is so weakened, no subject can easily develop or organize itself in sufficient strength to create a strong subject-object conflict. On the contrary, the overwhelming rhetorical domination of the subject by the object at the level of structure translates into the same domination at the level of event, at the level of everyday. The occasions for live subject-object confrontation have thus been delimited. In a second sense, they have also been marginalized. Within Langdellian formalism, the possible remonstrances of a questioning or rebellious subject have already been confined to the margins—very far

28. In Lakoff-Johnson terms, the use of the expression "contained in" is an instance of what they call the container metaphor. Here the use of the metaphor yields its prototypical effect: objectification. We have the objectification of Law (the container) as well as the doctrines and principles (its contents). G. LAKOFF & M. JOHNSON, *METAPHORS WE LIVE BY* 29-30 (1980) (describing the container metaphor and its implications); Winter, *Bull Durham*, *supra* note 7, at 673-74, 679-82 (showing how Stanley Fish relies upon the container metaphor to make his arguments against "theory"); Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1146-52 (1989) (showing the links between the container metaphor and objectivist epistemology).

29. As we will see, this is a very problematic "almost." See *infra* text accompanying notes 112-15.

from the action on center stage. Hence should any deviant individual subject (say, a Felix Cohen or a Duncan Kennedy) attempt to assert himself against this sort of formalism, the rhetorical spaces and paths that might potentially enable and legitimate such self-assertion have already been relocated to the periphery, if not altogether banished. The performative significance of self-assertion by a deviant individual subject is thus already structured to signify that this subject is outside the discourse of formalism and hence outside the discourse of law—beyond the pale.

Any strong self-assertion against the transcendental order of the object is always and already beyond consideration. And certainly for Langdellian formalism, this is exactly as it should be. Indeed, once meaning has been located in the transcendental order of the object, the individual subject emerges only as a potential threat. In more contemporary descriptions, for instance, the individual subject often features as the misguided "activist" judge who derails the law by imposing his "own personal values."<sup>30</sup> Hence, both the rhetoric and the substantive jurisprudential commitments of Langdellian formalism converge to suppress the space of the individual subject. And this suppression in turn coincides with the well-known formalist celebration of aesthetic values that suppress the individual subject:<sup>31</sup> *universality*, *neutrality*, and *objectivity*.<sup>32</sup>

Now, to the extent that Langdellian formalism can be understood as shaped by a transcendental object strategy,<sup>33</sup> can this strategy be secure? For us, it hardly seems possible to secure meaning solely by reference to a transcendental objective order of meaning *unless* we start quite problematically to "subjectify" the object—to project the categories of the subject onto the transcendental order of the object.<sup>34</sup> For us, even if

30. See, e.g., Kress, *Legal Indeterminacy*, 77 CALIF. L. REV. 283, 285 (1989) (observing that the debate about judicial activism rests upon the "presupposition that a judicial decision is . . . open to question, if not downright immoral, if it reflects nonlegal factors such as the judge's personal preferences or political ideology").

31. Beale describes the essential characteristics of law as *generality* (law as a body of general principles, not a collection of special commands), *universality* (law as all extending over all human action), *continuity* (law as temporally uninterrupted), *justice* (conformity to ethical standards of the people), *predictability* (knowledge in advance of decision), *regularity* (restriction of judicial discretion), and *systematicity* (capable of extension by means of principle). 1 J. BEALE, TREATISE ON THE CONFLICT OF LAWS 45-48 (2d ed. 1935).

32. "Objectivity implies that the interpretation can be judged by something other than one's own notion of correctness. It imparts a notion of impersonality." Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 744 (1982).

33. I make no claims here that Langdellian formalism *is* in fact grounded in a transcendental object strategy—only that it can be understood this way and that such an understanding coincides with many of the salient features we typically associate with Langdellian formalism.

34. But this argument, by introducing the contributions of various subjects, creates more

## The Problem of the Subject

Langdellian formalism reduces the subject to a subordinate, trivial role, the performance of that trivial role remains essential to the “reading” of the object order of law. But was this a problem for the Langdellian formalists? Clearly, they did not deal with this problem as stated in this form. But some of the Langdellian formalists did confront a strikingly similar (if not the same) problem—namely, if law has an objective order, how is it that it can change? What is the agent that leads legal thought to change? Some formalists like Beale argued that professional, judicial, and scholarly opinion enabled “progressive” changes in the law. As Beale put it:

It is assumed by most authorities that if the judges did not make, but discovered the law, then in the absence of legislation the law must remain what it has always been, and therefore by a process of backward projection, it is argued that unless the courts changed the law the law must have been the same in 1200 that it is today.<sup>35</sup>

Having stated the problem, Beale then made a precocious deconstructive move:

This line of reasoning, which has seemed convincing to many persons, is quite obviously a mere begging of the question. It is certain that the common law changes; not merely the common law of a particular jurisdiction, but the common-law system in general. This must be true, or the science of law, differing from all other sciences, would be unprogressive. The law of today must of course be better than that of seven centuries ago, more in accordance with the general principles of justice, more in accordance with the needs of the present age, more humane, more flexible, and more complex.<sup>36</sup>

And now the subject appears:

There are many sources of this change of law, of which, it is true the decisions of the courts are one and in many ways the most important. The law of a given time must be taken to be the body of principles which is accepted by the legal profession, whatever that profession may be; and it will be agreed that the judges have a preponderating share in fixing the opinion of the profession. They are, however, not the sole element in forming this opinion. Legal thinkers who are not judges have at all times played a considerable

problems than it resolves—at least in terms of safeguarding a transcendent order of object law from destabilization.

35. 1 J. BEALE, *supra* note 31, at 39.

36. *Id.* at 39. Compare:

[N]either interpretive communities nor the minds of community members are stable and fixed, but are, rather, moving projects—engines of change—whose work is at the same time assimilative and self-transforming. The conclusion, therefore, is that change is not a problem; and, indeed, to the extent that there is a problem, it would seem to be one of explaining how anything ever remains the same . . . .

S. FISH, *DOING WHAT COMES NATURALLY*, *supra* note 7, at 152.

part.<sup>37</sup>

Hence, by explaining change in the common law in terms of changes in the opinions of the legal profession—and in turn explaining these changes by reference to the influence of judges and legal thinkers—Beale refers the entire question of change in the law to the activity of the subject.

Of course, this throws into question the very transcendence of the transcendental objective order of law. If one concedes, as Beale in effect does, that the subject is necessary to read this order, what guarantees that this subject will read the order of the object correctly? It is not clear that this emerged as a serious problem for Langdell, but it has lingered in American legal thought up until the present day, appearing and reappearing under slightly different guises. Indeed, the problem of constraining the subject is reproduced as a series of conventional problematics of

delimiting judicial review  
 constraining interpretation  
 confining judicial activism  
 preventing judicial tyranny  
 securing objective meaning in adjudication  
 curtailing judicial discretion  
 and so on up until the present day.

We can already see something quite ironic about this constant reproduction of the concern with restraining the subject of law: this concern voiced by legal thinkers is almost invariably directed outward towards other subjects and (virtually) never *inward* to the legal thinker. The problem of restraining the subject, then, is almost invariably cast as the problem of restraining someone else (*i.e.*, the judge) not one's self (*i.e.*, not the Langdellian thinker). This irony skims the entire surface of Langdellian formalism. But to appreciate this point, we must back up.

Thus far, the intimation has been that Langdellian discourse is ruthless in its effacement of the individual subject. And in the senses suggested, I think this remains true. But in another sense, this effacement might well be understood as a ruse of discourse. It is quite possible that so long as the Langdellian "I" identifies with or collapses into the role of the legal scientist discovering the law, then such a *duly authorized and well disciplined* "I" is not required to self-efface at all. Instead, this sort of "I"—here you can picture a member of the old boys club—might very

37. 1 J. BEALE, *supra* note 31, at 39-40. It would not be until much later that Beale's notion of a "body of principles which is accepted by the legal profession" would be elaborated by Owen Fiss in his description of the character of "the interpretive community" of legal professionals and their "disciplining rules." See *infra* text accompanying notes 138-48.

well be authorized to project his own self-image onto the order of the object, only to then discover his own self-image as objective truth—all in the name of science.<sup>38</sup> The thing that makes this ruse of discourse a plausible feature of Langdellian formalism is that while the formalists were discursively quite self-effacing, their substantive self-image as scholars was nonetheless quite self-important. Indeed, in his own eyes, the Langdellian legal thinker was an extremely important player in the discovery, articulation, and arrangement of the law. Beale, for instance, was unabashedly self-aggrandizing:

The teachers of law today have an increasing influence, and one which is comparable in degree with the part played by the judges, in the development of the law; and their power to mould professional opinion is likely to increase in the future more rapidly than that of the judges. The expressed opinions of writers on the law also is powerful in the moulding of professional opinion . . . .<sup>39</sup>

Now, of course, this description seems somewhat at odds with the self-effacing discursive practices of the Langdellian legal thinker described above.<sup>40</sup> Rather than depicting a retiring individual subject awed and humbled in the presence of The Law, Beale seems instead to be describing a kind of imperial legal scholar<sup>41</sup> who rules by representing his own creations as objectified thought-structures.

If we begin to understand Langdellian formalism in this way—as a ruse of discourse—then what previously seemed to be a process of individual self-effacement before The Law becomes, through an unseen and undisclosed moment of self-objectification, a kind of fetishism of the order of the object. Object-forms such as rules, doctrines, and principles

38. Interestingly, the structure of this ruse of discourse describes the structure of the argument that cis and feminist thinkers will make much later to the effect that objectivity, neutrality and universality in law are a mask, a vehicle for the reproduction and maintenance of the partial, subjective world views of white males. As Martha Minow and Elizabeth Spelman note, “[W]e emphasize context in order to expose how apparently neutral and universal rules in effect burden or exclude anyone who does not share the characteristics of privileged, white, Christian, able-bodied, heterosexual, adult men for whom those rules were actually written.” Minow & Spelman, *In Context*, 63 S. CAL. L. REV. 1597, 1601 (1990).

39. 1 J. BEALE, *supra* note 31, at 40.

40. Langdell too had his moments of non-self-effacement. Here’s one statement where Langdell seems to be just brimming with self or at least self-assurance:

[T]he number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension.

C. LANGDELL, *supra* note 19, at ix.

41. This phrase was coined by Richard Delgado. The kind of intellectual practice that Richard Delgado describes (and criticizes) as imperial legal scholarship is enabled by the rhetoric of Langdellian formalism—and its simultaneous effacement of the individual subject together with the enthronement of the legal scholar as the oracle of The Law. See Delgado, *The Imperial Scholar: Reflections on a Review of Civil Rights Literature*, 132 U. PA. L. REV. 561, 573 (1984).

are worshipped in the manner of a fetish precisely because the Langdellian thinker never apprehends the moment of self-objectification. Thus, when the rules, doctrines, and principles discovered by the Langdellian thinker emerge already cast in his own image, they seem right and true and good—almost magically so.

If we are to understand Langdellian formalism as a ruse of discourse, its eclipse of the subject operates to cut off not subjectivity, but rather the recognition of the subject's role in creating and maintaining Langdellian law. In Langdellian formalism, the result is a fetishism of rules, doctrines, and principles. This fetishism of rules, doctrines, and principles continues virtually unmodified in rule-of-law thought.<sup>42</sup> In other later forms of legal thought, the same process leads to the fetishism of other artifacts—such as theory, methodology, extra-legal disciplines, extra-legal luminaries, and so on.<sup>43</sup>

For us, to understand these points is to recognize some obvious tensions in the Langdellian world view. For the Langdellian legal thinker, this tension was probably not as acute as we might take it to be—precisely because in Langdellian formalism the contributions of the individual self to self-objectification are not visible. If the Langdellian thinker sees himself as entitled to play an important role, it is because he considers himself a legal scientist—one who knows how to read the law with appropriate deference and respect and without reading too much into it.

The sublimation of the subject into the order of the object and the resulting fetishism is a move that is replayed endlessly in American legal thought. This self-effacement of the subject to the order of the object is precisely what enables legal thinkers to keep believing in their objectified thought-structures as off the shelf, stand-alone, self-sufficient, self-sustaining systems, completely independent of the activity of subjects. This sublimation of the subject is precisely the kind of process targeted by the reification critique of liberal legal thought offered by *cls*.<sup>44</sup> Ironically, however, the same sort of sublimation process is at work in critical legal thought itself,<sup>45</sup> as well as in neopragmatism<sup>46</sup> and, less surprisingly, in rule-of-law thought<sup>47</sup> and cultural conservatism.<sup>48</sup> Each of these ap-

42. See *infra* text accompanying notes 155-63 (discussing the judiciary's fetish with tests, prongs, and standards).

43. See *infra* text accompanying notes 281-93 (discussing critical legal thought); *infra* text accompanying notes 342-71 (discussing neopragmatism); and *infra* text accompanying notes 376-400 (discussing cultural conservatism).

44. See *infra* notes 197-293.

45. See *infra* text accompanying notes 281-93.

46. See *infra* text accompanying notes 342-71.

47. See *infra* text accompanying notes 146-77.

48. See *infra* text accompanying notes 376-400.

proaches to legal thought leads, in its own way, to its own kind of fetishism.

Now, of course, even if Langdellian formalism is understood as a kind of transcendental object strategy, we can hardly expect it to have broken down specifically along these lines. And yet, the sort of breakdown in transcendental object strategies described above is classic: first, the subject becomes aware that he is on the scene. Second, the subject notices that he is not just a spectator, but is actively contributing to the construction of what was supposed to be a self-sufficient transcendental order of the object.<sup>49</sup> Finally, the subject comes to understand that the order of the object is his own creation.

How are such startling recognitions achieved? Consider what Felix Cohen had to say about a question asked by the New York Court of Appeals—namely, “Where is a corporation?”

Will future historians deal more charitably with such legal questions as “Where is a corporation?” Nobody has ever seen a corporation. What right have we to believe in corporations if we don’t believe in angels. To be sure some of us have seen corporate funds, corporate transactions (just as some of us have seen angelic deeds, angelic countenances, etc.) But this does not give us the right to hypostatize, to “thingify” the corporation, and to assume that it travels about from State to State as mortal men travel.<sup>50</sup>

What Cohen’s hypostatization critique does here is revealing in two ways. First, he is showing that the specific presumptions about the character of corporations (such as existence and location in geographical space) are bizarre. At the same time, he is also showing that the hypostatization of the corporation, as well as the corporation itself, are constructions of a subject—in this case the New York Court of Appeals. The problem of the subject arises here precisely because the description offered by reference to the transcendental order of the object is no longer experienced as plausible, as canonically self-evident. Once this is appreciated, everything is then referred back to a subject—a subject whose active beliefs contribute to the creation and maintenance of what was supposed to have been, but clearly is no longer, the transcendental order of the object. Cohen makes the point perfectly clear: “Legal concepts . . . are supernatural entities which do not have a verifiable existence *except to the eyes of faith*.”<sup>51</sup>

49. For one recent attempt to produce such a recognition, consider Laurence Tribe’s essay on the implications for law of the Heisenberg Uncertainty Principle. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn from Modern Physics*, 103 HARV. L. REV. 1 (1989).

50. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809, 811 (1935).

51. *Id.* at 821 (emphasis added).

This recognition that various transcendental orders of the object are constructions of a subject—this demystification of fetishism—will be replayed over and over again in American legal thought as the layers of transcendental objectivism are successively peeled away.<sup>52</sup> For example, first we recognize that the framers' intent is a construction of the subject—and only one way to interpret the Constitution.<sup>53</sup> Then, we come to understand that the Constitution is itself a particular construction created by the subject of the text.<sup>54</sup> Then we come to understand that the text is itself a creation of an interpreting subject.<sup>55</sup> Then we come to understand that the supposition that the subject is doing the interpreting is itself a construction of [—].<sup>56</sup>

### B. *Doing Flips With Langdell*

There is, of course, a limit (though not a static or a stable one) as to how far we can go on like this before, like Wittgenstein, we are reduced to wanting to utter silence.<sup>57</sup> In law, our oft-repeated displacement of transcendental objectivism through the recognition that its construction is the action of a subject is usually arrested at some point well before the potential of the deconstructive moves is exhausted.<sup>58</sup> What is striking is that not only defenders of the faith, but also critics of the faith, will seek to arrest the displacement of transcendental objectivism.

The defenders of an orthodox faith<sup>59</sup> will typically resist the very

52. . . . and re-inscribed elsewhere, sub-textually.

53. See Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469, 476-82 (1981).

54. See Grey, *supra* note 25, at 1 (questioning "whether the constitutional text should be the sole source of law for purposes of judicial review, or whether judges should supplement the text with an unwritten constitution that is implicit in precedent, practice, and conventional morality").

55. See generally S. FISH, *IS THERE A TEXT IN THIS CLASS? THE AUTHORITY OF INTERPRETIVE COMMUNITIES* (1982) (discussing in various essays how readers, in essence, create what they read).

56. Indeed, many of the critical breakthroughs in American legal thought have come through ever more pronounced, ever more self-decentering recognitions that what previously seemed to be an obvious characteristic of the transcendental order of the object was instead a contribution of the subject. For instance, some of the key moves of the critical works of Felix Cohen, Ronald Coase, and Duncan Kennedy can be understood to fit this pattern. Cohen, *supra* note 50; Coase, *The Problem of Social Cost*, 3 J. LAW & ECON. 1 (1960); Kennedy, *Blackstone's Commentaries*, *supra* note 7.

57. L. WITTGENSTEIN, *TRACTATUS LOGICO-PHILOSOPHICUS* 151 (1961) ("What we cannot speak about we must pass over in silence."). Or, like Derrida, we are led to write "*sous rature*" in order to better approximate what we are made to want to mean. J. DERRIDA, *OF GRAMMATOLOGY* 60 (1976).

58. CLS thinkers have noted that legal realists aborted the deconstructive potential of their critiques. See, e.g., Peller, *supra* note 7, at 1219-59 (pointing out various inadequacies in realists' deconstructive moves). I am generalizing the point here and including CLS within the group of critics who fail to exhaust the deconstructive potential of their critiques. This is not necessarily meant as criticism. Indeed, I rather doubt that it is possible to do anything else. It is a question of more or less.

59. The expressions "defender" or "critic" of an "orthodox faith" are meant to denote not any

move that refers the purported objectivity back to a constituting subjectivity. If for the moment we can characterize Langdell, Bork, Fiss, and Dworkin as defenders of an orthodox faith, we can see that each, *at different conceptual points*, refuses to accept critical moves that would refer the order of the object back to the actions of a constituting subject. At some point, each of them holds out for a privileged description of the legal or doctrinal scene—one that will stand independently of the actions of subjects. Now, it is not surprising that those who occupy the role of defenders of an orthodox faith (whatever that orthodox faith may be) would at some point refuse the “referring-back” of the transcendental order of the object to some constituting subject. That is predictable.

What is less predictable and more interesting is that those who occupy the role of critics of an orthodox faith (whatever that orthodox faith may be) do the same thing. They, too, refuse to follow their critique of objectivism to its limits. For instance, the legal realists arrest their critique of formalist objectivism at precisely the point where they as legal subjects can begin to do what they consider to be *real* law: real functionalist law informed by real social science. In fact, it is striking how often critics of an orthodox faith advance their claims as crypto-objectivist pleas for recognizing “what is *really* going on.”

This is a telling phrase: it reveals that the very move which allows the critics to refer a transcendental order of the object back to a constituting subject is actually a re-inscription of the order of the object at a different level. We can see this effect at work most clearly in the legal realist’s stabilization of the new realm of the object as the realm of social science explanation and functionalist prescription.

This re-inscription of a transcendental order of the object is not the only, or even the most interesting, effect produced by the “referring-back to a subject” critique. After all, if this were the only kind of effect, we could count on increasingly serious—that is to say, increasingly radical—referring-back critiques to reveal any residual objectivism and to displace any remaining fetishism. But there is another kind of interesting and ironic effect produced by the “referring-back” critique: the arrest of this critique always leaves a *stabilized, untroubled, unexamined* subject in place. Critical legal thinkers thus arrest their critique of objectivism, often at precisely the point where they as legal subjects are enabled to recognize that “we must take responsibility for the judgments we make, rather than pretending that those judgments can be made for us by ap-

particular position or stance or closed category of stances within a conventional representation of the field of jurisprudence, but rather two modes of doing legal thinking, or reasoning, or arguing.

plying a determinate and comprehensive theory of justice.”<sup>60</sup> What is really striking about this is that, despite the increasing radicalism of the “referring-back to a subject” critiques, including legal realism and critical legal studies, the subject has been left almost entirely untroubled, unquestioned. We thus face the startling possibility that the configuration of the legal subject today is much the same as it was at the zenith of Langdellian formalism.

How did we get here? In a sense, perfectly naturally. Our conception of Langdellian formalism as a kind of transcendental order of the object is, in its outlines, utterly conventional. Not only is it conventional to understand Langdellian formalism as a kind of excessive objectivism, but, more importantly, it is conventional for American legal thinkers to understand and to criticize any undesirable orthodoxy as shaped by an untenable objectivism—even to the point of getting their own critiques demonstrably wrong. For instance, even as astute a critic as Felix Cohen, in his famous criticism of *Tauza v. Susquehanna Coal Co.*,<sup>61</sup> mistakenly criticized as “thingification”<sup>62</sup> a formalist instance of the personification, or animism, of the corporation.<sup>63</sup> If fetishism is the perennial risk run by the defenders of the faith, then a fetishistic critique of fetishism is the perennial risk run by the critics of the faith. Indeed, in American legal thought, undesirable orthodoxies (whatever they may be) are typically apprehended, conceptualized, and criticized as thingification, hypostatization, reification, formalization, conceptualization, and so on. In other words, they are typically<sup>64</sup> attacked either for being objectivist or for enacting the wrong sort of objectivism.<sup>65</sup> This is the American (juristic) way.

To some extent, I might be understood as following precisely that same path. Until now. Now, with this recognition another option presents itself. It presents itself as soon as we recognize that for any enterprise as complex and sophisticated as a jurisprudence, objectivism and subjectivism are the same moment organized in two different ways. This means that we don’t have to follow the conventional American ju-

60. Singer, *Property and Coercion in Federal Indian Law: The Conflict Between Critical and Complacent Pragmatism*, 63 S. CAL. L. REV. 1821, 1830 (1990). For an elaboration of this elision of the problem of the subject in critical legal thought, see *infra* text accompanying notes 201-13.

61. 220 N.Y. 259, 115 N.E. 915 (1917).

62. See Cohen, *supra* note 50, at 815.

63. Steve Winter makes the point that Cohen, in comparing the corporation to a traveler, does not so much thingify as personify the corporation. Winter, *supra* note 28, at 1164.

64. But not invariably.

65. For example, the feminist jurisprudence movement has faulted objectivist legal thought for contributing to “distortion of reality.” By this reasoning, objectivist attempts to fashion law using the rationale of “abstract universality” are no more than efforts to transform sexism into a legal code. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1377 (1986).

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ristic way and understand Langdellian formalism as shaped by a transcendent order of the object. Instead, we could try to understand Langdellian formalism as shaped by the presupposition of a certain kind of subject, by a kind of transcendental subject strategy. With these recognitions, we have just been invited to do a flip. We have just been invited to understand Langdellian formalism as shaped by, and composed of, not just a rhetoric of transcendental objectivism, but a rhetoric of transcendental subjectivism.

To try to understand Langdellian formalism as a kind of transcendental subjectivism may help us in several ways. First, to the extent that such an understanding proves to be convincing and yet contrary to the received stories of Langdellian formalism, we will have a graphic demonstration of our own erroneous objectivist propensities—the conventional tendency to “look for” and “find” law “in” the conceptual space of object-forms. Second, in carrying out this sort of understanding, we may come to understand how it is that transcendental subjects are insulated from recognition and challenge. Finally, we may gain some understanding of how to reveal the constituting subjects and their effects.

Much of Langdellian formalism can be understood as shaped by, and composed of, a transcendental subject strategy.<sup>66</sup> With this rhetorical strategy, once again one of the poles of the subject-object relation is severely marginalized. Formalism and its virtues are secured because the transcendental subject can be counted upon to repeat its same old recursive operative moves. Objectivity is secured by virtue of the stabilization and universalization of the gaze of the observer, the Langdellian legal scientist. This strategy stabilizes legal meaning and moral value by enshrining law as a paramount subject that legal interpreters are bound to honor and observe. That is, they must honor and observe the identity and teleology of this law as subject. This vision of law as subject secures legal meaning by effectively subordinating the acts and errancies of individual legal actors.<sup>67</sup> To the extent one understands the law as possessed of spiritual force, of will, the law can remain on track despite the deviations of errant legal actors. Legal meaning and moral value are secured because there is a force greater than all of us whose very purpose is to maintain that legal meaning and moral value.

Deviance is also kept to a minimum because any nonconforming

66. In Kant, “transcendental” means that which makes experience possible. A. KOJEVE, *INTRODUCTION TO THE READING OF HEGEL* 123 (1969). Here the transcendental subject would be that subject that renders the experience of law possible. But to be clear, I am not attempting here to follow Kant’s conception of the transcendental subject.

67. See Fiss, *supra* note 32, at 747.

object can already be identified as extralegal.<sup>68</sup> As for the transcendental subject, its formal and formative faculties cannot be dethroned because the objective order of things—the things in themselves—are never knowable as such. On the contrary, they are always and already mediated by categories and concepts of the subject.

### C. *Langdell's Immaculate Conception: The Transcendental Subject*

Recall that the occasion for conceiving Langdellian formalism as grounded in a transcendental order of the object was the almost invariable effacement of the individual subject (e.g., "Chris Langdell") whenever he spoke of law. This feature, together with Langdell's propensity to objectify law as rules, doctrines, and principles, led us to conceive this system as grounded in a transcendental order of the object.

Rather than understanding the effacement of the "I" in the face of an awesome transcendental order of the object, however, we can now see it as the subordination of the individual subject to the law as a transcendental subject. And there is something to this notion because, in Langdell's discourse, law, like a subject, actually does things. At times, law is fully animated. In Langdellian thought Law, or rather Equity, does some amazing stuff—and, what's more, does it *all by itself*: "Equity will, however, annex to such a contract an obligation directly to B."<sup>69</sup> And as you can see, apparently equity will often do its stuff without the mediation of social actors—neither courts,<sup>70</sup> nor parties. In fact, Langdell tells

68. This is why those who argue on behalf of any established orthodoxy almost always demand not simply a critique (a depiction of the shortcomings of the transcendental approach), but the affirmative demonstration of a suitable substitute. This is a very safe and effective argument to make because, in so far as the scene (the social, the political, the intellectual scene) is already a construction of the transcendental subject, there are no objects, no affirmative pieces of evidence, that the critic can rely upon to make out his positive case. All of this is *déjà vu*:

Having established the breakdown of the common law methods the task of the functionalists is not over. They must submit and establish a reform program and prove that it will function better than the traditional methods in vogue in our day and place . . . In this period of transition and change, the proponents of the New Deal in the law must submit to the critical examination of their evidence, must bear the affirmative of the issues, and must establish the "experiential capacity" of the experts offered by functionalism before their testimony is given full credence and the formulas are translated into action.

Kennedy, *Functional Nonsense and the Transcendental Approach*, 5 *FORDHAM L. REV.* 272, 283 (1936) (citation omitted).

69. Langdell, *supra* note 12, at 71.

70. Indeed, in the Langdellian universe, courts are rarely mentioned explicitly. Equity, for instance, often traverses the linguistic space of the institutional mediation of the court without a moment's (or a sign's) notice. Equity is always doing this, annexing that, or creating those obligations and so on all by itself. This subordination of courts to the Law or to Equity is not an accident of style, but a key aspect of the ambition of Langdellian jurisprudence to scientific rigor.

After all, as mere mortals, judges are likely to err. Thus, when courts are explicitly mentioned, it is often to rebuke them for having departed from the Law:

This doctrine had its origin in efforts of courts of equity to prevent the harsh and unjust discriminations which the law formerly made between creditors of persons deceased, whose

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you so: "Many equitable obligations are created . . . *by equity alone* . . . . For instance, *it is by force of equity alone* that an equitable obligation follows the property . . . ."71 In Langdell's discourse, the doctrines not only mean, they *do* things to each other—frequently in a visible way. Doctrines doing things to other doctrines is hardly a unique characteristic of Langdellian discourse. What is unique to Langdellian discourse is the uncharacteristic visibility and frequency of this doing and its apparent doctrinal self-actualization. Indeed, in Langdellian discourse the doctrines seem to negate, convert, modify, and limit each other without the apparent assistance of any social actor—not even the author.

Actually, if we pay attention to what Langdell says about law, we should not be surprised that his doctrines are animated. Langdell tells us that

[e]ach of these doctrines has *arrived* at its present state by slow degrees; in other words, it is a *growth*, *extending* in many cases through centuries. This growth is to be *traced* in the main through a series of cases in which it is *embodied*.72

Note the metaphorical image of the law and its doctrines and principles. They *arrive*. They are a *growth*. They are *extending*. Their growth can be *traced*. They are *embodied*.73 The law here is rendered in animistic terms. It is personified.74 It is, in short, a subject—a transcendental subject that moves all by itself. Soon it will even go so far as to make an appearance. Watch. "[T]he many different guises in which the same doctrine *is constantly making its appearance* . . . [is] the cause of much misapprehension."75 If Langdell's "I" disappears when law makes its appearance in Langdell's text, it is because law itself is operating as the subject. There is an important ratio operative here: the more the law becomes established as a subject, the more the "I" must be effaced. This is why whenever the law makes an appearance on the scene in Langdell's discourse, the "I" is relegated to an implicit space off-stage or to a passive subordinate position. This "I" can only say of the law, as Langdell

claims were in equity and justice equal; and it seems that the doctrine as a general one, cannot be sustained upon any principle.

*Id.* at 70.

71. *Id.* at 67 (emphasis added). There are limits to how far I'm willing to follow Langdell.

72. C. LANGDELL, *supra* note 19, at viii (emphasis added).

73. I'm sorry, but this still seems reptilian to me. For my first thoughts on reptilian jurisprudence, see Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929 (1988).

74. This personification is one of the possible constructions of law enabled by what Steve Winter calls our idealized cognitive model of law. For the complete idealized cognitive model of law, see Winter, *supra* note 28, at 1207-24.

75. C. LANGDELL, *supra* note 19, at viii-ix (emphasis added).

says in his own inaugural Harvard article, "So it seems . . .".<sup>76</sup>

This ratio between the transcendental subject and the individual "I" is very important. As we will see, the same ratio is re-enacted in Stanley Fish's discourse where the totalizing power of "interpretive communities" institutes the complete conformity of the individual subject—so much so that in Stanley Fish's discourse, there is not even any room for self-consciousness.<sup>77</sup> To some extent, we will even see the same ratio operative in the discourse of critical legal studies, which sees the false necessity attributed to rights and to law itself as inversely related to the liberation of the existentialist individual subject.<sup>78</sup>

Now, one might think that the undoing of this transcendental subject strategy is precisely a function of an unfortunate encounter between the transcendental subject (say, law) and the individual subject (say, Chris Langdell) within the confines of the same sentence or the same text. One might think, then, that the problem of the subject for transcendental-subject formalism would arise precisely from an unfortunate dialectical encounter between the transcendental subject and a potentially or actually nonconforming, noncomplying individual subject.

76. Langdell, *supra* note 12, at 72. This point about the retreat of the "I" in the face of the transcendental subject tracks with Gary Peller's observations concerning the structure of what he describes as liberal knowledge:

Liberal knowledge, whether based on the transcendental object or the transcendental subject, presumes that an act of cognition can occur separate from the object of cognition and separate from the social forces which it studies. The contemplative stance of liberal knowledge suggests that "truth" is reached by an effacement before a transcendental source and an ultimate nondifferentiated unity [*i.e.*, like "Law"], rather than by a historical, open-ended, and creative process unlimited by any transcendental laws.

Peller, *supra* note 7, at 1269.

77. See S. FISH, *DOING WHAT COMES NATURALLY*, *supra* note 7, at 394-95.

78. See *infra* text accompanying notes 203-13. Most critical legal thinkers decried this false necessity as the attribution of objectivity to law, rights, and legal reasoning. See, e.g., Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 689 (1986) ("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 attribute the tendency of cls thinkers to frame mystification claims in terms of false projections of objectivity to a combination of the critique of reification influenced by Lukács and the critique of bad faith developed by Sartre in *Being and Nothingness*. For the classic explanations of these ideas, see G. LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS* 83-222 (R. Livingstone trans. 1971); J.-P. SARTRE, *BEING AND NOTHINGNESS* 47-70 (H. Barnes trans. 1956).

Critical legal thinkers have missed two things because of their fixation on the critique of the objectivity of law. First, they have missed the extent to which animistic forms of thought that create transcendental subjects such as "the framers" or "the constitution" or "the court" have an ideologically disabling and pacifying effect on individual actors. For one provocative exception, see Gabel, *Founding Father Knows Best: A Response to Tushnet*, 1 TIKKUN, Fall 1986, at 41.

Second, with their fascination with objectivity, many critical legal thinkers have missed the ideological implications of legal thought that are to be found not in reification per se or in the practice of animism per se, but rather in the play of relations between animism and reification in legal culture and the distribution of animism-reification relations in legal culture. For a notable exception showing sensitivity to the contingency, multiplicity, and play of subject-object relations, see Kennedy, *Spring Break*, 63 TEXAS L. REV. 1377 (1985).

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One can imagine, for instance, Chris Langdell waking up one day, forgetting to use the imperial declarative mode, and writing not, "The law is . . ." but instead, "*I think* the law is . . .". By writing that sentence, Chris might have recognized that he (the "I"), far from passively receiving the commands of law, was actively engaged in *thinking* (i.e., constructing) the law.<sup>79</sup> Now, if that had happened, we might have had a precocious dialectical encounter between the transcendental subject and a nonconforming individual subject. We might have had the beginnings of an inquiry into the problem of the subject. Langdell might have asked, "Is law the subject or is it the 'I' or are they both subjects, and, if so, what is their relation to each other?"

But note how improbable it is that Langdell would have formulated such a question. It's improbable in all sorts of ways, but the one of interest here goes well beyond who and when Langdell was. The reason it is improbable that Langdell would have formulated such a question—even if he had tripped up one day and written (as he probably did), "*I think* the law states . . ."<sup>80</sup>—is that the recuperative capacities of the transcendental subject strategy are absolutely awesome.

Dialectical encounters between the transcendental subject and the individual subject are not so easily produced. To produce such an encounter requires bringing to consciousness some sort of rhetorical, ontological, or epistemic dislocation, discrepancy, or contradiction between the individual subject and the transcendental subject. But one can't simply assume into existence such a diremption between the individual and the transcendental subject. On the contrary, most successful transcendental subject formalisms are already well defended against the attempt to inscribe or recognize such diremptions. In our time, this recuperative defense is perhaps best expressed and demonstrated by the work of Stanley Fish, who shows (repeatedly) that there is no self, no individual subject, apart from the transcendental subject (i.e., the interpretive

79. And if he had, he would no doubt quickly have proceeded to cite most (if not all) of the following: P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* (1966); P. BOURDIEU, *THE LOGIC OF PRACTICE* (R. Nice trans. 1990); S. FISH, *DOING WHAT COMES NATURALLY*, *supra* note 7; M. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* (1972); C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973); C. GEERTZ, *LOCAL KNOWLEDGE* (1983); N. GOODMAN, *WAYS OF WORLDMAKING* (1978); D. HERZOG, *WITHOUT FOUNDATIONS: JUSTIFICATION IN POLITICAL THEORY* (1985); R. RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* (1979).

80. Here, for instance, he comes very close to saying just that:

It seemed to me, therefore, to be possible to take such a branch of the law as Contracts, for example, and without exceeding comparatively moderate limits, to select, classify, and arrange all the cases which had contributed in any important degree to the growth, development, or establishment of any of its essential doctrines.

C. LANGDELL, *supra* note 19, at ix.

communities) that has constructed this individual subject.<sup>81</sup> In other words, the transcendental subject strategy does not so much deny the existence of an individual subject as it fashions and refashions this individual subject in its own image.<sup>82</sup>

So when Steve Winter argues against Stanley Fish that self-consciousness is not only possible but helpful in understanding law and our selves,<sup>83</sup> Stanley Fish could nonetheless rightfully respond that there is no self-consciousness possible except within the sort of interpretive communities that enable the self-consciousness move to be made and to be represented as such.<sup>84</sup> This is to say (to simulate the prose of Stanley Fish) that self-consciousness is never possible because there is never any self apart from its interpretive community to be self-conscious about. Now, none of this is to say that Steve Winter is wrong. On the contrary, Steve Winter is right. This is just to show how this recuperative awesome re-envelopment, this capacious nesting move really works. First, one identifies within someone else's discourse those aspects that confirm one's own discourse. Then one highlights these aspects—bringing them to the foreground. And then one re-envelops<sup>85</sup> the other's discourse within one's own. It's very democratic,<sup>86</sup> very postmodern, very easy, and almost always very unconscious.

Now it is in precisely this way—by means of the recuperative awe-

81. Stanley Fish, for example, notes:

[B]eing situated not only means that one cannot achieve a distance on one's beliefs, but that one's beliefs do not relax their hold because one "knows" that they are local and not universal. This in turn means that even someone . . . like me . . . who is firmly convinced of the circumstantiality of his convictions will nevertheless experience those convictions as universally, not locally, true.

S. FISH, *DOING WHAT COMES NATURALLY*, *supra* note 7, at 467.

82. Proponents of self-consciousness often seem to be very confident that they are talking about something that is self-evident. But this sense that self-consciousness is easily distinguishable from consciousness of scene is attributable to the conventionally-embedded hypostatization of the self and its separation from scene. In other words, our conventional cultural linguistic forms for reporting instances of self-consciousness are far less opaque and much more precise than an adequate report of the experience itself would produce.

Consider that when you actually start thinking about what you are thinking about, it's not at all self-evident that what you are thinking about is the self: "Oh, this is the way I think about things. No—on further reflection, if I really push self-consciousness, it becomes clear that it's not really me who is thinking of things that way. It's also the way my culture, my discourse, and my computer lead me(?) to think about things."

83. Winter, *Bull Durham*, *supra* note 7, at 681-91.

84. This is close to what Stanley Fish actually does say: Self-consciousness for Fish "is impossible because there is no action or motion of the self that exists apart from the prevailing realm of purposes and therefore no way of achieving distance from that realm." S. FISH, *DOING WHAT COMES NATURALLY*, *supra* note 7, at 464.

85. (analytically, grammatically, semantically, syntactically, etymologically, metaphorically, performatively, constatively, etc.).

86. Not only can everyone do it—but more than one person can actually win (at least theoretically).

some re-envelopment, the capacious nesting move—that the transcendental-subject strategy sustains and defends itself against the disruptive questioning of an errant individual subject. And the truth as well as the significance of the point becomes obvious as one takes note that God himself (the all-time champion transcendental subject) was, according to transcendentially authoritative reports, capable of recuperating and recasting in his own image as severe a risk of deviance as Job. Indeed, the story of Job is the ultimate in the demonstration of the power of the all-time transcendental subject to re-appropriate even the most serious diremptions between the individual and the transcendental subject.

Displacing an operative transcendental subject is thus very hard work. How then are operative transcendental subjects displaced? Certainly the exploitation of diremptions between the individual and the transcendental subject are helpful. But there is more. Again, Langdell furnishes an excellent example.

Soon after Langdell tells us in his celebrated preface that doctrines are constantly making their “appearance” in “many different guises” thus causing “much misapprehension,” he proposes a solution: “If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.”<sup>87</sup> This taxonomic solution entails the objectification of law, the transcendental subject. In some less secular religions, such an act would be understood as crudely reductive, de-spiritualizing, and thus sacrilegious.<sup>88</sup> But Langdell goes ahead and does it: as Langdell says, “Law, considered as a science, consists of certain principles and doctrines.”<sup>89</sup> In this sentence, law has already been reduced to identifiable, discrete (though still living) entities.<sup>90</sup> It is this objectification and partitioning of the transcendental subject into *identifiable*, *discrete*, and *causally related* sub-parts that allow Langdellian formalism to be what it is.<sup>91</sup>

In Langdell’s brief article on equity jurisdiction, the partitioning action starts early—on the very first page:

87. C. LANGDELL, *supra* note 19, at ix.

88. No graven images. See, e.g., *Deuteronomy* 5:8.

89. C. LANGDELL, *supra* note 19, at viii.

90. This representation of law in terms of entities may seem unexceptionable to the reader, but it is quite significant both in the kind of vision law enabled as well as the kind of vision law excluded. To understand law as consisting of propositional entities creates entirely different opportunities and problems than understanding law as a *process* as in Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), a *field of forces* as in Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950), and so on. For a lucid demonstration of this point, see Winter, *supra* note 28, at 1105.

91. G. LAKOFF & M. JOHNSON, *supra* note 28, at 25-32. The metaphorical representation of [—] “as an entity allows us to refer to it, quantify it, identify a particular aspect of it, see it as a cause. . . . Ontological metaphors like this are necessary for even attempting to deal rationally with our experiences.” *Id.* at 26.

Rights are either absolute or relative. Absolute rights are such as do not imply any correlative duties. Relative rights are such as do imply correlative duties . . . . Relative rights, as well as their correlative duties, are called obligations; *i.e.*, we have but one word for both the right and its correlative duty. The creation of every obligation, *therefore*, is the creation of both a right and a duty . . . .<sup>92</sup>

What is interesting in Langdell's objectification of the transcendental subject is that no glaring internal conflict appears to arise from his simultaneous treatment of law as a transcendental subject and as an objectified taxonomy. And the reason this is so is that, within the Langdellian universe, the transcendental subject is itself in charge of its own self-objectification. Rules, doctrines, and principles are identified and described in object-form, but it is almost always the law (the rules, doctrines, and principles) that determines, in the manner of a transcendental subject, the identity and meaning of *other* doctrines. Rules, doctrines, and principles act upon each other, giving each other the significance they have. This, of course, is precisely the awesome recuperative-envelopment-nesting strategy described above: the transcendental subject effects its own transformation into an objectified form.

There is a certain elegance to understanding Langdellian formalism as shaped by a transcendental subject strategy. This understanding seems to secure everything we want in Langdellian formalism.<sup>93</sup> In fact, this is such a secure representation of Langdellian formalism that exactly how this transcendental ordering breaks down becomes a real question.

To answer this question we must return to what seemed to be the perfectly choreographed doctrinal movements of Langdellian formalism; a world in which doctrines themselves operated on each other with only the slightest assistance from the individual subject. Watch the doctrinal dance at work. Langdell writes:

With respect to the modes in which they are created, equitable obligations differ widely from legal obligations. Most legal obligations are created by means of contracts . . . . But a purely equitable obligation cannot be made in that way. . . .

[E]quity cannot annex an obligation to a promise or a covenant to which the law refuses to annex any obligation. In a word, there is properly no such thing as an equitable promise or covenant, and no such thing as an equitable contract. The reason, *therefore*, why a contract cannot result in creating a purely equitable obligation is,

92. Langdell, *supra* note 12, at 55.

93. And as compared to a transcendental object strategy, a transcendental subject strategy is more complete. The main aporia in this account lies precisely in tracing the ways in which the transcendental subject objectifies itself. Just how does this occur? How is it that law comes to be crystallized into this particular matrix of rules, doctrine, and principles? How do these object-entities come to be?

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that a contract always results in creating a legal obligation.<sup>94</sup>

To summarize then—going backward from the conclusion:<sup>95</sup> Contracts cannot create purely equitable considerations because contracts can only create legal obligations. And why is that? Because purely equitable obligations cannot be created in the same manner as legal obligations. And why is that? Well, because purely equitable obligations cannot be created by contract, whereas legal obligations can. Aaaaaah.<sup>96</sup> Got it? Well, even if you don't, the important thing to note is that Langdell's definitions and doctrines *act* upon each other to give each other content and meaning. It is generally thought improper to say that doctrines "im-pact" upon other doctrines, but in the Langdellian world they really do.

The transcendental subject is in charge of everything, including itself—its own identity, its own meaning, its own doctrinal elaboration. Now, in one sense, this is a very stable system. It is very stable because it is perfectly circular. That, of course, is also why it falls apart. Felix Cohen tells the story as follows:

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.<sup>97</sup>

Now it's possible, particularly to the extent we are under the influence of American, Anglo-Saxon academic philosophy or any other form of rationalist practice, to understand Cohen's argument about circularity here as a logical objection. But there is a far richer understanding of Cohen's argument. The problem is not circularity per se, but the very *shallowness* of the circularity Cohen reveals. The Langdellian formalism fails, not because it has committed a logical error, but because it ceases to tell us very much of what we want to know. It's as if the Langdellian transcendental subject had been revealed to be not merely a sham, not just a fraud, but something much more serious: an intellectual lightweight. The problem with transcendental subject formalism is that it stops speaking to us. In Felix Cohen's thought, the transcendental subject stopped speaking to him when the system was revealed to be a rather *shallow*, self-referential system. Indeed, it is at that point that the system itself becomes identifiable as a transcendental subject—*i.e.*, one that no longer speaks, but whose own internal structure can now be dissected in a postmortem.

94. Langdell, *supra* note 12, at 64-65 (emphasis added) (citation omitted).

95. Actually, it could go either way.

96. Didn't you always suspect it was something like that?

97. Cohen, *supra* note 50, at 820.

At this point we can begin to understand (just as Felix Cohen did) the *shallow*, self-referential character of the particular transcendental subject formalism that we are operating under. Phenomenologically, this breakdown of the transcendental subject can be experienced in various ways. It can be experienced with contempt and impatience, as in the case of Felix Cohen.<sup>98</sup> It can also be experienced in more insecure terms as a fear of nihilism.<sup>99</sup> For the participants, the breakdown of a transcendental subject formalism is thus experienced as a loss of meaning and significance. Or it can be experienced as a kind of boredom—the sense that the old moves are being replayed without producing anything new.<sup>100</sup>

Now, it is in precisely the same ways—with the same losses of meaning and the same affective experiences—that the problem of the subject arises in the contemporary modes of legal thought that we are about to consider. This is no accident. The various modes of contemporary legal thought can all be understood as variations on the transcendental subject strategy, the transcendental object strategy, or the disintegration of these strategies.<sup>101</sup>

I would like to move beyond the Langdellian scene.<sup>102</sup> But first there's a lingering question that may have to be answered: *Which is it?* Is Langdellian formalism a kind of transcendental subject strategy or a kind of transcendental object strategy? While this question arises predictably enough, it is not a terribly interesting or helpful one.<sup>103</sup> You will

98. See Cohen, *supra* note 90, at 242 (arguing that "so far the logicians, having concentrated their vision on the logical heavens where words continue at rest and mean the same thing forever, have not fully explored the imperfect efforts of human beings to communicate with each other").

99. See Fiss, *supra* note 32, at 746; (explaining that "literary critics are so unconstrained that no claim of objectivity can be made for any of their interpretations . . ."); Carrington, *Of Law and the River*, 34 J. LEG. EDUC. 222, 227 (1984) ("[P]rofessionalism and intellectual courage of lawyers . . . cannot abide . . . the embrace of nihilism and its lessons that who decides is everything and principle nothing but cosmetic.").

100. Schlag, *Normative and Nowhere to Go*, *supra* note 7, at 173-80 (noting that normative legal thought, even in its reaction to postmodernism, functions as a well-internalized routine).

101. Indeed, the coming to consciousness of the problem of the subject within the various modes of legal thought can be seen as an increasingly sophisticated awareness of the extent to which they already depend upon the presence of a satisfactory account of the transcendental subject and an increasingly sophisticated awareness of the extent to which such dependence, while unavoidable, is itself always and already insufficient.

102. Wouldn't we all?

103. If Langdell and his formalist confreres had been philosophically inclined, perhaps they might have experienced a need to answer this question. As it is, they didn't. Suppose the question is asked of us. How would we answer it?

It is extremely unlikely that we can understand Langdellian formalism as resting on a transcendental subject. For one thing, the intellectual tradition that underwrites this position was and is foreign to American culture. For another, Langdell's very insistence on the science metaphors, on the "empirical" observation of case law, on the rejection of natural law (a natural jurisprudential embodiment for the transcendental subject) make it difficult for us to understand Langdellian formalism as grounded in a transcendental subject.

For us to try to understand Langdellian formalism as grounded in a transcendental order of the

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notice that the asking of *this* question (rather than others) repeats what we have just revealed as the embedded objectivist orientation of American legal thought. In asking *this* question—"So which it?"—attention is directed again towards the *object* part of our inquiry—namely, on determining the identity of Langdellian formalism. Correspondingly, with the asking of *this* question, we are drawn away from the *subject* part of the inquiry—namely, away from questioning *our* use of transcendental subject and transcendental object strategies to make sense of Langdellian formalism.

If I stress this ironic point, it is to give just one more example of the way we are primed to focus on whatever occupies the conventional space of objectivity and to simultaneously elide the problem of the subject. Indeed, this brief survey of the subject-object relations of Langdellian formalism has helped reveal the ways in which our own objectivist tendencies lead us to eclipse the "space" of the subject. Our intellectual conventions in legal thought repeatedly direct our attention toward that which is already represented or easily representable as an object-form. It is "there," in the object-form, that we unconsciously expect to find legal

object is also difficult. The imperial pose of the Langdellian scholar looms too large for us to accept at face value his discursive self-image as some sort of self-effaced individual subject timidly observing the objects of law at work. But this transcendental object understanding is disabled precisely because it doesn't make sense for us. We cannot start with the object (of law) and move from there to the subject (us). In fact, we cannot even start with the object, period. What can we do—take the object's point of view? That's a projection of the categories of the subject onto the object.

Perhaps, then, we can understand Langdellian formalism as a kind of philosophically inelegant jurisprudence resting at times on a transcendental subject and at other times on a transcendental object. Or we have a transcendental subject objectified or a transcendental object subjectified.

Now, we could do any of these things. But I do not think answering the question "So which is it?" in the way that question is posed is particularly helpful. Rather, I think the reason we are having difficulties finding suitable answers to the question as posed is that the question itself presupposes that the transcendental subject and the transcendental object are *substantive positions* that underwrite Langdellian formalism in the same manner in which academic philosophy usually understands its constructions to underwrite other practices.

Looking at things in such a way—that is, in the manner of academic philosophy—is of limited help. If, after the manner of academic philosophy, the transcendental subject and the transcendental object are understood to be two competing positions, two competing ideas of subject-object relations, then we will indeed have difficulty understanding how it is that Langdellian formalism could have combined both and still sustained itself as a viable *formalism*. But if the transcendental subject and the transcendental object moves are considered instead to be rhetorical strategies, then the apparent contradiction dissipates, not just as a rhetorical matter, but as a philosophical one. If these are rhetorics of argument, strategies of representation, then what before seemed, in the rationalist representation of academic philosophy, to be an unacceptable contradiction, falls away. The contradiction falls away because the transcendental object and the transcendental subject become rhetorical moves—moves that the participants may or may not be conscious of.

Now, there's much to be said for this understanding of the matter. For one thing, it helps make sense of what seem to be both objectivist and subjectivist tendencies in Langdellian transcendentalism. For another, it actually conforms to the lines of attack used by realists such as Felix Cohen against the Langdellian formalists. Cohen advanced both a hypostatization critique aimed at objectivism and a circularity critique aimed at the subjectivist or animistic character of Langdellian thought.

meaning and legal significance, as well as legal problems—the stuff of legal meaning and the stuff of critique.

What we have revealed thus far, however, are possibilities for a new and different kind of jurisprudential intellectual inquiry—an inquiry into the kind of subject pre-supposed by the various schools of legal thought. Interestingly, this new possibility for inquiry also enables a different kind of jurisprudential “critique”—one which would seek to criticize a school of thought, not in terms of the truth, adequacy, or normative appeal of its representations of or in the objective realm, but rather in terms of the kind of subject that the school of thought presupposes or celebrates.

But in this Article, it is not critique that matters. Instead, given that the transcendental object and the transcendental subject strategies of Langdellian formalism have broken down, the question is, “What happens next?”

Meanwhile—onward to disintegration.

#### *D. Learning to Do Without: When the Transcendentals Are Out to Lunch*

Sometimes these object-forms and subject-forms seem to float around in no apparent order or pattern. This is a moment of *disintegration*. Sometimes the subject-forms and object-forms seem to coalesce in some grander pattern with operant or generative regularities. Here we can speak of *reconstruction*. When a previous reconstruction breaks down and legal thinkers seek to escape the chaos of disintegration and at the same time avoid the demonstrable falsity of reconstruction, they use the strategy of *collapse*: an arrangement of subject- and object-forms that eschews strong specifications of the subject-object relation. These three moments are not necessarily mutually exclusive. Each can, in various ways, be subsumed within the others spatially (e.g., partitions in a field), temporally (e.g., cycles), and in various nesting relationships (e.g., a collapse strategy that contains moments of reconstruction).

1. *Disintegration*.—We see, for instance, the law as object-form evidenced in frequent ontological assertions that there exist such *things* as “the framers’ intent” or “the plain meaning of a statute” or “the positive law” or even “the constitution.”<sup>104</sup> Likewise, the law as object-form remains the principal image that informs such crucial legal operations as legal analysis (i.e., breaking the whole into its parts), legal synthesis (i.e., putting the parts together into a whole), and so on. The law as object-

104. See, e.g., Grey, *supra* note 25, at 13-17 (discussing the constitution as an “instrument”).

form is prevalent among such legal thinkers—even those who try to reject it on theoretical or philosophical grounds.

The prevalence of the object-form of law is supported by the metaphorical and syntactical structure of language; they combine to produce what has been called the conventional metaphor: *ideas are objects*.<sup>105</sup> In turn, this metaphor subconsciously structures the manner in which we deal with ideas. To the extent that we subconsciously treat ideas as objects, we perform the same kind of operations on these ideas that we typically perform on objects. Thus, we end up treating ideas as if they were substantial, stable, unified and divisible. For instance, the conventional notion that the text has “a plain meaning” is underwritten by the projection of object-like characteristics on communicative activity: its reduction to a text, the text’s further reduction to a series of object-like features including substantiality, stability, unity, and so on. In the ALI Restatements and in Gilbert’s, this objectification finds further mimetic expression in the large block letters used to announce important doctrines—the big block letters suggesting solidity and permanence.<sup>106</sup>

The ease with which we can recognize law as object-forms is largely attributable to our own prereflective constitution as legal thinkers. Our own prereflective constitution situates us (you and me) as individual subjects who are reading or authoring objective statements of law. Because we already implicitly understand ourselves to be occupying the space of the subject, this prereflective constitution makes it more difficult for us to apprehend the moments when the law is cast as a subject-form rather than as an object-form.

Yet the law as subject-form is very much a part of our legal discourse. The law as subject-form is reflected, for instance, in the hopeful and optimistic view that law adapts and grows, that it confers meaning and value on our practices. As Justice Brandeis said, “Government is

105. The law-as-object vision is principally a cognitive or linguistic phenomenon—not principally a philosophical or an interpretive one. Indeed, recent work in cognitive science has identified the ways in which our cognitive and linguistic structures tend to produce the prototypical treatment of ideas as objects. To mention but one example, there is a persistent tendency to think of meaning as something that is *in* the text, somehow “contained” in words. This tendency, known as the “conduit metaphor,” tends to transform meaning into a thing contained by the text-container. The net effect is to endow the meaning-as-object with all the usual qualities of object such as substantiality, stability, etc. Reddy, *The Conduit Metaphor—A Case of Frame Conflict in Our Language About Language*, in METAPHOR AND THOUGHT 284 (A. Ortony ed. 1979). See also Schlag, “*Le Hors de Texte*,” *supra* note 7, at 1634 (noting that “traditional legal discourse has already framed its own form as . . . a container for ‘substantive’ thought”); Winter, *Death is the Mother of Metaphor*, 105 HARV. L. REV. (forthcoming 1991).

106. See, e.g., RESTATEMENT (SECOND) OF TORTS § 17 (1959) (featuring headings with large, block lettering); J. CHOPER & M. EISENBERG, CORPORATIONS (Gilbert 1983) § 65 (featuring a similar format).

the potent, the omnipresent teacher."<sup>107</sup> For instance, the notion that law must "keep up with the times" or the view that in time "law works itself pure," both originate in the law-as-subject vision. The widespread and largely unexamined assumption that there is and must be some connection between what law is and what it ought to be (e.g., just, right, or good) is typically sustained by the ascription of subject-like characteristics to the law, such as will, direction, and motivation. Indeed, much like any other subject, the law arrives on the scene of contemporary legal thought already normatively charged and already inherently meaningful.

On the cognitive and linguistic plane, the law-as-subject strategy is at once signalled and constituted by the deployment of the "meat-and-bones" imagery of the animated organism. As Felix Frankfurter said, for example, "law isn't something that exists as a closed system within itself, but draws its juices from life."<sup>108</sup> Frankfurter further noted that the "common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign . . . ."<sup>109</sup> In the law-as-subject vision, the law is often presented as a traveler on a journey.<sup>110</sup> The law speaks with many voices.<sup>111</sup> Etc., etc., etc.

Much of the legal discourse left after the collapse of Langdellianism is steeped in both the subject-form and the object-form. The objectification of law is underwritten largely by metaphysical metaphors, while the subjectification of law is underwritten largely by metabiological metaphors. Sometimes these object-forms and subject-forms are simply floating around in no apparent pattern, unnoticed and unremarkable. To describe law in this way is to describe law in a moment of disintegration.

2. *Reconstruction.*—At some times, the subject-forms and object-forms of law appear to crystallize into different arrangements that are actually patterned. For the sake of nomenclature, we can speak of this as a moment of reconstruction. An example of this reconstruction strategy is found in the great and grand recursive dispute over whether ours is "a machine that will work of itself" or "a living constitution." As Morton Horwitz put it:

[T]he issue is sometimes described by historians as an argument between an eighteenth century Newtonian Constitution and a nineteenth century Darwinian Constitution. The Newtonian view of

107. *Olmstead v. United States*, 277 U.S. 438, 485 (1928).

108. H. PHILLIPS, *FELIX FRANKFURTER REMINISCES* 168 (1960).

109. *Southern Pac. R.R. v. Jensen*, 244 U.S. 205, 222 (1916) (Holmes, J., dissenting).

110. See Holmes, *supra* note 90.

111. See Yudof, *'Tea at the Palaz of Hoon': The Human Voice in Legal Rights*, 66 TEXAS L. REV. 589 (1988).

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the universe was of a perfect machine set in motion by a deist God at the beginning of time. Everything subsequent was determined by the operation of physical laws, present at the beginning and themselves never changing. The Newtonian Constitution corresponded to these physical laws, and like them was meant to last for all time. The Newtonian world view of the framers certainly encouraged this sort of imagery. By contrast, the Darwinian ideal of the nineteenth century, the idea of evolution, supposed the unfolding of gradual but inevitable change in the Constitution. As society changed, the Constitution would also change, adapting to the environment in which it functioned.<sup>112</sup>

This description of the Newtonian and Darwinian constitution reconstructs the floating subject-form and object-form metaphors into patterned arrangements. In contemporary legal thought, we can see instances of this sort of reconstruction in the opposition of liberal pluralist theories of constitutional decision making (object-form dominance) to republican dialogic theories of constitutional decision making (subject-form dominance).<sup>113</sup> We can also see this reconstruction at work in the efforts to describe and organize legal thought along a "structuralist strand" (object-form dominance) and a "phenomenological subjectivist strand" (subject-form dominance).<sup>114</sup> More broadly we can see this pattern of reconstruction at work in the conflicting positions of "law-and-economics and its satellites on the one hand [object-form dominance] and what might loosely be called 'cultural legal studies' on the other [subject-form dominance]."<sup>115</sup>

Reconstruction never quite manages to entirely restabilize subject-object relations. The reconstruction always seems to depend on some subject-object relation that is transverse or askew to the attempted reconstruction. This is easiest to see in the simple visions of the Darwinian and Newtonian constitutions above. The objectivist Newtonian representation implicitly relies on a suppressed subject. The subjectivist Darwinian representation of the Constitution as an organic form relies on a suppressed object. Indeed, the objectivist Newtonian vision is "set in motion" by an unspecified "God," whereas change in the subjectivist Darwinian vision is constrained and limited by an unspecified changing "society" or social "environment." The problem of the subject arises when "God" stops speaking and when it is recognized that some subject

112. Horwitz, *The Meaning of the Bork Nomination in American Constitutional History*, 50 U. PITT. L. REV. 655, 657 (1989).

113. See, e.g., Michelman, *Law's Republic*, 97 YALE L.J. 1493, 1503 (1988) (contrasting the roles that the individual plays under the republican dialogic model and the liberal pluralist model).

114. See *infra* text accompanying notes 272-73.

115. Grey, *Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory*, 63 S. CAL. L. REV. 1569, 1571 (1990).

is required to specify that previously unspecified social "environment." What we have at this point is the *disintegration* of the transcendentals.

3. *Collapse*.—Collapse is the attempt to escape both disintegration and reconstruction through the collapse of subject-object relations. In order to maintain reconstruction, legal thought must deny the extent to which the subject-form and the object-form depend on each other. When legal thought can no longer sustain this denial, it either falls back into disintegration or emerges in a collapse strategy.

In the collapse strategy, legal meaning is located neither in the subject nor in the object, but in some *unspecified* synthesis, circumvention, mediation, or transcendence of the subject-object relation.<sup>116</sup> The appeal of this strategy for both naive and sophisticated legal thought lies in its frank admission that legal meaning is simply too complex to cabin within any specific articulation of the subject-object relation.

Although the collapse strategy is obviously open to the charge of mysticism,<sup>1</sup> its importance in shaping legal thought should not be underestimated. The collapse strategy is often exemplified in those approaches that (in essence) equate law with wisdom, sound judgment, practical reason, craft, or convention.<sup>117</sup> All such concepts of collapse must remain unspecified if they are to serve the collapse strategy. Any approach that claims to have overcome the subject-object dichotomy will resort frequently to at least one such unspecified term. Indeed, to the extent that the content or structure of any these collapse concepts are specified, they risk lapsing back into some sort of reconstruction or disintegration. So the critical concepts of collapse must remain virtually empty. Typically, the concepts of collapse are at once extremely abstract (as opposed to specific) and extremely earthy (as opposed to technical). The concepts of collapse often operate as theoretical unmentionables—those wonderful spaces and gaps that cannot be specified but can be named and in the naming apparently serve to resolve all the difficulties that the theory may have had.<sup>118</sup> Here, the concepts of collapse mysteriously serve to secure legal meaning and moral value. It is in the spaces described as wisdom, sound judgment, practical reason, craft, or that professional *je ne sais quoi* that legal meaning and moral value are secured.

116. In his foreword to this symposium, Steve Winter also uses the term "collapse" to describe a particular state of subject-object relations. Our uses of the term, "collapse," are not the same. See Winter, *Foreword: On Building Houses*, 69 TEXAS L. REV. 1595, 1610 (1991).

117. For a quick summary and citations to the literature, see Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI.-KENT L. REV. 1001, 1012-13 (1988).

118. For an example of a theoretical unmentionable, see *infra* text accompanying note 148 (suggesting that Owen Fiss's "disciplining rules" function as a theoretical unmentionable).

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The concepts of collapse work to secure legal meaning because they authorize whatever combination of subject-form and object-form that happens to be in place. That, of course, is also the undoing of the collapse strategy. At some point, the need to secure legal meaning or moral value against some perversion requires that the concepts of collapse be given explicit content or structure. And at that point we are back to some form of reconstruction.

Most of contemporary legal thought exists in this state of collapse. This means that it has no overarching structure specifying the subject-object relation. More specifically, the overarching structure is itself a theoretical unmentionable. Within collapsed legal thought, subject and object relations remain unregulated—except to the extent that any strong specification is disallowed. This means that virtually any sort of relation (except consciously specified relations) can occur within collapsed legal thought, including:

Rapid shifts between subjectification and objectification,  
interpenetration of subject by object (or vice versa),  
collapsed conceptualizations,  
and so on.

Any sort of relations (except consciously specified relations) are authorized in collapsed legal thought, but this does not imply that collapsed legal thought is transparently disorderly or aesthetically displeasing. On the contrary, it can be (and often is) extremely graceful in negotiating its own shifts, penetrations, and collapse—so much so that it is difficult for the participants to even perceive that there has been anything like collapse.<sup>119</sup>

Most sophisticated legal thought strives very hard to present itself as collapsed: that is, as refusing to specify any strong subject-object relation. The current prevalence of the collapse strategy is expressed in the work of Ronald Dworkin and confirmed by the popularity of his theories.<sup>120</sup> Moreover, much sophisticated legal thought goes to great lengths to present itself as antifoundational, nonfoundational, situational, situated, contextualist, pragmatic, antiformalist, anticonceptualist, and interpretive. Sophisticated legal thought will generally attempt to privilege hermeneutics over epistemology and, in turn, to privilege epistemology

119. See Kennedy, *A Rotation In Contemporary Legal Scholarship*, in *CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE* 353 (D. Trubek & C. Joerges eds. 1989).

120. I have previously tried to show how Dworkin's theories work as an elegant and sophisticated rhetorical structure that gains content and meaning through the projection and displacement of the legal reader's beliefs onto the Dworkinian text and the Herculean judge. See Schlag, "*Le Hors de Texte*," *supra* note 7, at 1660-64; Schlag, *Politics of Form*, *supra* note 7, at 875.

over ontology.<sup>121</sup> This methodological distancing from ontology serves to defuse, delay, and to some extent trivialize the reckoning with the subject-object relation. Indeed, given sufficient methodological sophistication, the interpretive and the epistemological turn can succeed in postponing any articulation of a strong specification of the subject-object relation.

The problem with collapse, however, is that it cannot locate or secure meaning or value—neither theoretically nor practically. Collapse strategies thus seldom serve the instrumental, political, or normative goals of legal thinkers. Even as legal thinkers practice the collapse strategy, they are engaged in some sort of reconstruction. Indeed, in order to stabilize meaning and value, collapse strategies typically attempt a covert deployment of reconstruction.<sup>122</sup>

## II. Rules of Law (a Whole Lot of Them)

“The genius of the common law does not lend itself to codification . . . .”<sup>123</sup>

—Joseph H. Beale

Initially, the rule-of-law approach is best understood as a kind of collapse strategy: an abandonment of the attempt to situate legal meaning entirely in the object or entirely in the subject. Both of these transcendental moves are eschewed, and any specification of subject-object relations is studiously avoided.

But how is it possible to effect a collapse? How is it possible to avoid specifying subject-object relations and still present an intellectually compelling vision of law? The rule-of-law approach accomplishes this task with the rubric of *craft*—a professional way of doing things that cannot be reduced to any formula, algorithm, or theory.<sup>124</sup> The notion of craft is at once the image and the rhetorical mechanism that enables rule-

121. See Moore, *supra* note 27, at 902.

122. See, e.g., *infra* text accompanying notes 145-53 (describing how rule-of-law thinkers use the strategies of collapse and reconstruction simultaneously).

123.

The increasing mass of decisions, however, in America has called for some palliative, and in 1923 the American Law Institute was founded for the purpose of restating the effect of the law as it was found to be at the time of restatement.

1 J. BEALE, *supra* note 31, at 43.

124. It is, however, difficult to identify the core jurisprudential commitments of this school of thought because these core commitments are rarely expressed in theoretical form. This is no accident: rule-of-law thinkers are typically suspicious of theory, and, thus, few have tried to articulate the theoretical structure of their own practices. Typically, this is not the sort of project that would interest rule-of-law thinkers. For them, the theoretical enterprise is almost always geared toward reducing law to some sort of algorithm, model, or paradigm, and they think that law cannot be

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of-law thinkers to avoid dealing specifically and explicitly with the problem of the subject and its analogues.

The craft notion allows rule-of-law thinkers to maintain a desired ambiguity in answering the question of whether law is principally, or even usually, theory or practice, universal or contextual, immanent or transcendent, and so on. Precisely because the rule-of-law approach represents law as a craft—as a way of doing things—the approach is simultaneously easy to recognize in gestalt terms but difficult to identify in terms of its constitutive jurisprudential commitments.

We will start with the gestalt. Rule-of-law thinkers tend to think of law as doctrines, principles, and policies properly understood—that is to say, understood in the manner of competent members of the legal profession.<sup>125</sup> Within the legal community, these concepts have integrity, identity, and a certain constancy, all of which enable sound and roughly predictable decision making. Typically, these doctrines, principles, and policies are represented in object-form—with identity, constancy, and boundedness, along with a location and presence within the field of other related doctrines, principles, and policies. For rule-of-law thinkers, the doctrines, principles, and policies thus have an object-like character. They are there to be read and can be read with the accepted procedures, methods, and norms of legal thinkers.

For rule-of-law thinkers, law “works.” What’s more, it works fairly well. Rule-of-law thinkers hold that the legal institutions of the United States, the prevailing mode of legal reasoning, the legal decisions actually rendered are all, by and large, pretty good. For these kinds of legal thinkers, jurisprudential problems such as illegitimacy, indeterminacy, or incoherence are largely illusory. They attribute these jurisprudential problems to misguided attempts to impose from the outside—from the economics department, the philosophy department, or the *Quartier Latin*—a series of intellectual constructs and criteria that are foreign to law properly understood. The foreign imports are seen as inappropriate in either of two ways. They may be seen as inappropriate because they conflict with some important, explicit aspect of law properly understood or because they are crudely reductivist, meaning they fail to take into account all of law properly understood.

These responses are very convincing to the rule-of-law thinker. They are convincing precisely because the rule-of-law thinker always and

reduced to such one-dimensional representations. Rather, law is not capable of sound or accurate representation in theoretical form because it is much more like a craft.

125. See 1 J. BEALE, *supra* note 31, at 40-41; see also *supra* text accompanying note 37 (quoting same).

already understands himself as immersed *within* the rule of law and thus as competent to identify the character and composition of law properly understood. Jurisprudentially, this authority to make determinations about what is and what is not law properly understood is established and defended by the metaphor of inside and outside. The rule-of-law thinker asserts that there is an internal perspective to law that is distinct from the external perspective to law. The internal perspective is asserted to be that of the judge, with whom the rule-of-law thinker identifies implicitly. The external perspective is that of other social observers, such as sociologists and moral philosophers. The effectuation and maintenance of this distinction between the internal and external perspective creates a domain—the internal perspective on the rule of law—that is autonomous from the rest of social life and that is implicitly the rightful dominion of the rule-of-law thinker and his projected alter ego, the judge. The space of the external perspective serves as a rhetorical dumping ground for misguided, irrelevant, and threatening lines of inquiry about the rule of law.<sup>126</sup> Although he would never use this expression, the rule-of-law thinker understands himself to be a “privileged reader” of the law.

The interesting thing about rule-of-law thinkers is that while their most appealing self-image depends heavily on the notion that law is a craft, their scholarly and pedagogical interest has been centered almost exclusively on the articulation, improvement, and perfection of legal doctrine.<sup>127</sup> From law as craft to law as mastery-of-doctrine there is, of course, a certain reductive operation.<sup>128</sup> Yet rule-of-law thinkers are unlikely to experience this reductive operation as reductive at all. On the contrary—for rule-of-law thinkers there is an implicit and unquestioned equation of the craft of law with the mastery of doctrine and doctrinal argument. What this reductive equation avoids is the problem of the subject: what kind of subject—more precisely, what kind of person—is presupposed, is necessary to practice law as a craft? What kinds of moral virtues, talents, and faculties are required in order to make the law-as-craft vision not only plausible but actual in contemporary American culture? These are questions that typically do not arise for the rule-of-law thinkers.<sup>129</sup>

126. For an elaboration of how the internal-external distinction is used to construct, stabilize, and insulate The Law, see Schlag, *Politics of Form*, *supra* note 7, at 916-26.

127. There is a sense in which, although the rule-of-law thinkers have moved far beyond Langdell and the formalists, nonetheless the actual role they play in their scholarship and teaching has remained essentially the same. See *infra* text accompanying notes 412-15.

128. Cf. Winter, *Without Privilege*, 139 U. PA. L. REV. 1063, 1065 (1991) (noting pragmatists Margaret Jane Radin and Frank Michelman's characterization of the practice of normative legal thought as “a unitary, static, or invariable ‘thing,’ [rather than] a dynamic pattern of performance”).

129. In a related context Anthony Kronman has pointed out that the question of why one

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And yet, these are crucial questions for the rule-of-law vision. They are crucial because the rule-of-law thinker imagines that legal meaning is produced and secured by a well-trained professional who possesses the moral virtues and epistemic capacities necessary to read doctrines, principles, and policies in a manner that secures and preserves their true (or best) meaning. The capacity of the rule-of-law vision to avoid lapsing back into one or the other of the transcendental strategies of the legal formalist (*i.e.*, reconstruction) or disaggregating into an unappealing pile of fragmented doctrines and principles (*i.e.*, disintegration) depends precisely upon the continued presence on the legal scene of such a competent individual subject.

Sometimes the rule-of-law thinker answers this problem by suggesting that it is a nonproblem, that common sense or good judgment are sufficient to safeguard the rule-of-law enterprise and to assure that each doctrine, principle, or policy is used “correctly.” But there is something tendentious in such an approach. To say that good judgment allows the rule-of-law thinker to “know” which doctrine applies when is a bit too self-congratulatory. Is good judgment here something more than a nice name for arresting certain potentially problematic lines of inquiry? And if so, is “good judgment” all that different from “lack of imagination” or “intellectual mediocrity?”<sup>130</sup>

In one sense the rule-of-law thinker might try to put an end to these questions by answering, “No.” To put it in less charged terms: it may in some sense be correct to say that the rule of law “works” because the legally trained have acquired through years of arduous training serious perceptual and intellectual deficits and limitations. I would say that the rule of law “works” precisely to the extent that its practitioners have lost the ability to perceive and apprehend how law doesn’t “work.” Now, there is a sense in which this is undoubtedly true. But still, this quasi-

should care about being or becoming a lawyer has been largely ignored. Kronman, *Living in the Law*, 54 U. CHI. L. REV. 835, 837 (1987).

By contrast, Kronman recognizes that “[t]o practice law well requires not only a formal knowledge of the law (a knowledge of what the legal realists termed the ‘paper’ rules or rules ‘on the books’) but certain qualities of mind and temperament as well. Most lawyers recognize this . . .” *Id.* at 841 (footnote omitted).

130. My point here is not that distinctions cannot be drawn. Rather, my point is to show that the isolation of virtues from vices is not as easily achieved (theoretically or practically) as we are often led to believe. Consider the following list and ask yourself what enables practical or theoretical distinctions between

|               |     |                         |
|---------------|-----|-------------------------|
| common sense  | and | slavish conventionalism |
| good judgment | and | intellectual mediocrity |
| sympathy      | and | prejudice               |
| detachment    | and | lack of empathy         |
| intelligence  | and | shrewdness              |

Kantian move is not terribly satisfactory. A quasi-Kantian attempt to ground the rule-of-law vision on the intellectual limitations of its practitioners is problematic precisely to the extent that the legitimacy of the rule-of-law vision depends upon the pursuit of truth, justice, and reason.<sup>131</sup>

Recently, the intellectual heat on identifying a competent individual subject for the rule-of-law vision has been turned up. Intellectual currents—notably critical legal thought and moral and economic theory—have created great intellectual pressure to answer precisely this question. The moral and economic theorist's insistence on coherence and elegance in legal thought<sup>132</sup> and the critical insistence that rule-of-law thinking is recursively contradictory raise the stakes for rule-of-law thinkers in locating and reproducing a legal subject who can meet the theorist's intellectual requirements and rebuff the *cls* critique. What is needed here is an account of the subject that can make the view of law as a craft at once plausible and appealing. More than that: What is needed is a reconstitution of the kind of subject who could give the lie to the malaise so well described by David Kennedy:

Doctrinal argument seems increasingly complex and ever less able to determine outcomes. The normative moorings of the most basic doctrinal discourse by lawyers, scholars and judges seem infirm . . . . The more diverse the sphere of an argument's application, the thinner it seems to become until its manipulability becomes more apparent than its persuasive clout. The result has been ever more polarized arguments, ever more sophisticated doctrinal diversity, and ever more narrowly applicable holdings.<sup>133</sup>

What matters in David Kennedy's description is not whether doctrinal argument is or is not determinate or how much. Framed in that way, the question presupposes that what matters is the state of the law conceived in objectified terms. But that's precisely what is not in issue. What is in issue, and what is so well captured by David Kennedy's account, is that doctrinal argument is experienced as infirm, indeterminate, and manipulable. What is in issue is precisely the condition of the subject, that a large number of legal thinkers of David Kennedy's generation and

131. I don't discount the possibility of resurrecting some vision of the rule of law by appeal to a notion of institutionally inculcated intellectual and perceptual deficits. In some sense, the inculcation of intellectual and perceptual deficits is precisely what the first year of law school (with its rule-of-law orientation) accomplishes. But my sense is that to ground the rule-of-law vision in some sort of description of the socially instituted limitations of the legal thinker is likely to be normatively and aesthetically offensive to the academic practitioners of the rule-of-law vision.

132. See, e.g., Posner, *Utilitarianism, Economics and Legal Theory*, 8 J. LEGAL STUD. 103, 110 (1979).

133. Kennedy, *Critical Theory, Structuralism and Contemporary Legal Scholarship*, 21 NEW ENG. L. REV. 209, 211-12 (1986).

younger often (not always) experience doctrinal argument as infirm, indeterminate, and manipulable.

The problem here is the problem of the subject. Doctrinal legal argument simply increasingly fails to speak. And this state of affairs is not going to be repaired by complex arguments that Wittgenstein or William James can help underwrite the practice of doctrinal argument. Suppose they do. So what? Even if the Wittgensteinian or pragmatic arguments are correct, the connection still needs to be made between what those philosophical arguments tell us is true and the social condition or cognitive practices of the subject. Absent an extreme philosophical idealism (which would treat law as philosophy's colony), there is no reason to suppose that these kinds of philosophical arguments have any practical or desired effect on the practices or condition of the subject. Philosophical accounts drawn from Wittgenstein or William James can help fend off certain kinds of arguments launched against the rule-of-law vision.<sup>134</sup> But these philosophical accounts fail to reconstitute the legal subject as epistemically and normatively competent to realize the rule-of-law vision. It is not enough—not socially, rhetorically, or intellectually—simply to reaffirm that law is a craft and then invoke the support of Wittgenstein or William James. Law may very well be a craft or a language game, but that does not tell us *what kind* of craft or language game it is—or whether its self-representations are adequate or not. And the reason these arguments fail in this way (not in all ways) is that they don't address this question of the subject's competence. On the contrary, these accounts implicitly assume—they have to assume—an epistemically and normatively competent subject. In other words, these sorts of philosophical accounts assume, and thus assume away, precisely what is in question: the problem of the subject.

Now, in one sense, the rule-of-law vision has largely ignored this problem. For much of its history, the rule-of-law vision has simply presupposed the existence of such a competent subject. In its scholarship, for instance, the rule-of-law vision has quite systematically and unconsciously assumed the perspective of a normatively and epistemically competent agent and, in turn, reduced the agent to a certain idealized image of the appellate judge. Indeed, most rule-of-law scholarship is addressed to this idealized image of the appellate judge—an image that depicts appellate judges as important legal decision makers who operate more or

134. See Williams, *Critical Legal Studies: The Death of Transcendence and the Rise of the New Langdells*, 62 N.Y.U. L. REV. 429, 451-57, 492 (1987) (explaining that to Wittgenstein "concepts need not be secured against every possible contingency, nor need rules be developed to deal with all the situations that people can imagine").

less autonomously within a field of legal doctrine, but who are receptive to rational legal argument and committed to accepting the better argument.<sup>135</sup> The idealized appellate judge is one who does a "close reading" of the cases, venerates legal precedent, and rarely departs from the traditional pathways of conventional legal interpretation or reasoning. In this way, by presupposing the effective presence of such a competent agent, rule-of-law thinking has elided the problem of the subject.

Yet there is another crucial sense in which the rule-of-law vision has always been concerned with at least one version of the problem of the subject. Rule-of-law thinkers have been persistently concerned that, insofar as law as craft depends upon the individual subject, his or her actions and thoughts need to be constrained in some way. Typically, the problem of the subject first presents itself to the rule-of-law vision as the risk that some errant individual subject, some person occupying the critical role of judge, might fail to read the doctrine "correctly" and thus might "impose his personal values" on the rest of us.<sup>136</sup> This way of thinking about the problem of the subject is so deeply ingrained in rule-of-law thinkers that they are often incapable of or unwilling to think about the subject in any other way. Instead, they often subsume or reformulate other very different concerns about the problem of the subject within this problematic strategy of constraining the deviant autonomous individual subject.

Consider, for instance, Owen Fiss's reply to what he perceives as a threat of nihilism posed by critical legal thinkers and deconstructionists. He experiences and conceptualizes this threat, not so much as a loss of meaning, but as a loss of objectivity—a loss of constraint in legal interpretation.<sup>137</sup> Indeed, it is remarkable how passionately Fiss fears the loss of objective constraints on interpretation, how much he dreads the errancy of a deviant individual subject: "The nihilist would argue that for any text . . . there are any number of possible meanings, that interpretation consists of choosing one of those meanings, and that in this selection process the judge will inevitably express his own values. All law is masked power."<sup>138</sup>

For Fiss, then, the nihilist threat is personified in the radical individ-

135. Schlag, *Politics of Form*, *supra* note 7, at 848-52, 925; *see also supra* text accompanying notes 412-22 (describing the continued dominance of Langdellian formalism in defining the aesthetics of law, the jurisprudential field, and the role of the legal thinker).

136. *See, e.g.*, Fiss, *supra* note 32, at 751 (arguing that in a judicial decision, "[w]hat is being interpreted is a text, and the morality embodied in that text, not what individual people believe to be the good or right").

137. *See id.* at 742.

138. *Id.* at 741.

ual subjectivist—the one who, upon discovering that meaning is not located in the object, concludes that “anything goes.” This representation of the nihilist threat as radical individual subjectivism is central to Fiss’s text. And it is against this threat that Fiss sets out to reconstruct the site of legal meaning and moral value.<sup>139</sup>

Fiss begins his reconstruction with a frank admission of what it cannot accomplish. This retreat serves to moderate our expectations; a theoretical attempt to secure legal meaning and moral value cannot yield a wholly deterministic account of interpretation. This would be neither possible nor desirable. The only possible or desirable objectivity is a “bounded one.” Between the mechanistic determinism of the naive objectivist and the “anything goes” of the radical individual subjectivist, Fiss tries to reconstruct the middle ground of a “bounded objectivity.”<sup>140</sup>

Identifying himself as a “conventionalist,” Fiss nevertheless makes an *ontological* claim for the existence of both disciplining rules and the interpretive community. For Fiss, disciplining rules constrain the interpreter and serve as the standards by which to determine the validity of judicial interpretation. The authoritative character of these rules is secured by an interpretive community that considers the rules authoritative and that is itself constituted by these rules.

Examples of well-known disciplining rules are those insisting that one consult the framers’ intent, observe precedent, and justify decisions on universalizeable grounds.<sup>141</sup> These disciplining rules constrain interpretation. But they do not do so in the naive manner of the transcendental order of the object. They constrain inasmuch as they constitute the conditions for a community of intersubjective meaning—“the interpretive community.”<sup>142</sup> Accordingly, it is possible within that community to disagree about the meaning of the disciplining rules. In turn, the interpretive community imbues these disciplining rules with legitimacy. Further, unlike the naive transcendental subject vision, Fiss’s conception of the interpretive community is not a totalizing one. It remains possible

139. Fiss notes that he offers his disciplining rules to combat the excessive freedom Sanford Levinson bestows upon individual interpreters. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177, 186-87 (1985). Fiss also acknowledges that there is another version of nihilism. This version, rather than holding that texts can mean anything (*i.e.*, anything goes) holds instead that texts mean nothing at all. Fiss, *supra* note 32, at 763; *see also supra* text accompanying note 154 (explaining how Fiss’s main defense is framed in objectivist terms).

140. Fiss, *supra* note 32, at 745-46. Fiss further elaborates on the extreme positions and firmly places himself in the middle in Fiss, *supra* note 139, at 178-83.

141. Fiss, *supra* note 32, at 754.

142. *See id.* at 745 (“Rules are not rules unless they are authoritative, and that authority can only be conferred by a community. Accordingly, the disciplining rules that govern an interpretive activity must be seen as defining or demarcating an interpretive community consisting of those who recognize the rules as authoritative.”).

for individual interpreters to play an important personal role in the meaning-giving process.<sup>143</sup> The result is that “[w]e can find in this conceptualization a recognition of both the subjective and the objective.”<sup>144</sup> Or as he says elsewhere, “I conceive the interpretive process as a dynamic interaction between the text and the reader.”<sup>145</sup>

It is clear, then, that Fiss wants very much to reconcile the subject and the object in the medium of interpretation. But, at the same time, he wants very much to make legal interpretation constraining. The first desire leads him to the strategy of *collapse*, that is, the refusal to specify strong subject-object relations. The second desire—to constrain interpretation—leads him to a displacement and a *reconstruction*, one which re-situates the transcendental object in the disciplining rules and supplants the transcendental subject with the interpretive community.

In the collapse mode, the disciplining rules and the interpretive community—the object and the subject—stand in a reciprocally constitutive and constraining relation.<sup>146</sup> Without more, of course, this leaves the relation of subject and object rather unspecified.<sup>147</sup> Indeed, both disciplining rules and the interpretive community are concepts that appear to have substance and meaning, but in fact have very little. For instance, consider what Fiss says about disciplining rules:

1. They receive their authority from the interpretive community.
2. They also constitute and define the interpretive community.
3. They are norms.
4. They can be internalized.
5. They can also be objects of conscious self-reflection.
6. They must be interpreted.
7. They are the standards by which the correctness of interpretation is to be judged.
8. They constrain legal interpretation.<sup>148</sup>

In defining disciplining rules in items one through eight above, Fiss at first appears to provide an answer to the problem of stabilizing legal meaning. And the answer he gives (“disciplining rules”) looks like an answer. But if instead of looking at the answer, one looks closely at the

143. *Id.* at 750.

144. *Id.*

145. Fiss, *supra* note 139, at 184.

146. The constraining effect stems precisely from the fact that the interpretive community is “constituted by, and confers authority upon, the disciplining rules.” *Id.*

147. It is also difficult to understand in what way their relation mutually constrains given that all Fiss can say is that it is mutually constituting. Indeed, the account provided by Fiss does not specify things much beyond the suggestion that interpretation stems from the interaction of the text, the author, the reader, and their respective communities.

148. *See id.* at 184-94.

list above, the answer loses the character of an answer and becomes instead a shorthand reference to a series of problems. Indeed, how could a text-analogue like a disciplining rule satisfy all eight characteristics above all at once? How can disciplining rules receive their legitimacy from the interpretative community, yet constrain legal interpretation? How is it that disciplining rules can be at once norms that are susceptible to internalization and yet are also objects of conscious self-reflection? What, apart from Fiss's own affirmation that these rules constrain, would make us think that they do in fact constrain?

What we have in the concept of disciplining rules is a paradigm example of the theoretical unmentionable—a concept that appears to provide a positive solution to a problem, but that is in fact nothing more than the name for a whole series of unresolved difficulties, aporias, and contradictions.<sup>149</sup>

To the extent that Fiss succeeds in making a compelling case that disciplining rules constrain, it is because he objectifies these disciplining rules or, better yet, because he allows the reader to do the objectifying for him.<sup>150</sup> In other words, the potential constraining effect of the disciplining rules (if any) stems from the fact that, despite the apparent prevalence of his collapse strategy, Fiss objectifies the rules. One very important moment of objectification lies in Fiss's assertion that the disciplining rules are contained in the delimited and ascertainable text of law<sup>151</sup>—a text that can apparently be distinguished from the moral or social text.<sup>152</sup> This assertion serves to locate the possible set of materials from which the disciplining rules might be drawn and to exclude other sources. Second, the disciplining rules apparently take a flat, static and ostensibly self-coinciding form—just like objects. The objectified form of the disciplining rules is evident in their interrelations. Fiss says very little about the relations among the various disciplining rules—but what he

149. See *supra* text accompanying note 118.

150. Indeed, this vision of rules as constraining objects is part of the conventional metaphors of our conceptual system. See Winter, *supra* note 28, at 1216-17 ("It is LAW personified that lays down the rules (from the Latin *regula*, meaning straightedge, and *regere* meaning to lead straight). . . . This understanding . . . views LAW as a constraint on motion, much as a path constrains travel. . . . Thus, it is the objectified constraint of the path that is the object referred to in the phrase 'to break the law.'").

151. Fiss, *supra* note 32, at 740.

152. See *id.* at 750. By situating the disciplining rules within the legal text, as opposed to the moral or social text, Fiss has located these rules within an objectified form. In one sense, he clearly needs to do this to constrain interpretation and to prevent the creation of law from materials that are not themselves legal. On the other hand, this move in effect situates the disciplining rules in an objectified field—a field of delimited legal materials. Fiss's rules constrain precisely to the extent that he objectifies them. And yet, as he correctly notes, objectification is precisely the sort of naive strategy that does not work. *Id.* at 762-63.

does say suggests a relation that is at once objectified and, not surprisingly, constraining. Says Fiss:

The image I have in mind is that of a judge moving toward judgment along a *spiral of norms that increasingly constrain*. At any point in the spiral there might be a disagreement over the meaning of a rule . . . . To resolve this dispute, the disciplining rules must be interpreted and the process of interpreting those rules must itself be constrained by other norms further along or higher up the spiral.<sup>153</sup>

This spiral—or, really, hierarchical arrangement—of disciplining rules is, of course, an extremely orderly and stable depiction of the relation among the various disciplining rules. Each rule has its place in the hierarchy.

In sum, the strategy deployed by Fiss goes as follows: First, as in any collapse strategy, he recognizes the futility of reconstruction. He notes, for instance, that law is both subject and object. But no sooner does he acknowledge the futility of reconstruction than he displaces objectivity from the text of ordinary law to the realm of disciplining rules and projects the subjectivity of the rule-of-law thinker onto the interpretive community. Next, by noting that disciplining rules and the interpretive community are reciprocally constituting, he effectuates a *collapse*. One might speak of a dialectical collapse here: dialectical in the sense that the subject and object have become mutually dependent and collapse in the sense that the relation of both remains relatively vacant and unspecified. For Fiss, however, one unfortunate implication of the collapse is that the disciplining rules and the interpretive community are one and the same and, therefore, will not be available to sufficiently constrain each other—that is, themselves. Accordingly, Fiss remedies this lapse of constraint by objectifying the disciplining rules and authorizing the reader to engage in similar acts of objectification. Fiss is remarkably effective in simultaneously authoring and authorizing such objectifications. He rehearses some examples of disciplining rules that the reader is bound to recognize and thereby inscribes the form as well as the structure of the disciplining rules: they are clear, they are static, and they cohere. They certainly are not contradictory.

All this provides an elegant theoretical structure in which the rule-of-law thinker can project his or her own set of beliefs about law. If Fiss's account is believable because of the logic of projection, then the account hardly secures what Fiss most wants secured: constraint of the deviant subject. On the contrary, whatever constraint the individual

153. Fiss, *supra* note 139, at 185 (emphasis added).

legal subject experiences turns out to be his own projections of constraint. All of this, of course, throws the plausibility of the rule-of-law project—and the existence of constraint—back onto the character and composition of the legal subject.

But this is an issue that Fiss never fully confronts: for Fiss, the *initial* enablement, competence, and capacity of the individual legal subject is never really in question. On the contrary, in the routine framing of the problem of the subject as one of constraining *deviant* individual subjects, Fiss and the rule-of-law thinkers implicitly presuppose and establish the presence of a *normal* individual legal subject who is always already O.K.. They presuppose and establish an individual legal subject who is always and already competent to discharge the rule-of-law mission.

What is eclipsed in this process is a much more serious and possibly much more interesting problem of the subject: how is the legal subject rendered epistemically and normatively competent in the first place? In a telling passage at the end of *Objectivity and Interpretation*, Fiss reveals simultaneously the avoidance and the recognition of *this* problem of the subject:

My defense of adjudication as objective interpretation, however, assumes that the Constitution has some meaning—more specifically, that the text embodies the fundamental public values of our society. I have confronted the nihilism that claims the Constitution means everything . . . . My defense does not work if it is said that the Constitution has no meaning, for there is no theory of legitimacy that would allow judges to interpret texts that themselves mean nothing.<sup>154</sup>

With this passage, Fiss reveals that his essay—or his “defense” as he tellingly puts it—has missed the problem of the subject. The difficulty with this defensive conceptualization is that it assumes there is something *in* the Constitution to defend in the first place. But that is to frame the question in object-form terms. And that’s not the question; that’s not the problem. The problem is one of the subject: is there anyone who is normatively and epistemically competent to make the Constitution mean *in a way that Fiss might approve*? Fiss presumes that legal knowledge, legal capacities, and legal aptitudes will be transnitted from generation to generation without difficulty. The problem of the subject for a rule-of-law thinker like Fiss is that the sort of subject who would be capable of interpreting the Constitution to mean something *in a way Fiss might approve* is fast disappearing from the legal scene.

154. Fiss, *supra* note 32, at 762-63.

The reasons for this disappearance are quite simple. First of all, the professional forms of argumentation and interpretation—those used by the courts—are fast becoming lifeless forms. The current judicial style emphasizes formalized doctrine expressed in elaborately layered sets of “tests” or “prongs” or “requirements” or “standards” or “hurdles.” The judicial opinions in which these “analytical devices” appear tend to be characterized by tireless, detailed debates among the Justices.<sup>155</sup>

Lawyers and judges go through the motions, but the rule of law is no longer an animated vision. It rarely elicits respect or admiration.

Think for example of the piles of books and journal articles that litter your office: With what expectations and what feelings do you turn to them? If you are at all like me, you do so with a feeling of guilty dread and with an expectation of frustration. We live in a world of specialized texts and discourses, which all too often seem marked by a kind of thinness, a want of life and force and meaning.<sup>156</sup>

The gods are leaving the rule-of-law temple. The most thoughtful and reflective young scholars and students understand that doctrinal argument is to be used in the same way that one uses a complaint to get a lawsuit started or a postage stamp to get a letter mailed. Postage stamps, complaints, doctrinal legal argument—all have performative value. None is to be sneered at. Each has its use in appropriate circumstances. It is even appropriate to admire the intellectual or cultural achievement required to bring each into being. But do they inspire *intellectual* respect, *moral* attention, or *aesthetic* admiration? Doubtful. Postage stamps are useful to get letters mailed. Doctrine is helpful to get a doctrinal judge to bring certain relations of coercion into play.<sup>157</sup> Period.

We need note only that to the extent the writing of the judicial branch, or of the lawyer giving advice on what the law is, is the outcome of bureaucratic processes, to that extent it is in danger of losing its claim upon us and failing to leave us with a sense of obligation and willing obedience after we read and hear it . . . .<sup>158</sup>

For the rule-of-law thinker, this is a horrifying picture. And for the rule-of-law thinker, it is very tempting to argue that this picture must not come to pass, that belief in the rule of law and its virtues should be main-

155. Nagel, *The Formulaic Constitution*, 84 MICH. L. REV. 165, 165 (1985) (citation omitted).

156. White, *Intellectual Integration*, 82 NW. U.L. REV. 1, 5-6 (1987). “How often, for example, do you simply skim-read what is before you, and how often do you feel that nothing is lost?” *Id.* at 6.

157. Cf. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1617-18 (1986) (discussing how doctrine renders judges capable of overcoming any inhibitions against bringing coercive mechanisms of society to bear).

158. Vining, *Law and Enchantment: The Place of Belief*, 86 MICH. L. REV. 577, 594 (1987).

tained. But this response misses the point again—and in a very stereotyped way.<sup>159</sup> The question is not whether the rule-of-law vision *should* be maintained. The question for the rule-of-law thinker is much more acute and much more interesting: where is the subject who will reconstruct the rule-of-law vision?<sup>160</sup>

This is an acute question—rendered all the more so when one recognizes that the older generation of rule-of-law thinkers have no readily apparent successors. What remains of the lawyer's craft, of doctrinal argument tempered by public values is something that rule-of-law thinkers would probably not want to recognize as their own. As Judge Posner says, "Many students regard a law school as an obstacle course . . . . They come in believing the law is something you look up in a book somewhere. All they want to know is which book. They discover it's Gilbert's and Emmanuel's."<sup>161</sup> And this cannot surprise, for, as Judge Posner observes, the opinions of judges and the writings of legislators are "essentially mediocre texts."<sup>162</sup> As for indigenous practices of legal scholars, they entail the application of "analytical tools of no great power or beauty."<sup>163</sup>

For rule-of-law thinkers, then, the problem of the subject comes to be experienced as the disappearance of the subject. Few if any subjects are left on the scene—either in the courts or in the academy—who are epistemically capable of appreciating, for instance, the fascinating puzzles presented in the Hart & Sacks legal process materials.<sup>164</sup> Doctrinal sophistication is fast becoming a superfluous faculty—one that has lost meaning as the kind of subjects who have maintained it as a practice recede ever more rapidly into history.

Precisely because the problem of the subject presents itself to rule-of-law thinkers in such stark terms—as the death of the subject—it is difficult for rule-of-law thinkers to take cognizance of the problem. Af-

159. See Schlag, *Normative and Nowhere to Go*, *supra* note 7, at 178 (noting that a normative legal thinker will typically ask a challenger to engage in norm-selection with the question, "What should we do?"); Schlag, *Politics of Form*, *supra* note 7, at 805-06 (noting that when you're utterly lost it is not helpful to ask, "Where should we go?").

160. Or even more acutely (and even more interestingly): By what process might conditions be created to enable the reconstruction of a competent subject? Cf. Winter, *Contingency and Community*, *supra* note 7, at 989-91 (noting that the various rules constituting the "self" are created through interaction with the community).

161. Statement of Richard Posner at AALS Conference, Jan. 5, 1991, *reprinted in* Myers, *At Conference, Posner Lambasts Academics for Weak Scholarship*, NAT'L L.J., Jan. 21, 1991, at 4, col. 3.

162. *Id.* at 4, col. 4.

163. *Id.*

164. H. Hart & A. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (tent. ed. 1958) (unpublished manuscript).

ter all, from their perspective, it is extremely unpleasant. Among rule-of-law thinkers, denial is thus a predictable and, *for them*, perhaps even healthy response.<sup>165</sup>

And yet, some rule-of-law thinkers have attempted to confront the problem. Owen Fiss is one of them. In an essay entitled *The Death of the Law?*,<sup>166</sup> Fiss courageously confronts the question. Characterizing both law and economics and critical legal thought as ascendant intellectual movements that reject "law as an embodiment of a public morality"<sup>167</sup> he writes:

We will never be able to respond fully to the negativism of critical legal studies or the crude instrumentalism of law and economics until a regenerative process takes hold, until the broad social processes that fed and nourished those movements are reversed. The analytic arguments wholly internal to the law can take us only so far. There must be something more—a belief in public values and the willingness to act on them.<sup>168</sup>

And then Fiss asks the question that the rule-of-law thinkers need to ask: "Where will that belief come from?"<sup>169</sup> That is the critical question—or at least a way of posing it: who is the subject, and what is the social process that will regenerate a belief in the rule-of-law vision?

But then having asked the question—the *right* question—Fiss retreats to old and familiar ground: "In speaking of . . . morality . . . *I am sustained* by a historical vision—by remembering the 1960's, and the role that the law played in the struggle for racial equality."<sup>170</sup> This invocation of the sixties is disappointing—it seems to be a nostalgic avoidance of the problem of the subject. Then, in an unexpected and promising turn, Fiss engages again: "But for a generation born after *Brown*, after Ole Miss, [etc.] *this vision does not work*."<sup>171</sup> Right, exactly so, one wants to say, looking forward to Fiss's renewed attempt to engage the problem of the subject. But then—no go: Fiss proceeds to look for the regeneration of the subject in modern-day analogues of the civil rights movement. He finds feminism, expresses some doubts about the analogy and then in despair concludes, "Beyond that, it is difficult to know how a belief in

165. See Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) (arguing that jurisprudential denial and repression is not all bad); Schlag, *Contradiction and Denial* (Book Review), 87 MICH. L. REV. 1216, 1220 (1989) (reviewing M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987)) (noting that denial has the advantage of being easier, if less interesting, than acknowledgement).

166. Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1 (1986).

167. *Id.* at 15.

168. *Id.*

169. *Id.*

170. *Id.* at 14-15 (emphasis added).

171. *Id.* at 15 (emphasis added).

public values might be regenerated.”<sup>172</sup>

Now, this sort of on-again, off-again attempt to deal with the problem of the subject is emblematic of the difficulties facing rule-of-law thinkers. Fiss is ultimately not able to engage the problem of the subject—because he wants to do so on his own terms, and his terms do not let him imagine any source of regeneration for the subject other than rather rigid, rather literal social analogies to the civil rights movement of the 1960s. This rigidification of the rhetorical and jurisprudential framework over time is one consequence of the lack of engagement with the problem of the subject. As history proceeds, intellectual frameworks reveal more readily, more visibly their moments of inflexibility as they show themselves increasingly incapable of mapping onto the social or political scene and incapable of adapting.

Fiss does not engage the problem of the subject because the problem is always and already framed for him within the project of entrenching and preserving his vision of law—the one informed by the civil rights movement of the 1960s—for later generations. In part there is something admirable about this highly political enterprise, especially if the relevant frame of comparison is the uninspired, uninspiring jurisprudence of the Burger and the Rehnquist Courts. But, at the same time, there is something not at all admirable about Fiss’s attempt to entrench the jurisprudence of the 1960s Warren court. Fiss is attempting to force us to relive *the past* . . . and not just the past, but *his* past . . . and not just his past, but his past as *The Law*. What is particularly problematic about this is that this authoritarian strategy is inconsistent with and, in effect, neutralizes the more democratic, empowering Warren Court vision that Fiss champions. In a repetition of the sublimation of the subject that we saw at work in the Langdellian formalism,<sup>173</sup> rule-of-law thinkers typically situate themselves at the center of the discipline as if they were oracles whose own projections, whose own subjectivity were somehow beyond question. Again, this pattern is an entailment of the presupposition that the subject need not be questioned . . . because the subject is always already O.K. . . . because the subject is always already *us*.

This failure to engage the problem of the subject is tragic for the rule-of-law thinkers (as well as for others). For rule-of-law thinkers, it is tragic because they have thus far failed to understand that the cultural reproduction of an intellectual or moral vision is not so much a matter of handing down stone tablets (doctrinal or otherwise) as it is a matter of

172. *Id.*

173. See *supra* text accompanying note 37.

engaging the next generation. And this means engaging the kind of subject they are. In an older, somewhat objectivist and thus somewhat inadequate idiom, it means engaging the next generation *on its own turf*. This is ironic in some sense because the warning signs that the stone tablet strategy, the "restatement" approach would not work were there early. In 1970, just before Owen Fiss joined the Yale faculty, one Yale law student (later to become quite famous in legal academic circles) wrote:

I have a strong feeling that when a professor speaks about "intellectual response" in a classroom at the Law School, what he really means is an enthusiastic, eager, involved response to the particular question he has identified for the class as "interesting." Few teachers anywhere show an enormous amount of interest in exactly what it is that makes their students enthusiastic and excited until *it becomes apparent to them that for some reason or another they have lost the capacity to evoke that response.*<sup>174</sup>

So the problem of the subject for rule-of-law thinkers is cast in very stark terms. The question is very much one of succession: who (if anyone) will follow in their footsteps?

Owen Fiss, at times, indicates an awareness of this problem. And yet, tellingly, the solutions he offers are either extremely grim or strikingly implausible. First, extremely grim—*The Death of the Law?*:

[I]f the two jurisprudential movements of which I have spoken are victorious, . . . there will be people who wear black robes and decide cases, but it will be a very different kind of law. . . . In neither case will it be capable of sustaining or generating a public morality. It will be law without inspiration. This will mean the death of the law, as we have known it throughout history, and as we have come to admire it.<sup>175</sup>

Second, strikingly implausible—*The Law Regained*:<sup>176</sup>

Sensitive to the difference between law and politics and determined to uncover the liberating potential of the law, Catherine MacKinnon and the legal practice she has developed now stand as an inspiration to an entire generation of law students. She has shown them what they can do with the law, not simply as power, but as an especially disciplined kind of power.<sup>177</sup>

Fiss's statements concerning Catharine MacKinnon, as well as his entire effort to assimilate feminist jurisprudence into his vision of the 1960s civil rights movement, seems a strained and unsatisfactory attempt to

174. Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71, 79 (1970) (emphasis added).

175. Fiss, *supra* note 166, at 15-16.

176. Fiss, *The Law Regained*, 74 CORNELL L. REV. 245 (1989).

177. *Id.* at 253.

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produce (if only rhetorically) a jurisprudential heir—one that just isn't there.

Now, it is important not to overstate the point. Even if the rule-of-law thinkers continue to fail to address the problem of the subject, orthodox doctrinal legal thought will no doubt continue to occupy the vast majority of hours in the classroom and most of the pages of the law reviews. But it will become an increasingly uninspiring, hackneyed, and mediocre form of thought—one which fails to engage the problems or the generations of the day, a way of talking that has to be used because the powers that be have lost the imaginative capacity to talk any other way. It'll be just a bunch of rules of law.

### III. Critical Legal Sartre

"But he did not like structuralism."

—Simone de Beauvoir (on Jean-Paul Sartre)<sup>178</sup>

Instead of beginning with the stereotypical scholarly frameworks for examining cls (indeterminacy, contradiction, incoherence, or the "law is politics" slogan), consider the social situation of young, left, liberal legal thinkers circa 1975. This is a group of young scholars whose defining political and cultural experiences are significantly influenced by the civil rights movement, the Vietnam war, and the counterculture. This is a generation pervasively alienated from mainstream American culture—more likely to find resonant meaning and guidance in *Being and Nothingness* than in *Huckleberry Finn*.<sup>179</sup> This is a generation that, as a result of government policy—lies during the Vietnam war—has acquired a permanent distrust of authority, authority structures, and authority figures, or any word w/6 of authority.<sup>180</sup> This is a generation that has gained an acute, highly developed, pervasively internalized understanding that reasoned argument (particularly the best and brightest reasoned argument) can never be taken just on its own terms but must always be read for the violence,<sup>181</sup> the death, and the power that the argument simultaneously

178. S. DE BEAUVOIR, ADIEUX: A FAREWELL TO SARTRE 33 (1984).

179. This is, of course, a premature anticipation of a critique to arrive many years later in which Paul Carrington will remonstrate with the crits for not loving the river enough and for trying to replace Mark Twain with a nihilistic worm at the heart of being. See Carrington, *supra* note 99, at 222, 227.

180. Of course, if the Vietnam war was a demonstration of this point, Watergate was its protracted confirmation.

181. "It should not be so difficult to admit that a substantial part of the pleasure of being aggressive in class consists of being able to demolish students. And that another substantial part consists of being able to impose on them, by 'main force' of reason, a concept or conclusion they might not have reached alone." Kennedy, *supra* note 174, at 74 (commenting as a law student at Yale Law School).

effects, engenders, and disguises.<sup>182</sup> This is a generation that has lived through virulent reversals of the Oedipal myth: Daddy kills his young—literally and figuratively.

So here it is 1975, and this generation is entering the ranks of teaching in law schools. Here they are going to lectures at the AALS. Here they are listening to talks at various faculty colloquia throughout the country. Here they are arguing in the hallways adjoining the faculty offices. Here they are eating their lunches from paper bags in the faculty lounges of American law schools everywhere. Here they are—and what do they hear? What do they encounter?

What they encounter, over and over again, is the deeply doctrinal,<sup>183</sup> judge-identified, un-self-conscious,<sup>184</sup> self-satisfied,<sup>185</sup> stiff, and pompous<sup>186</sup> rule-of-law rhetoric. Now for them this rule-of-law stuff is déjà vu with a vengeance.<sup>187</sup> If you are a young liberal thinker circa

182. This critical approach to interpretation is as good an explanation as any for the well-known virulence of the critical legal thinkers' reaction to the jurisprudence of Ronald Dworkin. When Ronald Dworkin announces that interpretation consists of "making the material the best it can be" it is as if he had just declared himself to be the William Westmoreland of Jurisprudence. See R. DWORKIN, *LAW'S EMPIRE* 413 (1986) (noting, after an extended discussion of "what law is," that the definition holds true "for the people we want to be and the community we aim to have").

For critical legal thinkers, "making the material the best it can be"—the principle of charity in interpretation—is precisely the sort of interpretive approach that led Americans to believe the lies of their government and to overlook the violent realities implicit in such expressions as "Vietnamization," "pacification," "no longer operative," "post-traumatic stress syndrome," and all the other double-talk that emerged during the Vietnam war.

Note that this double talk reemerged during the war with Iraq. We did not *bomb* targets, we "*visited*" them. If necessary, we "*revisited*" them. The targets were not *destroyed*; they were "*acquired*." We had lots of military "*assets*" from which, of course, we got "*dividends*." All of these euphemistic expressions served to avoid the evocation of the violence, carnage, death that war is. Professor William Lutz notes that "you start getting two to three times removed from the reality that you're supposed to be talking about." *Morning Edition* (NPR radio broadcast, Jan. 28, 1991) (transcript on file at *Texas Law Review*).

183.

What is needed is a feeling that for once a piece of doctrine will be challenged from a *new* direction rather than confronted for the thousandth time with some well known countervailing principle . . . . After a certain amount of this, the impression grows that the law is without what could properly be called theoretical or philosophical problems. There are only "conflicting principles", factors to be "balanced", and problems to be "left" to this, that or the other institution . . . .

Kennedy, *supra* note 174, at 84 (emphasis in original).

184. "At a bare minimum it seems to me that the faculty as a group is guilty of an astounding lack of awareness of what they are doing." *Id.* at 73.

185. "It is hard for the student not to wince at the air of magisterial self-satisfaction with which professors tend to approach questions they know little about." *Id.* at 72.

186. "One of the first and most lasting impressions that many students have of the Law School is that the teachers are either astoundingly intellectually self-confident or just plain *smug*." *Id.* at 71 (emphasis in original).

187. This is Kissinger jurisprudence. It's early McNamara doctrine. It's all the same.

From (Southeast Asian) domino theories to (constitutional) slippery slopes;  
from reason of state to institutional competence;  
from military latinate abstractions to Weschlerian conceptions of neutrality;  
from fetishism of the free world to fetishism of the rule of law;

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1975, you experience this jurisprudential rhetoric not at all as an exercise of reasoned argument (which it represents itself to be), but as a kind of rhetorical police action—the intellectual or discursive equivalent of police lines. Not only are there things that you cannot do or say—lines you cannot cross—but you are not even permitted to talk about the fact that there are lines you cannot cross or inquire into the whys or wherefores. Indeed, you have just landed in a rhetorical zone whose recursive argument pathways (such as neutrality, objectivity, universality, and a curiously intense fascination with authority-based arguments) immediately rule out or disable your kind of argument as extralegal and overly political, not to mention bad and probably nontenurable. What you experience as a rhetorical assault on your self<sup>188</sup> does not stop here. Not only are you prevented from making the kinds of arguments and articulating the kinds of visions of law you want, but you are being groomed (like it or not) to become the next Dean Rusk of Property, the next Dr. Kissinger of Contracts, the next William Westmoreland of Torts. In a word, you are being asked to become the one thing you are quite sure you don't want to become: "Dad."

Now, if you were a young scholar and you stepped into this sort of psycho-socio-political setting—one where virtually all the rhetorical action is tightly patterned to preserve the prestige, status, and conceptual matrices of the old school—wouldn't you be just a little bit tempted to do a structuralist number on them? Wouldn't you show some interest in concepts like "indeterminacy" and "antifoundationalism"? Wouldn't you show at least mild interest in something that announces itself as "deconstruction"?

Of course you would. And if you did, you would likely help construct what is now known as critical legal studies. In this sense, then, critical legal thought is like the thought of all other jurisprudential schools: its formative intellectual structure is a working out of its reaction to the recursive projection of its own primal, generation-specific encounters with The Law as it is represented by the elders in the faculty lounge . . . or in the first year classroom.<sup>189</sup>

from the objectivity of (technocratic) expertise to the objectivity of (technocratic) doctrine;  
from Vietnamization to cost internalization.

Note that these equivalencies will form part of the experiential source field for the cls slogan "Law is Politics."

188. "A great many students . . . feel the socratic [sic] method . . . is an assanlt. The observation that students often respond physically and emotionally to questioning as though they were in the presence of a profound danger is simply *true*." Kennedy, *supra* note 174, at 72-73 (emphasis in original) (citation omitted).

189. . . . or in the legal theory workshop, or in . . . . You get the metonymic point.

Here, then, is how the cls reaction might have been played out.<sup>190</sup> After years of bumping up against rule-of-law rhetoric, you might try to understand how the rhetoric is structured in a way that keeps you from making your arguments. This inquiry would present itself as at once intellectually fascinating (how does this work?) and politically significant (I can try to scuttle or use this structure once I understand how it produces its effects).<sup>191</sup>

In collecting these patterns of argument, you notice that they are all arranged in a systemically contradictory order.<sup>192</sup> And as you collect and document all this, you are stripping doctrinal argument of its power. You are no longer within the game that finds these doctrinal moves compelling or even interesting. On the contrary, you have gained a distance and achieved a perspective from which these moves begin to seem rather silly and unconvincing.<sup>193</sup> No longer a pawn in somebody else's chess game, you can now see the entire board: you are now a player.<sup>194</sup>

And at this point, of course, you have a new insight: the rule-of-law doctrinal arguments are indeterminate. They are indeterminate in oh so

190. Here I'm offering a speculative *motivational* account of the rise of the critical legal strategies—all the better to prepare you to accept my description of the subject-object permutations instanced in critical legal writings. For an excellent account of the early days of cls, one that rises beyond the merely speculative to the authoritatively anecdotal, see Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference of Critical Legal Studies*, 36 STAN. L. REV. 391 (1984). For a more "political" account, see Tushnet, *CLS: A Political History*, 100 YALE L.J. 1515 (1991).

191. For two different views of the instrumental, intellectual, and political character of structuralist analysis of legal argument, see Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 MIAMI L. REV. 1119, 1137-40 (1990); and Paul, *The Politics of Legal Semiotics*, 69 TEXAS L. REV. 1779, 1795-99 (1991).

192. For descriptions of the dominant recursive contradictions in early critical legal thought, see R. UNGER, *KNOWLEDGE & POLITICS* 76-81 (1975) (subjectivity of value versus objectivity of reason); Keunedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1687-1713 (1976) (rules v. standards); *id.* at 1713-37 (altruism v. individualism); Kennedy, *Blackstone's Commentaries*, *supra* note 7, at 211-13 ("the fundamental contradiction").

193. Consider, for example, Boyle's admonition to torts students:

My description should show you that these argumentative techniques are, by themselves, incapable of explaining the cases or the "rules," because for each argument or technique there is a counterargument. Without some political choice as to which side one is going to favor, the arguments are just like pairs of cliches, e.g., *many hands make light work* vs. *too many cooks spoil the broth*; *a stitch in time saves nine* vs. *cross your bridges when you come to them*.

Like cliches they appear convincing because the judge only uses one of them at a time . . . but you have to learn that there is always another opposite one . . . . Until you learn to do this, you will be fooled by the shell game of judicial rhetoric, which appears to deduce solutions from "legal reasoning," when in fact those decisions rest on political, moral or economic decisions.

Boyle, *The Anatomy of a Torts Class*, 34 AM. U.L. REV. 1003, 1051 (1985) (emphasis omitted and added).

194. If you are socially constructed as a pawn, you have reason to fear the knight. But if you learn chess, you can stop being a pawn—you can actually become a player. The pawn, of course, is caught up within the moves on the board. The player, in contrast, enjoys a meta-view. And it is precisely that meta-perspective that constitutes part of the appeal of structuralism in legal thought.

## The Problem of the Subject

many ways, but mostly because they are systemically contradictory—that is, it is only if one supplements these arguments with an extralegal infusion of moral, political, social, or economic context that one or the other side of the doctrinal argument can be made to prevail.<sup>195</sup> Once one starts to question that context, the doctrinal arguments begin to lose their power. The next insight is that there is no way to freeze the baselines. Freezing baselines is a kind of naive foundationalism—one that is not only wrongheaded, but impossible in any event.<sup>196</sup>

195. See Boyle, *supra* note 193, at 1052. The aesthetics of the description of the source or character of indeterminacy varies among the various critical legal writers—perhaps an unwitting testimony to the difficulty of freezing shared baselines (even among friends).

Here is a non-exhaustive list:

1. *The normative indeterminacy claim (Version #1):*

Liberal legal thought is committed to systematically contradictory norms or justifying principles. Each prong of the contradiction will in any given case justify the opposite result. Thus, “[w]hile settled practice is not unattainable, the CLS claim is that settled justificatory schemes are in fact unattainable. Efforts at norm legitimation are radically indeterminate not because the source of authority cannot speak clearly (though, rather incidentally, she often cannot) but because if pressed, she would not want to.” M. KELMAN, *supra* note 165, at 13 (emphasis in original).

2. *The normative indeterminacy claim (Version #2):*

In order to render legal reasoning determinate and consistent with decisions actually reached, one would have to introduce political, aesthetic, and empirical assumptions that could not be (or that no one would want to see) justified on a normative basis. Since no one really wants to acknowledge these political, aesthetic and empirical assumptions as normatively legitimate, the system of legal reasoning remains on the whole normatively indeterminate. See Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 625 n.40 (1988) (arguing that in terms of fostering desired political change within the system of law, it is more helpful to see the law as conflictual and indeterminate rather than coherent and outside of political controversy).

3. *The early-Sartre phenomenological (“I’m taking the perspective of the individual agent”) indeterminacy claim:*

All legal decisions facing legal decision makers such as judges are indeterminate in that the legal decision maker remains at each instance free to choose (and responsible for choosing) the manner in which (the scope, the reach, the meaning, the structure, the closure or lack thereof) the law binds him or her. See Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEG. EDUC. 518 (1986).

4. *The political value choice insufficiency indeterminacy claim:*

Liberal legal thought is indeterminate because it cannot yield outcomes absent further specification of (unredeemed and controverted) political or aesthetic or rhetorical choices about how to characterize what is at issue and what is the context. Boyle, *supra* note 193, at 1052.

5. *The circular indeterminacy claim:*

The authority of all conceivable legal requirements (e.g., facts, precedent, intentions of parties to the agreement, and policy considerations) ultimately rest upon each other in a circular manner and are thus always subject to destabilization in any given case. Frug, *Argument as Character*, 40 STAN. L. REV. 869, 870-71 (1988).

6. *The underdeterminacy indeterminacy claim:*

The medium range regularities observed in the interpretation and application of legal rules in given contexts are not “necessary consequences of the adoption of a given regime of rules.” Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 125 (1984) (emphasis in original).

196. The myth of the subject-object metaphor is the projection of some place either in the subject or the structure of things, that is outside social inscription. But there is no point beyond social inscription, no law separate from politics, no knowledge separate from power, no reason separate from imagination, no things underneath mere words, and no free subjects separate from social language. The myth of presence is the treachery of

As you look back at what this structuralist account reveals, what you see is contradiction, indeterminacy, and foundationalist attempts to cut off serious legal inquiry. At this point, given the unbelievably upbeat and cheery tone of doctrinal legal argument, it is a cinch for you to recognize that doctrinal thought is a species of legitimation.

Now, as we can tell from the foregoing, there are close connections between the social experiences of cls thinkers and their intellectual claims. Indeed, one can find in Duncan Kennedy's student essay, *How the Law School Fails: A Polemic*,<sup>197</sup> the expression of the experiential basis for virtually every major claim that not only Duncan Kennedy but cls was to make during the period from 1975 to 1984: the decline of liberal legal thought and the corresponding turn to structuralism, indeterminacy, and contradiction.<sup>198</sup> Indeed, these points are corroborated by the text-footnote interaction in this very Article.<sup>199</sup>

This close connection between the social experiences and the intellectual claims of cls thinkers hardly distinguishes cls from any other jurisprudential school. What does distinguish cls from other schools, however, is that these connections or relations have themselves become a focus of inquiry for critical legal thought. James Boyle, for instance, conceptualized this interaction in terms of a tension between the structuralist and the subjectivist strands of critical thought:

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. . . . Conversely, the structuralist strand focuses, unsurprisingly, on structures. . . . [T]he structuralist strand . . . 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.<sup>200</sup>

One of the interesting and valuable aspects of Boyle's account is that he articulates what appears to be an obvious tension between the subjectivist and the structuralist strand.

Boyle summarizes the tensions as follows: "Each strand, in other words, both contradicts and relies on the other. Each contains the dan-

self-denial as we filter our perception and communication about social life through the official metaphors of validity.

Peller, *supra* note 7, at 1290.

197. Kennedy, *supra* note 174.

198. *Id.* at 79, 80-81.

199. See, e.g., *supra* notes 183-88 and accompanying text (and accompanying interaction).

200. Boyle, *supra* note 78, at 741-43 (citation omitted).

gerous supplement . . . of its opposite.”<sup>201</sup> This description appears symmetrical: it seemingly refuses to accord any privilege to either the structuralist or the subjectivist strand. In contrast to Boyle, Duncan Kennedy denies any incompatibility between the two strands.<sup>202</sup> But like Boyle, Kennedy accords symmetrical status to both the subjectivist strand (traced to Sartre’s *Being and Nothingness*) and the structuralist strand (traced to Levi Strauss’s *The Savage Mind*).<sup>203</sup>

This apparent symmetry is misleading; it covers up a problematic and relentlessly recursive subject-object hierarchy in critical legal thought. We can see this hierarchy at work and the asymmetry revealed once Jamie Boyle begins to describe the political and intellectual aims of both the subjectivist and the structuralist strands: “The subjectivist strand is informed by ‘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*.”<sup>204</sup> As for the structuralist strand, it has the same aim:

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.<sup>205</sup>

With this account of the aims of critical legal thought, the symmetry disappears in favor of an asymmetrical convergence on a single goal to be attained by a single means. The single means is the intellectual and political empowerment of the individual subject. The single goal is the liberation of the individual subject from the constraint of oppressive reified structures. Or as Jamie Boyle puts it: “Critical legal thought offers accounts of *structures* of thought with the aim of liberating *subjective* potential.”<sup>206</sup>

Here CLS establishes a very sharp subject-object hierarchy. The recurrent picture informing critical legal thought is that legal thinkers are already politically and morally competent subjects who are systemati-

201. *Id.* at 744 (footnotes omitted).

202. Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705, 746.

203. *Id.* at 746 & n.80.

204. Boyle, *supra* note 78, at 742 (emphasis added).

205. *Id.* at 743 (emphasis added).

206. *Id.* at 745 (emphasis in original).

cally mystified and constrained by an oppressive object-order of legal structures and thingified social roles.<sup>207</sup> The critical image here is of the competent subject encased like a prisoner within the cage of objectivity<sup>208</sup>—a cage that is ironically of his own making. This leads to a politics aimed at setting the prisoner-subject free. This image and the politics it engenders are recursive throughout critical thought.<sup>209</sup>

By criticizing those justificatory structures we “open up space to think and act in the world.”<sup>210</sup>

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.<sup>211</sup>

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.<sup>212</sup>

If you really take seriously the notion that freedom is *just* interstitial, doesn't have an essence, it's just things you can do in spite of the structured character of the situation, that's freedom—then it's always there; there are always millions of things you can do in spite of the structured character of the situation.<sup>213</sup>

Now, this prototypical cls image of the individual subject encased by reified legal structures and thingified social roles turns out to be the recursive playing out of Jean-Paul Sartre's phenomenology of consciousness. In turn, Sartre's phenomenology is the recursive playing out of a few excruciatingly rationalist moves<sup>214</sup> made early in *Being and Nothingness*. In the introduction to *Being and Nothingness*, Sartre wrote, “consciousness is a being such that in its being, its being is in question in so far as this being implies a being other than itself.”<sup>215</sup> This inevitable non-coincidence of consciousness with itself, this “decompression of being”<sup>216</sup>

207. See Gabel, *Reification in Legal Reasoning*, 3 RES. LAW & SOC. 25, 26-29 (1980).

208. I am borrowing this image of the prisoner-subject from Balkin, *Ideology as Constraint*, *supra* note 9, at 1040-41.

209. See Boyle, *supra* note 78, at 766 (“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.”).

210. *Id.* at 739 (emphasis added) (quoting Gary Peller).

211. See *id.* at 762 (emphasis added).

212. *Id.* at 765 (emphasis added).

213. Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 53-54 (1984) (emphasis in original) (comments of Duncan Kennedy).

214. “Rationalist” as I describe this mode of thought in Schlag, *Missing Pieces*, *supra* note 7, at 1210-13.

215. J.-P. SARTRE, *supra* note 78, at 24 (emphasis in original).

216. *Id.* at 121.

is what, for Sartre, defines the being of the for-itself (roughly, the subject). Total self-coincidence, on the other hand, is the being of the in-itself (roughly, the object). As Sartre puts it, "[t]he in-itself is full of itself."<sup>217</sup> It is a "perfect equivalence of content to container."<sup>218</sup> Hence, for Sartre, the being of the for-itself (the subject) is radically and irretrievably separate and distinct from the being of the in-itself (the object).

This radical separation of the for-itself and in-itself, subject and object, ego and world is established early in Sartre's work by the privileging of an epistemological—some have said Cartesian<sup>219</sup>—phenomenology. Sartre starts his phenomenology with what consciousness can *know*; more precisely, he starts with what a highly intellectualized consciousness can know.<sup>220</sup>

The argument is extraordinarily rationalist in tenor. It goes like this: in order to be conscious of something—say, a table—it is necessary to be conscious of being conscious of the table. This follows because if one were not conscious of being conscious of the table, then we would have "a consciousness ignorant of itself, an unconscious—which is absurd."<sup>221</sup> How, then, is consciousness to be secured? If we keep thinking of consciousness as knowing consciousness then we are faced with two unattractive possibilities. Either we declare some arbitrary end to the series of reflexive knowings (*i.e.*, a knowing consciousness that (absurdly) is not conscious that it knows) or we run into an infinite regress. To avoid these two unattractive possibilities, we must do as Sartre says: "If we wish to avoid an infinite regress, there must be an immediate, non-cognitive [*i.e.*, nonknowing, nonpositional] relation of the self to itself. . . . In other words, every positional consciousness of an object is at the same time a non-positional consciousness of itself."<sup>222</sup> Now, of course, as a result of this last move, consciousness becomes precisely that which escapes knowledge, as Sartre is quick to point out: "We . . . have apprehended a being which *is not* subject to knowledge."<sup>223</sup> Later Duncan Kennedy will echo the point: we have here a being that "is ineffable, unjudgeable, ungraspable with the apparatus of thought."<sup>224</sup> Sar-

217. *Id.* at 120.

218. *Id.* at 120-21.

219. See K. WHITESIDE, MERLEAU-PONTY AND THE FOUNDATION OF AN EXISTENTIAL POLITICS 71 (1988).

220. Sartre denies this. J.-P. SARTRE, *supra* note 78, at 17-18 ("Henceforth, we have escaped idealism. For the latter, being is measured by knowledge . . . . There is only *known* being; it is a question of thought itself. . . . We, on the other hand, have apprehended a being which is not subject to knowledge and which founds knowledge . . . ." (emphasis in original)).

221. *Id.* at 11.

222. *Id.* at 12-13.

223. *Id.* at 18 (emphasis added).

224. Kennedy, *supra* note 202, at 745.

tre's next move is to universalize this ineffable, nonpositional, noncognitive being of self-consciousness: "This self-consciousness we ought to consider not as a new consciousness, but as *the only mode of existence which is possible for a consciousness of something*."<sup>225</sup>

And from this beginning, everything (all of Sartre's philosophy) follows:

If the standard of all certainty is uncovered in the Cartesian inner dialogue that strips existing things to their essence, then it follows logically that nothing else can possibly exist with the same degree of truth as my own ego. With nothing else do I have such intimate contact. Because the analysis starts from the cogito, because thought is made the measure of truth, everything external to the ego, including other persons, is first assimilated to the status of an object.<sup>226</sup>

Hence, despite Sartre's constant self-conscious efforts to avoid lapsing into idealism, to avoid according primacy to thought over being, his own beginnings betray his best ambitions. The kind of consciousness that Sartre starts out to secure is a *knowing consciousness*—one that he posits as knowing something like one knows a table (in the manner of a distinct object). That kind of knowing consciousness,<sup>227</sup> which already presumes a sharp separation of subject and object, is not universal.<sup>228</sup> And when it passes for a universal mode of being, as it does in Sartre's work, it falsely represents not only its own character, but the world and its situation in the world.

Failing to recognize the partiality of his own starting point, Sartre proceeds to project it right and left, even in areas of social life where it may not belong. The radical distancing of subject and object, ego and world, consciousness and role is re-enacted even in Sartre's famous example of the restaurant waiter playing at being a waiter:

Let us consider this waiter in the cafe. His movement is quick and

225. J.-P. SARTRE, *supra* note 78, at 14 (emphasis in original).

226. K. WHITESIDE, *supra* note 219, at 78-79.

227. I would call it rationalist consciousness. See Schlag, *Missing Pieces*, *supra* note 7, at 1210-11.

228.

The separation of subject and object is both real and illusory. True, because in the cognitive realm it serves to express the real separation, the dichotomy of the human condition, a coercive development. False, because the resulting separation must not be hypostatized, not magically transformed into an invariant . . . . The separation is no sooner established directly, without mediation, than it becomes ideology, which is indeed its normal form. The mind will then usurp the place of something absolutely independent—which it is not; its claim of independence heralds the claim of dominance. Once radically parted from the object, the subject reduces it to its own measure; the subject swallows the object, forgetting how much it is an object itself.

Adorno, *Subject and Object*, in THE ESSENTIAL FRANKFURT SCHOOL READER 497, 498-99 (A. Arato & E. Gebhardt eds. 1987).

## The Problem of the Subject

forward, a little too precise, a little too rapid. He comes toward the patrons with a step a little too quick. He bends forward a little too eagerly; his voice, his eyes express an interest a little too solicitous for the order of the customer. Finally there he returns, trying to imitate in his walk the inflexible stiffness of some kind of automaton while carrying his tray with the recklessness of a tight-rope-walker by putting it in a perpetually unstable, perpetually broken equilibrium which he perpetually re-establishes by a light movement of the arm and hand. All his behavior seems to us a game . . . . He is playing, he is amusing himself. But what is he playing? We need not watch long before we can explain it: he is playing at *being a waiter in a cafe*.<sup>229</sup>

Now, this passage presents itself as a phenomenological description of "being a waiter in a cafe." But it is not that at all. On the contrary, this is a phenomenological description of being an intellectual in a cafe—waiting for one's food, observing the waiters, and entertaining one's intellectual friends with philosophical reflections on the being of a waiter.<sup>230</sup> This is not the phenomenology of waiting tables. This is the phenomenology of intellectual observation while waiting for one's food.

And if we think about it, the conclusion that the waiter is playing at being a waiter doesn't have all that much to do with the waiter that Sartre is describing. I don't mean to say that the waiter could not have a moment of self-reflection and think of himself as playing at being a waiter. But if he thought about this in the manner of Sartre (and particularly if he were seriously self-reflective) he would say: "*Ah, Mais oui, en effet*—just a moment ago, I was playing at being a waiter. But now that I think about *ces choses* in this way, I am playing at being a Sartrean existentialist intellectual—that is, one who observes others from a great (virtually unbridgeable) distance in a manner already required, already legislated by an epistemic description of consciousness that radically sep-

229. J.-P. SARTRE, *supra* note 78, at 101-02. Compare Peter Gabel's description of his interaction with a bank teller: "her words are somehow 'processed'; her gestures, ever so slightly delayed, have been 'subject to review.' In other words she is playing the role of being a bank teller, while acting as if her performance is real." Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 TEXAS L. REV. 1563, 1568 (1984).

230. And just to show this is not mere idle speculation, consider Simone de Beauvoir's reminiscence:

On one of their weekends in Paris, they met Sartre's fellow *normalien* and friend Raymond Aron for drinks, in what has since come to be considered an encounter of epic, if not mythic, proportions. Aron was home on holiday from the year he was spending at the French institute in Berlin, where he had a scholarship to study philosophy and write a thesis. . . . [W]hile they were actually imbibing the drink Aron said the liquor reflected Husserl's remark that a phenomenologist could create philosophy from anything in life. From then on, Sartre regarded that casual comment as the moment when he began to formulate his own Existential system.

D. BAIR, SIMONE DE BEAUVOIR: A BIOGRAPHY 187 (1990).

arates the subject from its object and precludes fusion."<sup>231</sup>

In this reflexive (admittedly ironic) reversal of Sartre's description of playing at being a waiter, we are provided with yet another example of how Sartre's thought covertly privileges the epistemic phenomenology of the intellectual knower and projects this phenomenology onto others. Sartre's observation of the waiter is already an anticipation of another crucial aspect of Sartrean thought: "the gaze" as constitutive of the relation between the self and the other. In *Being and Nothingness*, Sartre describes a jealous lover peeping through a key-hole. The lover is a subject reducing those who are seen to an object. But when the jealous lover feels observed by a third party, he is instantly degraded to the status of an object—his possibilities alienated, in the control of another.<sup>232</sup> "Thus being-seen constitutes me as a defenseless being for a freedom which is not my freedom."<sup>233</sup> This dominance of the subject-object relation governing the self-other relation enables Sartre to describe the relation between self and other as alternating moments of sadism (mastery) and masochism (self-denial).<sup>234</sup>

It is this universalization of the non-coincidence of the for-itself and the in-itself, this radical separation between the being of the for-itself and the being of the in-itself, between subject and object, between self and other, and between consciousness and social roles that enables Sartre as well as critical legal thinkers to imagine and conceptualize the problem of the subject as its imprisonment in reified legal structures and thingified social roles.<sup>235</sup>

As Sartre himself put it, "There are indeed many precautions to *imprison* a man *in* what he is, as if we lived in perpetual fear that he might escape from it, that he might break away and suddenly elude his condition."<sup>236</sup> Many precautions indeed. And here we encounter some irony. One of the ironic aspects of critical legal thought is that it too has become a kind of prison, a kind of critical legal orthodoxy, a sort of recur-

231.

[T]he very being of self-consciousness is such that in its being, its being is in question; this means that it is pure interiority. . . . Its being is defined by this: that it is this being in the mode of being what it is not and of not being what it is. Its being, therefore, is the radical exclusion of all objectivity. . . . In short the *for-itself* as for-itself can not be known by the Other. The object which I apprehend under the name of the Other appears to me in a radically *other* form. The Other is not a *for-itself* as he appears to me . . . .

J.-P. SARTRE, *supra* note 78, at 326-27 (emphasis in original).

232. *See id.* at 348-58.

233. *Id.* at 358.

234. *See id.* at 474-534.

235. *See* H. MARCUSE, *STUDIES IN CRITICAL PHILOSOPHY* 166-68 (1972) (tracing the connections between Sartre's subject-object relations and the self-other relation in terms of conflict, competition, alienation, and reification).

236. J.-P. SARTRE, *supra* note 78, at 102 (emphasis added).

sive re-enactment of the Sartrean rehearsal of the subject and object, the for-itself and in-itself, consciousness and role incommensurabilities. The intellectual attempts of critical legal studies to dislodge the objective reified structures of thought in order to allow the Sartrean-existentialist subject to awaken to his or her freedom and responsibility have themselves crystallized into a frozen thought structure, into "a pod." Indeed, this point is presaged in James Boyle's observation that "[s]ubjectivism 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."<sup>237</sup>

Now, of course, this possibility is itself envisioned by Sartre's phenomenology:

If bad faith is possible, it is because it is an immediate, permanent threat to every project of the human being; it is because consciousness conceals in its being a permanent risk of bad faith. The origin of this risk is the fact that the nature of consciousness simultaneously is to be what it is not and not to be what it is.<sup>238</sup>

So the reification of critical legal thought can be understood within the Sartrean problematic of the radical discontinuity between the for-itself and the in-itself. To some extent, Duncan Kennedy himself provides such a Sartrean account of the reification of critical thought in *Roll Over Beethoven*.<sup>239</sup>

In that article, Duncan Kennedy expresses concern over the reification of certain of his own critical contributions—namely, "the fundamental contradiction" and the altruism-individualism split. Kennedy's concern is that these notions have become "absolutely classic examples of 'philosophical' abstractions,"<sup>240</sup> which are then manipulated and applied as if they contained some sort of overarching truth about the character of legal reality. Kennedy recants these critical artifacts and then states that they nonetheless did contain "a truth."<sup>241</sup> What then follows in the interchange between Peter Gabel and Duncan Kennedy is an acute Sartrean attempt simultaneously to state this truth and yet escape the objectifying implications of having stated it. The Sartrean anxiety is at fever pitch. It is, as the notorious Hindu learning on turtles suggests,<sup>242</sup>

237. Boyle, *supra* note 78, at 767 (emphasis added).

238. J.-P. SARTRE, *supra* note 78, at 116.

239. See Gabel & Kennedy, *supra* note 213, at 17.

240. *Id.* at 15-16.

241. *Id.* at 16-17.

242. See Crampton, *Demystifying Legal Scholarship*, 75 GEO. L.J. 1, 1 n.4 (1986) ("Like the old woman in the story who described the world as resting on a rock, and then explained that rock to be supported by another rock, and finally when pushed with questions said it was rocks all the way down.").

Sartre all the way down. Watch.

Kennedy announces the truth identified by the fundamental contradiction as Sartre's idea that "[n]othingness is the worm at the heart of being,"<sup>243</sup> adding, "I'm willing to embroider that on the flag."<sup>244</sup> Not skipping a beat, Peter Gabel aptly responds: "Is that a universal? That you're willing to be pinned down to?"<sup>245</sup> This is exactly the right question. And Duncan Kennedy's response confirms that it *is* the right question—because immediately Duncan Kennedy walks away from the flag, its embroidery, and the worm at the heart of being: "Yes. As long as it's clear that the concept of a 'worm' is like 'making the kettle boil.' The idea that nothingness is the worm at the heart of being is no more defensible, but because it's an image, a metaphor, almost a joke . . . ."<sup>246</sup> Now here, on the constative level, Duncan Kennedy seems to be taking some distance from Sartre's proclamation that nothingness is the worm at the heart of being. It's a joke, he says. And yet, on a performative level, Kennedy's trivialization, his virtual retraction, of Sartre's slogan is precisely the re-enactment of the distance, the non-coincidence that the Sartrean subject, the for-itself, must always and already take from objectified thought-structures—from the in-itself.<sup>247</sup>

So, what appears to be Kennedy's conflicted stance towards the articulation of knowledge (*i.e.*, "I'm saying it,—but now I take it back") is an ironic playing out of, a repetition of his *pregiven* commitment to the Sartrean metaphysic. The problem is that there's a self-defeating aspect to Sartre. Indeed, so long as Duncan Kennedy keeps on faithfully playing the part of Sartre, he will never be able to take back enough. It is not just the fundamental contradiction that has to be recanted. It's not just the altruism-individualism split. What has to be recanted is *the very structure* (a telling phrase) of critical legal thought as divided along the lines of a thoroughly objectified structuralist moment and a subjective, Sartrean phenomenological moment. In other words, so long as it adheres to the Sartrean metaphysic, critical legal thought must (and likely will) recant whatever *knowledge* it produces. And this *must* happen because the Sartrean subject (absent bad faith) can never find itself to coin-

243. Gabel & Kennedy, *supra* note 213, at 17.

244. *Id.*

245. *Id.*

246. *Id.*

247. As noted elsewhere, "constative utterances simply describe or report states of affairs, and performative utterances are actions directed at other ends. The classic performative utterance is 'I promise'—by saying the words, the speaker engages in the act of promising." Schlag, *Missing Pieces*, *supra* note 7, at 1205 n.53 (discussing terms borrowed from J. AUSTIN, *HOW TO DO THINGS WITH WORDS* 3-15 (J. Urmson ed. 1965)).

cide with the in-itself.<sup>248</sup> Ironically then, in the ultimate reflexivity the Sartrean-existentialist subject (including the critical legal thinker) must rebel at the very confinement, the very structural jurisdiction that Jean-Paul Sartre has reserved for that subject. It is precisely that rebellion that I have been trying to provoke in the last two paragraphs: Sartre is the worm at the heart of critical legal studies.

Sartre's metaphysic is the one that prevents critical legal thought from ever fully coinciding with itself. It is Sartre's metaphysic that introduces, locates, and shapes the recursive dislocation at the heart of critical legal thought—the recursive rejection of the logic of identity at the heart of cls.<sup>249</sup>

It is important not to understate the significance of the Sartrean worm at the heart of cls. Indeed, despite the significant influence of post-structuralist thinkers like Derrida and Foucault on recent critical legal thought, virtually all of this poststructuralist thought has been received by cls within the formative aesthetic of the Sartrean metaphysic—the ontological non-coincidence of the for-itself and the in-itself. Indeed, Jack Balkin's recent writings confirm the point:

I am sure that I am not the first person to note the curious relationship between deconstruction and an earlier French import—existentialism . . . . If we see life itself as the general text, the textual freedom of the deconstructionist becomes quite similar to the pragmatic (action-oriented) freedom of the existentialist.<sup>250</sup>

248. The point was put in more expressly political terms by Merleau-Ponty who saw Sartre's radical subjectivism as tending towards violence: "When negativity descends into the world and takes possession of it by force [then all] that opposes it appears as negation and can be put pell-mell in the same bag." M. MERLEAU-PONTY, *THE ADVENTURES OF THE DIALECTIC* 163 (1973); see also K. WHITESIDE, *supra* note 219, at 243-45.

249. In part this explains why cls has been so difficult to understand even for sophisticated critics like John Stick and Larry Solum. Working from within an Anglo-Saxon philosophical tradition that is unreflectively steeped in the logic of identity, most critics of cls (and some cls proponents as well) have been unable to understand the deliberately unstable, the designedly dislocated and dislocating character of a critical legal thought that is steeped in a continental tradition that follows Hegel. See *infra* text accompanying notes 252-54. Instead, the strategy of cls critics like Solum and Stick has been to try to pin cls claims down (in an objectified manner) to a series of stabilized propositions and then to harvest the resulting incoherence. See generally Stick, *Can Nihilism Be Pragmatic*, 100 HARV. L. REV. 332, 389-401 (1986); Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462-70 (1987). Sophisticated critical legal thinkers typically feel unmoved and unscathed by such critiques precisely because they do not see their thought as implicated in the objectified thought representations of critics like Stick and Solum. Sophisticated critical legal thinkers—those who have done the most to escape the routine aesthetic of Anglo-Saxon analytical philosophy—understand critics like Stick and Solum to be projecting their own philosophical aesthetics onto the text of critical legal thought. See Schlag, *supra* note 165. In fairness to Stick and Solum and for the sake of accuracy, the unappealing nesting of Hegelian-inspired critical thought within the Anglo-Saxon analytical form is something that (some?) (many?) critical legal thinkers unfortunately accomplished all by themselves.

250. Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1629-30 (1990).

Now, from the perspective of analytical Anglo-Saxon philosophy, there does seem to be a "curious relationship" here. In fact, from that perspective, we can even refine and deepen this curious relationship by moving back from freedom to being.<sup>251</sup> Indeed, we can trace this curious relationship back to what must seem like the even more curious correspondence between Sartre's "nothingness" that lies at the heart of being and Derrida's "différance."<sup>252</sup> To analytical Anglo-Saxon thinkers, it must seem as if there is great significance in the fact that both Sartre and Derrida accord dislocation and non-self-coincidence such key roles in their own thought. But, of course, within the continental tradition so heavily influenced by Hegel, the presence of such dislocations is simply an entirely expected entailment of any approach that rejects the logic of identity—which is to say, basically *any* approach.<sup>253</sup> Within the continental tradition, therefore, the presence of a dislocating dislocation at the heart of Sartre and Derrida is about as significant and as interesting as the fact that both are speakers of French.<sup>254</sup>

For analytical thinkers who implicitly accept the logic of identity, it is much easier to see Sartrean and Derridean thought as curiously similar. And it is thus easy for analytical Anglo-Saxon thinkers to conflate Derrida with Sartre. While it is easy for critical legal thinkers to conceive of Sartrean existentialism and Derridean deconstruction as natural complements, we should not fall into that trap here. If Sartre and Derrida seem like such natural complements in critical legal thought, it is because critical legal thinkers have received (and deformed) Derridean deconstruction through the Sartrean formative metaphysic and its frozen subject-object ontology. In critical legal thought, deconstruction is typi-

251. For Sartre, human freedom is grounded in the non-self-coincidence of the for-itself with itself. See H. MARCUSE, *supra* note 235, at 165 ("Human freedom [as] conceived [by Sartre] is not one quality of man among others, nor something which man possesses or lacks . . . , but is the human being itself and as such.").

252. In Sartre, *nothingness* is the source of the subject's non-self-coincidence and freedom. J.-P. SARTRE, *supra* note 78, at 239. In Derrida, *différance* is the problematic and highly problematized name given to the free play of the text. See J. DERRIDA, *Différance*, in MARGINS OF PHILOSOPHY 1, 11-22 (A. Bass trans. 1982).

253. See C. TAYLOR, *HEGEL* 76-94 (1975).

Hegel holds that the ordinary viewpoint of identity has to be abandoned in philosophy in favour of a way of thinking which can be called dialectical in that it presents us with something which cannot be grasped in a single proposition or series of propositions, which does not violate the principle of non-contradiction: (p.p). The minimum cluster which can really do justice to reality is three propositions, that A is A, that A is also A; and that A show itself to be after all A.

*Id.* at 80.

254. Or as Jacques Derrida responded himself (in a stage whisper): "Sure, sure. Same university. Same city. Same Planet." Remark made at the Cardozo Law School Conference on Deconstruction and the Possibility of Justice (Oct. 2, 1989).

cally (not always) depicted and used as an “analytical tool”<sup>255</sup> by a purportedly free individual subject. What is in Derrida the free play of signifiers becomes in Sartre the free play of the individual deconstructionist who makes the text mean what he “wants it to mean.”<sup>256</sup> It is in this way that deconstruction gets stuffed in the stabilized, reified, acritical, and relatively uninteresting space of the *analytical tool*. The reification of deconstruction in critical legal thought is almost palpable: “Described in its simplest form, the deconstructionist project involves the identification of hierarchical oppositions, followed by a *temporary reversal* of the hierarchy.”<sup>257</sup> What do these deconstructive operations get us? A helpful *thought experiment*: “The point is not to establish a new conceptual bedrock, but rather to *investigate* what happens when the given, ‘common sense’ arrangement is reversed. Derrida believes that we derive *new insights* when the privileging in a text is turned on its head.”<sup>258</sup>

Now, of course, this is not Derrida, and it is not deconstruction. Deconstruction is not an *analytical tool* or a “method.” On the contrary, as Derrida says, “We here note a point/lack of method.”<sup>259</sup> And Derrida is not into *temporary reversals* of hierarchies—but rather “an overturning of the classical opposition and a general displacement of the system.”<sup>260</sup> And deconstruction is not a *thought experiment* designed to provide new *insights*. Rather, deconstruction seeks to *intervene* in the field of oppositions that it criticizes, which is also a field of nondiscursive forces.”<sup>261</sup>

How then has it been possible for critical legal thinkers to claim to practice Derridean deconstruction while manifestly following an altogether different approach? The answer is Sartre. Indeed, consider the following account of deconstruction by Jack Balkin and watch for the Sartre:

I believe that in each case, one deconstructs because one has a particular ax to grind, whether it be a philosophical, ideological, moral, or political ax. [Even t]he deconstructor of the self is still *picking* her targets . . . . And this *choice* (for we can find no other word to describe it) is still the grinding of a particular ax . . . .<sup>262</sup>

255. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 786 (1987).

256. Balkin, *supra* note 250, at 1630.

257. Balkin, *supra* note 255, at 746 (emphasis added).

258. *Id.* at 746-47 (emphasis added).

259. J. DERRIDA, *DISSEMINATION* 271 (1981).

260. J. DERRIDA, *Signature Event Context*, in MARGINS OF PHILOSOPHY, *supra* note 252, at 329.

261. *Id.* at 329 (emphasis in original).

262. Balkin, *supra* note 250, at 1627-29 (emphasis added).

Now, this description assumes—right down to its very choice of an agent (*i.e.*, in Balkin's sentence it is the deconstructor, not the deconstruction, that is pre-scripted as the agent doing the choosing)—precisely the sort of radically free autonomous subject that is at the heart of Sartre. This is the enclosure, the nesting of Derrida within the Sartrean metaphysic. Indeed, compare the grand role Balkin accords to the individual subject in the deployment of deconstruction with what Derrida says in the following and experience the dissonance:

[Deconstruction is an] incision precisely [because] *it can be made only* according to lines of force and forces or rupture that are localizable in the discourse to be deconstructed.<sup>[263]</sup> The topical and technical determination of the most necessary sites and operators—beginnings holds, levers, etc.—in a given situation depends upon an historical analysis. The analysis is made in the general movement of the field *and is never exhausted by the conscious calculation of a "subject."*<sup>264</sup>

Of course, the kind of subject presupposed in Balkin's account is much more consistent with Sartre than with Derrida; it is much more consistent with the subject usually presumed within legal academic thought than with the troubling of the subject usually effected by deconstruction.

It is not hard to understand how critical legal thinkers might have come, through the Sartrean metaphysic, to subscribe to Derridean deconstruction without actually practicing it. The consequences for critical legal thought, however, are quite serious. It is precisely this Sartrean metaphysic (so congenial to orthodox descriptions of the subject-object scene) that is pervasively inscribed throughout critical legal thought, and it is precisely this Sartrean metaphysic that has contributed to the self-immobilization of critical legal thought.

Now, that doesn't make Sartre all bad. Indeed, one of the important and critical contributions of cls has been to demonstrate the extent to which our socially constructed knowledge can lead to pacification and to our own personal-political immobilization.<sup>265</sup> After having pushed Sartre to his limits, however, we can consider precisely what kind of subject is presupposed in critical legal thought. As Jean-Paul himself said, "There are indeed many precautions to imprison a man in what he is."<sup>266</sup>

263. This is why Balkin is correct when he notes that deconstruction does not "seize upon every word in the text as the source of a deconstructive reverie." *Id.* at 1627. But it is only the pervasively inscribed binary, either-or form of thinking, together with the usual logocentric privileging of the normatively competent individual subject, that leads Balkin to imagine that, therefore, individual subjects must be the ones who are choosing what and how to deconstruct.

264. J. DERRIDA, *POSITIONS* 82 (1981) (emphasis added).

265. See, e.g., Gabel, *supra* note 207, at 28-29.

266. J.-P. SARTRE, *supra* note 78, at 102.

And no doubt one such precaution is the configuration of the space defining him as a subject. I suggest, then, that we pause to consider the extent to which this precaution applies to critical legal thinkers. One good reason for doing so is that the development in cls of the subjectivist Sartrean strand and the structuralist strand have produced a political and intellectual image of subject-object relations that appears—shockingly enough—to be utterly conventional. Indeed, the subject at the heart of critical legal thought, the Sartrean subject, is a stunningly liberal subject.<sup>267</sup>

The apparent radicalism of critical legal thought does not stem from a new conceptualization of the subject, but rather from a reversal of the valences in the same old rule-of-law depiction of subject-object relations.<sup>268</sup> Whereas the rule-of-law thinkers radically separate and distinguish subject and object, seeking to restrain and constrain the legal subject by means of “objective law,” critical legal thinkers adopt the mirror image and strive to accomplish exactly the reverse.<sup>269</sup> For critical legal thinkers, as for Sartre, the perpetual problem is that the subject is always constrained by “reified structures” and “thingified social roles” and that everything turns into “pods.”

The only change in this picture of subject-object relations is the reversal of the traditional valences. Critical legal thought celebrates precisely what the rule of law fears: the emancipation of the individual subject. In turn, this cls reversal authorizes a whole series of aesthetically analogous reversals on the political plane—the reversal of the orthodox preference for rules over standards<sup>270</sup> and the reversal of the orthodox preference for freedom of contract as opposed to paternal-

267. If Sartre is the worm at the heart of critical legal studies, then the liberal subject is the worm at the heart of Sartre:

[Sartre] attempts to found existential understanding on Cartesian categories. Being-in-itself updates Descartes' conception of a dense material world that is absolutely other to the consciousness. Being-for-itself revives Descartes' pure thinking substance that freely surveys the world. Sartre deliberately sets himself the task of standing between a deterministic positivism and an unconstrained idealism. But he is unable to define that position theoretically because the Cartesian spirit virtually possesses his philosophy.

K. WHITESIDE, *supra* note 219 at 71.

268. Cf. Genovese, *Critical Legal Studies as Radical Politics and World View* (Book Review), 3 YALE J.L. & HUMANITIES 131, 149 (1991) (reviewing M. KELMAN, *supra* note 165) (“Kelman, like Unger, Kennedy, and others, begins with the conflicted concerns of the individual and ends with his liberation . . . . In this respect they follow proudly in the tradition of the great bourgeois theorists from Hobbes to Locke and Blackstone and Burke, and beyond.”).

269. This sense that critical legal theory can be understood as a recursive inversion of liberal legalist valuations is also suggested in Boyle, *supra* note 7, at 506 (“Are there uses of subjectivity rather than objectivity in order to privilege, to armor, to give authority to particular statements, particular theories, particular visions of society? I think the answer is clearly ‘yes’ . . .”).

270. See M. KELMAN, *supra* note 165, at 16 (“One should expect that those on the political left like the cls writers would contribute most heavily to the pro-standards position.”).

ism.<sup>271</sup> What we find, then, in orthodox critical legal thought is a kind of upside-down version of liberal legalism: the valences change, but the aesthetic structure remains the same.

One consequence of this critical reversal is that all the critical hopes—political, aesthetic and intellectual—are staked on the (liberal) individual subject who, once freed from the reifications of thought and role, is to emerge as a competent intellectual and normative agent. Terrific pressure is thus placed on the individual subject, both in theory and in practice, to develop all the right normative moves and to do the right thing. As Mark Kelman puts it: “We think in prepackaged categories, clusters, reified systems. We forget the degree to which we invent the social world. We come to think that rules make us act impersonally; we often forget that we must continually choose to act impersonally.”<sup>272</sup> This, of course, is not so much a radical vision as it is a repetition of the quintessentially liberal-legalist aggrandizement of the individual subject as a self-determining agent who fashions his or her world by choosing to realize *this* moral vision as opposed to *that* one.

Now, in a sense this is precisely the sort of understanding of the subject and of politics that we should have expected. It is precisely what one should expect from the Sartrean existentialist metaphysic, which ceaselessly saddles the individual subject with an inexhaustible responsibility to bridge the chasm of the subject and the object on the basis of ungrounded value choices. It is also what should be expected if one understands the history and the social situation of critical legal thinkers. The cls adoption of Sartrean existentialist phenomenology (the subjectivist strand) and structuralism (the structuralist strand) is a mimetic replay of precisely the relation of the personal social situation of critical thinkers circa 1975 to the intellectual claims that they advanced.

Indeed, if you reconsider the beginning paragraphs of this section, it becomes evident that the structure of critical legal thought is a projection of the social situation of critical legal thinkers onto the intellectual plane. Sartre’s existentialist subject very easily describes the critical legal thinker circa 1975 sitting in the faculty lounge, experiencing rule-of-law rhetoric as an objectified thought-structure that is at once alien and hostile.

From there, it is fairly easy to get to the basic structure of orthodox cls thought. In orthodox cls thought, the spaces occupied by the legal

271. See Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 624-49 (1982) (suggesting that compulsory terms motivated by paternalism are both pervasive and desirable).

272. M. KELMAN, *supra* note 165, at 294.

subject are almost always explored from a phenomenological perspective (and never from a structuralist perspective). One result, then, is that these spaces are in effect immunized, removed as they are from the purview of structuralist interpretation. A second result is that the subject is almost always conceived as a projection of the critical thinker himself.

On the other side of the ledger, the objective moment in law (*i.e.*, doctrines and policy arguments) is almost always approached from a structuralist perspective (never a phenomenological one).<sup>273</sup> One result is that doctrine, policy, and other objectified sites of the law are almost always represented as alien and object-like, never quite resonant with the subject. A second result is that the reappropriation of doctrine and policy by the subject is not possible except in a very distanced instrumental sense. Yet a third result is that phenomenological accounts of law remain mediated by a subject who already experiences himself as free, as the original creator of his own meanings.

What we get, then, in orthodox critical legal thought is a kind of structuralism that remains confined to the most object-like moments in law: a structuralism of appellate doctrine. On the phenomenological side, what we get is a sense of the tremendous freedom of the critical subject, who cannot be constrained or confined by the objective moments of law because these objective moments are never *him*. The unbearable lightness of being a subject is a consequence of never recognizing one's self in the meaningless solidity of dead doctrine.

Notice the black holes created on both the structural and phenomenological sides of the ledger by this highly structured critical practice. Structuralism never proceeds beyond the object-forms already privileged by traditional legal thought. Hence, the deep structure turns out to be located in an utterly conventional, superficial place—in appellate doctrine. This is why structuralist interpretation has been so successful pedagogically and at the same time so visibly threatening to traditional legal thinkers. Now, in a sense this represents a victory for cls. But it is also a bit of a defeat: this sort of work does nothing to displace the conventional spaces, the conventional conceptual and social aesthetics established by traditional legal thought. To give a concrete example, even after cls structuralist interpretation, appellate doctrine remains the place where law school says the law is to be found.

Now, on the phenomenological side of the ledger, there is another

273. More accurately, the phenomenology of doctrine, policy, and other objectified sites of law is, for the orthodox critical legal thinker, almost always experienced in structuralist terms. The orthodox critical legal thinker's experience of doctrine, policy, etc. is already mediated by the structuralist framework.

black hole. Since we are always dealing with the phenomenology of a subject who is free to create his own meaning, critical phenomenology never proceeds beyond the phenomenology of freedom to "real" experiences of constraint.<sup>274</sup> Constraint always and already has to be experienced (at least in theory) as an illusion—always and already susceptible to structuralist dismantlement.

Ironically, what I have been trying to suggest is that this structured practice of critical legal thought is itself disabling. It is not that there is anything wrong with doing a structuralist number on doctrine or moral theory. Nor is phenomenological inquiry misguided. What is wrong is that this division among the structuralist (appellate doctrine in itself) strand and the phenomenological subjectivist (value choices) strand has become, consciously or not, the master rule, the totalizing framework. Not only is this totalizing, structured practice intellectually limiting, it is politically disabling and oppressive.

The Sartrean metaphysic constantly calls for individual subjects to recognize their responsibilities and to choose. The message is this: Avoid bad faith—choose! But, in a Foucaultian sense, this construction of the subject entails a prevailing unfreedom. Each and every social, legal, and political event is immediately represented as an event calling for a value-based choice. You are free to choose between this and that. But, of course, you are not free. You are not free because you are constantly required to reenact the motions of the prescribed, already organized configuration of the individual being as chooser. You have to, you already are constructed and channeled as a choosing being.<sup>275</sup> Not only is this social construction of the self extraordinarily oppressive—but it often turns out to be absurd as well. Much of its absurdity can be seen in the normative visions that routinely issue from the legal academy urging us to adopt this utopian program or that one—as if somehow our choices (I like decentralized socialism, you like conservative pastoral politics, she likes liberal cultural pluralism) had any direct, self-identical effect on the

274. Duncan Kennedy gets pretty close in Keunedy, *supra* note 195, at 526.

275.

What I am afraid of about humanism is that it presents a certain form of our ethics as a universal model for any kind of freedom. . . . [N]ow this idea of man has become normative, self-evident, and is supposed to be universal. Humanism may not be universal but may be quite relative to a certain situation. What we call humanism has been used by Marxists, liberals, Nazis, Catholics. . . . I think there are more secrets, more possible freedoms, and more inventions in our future than we can imagine in humanism as it is dogmatically represented on every side of the political rainbow: the Left, the Center, the Right.

*Truth, Power, Self: An Interview with Michel Foucault* (Oct. 25, 1982), in *TECHNOLOGIES OF THE SELF: A SEMINAR WITH MICHEL FOUCAULT* 9, 15 (L. Martin, H. Gutman & P. Hutton eds. 1988) (sentence order rearranged).

construction of our social or political scene. The critical insistence on making political value choices is utterly captive to a conventional and nostalgic description of the political field—a description and definition of the field that is guaranteed to yield political disablement and disempowerment.<sup>276</sup> To tell people that they are already empowered to make political value choices is, in effect, to bolster the dominant culture's representation that we are free-choosing beings and to strengthen the forces that lead to our own repeated, compelled affirmation of (meaningless) choices.<sup>277</sup> By presupposing the authenticity of the Sartrean subject, critical legal thought has greatly underestimated the extent to which this "free" subject, in its very "freedom to choose," is already constructed to compulsively act out choosing behavior—regardless of whether the social, political, or rhetorical scene warrants or even enables a choice to be made at all.

In legal thought, the sterility of this approach is manifest in articles that exhort us to engage in choosing behavior while refraining from telling us what to choose. For instance, a while back John Stick argued that cls-ers and liberals ought to drop epistemic warfare and start arguing about what really counts: politics (conceived, of course, as political value choice).<sup>278</sup> But nothing happened and, of course, that's not surprising. All dressed up and nowhere to go. What are legal thinkers supposed to say? Three cheers for democratic socialism? I (really) like Ike? The Rawlsian difference principle really does require the Rule in Shelley's Case? There is a big and very widespread category mistake at work here: the presupposition that arguing about political values is somehow synonymous with engaging in politics.<sup>279</sup> Talking and arguing about political values is not necessarily (or even usually) political, anymore than talking about football is political.<sup>280</sup> To engage in politics is to engage with

276. See Schlag, *Politics of Form*, *supra* note 7, at 805-07.

277. I like:

Desert Rose corn chips (regular flavor, lightly salted, if the date of expiration has more than 10 weeks to go and the bag is not crumpled),  
Japanese cars built after December 1988,  
Non-tyrannical, watered-down, deontological moral theory,  
Decentralized, pluralistic socialism—but only in combination with strong legal protection for the traditional liberal freedoms,  
Small to medium size firms with an emphasis on corporate litigation,  
Four out of six large Eastern seaboard cities but only if the commute is less than 35 minutes,  
Ike.

278. See Stick, *supra* note 249, at 389-401.

279. See Schlag, *Politics of Form*, *supra* note 7, at 906-09; Winter, *Indeterminacy*, *supra* note 7, at 1473-85.

280. Now talking about football is in some senses political—because it typically excludes certain types of people from the conversation (women) and because it establishes and reaffirms certain bonds of solidarity and trust among other kinds of people (male sports fans). Talking about football is also

power. Arguing about political values may or may not engage with power. It depends. But there is no reason to presuppose that academic political value talk has any desired political effect whatsoever. Whether such talk has any desired political effect depends on how the aesthetics of power have enabled and constituted this political value talk and on the context within which this political value talk is issued and heard (assuming it is heard at all).

Now, it seems that critical legal thought has not considered these kinds of problems because cls thinkers have not inquired into the problem of the subject.<sup>281</sup> In turn, that is because critical legal thought already presupposes—indeed, is enabled by—the tacit construction of the space and the configuration of the subject. The space and configuration of the subject have been presupposed in two ways. First, à la Sartre, the individual subject “is ineffable, unjudgeable, ungraspable with the apparatus of thought,”<sup>282</sup> that is, he is that nothingness, that worm at the heart of being. In a second sense, however, the subject of cls thought is also understood as the people who got together in Madison, Wisconsin in 1977—complete with their rich, counterculture, new-left, oppositionalist social identities. Both of these tacit understandings of the subject converge to eclipse the problem of the subject. Sartre’s metaphysic makes the subject irretrievable in such a way that there is simply no point in pursuing the problem: there is no motivation to look for the subject, because there is literally nothing to find. But even aside from that point, there is no motivation to even *start* thinking about the problem of the subject, because the primal experience is that the subject is O.K. and all the problems are situated on the outside—in the external objectified thought structures that *constrain* the critical legal thinker (and all other legal thinkers).

Of course, now the problem of the subject does arise. And it arises for critical thought in several virulent forms. First, we are coming to understand that orthodox critical legal thought is structured in terms that turn out to be antithetical<sup>283</sup> to the Sartrean subject.<sup>284</sup> The very

political because it occupies conversational space and recursively rehearses certain highly stereotyped aesthetics of social life: the corporate form, the primacy of competition, the zero-sum nature of social life, the spatialization of conflict, the importance of strategy and capital asset management, the artificiality of socio-economic and racial class, and so on. Now, if talking *about* political value choices is political, it is political in the same kind of ways.

281. See Boyle, *supra* note 7, at 489 (noting that cls “has concentrated too much on critiques of objectivity, wrongly assuming that ‘subjectivity’ was an unproblematic term”).

282. Kennedy, *supra* note 202, at 745.

283. Antithetical, that is, to the extent that the subject does not actualize the permanent possibility of bad faith.

284. Hence it is really no surprise that Jean-Paul Sartre

did not like structuralism. He gave his reasons: “The specialists in linguistics try to treat

identification of legal thought as consisting of two unbridgeable and incommensurable subjectivist and structuralist moments turns out to be an intolerable burden for the Sartrean critical legal thinker to bear. What is unbearable is *the freezing of this division* as accepted or operative truth.

Second, cls thought is constantly driven by this subjectivist-structuralist division to reject whatever positive knowledge it produces.<sup>285</sup> This is why the highest political-intellectual program of cls is conceived as an “intersubjective zap”—a sort of ecstatic jurisprudential moment in which the false consciousness of thingified social roles dissipates, and the subject becomes one with the group.<sup>286</sup> But this intersubjective zap never lasts; the sort of subject required to achieve “it”—that wonderful Sartrean moment in which one recognizes one’s total freedom—is of necessity unsupported and unsupportable by any objective social structure. Understood in Sartrean terms, the for-itself, despite its best intentions, is always and already transforming itself into the in-itself.<sup>287</sup> Cls thinking leaves us oscillating within the Sartrean metaphysic—alternating between ecstatic moments of triumph and abject moments of utter failure. Never a dull moment, but never an enduring one either.

Third, the problem of the subject arises for critical legal thought because the realization of a radically free subjectivity always seems to elicit an equal and opposite radical objectivism. In other words, a certain symmetrical supplementarity is at work here. The more the subject is conceived, constituted, or called forth as a *radical* subjectivity, the more the object will also have to be conceived, constituted, or called forth as a *radical* objectivity. This symmetrical supplementarity has already been acted out in several ways. First, of course, it has already been acted out in Sartre’s *Being and Nothingness*.<sup>288</sup> Second, it has been acted out in the critical interventions of cls thought.<sup>289</sup> Indeed, the theoretical alternative that many critical legal thinkers conceive as most plausible, most serious, and most worthy of critical attention is precisely the most objectivist ju-

language *from without*, and the structuralists, who base themselves on linguistics, also deal with a whole *from outside*; for them it is a matter of carrying concepts to their utmost limit. But I cannot do that because I set myself not on a scientific but a philosophic plane, and that is why *I do not need to exteriorize* what is entire.”

S. DE BEAUVOIR, *supra* note 178, at 33 (emphasis added).

285. See *supra* text accompanying note 248.

286. This is close to Sartre’s notion of “groupe en fusion.” J.-P. SARTRE, *CRITIQUE DE LA RAISON DIALECTIQUE (PRÉCÉDÉ DE QUESTIONS DE MÉTHODE)* (TOME 1) 627 (1960).

287. Critical legal thinkers have a direct experiential confirmation of this point as they see their thought systematically reified and thus neutralized by unfriendly as well as friendly commentators. See Gabel & Kennedy, *supra* note 213, at 7 (suggesting that some critical thinkers have turned the fundamental contradiction into a “pod”).

288. See *supra* text accompanying notes 214-35.

289. See *supra* text accompanying notes 272-87.

risprudence on the legal landscape—namely, law and economics.<sup>290</sup> Moreover, on a more local level, the most routine dismissal in the academy (with or without accompanying personnel action<sup>291</sup>) is accomplished through the tendentious objectivist claim that cls thought is not “law.” In these ways, then, we can see that radical individual subjectivism tends to call forth a radical objectivism in response.

These instantiations of symmetrical supplementarity remain relatively unimportant compared to what amounts itself as a much more significant political problem for cls: the resurgence of the order of the object in the form of the bureaucratic structuring of thought and life. Cls is not the only movement to insist upon the radical freedom of the individual subject. On the contrary, that theme is pervasive throughout American culture. And the problem is that this insistence on the radical freedom of the individual subject is accompanied and effectuated by the increasing pervasiveness and dominance of technology-centered, market-bureaucratic instrumentalist practices. Thus, the problem for critical legal thought is this: Critical legal thought insists on the radical freedom of the subject—but it does so at precisely the same time that the technology-centered, market-bureaucratic practices are insisting on the same thing. It thus becomes highly questionable whether the critical insistence on the radical freedom of the individual subject has any political or intellectual significance other than to help constitute a subject who is already missing the critical capacity to understand or resist the techno-instrumentalism of our private-public, market-bureaucratic practices.

Now, perhaps the Sartrean existentialist subject is competent to deal with issues like:

socialism v. capitalism  
liberation v. colonialism  
communalism v. individualism  
or any other conventional, value-based description of the  
political field.<sup>292</sup>

The problem for critical thought, however, is that the Sartrean subject and its value-based description of the political field provide no critical or epistemic or ethical competencies to deal with the sort of politics implicit in the techno-instrumentalism of our private-public, market-bureaucratic practices. Indeed, inasmuch as the Sartrean existentialist subject and its

290. See M. KELMAN, *supra* note 165, at 114 (noting that “the Law and Economics movement . . . is the best worked-out, most consummated liberal legal ideology of the sort that CLS has tried both to understand and to critique”).

291. or inaction

292. At the very least, one can say that the Sartrean subject is theorized and constituted as a subject who can take cognizance of these types of issues and respond cogently. This value-based description of the political field is one in which the Sartrean subject can fit.

## The Problem of the Subject

morality are already captive to and collaborative with these practices, they are politically regressive phenomena.<sup>293</sup>

This brings us to the fourth and, indeed, the most serious form of the problem of the subject for cls: the subject, having been already specified as non-self-coinciding, as “ineffable” and “ungraspable” through thought, becomes that blank space in which dominating ideologies do their work free from critical inquiry. The subject presupposed by critical legal thought is precisely the sort of subject that is (in the current structuralist-subjectivist configuration of critical legal thought) impervious to critical inquiry and to thematization. For critical legal thinkers to confront the problem of the subject thus requires a reconsideration or, more accurately, a displacement of the Sartrean metaphysic that has defined and confined the enterprise of critical legal thought thus far. That, of course, is precisely the sort of reconsideration or displacement that I have been trying (ever so gently) to prompt here.

### IV. Neopragmatism: Within the Context of No Context

Wonder was the grace of the country. Any action could be justified by that: the wonder it was rooted in. Period followed period, and finally the wonder was *that things could be built so big*. Bridges, skyscrapers, *fortunes*, all having a life first in the marketplace, still drew on the force of wonder. But then a moment's quiet. What was it now that was built so big? Only the marketplace itself. Could there be wonder in that? The size of the con?<sup>294</sup>

#### A. *Freedom From Theory-Guilt Now!*

The remarkable advent of pragmatism in the past five years is no accident. Pragmatism is featured as an initially plausible candidate for the answer to several different but related jurisprudential embarrassments. After rule-of-law thinking stalls in a series of interpretive contretemps, pragmatism arrives to explain how the interpretive enterprise can be stabilized. After a devaluation of normal doctrinal science by fancy theorists, pragmatism arrives to lend legitimacy to standard doctrinal

293. For a profoundly alienated and apocalyptic vision of an order of the object working itself through without regard for and not subordinate to the control of individual subjects, see J. BAUDRILLARD, *LA TRANSPARENCE DU MAL—ESSAI SUR LES PHÉNOMÈNES EXTRÊMES* (1990). As description, Baudrillard's essay tends towards the anti-humanist extremes. Nonetheless, taken in fragments it aptly describes the sort of anti-humanist social circumstances we may have stumbled into. It is a reminder of the extent to which our social constructions work and work and continue to work regardless of us, without regard for us, through us. Baudrillard's work is helpful because it is a new marker extending the intellectual field—one that makes Weber's iron cage look like a picnic.

294. G. TROW, *WITHIN THE CONTEXT OF NO CONTEXT* 3 (1981) (emphasis in original).

work.<sup>295</sup> After grand theory fails to provide constraints on adjudication,<sup>296</sup> pragmatism arrives to provide a new theory of decision making.<sup>297</sup> After the normative aspects of critical legal thought risk devolving into irrationalist particularism, pragmatism arrives at once as the inspiration, the structure, and the legitimation of contextualism.<sup>298</sup>

There is thus a great deal in pragmatism to like—apparently from a great many directions. Part of the appeal of pragmatism is no doubt captured in Tom Grey's slogan: "Pragmatism is freedom from theory-guilt."<sup>299</sup> Pragmatism provides an intellectually respectable justification for one's inability or refusal to provide a theoretically cogent account of what one is doing.<sup>300</sup> Pragmatism is the indigenous American substitute for the Wittgenstein cite.<sup>301</sup> It is the indigenous intellectual tradition for

295. See Farber, *The Case Against Brilliance*, 70 MINN. L. REV. 917, 929 (1986) ("Perhaps the current bias in favor of brilliant, 'paradigm shifting' work should be abandoned. The more pedestrian 'normal science' may be the worthier endeavor."); Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1334 (1988) ("A growing number of scholars share my discontent with foundationalism.").

296. See M. TUSHNET, RED, WHITE AND BLUE 1-4 (1989) (positing grand theory as an attempt to constrain judicial decision making); Minow & Spelman, *supra* note 38, at 1601 (noting the failure of abstract universal principles to resolve problems).

297. Sherry, *The Ninth Amendment: Righting an Unwritten Constitution*, 64 CHI. KENT L. REV. 1001, 1013 (1989) ("In light of the failure of the 'grand theories' to produce a useful and noncontroversial theory of constitutional constraints, many constitutional scholars have recently turned instead to anti-formalist, anti-theoretical approaches.").

298. It would be too much to suggest that critical legal thinkers have adopted pragmatism as their own approach. Hutchinson, *The Three R's: Reading/Rorty/Radically* (Book Review), 103 HARV. L. REV. 555, 572 (1989) (criticizing Rorty's pragmatism as vaguely quiescent). Yet, clearly, pragmatist approaches hold some appeal for critical legal thinkers. See, e.g., Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 25-26 (1984).

299. Grey, *supra* note 115, at 1569.

300. "The pragmatist thus possesses a general antidote to statements of the form 'We cannot proceed with X until we have an adequate theory of Y,' where X is a socially constituted practice and Y is an academic subject or theoretical topic." *Id.* at 1569. Now, of course, this "antidote" quality is not a distinguishing characteristic of pragmatism. The Hegelian, the Marxist, the French Existentialist, the poststructuralist, or anyone with any sort of sophisticated (i.e., nonrationalist) understanding of the relations of theory and practice has a "general antidote" too.

By comparison with all these other approaches, the distinguishing mark of pragmatism is that it can provide the "general antidote" while least disturbing the already existing intellectual and social constitution of the American legal intellectual. That is why pragmatism can seem appealing (in varying degrees) to such widely different intellectual personages as Tom Grey, Richard Posner, Margaret Jane Radin, Dan Farber, Martha Minnow, Frank Michelman, and Suzanna Sherry. See generally *Symposium on the Renaissance of Pragmatism in American Legal Thought*, 63 S. CAL. L. REV. 1569 (1990).

301. The Wittgenstein cite goes like this:

"So you are saying that human agreement decides what is true and what is false?"—It is what human beings say that is true and false; and they agree in the language they use. That is not agreement in opinions but in form of life.

L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* ¶ 241, at 88E (G. Anscombe trans. 2d ed. 1958). The Wittgenstein cite is used in three prototypical ways in legal thought. First, it is a way of arresting an infinite regress in the search for rational foundations. Second (and relatedly) it is a way of indicating that the way in which a particular theoretical or regulative inquiry or question has been framed is iniscast—misconstruing not only what is to be sought, but the searching that is to seek it.

defusing (miscast) theoretical inquiries and for disassembling overly formalized, overly ambitious forms of thought. It is the traditional American way in which being—apparently any being—revolts against the imperialism of thought.

This all sounds very good—but it raises a certain identity crisis problem for pragmatism. What is it? One thing's for sure: pragmatism is not a theory—at least, not as the term “theory” is commonly understood among legal thinkers. Pragmatism cannot be the sort of intellectual artifact that occupies the customarily reified space of theory.

Of course, having pointed this out, we needn't be so miserly, so rationalist, in our conception of the space accorded to “theory.” We can redefine our terms:

Theories understood in the pragmatist (“pensive”) way are not Euclidean axioms or Kantian categorical imperatives, but graffiti, practical guidelines to be noticed by the alertly street-wise when context makes them applicable. It is a lively and attractive, if not particularly inspiring, picture of the way the pragmatist makes use of theory.<sup>302</sup>

Now, here the question of what kind of theory pragmatism may be is ultimately referred back to the identity of the user: the pragmatist who “makes use of theory.”<sup>303</sup> This reference of theoretical questions back to the pragmatist is a critical recursive move in pragmatic legal thought. The move can be understood in terms of two related moments.

First, pragmatism strives to decompress the space legitimately to be accorded to theory—that is, the theories of others, as well as the theories of pragmatists. This is pragmatism's negating moment. As Posner says, “Pragmatism remains a powerful antidote to formalism.”<sup>304</sup> It “clears the underbrush; it does not plant the forest.”<sup>305</sup> Radin agrees: pragmatism (along with feminism) shares “a commitment against abstract idealism, transcendence, foundationalism, and atemporal universality; and in favor of immanence, historicity, concreteness, situatedness, contextuality, embeddedness, narrativity of meaning.”<sup>306</sup> More bluntly, Rorty says, “I think it is true that by now pragmatism is banal in its application to

Third, the Wittgenstein cite is a performative move (and not always a polite one) designed to communicate something like, “Oh be quiet, and stop bothering me with *your* problems.”

For a playful, that is to say, deadly serious, deconstruction of this Wittgenstein Maneuver, see Schlag, *supra* note 73, at 938-42 (1988).

302. Grey, *supra* note 115, at 1593.

303. *Id.*

304. Posner, *What Has Pragmatism to Offer Law?*, 63 S. CAL. L. REV. 1653, 1663 (1990).

305. *Id.* at 1670. Richard Posner even goes further, endorsing T.S. Eliot's conclusion: “[T]he great weakness of Pragmatism is that it ends by being of no use to anybody.” *Id.* at 1653 (citing T.S. ELIOT, *Francis Herbert Bradley*, in *SELECTED PROSE OF T.S. ELIOT* 204 (F. Kermode ed. 1975)).

306. Radin, *The Pragmatist and the Feminist*, 63 S. CAL. L. REV. 1699, 1707 (1990).

law."<sup>307</sup>

In the second moment, all remaining questions are then referred back to the identity or character of the pragmatist. As Posner says, pragmatism "signals an attitude, an orientation, at times a change in direction."<sup>308</sup> And as Tom Grey says, "To become a pragmatist is to undergo a paradigm-switch, a change in attitude or outlook as much as a change in belief."<sup>309</sup> And since, in the pragmatic world view, it is intuition, experience, context, and perspectivism that count, it can hardly surprise anyone that the precise identity and location of the one having the intuition, experience, and perspective should matter greatly.<sup>310</sup> It is thus understandable that a pragmatist like Margaret Jane Radin, for instance, eschews writing about pragmatism, preferring instead to write about the pragmatist—what she thinks, what she does.<sup>311</sup> Likewise, it is also aesthetically fitting that in confronting some difficult problems posed about the status of pragmatic perspectivism, Tom Grey eschews a theoretical resolution and instead traces in detail the way in which "Stevens's poetic practice shows a way for perspectivists to move on."<sup>312</sup>

### B. *Being a Pragmatist Is Hard to Do*

All of this, of course, places great intellectual and social pressure on the character and the identity of the pragmatist. In a sense, we have a replay of the problem of the subject faced by the rule-of-law thinkers. But here we must ask, who is the pragmatist? Who is this personage, this individual subject so critical to the pragmatic enterprise? Not surprisingly, the pragmatist is the one who understands, who recognizes what it means to be a thinking, acting individual subject. To understand what it means to be an individual subject means to understand that the individual and his thoughts are socially constructed. His thinking is "always embodied in *practices*—habits and patterns of perceiving and conceiv-

307. Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1811 (1990).

308. Posner, *supra* note 304, at 1670.

309. Grey, *supra* note 115, at 1570; see also Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567, 1569, 1573 (1985) (emphasizing the importance of "attitude" or "temperamental disposition" in his own "prudentialist" version of pragmatism).

310. Tushnet, *Character as Argument* (Book Review), 14 LAW & SOC. INQUIRY 539, 547-48 (1989) (reviewing H. KALVEN, *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (1988)) (criticizing Kalven's "theory" of the First Amendment as entirely dependent on Kalven's character).

311. Radin, *supra* note 306, at 1699 (reflecting even in her article's title the importance of the pragmatist agent).

312. Grey, *supra* note 115, at 1577.

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ing”<sup>313</sup>—most of which are collectively produced through the culture.<sup>314</sup> At the same time—and in apparent tension—the pragmatic view “grants no special authority to unconscious habit and slowly evolved custom; self-conscious reflection and innovative reason are equally central . . . .”<sup>315</sup> The pragmatist recognizes the subject as reflective, deliberative, even contemplative—capable through his thought of guiding action—so much so that beliefs are to be “judged by their efficacy in leading the agent through experience successfully.”<sup>316</sup>

Now, as between the image of the subject as socially constructed and the image of the subject as in charge of his own thought and action, there is a certain tension. The pragmatist deals with this tension by invoking the image of mediation. The pragmatist subject is conceived as the site for mediation. This conceptualization of the subject is not surprising given that “James offered pragmatism as a ‘*mediating*’ way of thinking.”<sup>317</sup> Indeed, the term “mediating” and its location in the thinking of the pragmatist subject recurs frequently throughout the neopragmatic literature, not just to mediate the specific tension of the contextualist and the instrumentalist strands of pragmatism, but to identify the site for the mediation of a whole series of recursive binary conflicts:

|              |                                |
|--------------|--------------------------------|
| reason       | feeling <sup>318</sup>         |
| mind         | body <sup>319</sup>            |
| nature       | nurture <sup>320</sup>         |
| connection   | separation <sup>321</sup>      |
| means        | ends <sup>322</sup>            |
| public (man) | private (woman) <sup>323</sup> |
| optimism     | pluralism <sup>324</sup>       |

313. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 798 (1989) (emphasis in original).

314. *Id.*

315. *Id.* at 801.

316. *Id.* at 803.

317. Radin, *supra* note 306, at 1715 (emphasis added) (quoting W. JAMES, PRAGMATISM 26 (1975)).

318. Radin, *supra* note 306, at 1707.

319. *Id.*

320. *Id.* at 1708.

321. *Id.*

322. *Id.*

323. *Id.*

324.

Pragmatism is a way of understanding our simultaneous commitments to optimism *and* pluralism, to concrete empiricism *and* principles, to an incomplete and dynamic universe *and* to the possibility of perfection that our ideals impel us unceasingly to hope for and work for.

Radin, *supra* note 306, at 1715 (emphasis in original).

|  |   |
|--|---|
| concrete empiricism  | principles <sup>325</sup>   |
| an incomplete dynamic universe   | the possibility of perfection <sup>326</sup>  |
| all previous truths  | certain new experiences <sup>327</sup>  |
| tough-minded philosophical realism   | tender-minded idealism <sup>328</sup>   |
| philosophical positions that stress the determining force of material, physical, or biological reality | philosophical positions that stress the shaping power of the imaginative capacity for cultural development <sup>329</sup> |

Pragmatists almost always seem to be dealing with bipolar tensions and almost always seem to respond by mediating them.<sup>330</sup> For pragmatism, then, it is the pragmatist subject who must already be competent to mediate these and other tensions. Not surprisingly, given its mediating function, the space of the pragmatist subject is left relatively unstructured and unspecified.

This minimalist aesthetic representation of the pragmatist's subject need not produce uncertainty or unpredictability or anything of the sort. If pragmatists take or are led to take a strong conventionalist turn—and the conventions already in place happen to be monistic and univocal (rather than pluralistic and dissonant)—then some degree of stability can be achieved. But it is quite clear that many pragmatists seem disinclined to adopt this tack. Many pragmatists disclaim any such conservative or “complacent” agenda.<sup>331</sup> On the contrary, the kind of mediating that the pragmatist subject is supposed to accomplish is left generously unclear, virtually free flowing:

A corollary of pragmatism, derived from the tenets that thought is always both situated and instrumental, is a kind of perspectivism. Because new beliefs emerge out of a complex of already existing beliefs that can never be made fully conscious and explicit, all use-

325. *Id.*

326. *Id.*

327. Radin, *supra* note 306, at 1709 n.26 (“[O]ur theory must mediate between all previous truths and certain new experiences.” (emphasis added) (quoting W. JAMES, *supra* note 317, at 104)).

328. Grey, *supra* note 115, at 1571 (suggesting that a Wallace Stevens poem “captures pragmatism’s double focus—its mediation of ‘tough minded’ philosophical realism . . . and ‘tender-minded’ idealism”).

329. *Id.* at 1572 (“These are the chief American legal theorists who have followed the pragmatist middle way, the *mediation* between philosophical positions that stress the determining force of material, physical, or biological reality, *and* those that stress the shaping power of the imaginative human capacity for cultural development.” (emphasis added)).

330. I think that the pragmatist makes a valuable contribution in bringing to our attention the conventionally embedded dualisms of our (legal) culture. I am, however, rather doubtful that pragmatic mediating or oscillating moves in any significant way beyond these embedded dualisms. For a critique and an alternative to the latent binary tendency of pragmatism, see Winter, *supra* note 105.

331. See, e.g., Radin, *supra* note 306, at 1711 (arguing that the feminist perspective of domination prevents the complacency seen in some pragmatists).

ful beliefs may not ultimately prove commensurable with each other. Furthermore, because inquiry is at root an instrument to guide action (including the action of further inquiry), its products are subject to revision as the ends sought in action change. This double relativity of situation and purpose implies a tentative attitude toward all beliefs, including especially those "theoretical" and "fundamental" ones to which we are most likely to attribute permanent and universal validity. The pragmatist recognizes that the best account of a phenomenon (such as law) from one angle, for one purpose, at one time, might not serve as well from another perspective, rooted in another temporal context, and aimed at different goals.<sup>332</sup>

To read this description of the pragmatic approach can yield a sense of jurisprudential vertigo: the passage reads like the description of reflective equilibrium<sup>333</sup> in the context of all contexts. Among the socially situated, instrumentalist, and perspectivist themes of pragmatism, there is always the possibility of changing the *social situation* one finds oneself in, the *goals* one seeks to pursue, or the *perspective* that one is using to understand one's social situation or goals.<sup>334</sup> Tom Grey highlights this phenomenon with the thought of Wallace Stevens: "Stevens moves from *idealism* to *realism*, then dialectically to an integrating *perspectivism*, then to a renewed dialogic oscillation between *idealism* and *realism*, with the partners reconceived as *perspectives*."<sup>335</sup> Interestingly, even Grey's sensitive rendition slips into essentialism and thus understates the vertiginous potential of pragmatism. Indeed, rather than conceiving *idealism*, *realism*, and *perspectivism* as distinct moments, we can begin to understand the extent to which any act of thought might be understood as a [—]<sup>336</sup> *nesting* of idealism within realism within perspectivism (or any other combination). In other words, within the pragmatic vision, we can become structuralists and recognize that utterances, language, and

332. Grey, *supra* note 313, at 804-05.

333. See generally J. RAWLS, A THEORY OF JUSTICE 48-51 (1971) (arguing that our sense of justice comes from matching prereflective intuitions with proposed reconceptions until we achieve a kind of balance, called "reflective equilibrium").

334. As Tom Grey points out, a pragmatist will not go round and round forever trying to understand these instabilities, because inquiry is itself a kind of action (or inaction) and might thus interfere with the pursuit of goals, or even the understanding of one's social situation. Grey, *supra* note 313, at 797-99.

This is an important point for the pragmatists (and non-pragmatists) to recognize, but it really doesn't provide much in the way of stabilizing pragmatic inquiry. As the micro-economists would put it: the absolute value of transaction costs are neither here nor there. You need to know something about the value of what is at stake to understand whether the transaction costs are worth incurring. See A. SCHMID, PROPERTY, POWER, AND PUBLIC CHOICE: AN INQUIRY INTO LAW AND ECONOMICS 104 (2d ed. 1981).

335. Grey, *supra* note 115, at 1583 (emphasis added).

336. Fill in the blank:

thought are structured like Russian dolls.<sup>337</sup> We can even become post-structuralists and understand that utterance, language, and thought are like Russian dolls, in which the boundaries between each doll can fuse, disappear, or be relocated depending upon changes in the frame of reference that are not [—]<sup>338</sup> within our control.<sup>339</sup>

In short, it would seem that the pragmatic approach can, in effect, slide into anything—including the adoption of what might otherwise appear to be highly nonpragmatic, essentialist a priori approaches. It could, for instance, become a pragmatic imperative to adopt a non-pragmatic approach so as to carry out very pragmatic, instrumental goals. Nonpragmatism can also become the pragmatic program in so far as the self of the pragmatist is shaped by a highly formalist, essentialist culture of thought. Notice that *in a sense* everyone (even the essentialist, the bad a priori thinker) can always already make a pretty good claim<sup>340</sup> to being a pragmatist.<sup>341</sup> What is more, everyone can always already make a pretty good claim that any ostensible violation of the pragmatic approach, such as “bad” essentialist a priori thinking, is already instrumentally justified. What is more, on pragmatic grounds the retort is always ready. It’s the standard reflexive perspectivist response: “So you say I am essentialist, an a priori thinker? By reference to what view of

|                          |                   |
|--------------------------|-------------------|
| (case specific?)         | contextualism     |
| (stereotypical?)         | structuralism     |
| (recursive & recombant?) | poststructuralism |
| (abstractly stable?)     | essentialism      |
| and so on.               |                   |

337. Jack Balkin and Duncan Kennedy “use the term ‘nesting’ to describe this sequential ordering of legal questions in which the second issue raises concerns seemingly put to rest by resolution of the first issue.” Paul, *supra* note 191, at 1795 (footnote omitted). The import of Kennedy’s and Balkin’s conception lies in identifying the extent to which moral and policy questions, presumably resolved at one level of decision making (*i.e.*, substantive doctrinal rule) may resurface as a live dispute at another level of legal decision making (*i.e.*, evidentiary standard). *Id.* at 1795 n.36. This is akin to the *linear* infinite regress.

My use of the term “nesting” is more general and is designed to include far less orderly recursive patterns. It is designed to identify the presence of a logic of containment or envelopment or reappropriation. None of my Russian dolls have to look alike; they don’t have to belong to the same set; they don’t even have to get along very well. In fact, very often, they don’t. See Schlag, *Missing Pieces*, *supra* note 7, at 1222-28 (demonstrating how rationalism reappropriates and refashions modernist and postmodern thought in its own rationalist image thereby defusing both).

338.

(often?)  
(necessarily?)  
(usually?)  
(always?)  
and so on.

339. See generally Schlag, *supra* note 73.

340. (This is a technical term.)

341. See Smith, *The Pursuit of Pragmatism*, 100 YALE L.J. 409, 435-37 (1990) (“In short, the pragmatist suggests that . . . [w]e should talk things over, and we should look at problems in context. All of this seems eminently sensible. Who does—who *could*—disagree?” (emphasis in original)).

reality, pray tell? Uh, huh, yes. And where's your tap into the heart of being, guy?"

Now, I don't think that Grey or Radin or any other sophisticated pragmatist would disagree with any of this. They could, of course, reply with a standard pragmatist move: All of these vertiginous gyrations and uncertainties are possible—but only in a (bad?) *theoretical* sense. The *pragmatic* possibilities of pragmatism—as distinguished from the *theoretical* possibilities of pragmatism—are, for Radin and Grey, far narrower. But how so? Again, I think we are referred to the pragmatist subject who is at once situated and guided by instrumental concerns. It is *this* situatedness and *this* instrumentalism of the subject that keeps the lid on what would otherwise be the wild Nietzschean poststructuralist perspectivism. But how?

If Grey or Radin thinks that pragmatism means something, it is because pragmatism refers questions to the character and temperament of the pragmatist subject.<sup>342</sup> Tom Grey, for instance, keeps on talking about “what it feels like” to be a pragmatist.<sup>343</sup> Now, one has to have some sympathy for the enterprise that Grey and Radin are pursuing: in some sense they are trying to describe pragmatism phenomenologically—that is, in terms of what it feels like to be a pragmatist. The usual objectivist matrix of jurisprudential discourse makes this exercise in description by Grey and Radin very difficult. Part of their point, presumably, is that being a pragmatist does not reduce to any one position in the usual aesthetic matrix of jurisprudential discourse. That is why, for instance, Grey adopts the unusual jurisprudential strategy of trying to describe pragmatism by tracing the philosophical implications of Wallace Stevens's poetry.<sup>344</sup> This is definitely not the usual taxonomic (*i.e.*, which box do you fit in?) approach to jurisprudence.

The rejection of the box approach to jurisprudence (which Radin correctly identifies as tendentiously leading towards essentialism)<sup>345</sup> is precisely what leads both Radin and Grey to experience some difficulty expressing their thinking when the boxy dualistic matrices resurface in their own work. Whenever the dreaded dualities return, Radin and Grey use opaque verbs like “mediate” or “oscillate” to describe how

342. In contrasting the pragmatist to the poststructuralist, Radin and Michelman insist on temperament as a key difference. Radin & Michelman, *supra* note 8, at 1043-44; see also Smith, *supra* note 341, at 437-40 (noting the importance of “temperament” to neopragmatism).

343. Grey, *supra* note 115, at 1570.

344. *Id.* at 1583.

345. See Radin & Michelman, *supra* note 8 at 1049-51 (cautioning that some feminists have adopted an “essentializing” stance that entrenches the current, injurious cultural understanding of women's limited nature).

pragmatists deal with binary representations. This opacity, this deflection, is perfectly understandable in as much as both Grey and Radin want to avoid representing the pragmatist subject in terms of these dualities. They seek to arrest the infinite regress and to avoid jurisprudential vertigo. They do this by invoking a pragmatist subject—one who meditates. But this move, of course, refers all the problems to the identity of the pragmatist subject. The question still remains, who is this pragmatist subject?

The short answer is that the pragmatist subject is them (Radin, Grey, etc.). "Today the legal pragmatist stands—to oversimplify as one must for summary purposes—between law-and-economics and its satellites on the one hand, and what might loosely be called 'cultural legal studies' on the other."<sup>346</sup> Now, of course, this description of the legal pragmatist coincides almost perfectly with a description of both Radin's and Grey's jurisprudential stances, as they see them.

The longer answer requires a new question: how is it that the pragmatist subject came to be them (Radin and Grey) as opposed to someone else, say Duncan Kennedy or Frank Easterbrook? Radin and Grey would likely answer that Duncan Kennedy and Frank Easterbrook (whatever their virtues) simply do not have the temperament, the attitude, or the quality of mind of pragmatists. Kennedy and Easterbrook are not pragmatists because they do not "take our present descriptions with humility and openness."<sup>347</sup> Within the conventional understanding of "humility and openness" in the legal community, this judgment will likely seem right to many people. But notice what is going on here: our ability to identify a quality of mind, a temperament, the pragmatist subject himself, turns out to depend upon a thoroughly conventionalist representation of the field of contemporary jurisprudence.

"Precisely so," Radin and Grey might say, "that is exactly what pragmatism prescribes. We are all creatures of the conventions we learn."<sup>348</sup> But such a response is belied by their drive to describe the pragmatist subject in a transcontextual manner—a manner that will cut across contexts.<sup>349</sup> In changing the context by discussing Wallace Ste-

346. Grey, *supra* note 115, at 1571.

347. Radin, *supra* note 306, at 1726. If Duncan Kennedy is not a pragmatist for Grey or Radin, it is because he does these structuralist things that look to them very *a priori*, essentialist and somewhat formalistic. Roughly the same is true of Frank Easterbrook. Now, no doubt such a judgment will ring true to many legal academics. But what vision of jurisprudence is being presupposed here? I'm sure if we asked Easterbrook or Kennedy if they were being *a priori*, essentialist or somewhat formalistic, each would say something like—"no, not at all, no more than I need to be: I've got it just right, thank you."

348. See *supra* text accompanying note 346.

349. This is understandable: they are both theorists. And both, to some extent, understand the

vens's poetry and thought, Grey hopes to provide an understanding of "what it feels like" to be a pragmatist. But this is a transcontextual project. It is clear that the motivation for a discussion of the life, thought, and poetry of Wallace Stevens is driven by Grey's desire to escape from the clichés of conventional jurisprudential "reality" through a metaphor: Wallace Stevens as metaphor, a metaphor for how *to be*. But this transcontextual attempt to capture the identity of the pragmatist subject cannot work. We would fly off once again, in the context of all contexts, with the unbearable-lightness-of-being-a-subject blues again.<sup>350</sup> There is simply no describing the character, temperament, or sensibility of the pragmatist subject *outside* the representation of the field within which that subject's character, temperament, and sensibility is constituted—both as concept and as determinable content.<sup>351</sup> That is why, to understand what pragmatism means for law, Grey had to come down to jurisprudential earth and tell us in a highly conventionalist representation of the legal field: "Today the legal pragmatist stands—to oversimplify as one must for summary purposes—between law-and-economics and its satellites on the one hand, and what might loosely be called 'cultural legal studies' on the other."<sup>352</sup>

But what is Grey *doing* with this answer? He is doing what pragmatists are almost always driven to do: he is "mediating" or "oscillating" between two poles. Usually, this standard pragmatic answer in the face of conflicting dualisms has at least the appearance of plausibility. But here, the standard pragmatic "mediating" answer is particularly inappropriate. It is particularly inappropriate precisely because the question here is *who* or *what* is it that is doing the mediating? One answer, of course, is the conventionally oscillating self. This is a bit *déjà vu*, a bit too close to Sartre for comfort.

And yet it may be right. The mediation, the oscillation of the pragmatist subject are in several senses quite conventional. First, the pragmatist is always mediating, always oscillating between a highly conventional set of dualities: subject-object, imagination-reality—in short, the usual binary suspects. Pragmatism can hardly be faulted for recognizing the patterned binary character of intellectual and social culture in the West.

extent to which the theory-game as it is currently practiced and structured within the legal academy resists their attempt to re-present pragmatism. Believe me; I empathize. See Schlag, *Politics of Form*, *supra* note 7, at 889-95.

350. "Am I being a bit too referential here?" No, not at all: this is the context of all contexts.

351. This sort of problem is pointed out by Martha Minow and Elizabeth Spelman. See Minow & Spelman, *supra* note 38, at 1639 ("[O]ur discussion of a conception of judging founded in the particulars of a circumstance and in the situated sensibilities of the judge risks sounding abstract in the absence of a specific context.").

352. Grey, *supra* note 115, at 1571.

What is striking about legal pragmatism, however, is that its understanding of the situation, role, and effect of these dualities is stunningly conventional. Legal pragmatism (unlike, for instance, some kinds of poststructuralist, rhetorical, or cognitive approaches) locates these dualities in the spaces of mind, thought, and theory. Hence, neopragmatists may claim to “oscillate” or “mediate” between idealism and materialism, thought and practice, mind and body, but the oscillation, the mediation itself always and already takes place within a conventional discourse field that is already configured or formatted in the image of idealism, thought, and mind.<sup>353</sup> Pragmatists are thus limited to a highly conventional form of “oscillation” or “mediation.” In consequence, while pragmatists *may claim to oscillate* between theory and practice, *the oscillation they do* remains quite conventionally confined to theory’s idea of theory as well as to theory’s idea of practice. Theory, idealism, and mind are the conventionally inscribed formats and there is nothing in the pragmatic repertoire to suggest that neopragmatists have recognized that they are operating within this format. Indeed, as pragmatists, how could they achieve such a recognition? What’s more, even if they did, there is no indication that they have the moves to escape from or to reconfigure this conventional format.

The practical implication is that neopragmatists do not yet understand that these dualities *have a material, bodily, practical dimension*.<sup>354</sup> That is why pragmatists can talk in overly audacious ways of a “*refusal* to think the world divisible by categorical oppositions,”<sup>355</sup> or of having “*rejected* the dichotomies of reason and feeling.”<sup>356</sup> Within the conventional conceptual structure of orthodox legal thinking, such *refusals* or *rejections* are generally considered meaningful. But they are considered meaningful within conventional legal thought precisely because conventional legal thought has already been conventionally formatted in the image of idealism, mind, and theory. Neopragmatism thus remains a protest against philosophical idealism, rationalism, and transcendentalism that ironically remains confined to the realms, the matrices already carved in the self-images of philosophical idealism, rationalism, and transcendentalism.<sup>357</sup>

353. The computer metaphor here is deliberate—as deliberate as deliberate can be.

354. For elaboration, see Schlag, *Politics of Form*, *supra* note 7, at 897-99.

355. Michelman, *Private Personal but not Split: Radin Versus Rorty*, 63 S. CAL. L. REV. 1783, 1783 (1990) (emphasis added).

356. Radin, *supra* note 306, at 1707 (emphasis added).

357. See Schlag, *supra* note 73, at 955-57 & n.95; Schlag, *Missing Pieces*, *supra* note 7, at 1223-24. For a similar point in connection with the already neutralized practice of cls-deconstruction, see Schlag, “*Le Hors de Texte*,” *supra* note 7, at 1660.

## The Problem of the Subject

Neopragmatism is, in short, a *stance*—a stance that would like to be a *practice*. But that is the standard-issue idealist dream. When Tom Grey writes that “the legal pragmatist *stands* . . . between law-and-economics and . . . ‘cultural legal studies,’ ”<sup>358</sup> the critical term is “stands.” Notice that once the legal pragmatist *stands* on this conventional jurisprudential spectrum, he is somewhere between the two extremes. His position has become localized (within a highly conventional depiction of the jurisprudential universe as arranged along a spectrum). The pragmatist is no longer open or critical. Instead, he is located at a precise point with a precise position between the extremes of the jurisprudential spectrum.

How did he get here? This is not his critical pragmatism. This is not his humble openness. He’s got a stance: the pragmatist *stands* between the two poles. He is no longer embedded in a traditional field of jurisprudence. Still less is this field embedded in him. No, on the contrary: the legal pragmatist *stands*—thus separating himself from the grounds of his own social constructedness. And in standing, he has acquired the necessary distance from convention so that he may “consult” history and “treat” law as “policy coupled with tradition.”<sup>359</sup> Here the legal pragmatist stands outside his social construction as a kind of epistemic free agent who decides what to make (hermeneutically, intellectually, and politically) of his own social constructedness. This understanding of the self—its agency and its situation—is, of course, utterly conventional—an instance of what I have elsewhere described as the “relatively autonomous self.”<sup>360</sup>

Interestingly, this moment of critical lucidity in which the pragmatist subject takes distance from its own social constructedness is precisely the moment that pragmatists seize upon to counsel a critical, open, revisionary attitude. Michelman and Radin warn, for instance, that “[o]nly by constant attentiveness to the commonplace can pragmatist critical practice keep faith with its postmodernist commitments to suspect facile consensus and pursue epistemic openness.”<sup>361</sup> But warning is not enough; it does not get at the problem. The problem is with the way the pragmatist subject is already socially constituted to understand the warning. “Be more self-conscious” doesn’t tell you anything more than that you should be self-conscious in accordance with the usual *conventionally*

358. Grey, *supra* note 115, at 1571.

359. Grey, *supra* note 313, at 807 (quoting O.W. HOLMES, THE COMMON LAW 5 (Mittowe ed. 1963)).

360. Schlag, “*Le Hors de Texte*,” *supra* note 7, at 1667-68.

361. Radin & Michelman, *supra* note 8, at 1048 (footnote omitted).

(limited) forms of self-reflection that constitute you as a self-conscious creature.<sup>362</sup> The convention-transcending moment in pragmatism—the perspectivist moment—is extremely weak. It is an invitation, an urging, “to take our present descriptions with humility and openness.”<sup>363</sup> But again, given a conventionally constructed pragmatist subject, this invitation can mean no more than “be as humble and as open as convention allows and has constructed you to be.”

Radin, Grey, and the other neopragmatists are stuck within a conventional representation of the scene in which they are operating. Indeed, (on their own pragmatic grounds) how could they not be? They talk about “dissolution of traditional dichotomies.”<sup>364</sup> But in the context of a rhetoric that systematically reinscribes these traditional dichotomies in the very construction of discourse, action, *and the subject*, what critical move does pragmatism provide that would enable the pragmatists to practice what they preach? None. All the moves refer back to the pragmatist subject—his temperament, her sensibility, their character—and thus to the conventions that have constituted this subject. How then, by what moves are the pragmatists to move beyond (as they think they must) the conventional context they are in? If the subject is already colonized by undesirable conventions, how does pragmatism propose to “rescue” this subject?

Now, for pragmatists, the problem raised here is unlikely to seem acute—at least, not yet. The problem does not seem acute for pragmatists precisely because they arrive on the scene of pragmatic jurisprudence as already-constituted individual subjects with pre-given political agendas in a pre-given political division of the field in which they “stand.”<sup>365</sup> One of the things that is attractive for some legal thinkers is that, even in its perspectivist moment, pragmatism does very little to initiate an interrogation of the pragmatist subject or its political agenda. If it did, we would be back to jurisprudential vertigo.

But we're not. Instead, we see neopragmatists providing the most

362. See generally S. FISH, *Critical Self-Consciousness, or Can We Know What We're Doing?*, in *DOING WHAT COMES NATURALLY*, *supra* note 7, at 436. I am not urging this point as a criticism of the practice of self-consciousness. I agree with Winter on this point. See *supra* text accompanying notes 83-84. But practicing self-consciousness (or showing how self-consciousness is practiced) and saying that one should be self-conscious are quite different events. And it is only the usual (legal academic) supposition that thought controls practice that allows us to (erroneously) see one as referring unproblematically to the other.

363. Radin, *supra* note 306, at 1726.

364. *Id.* at 1707.

365. Indeed, as will be suggested below, pragmatism is likely to seem most appealing to legal thinkers who already have relatively well-defined, deeply sedimented social-political-intellectual identities within the conventional jurisprudential description of the field (*i.e.*, precisely persons like Michelman, Grey, Radin, Posner, and Fish). It's in large part a generational thing.

strikingly *conventional* description of their own scene and doing so uncannily at precisely the moment when they are also insisting upon the need for critical perspectivism and the recognition of indeterminacy. Listen to, for instance, Ruth Putnam's opening remarks for her talk at the pragmatism conference at U.S.C.:

We pragmatists believe that inquiry begins in an indeterminate situation. I take it that the inquiry to which this conference is devoted begins as follows: We find ourselves in a situation in which society has disappointed the hopes and legitimate expectations of the poor and the powerless (women and minorities, children, and those who are ill) in spite of legislation and Supreme Court decisions that promised to meet those hopes and expectations.<sup>366</sup>

Now, this is a very conventional, even if contestable, view of "the situation." This is exactly what you would expect a liberal academic to say at a conference on pragmatism. But of course, although this is one situation—one context—that these academics find themselves in, it is important not to overlook the others. For example, here is another way describing "the situation" at the U.S.C. conference—one that pragmatists seem to routinely overlook as if it had no effect on what they are saying or doing:

I take it that the inquiry to which this conference is devoted begins as follows: We find ourselves in a situation in which social and rhetorical forces have constructed an assembly of highly respected legal scholars meeting with other highly respected scholars to exchange papers on pragmatism. The audience is largely composed of law students (most of whom will become lawyers) and legal academics who will mostly remain legal academics. At this conference, any number of things will go on: idle chatter, micro-politics, career advancement, career retardation, play, sex, love, hate, put downs, revenge, eating, drinking, drives to the beach—punctuated at times by refreshing displays of wit and insight against a background of relentless standard rhetorical moves.<sup>367</sup> Now, within

366. Putnam, *Justice in Context*, 63 S. CAL. L. REV. 1797, 1797 (1990).

367. I'm a bit ambivalent about these standard rhetorical moves. On the one hand, they are part of the fabric of our thought marking out its borders, the structure of its interior region, the pathways that lead nowhere, and the pathways that might lead somewhere. It seems miserly to object to these rhetorical moves—akin to objecting to the weather. "I wish we didn't even have any weather today."

On the other hand, these standard rhetorical moves are to legal thought as public opinion polls are to politics. The standard performative contradiction move, for instance, becomes a standard problematic objection organizing the development of the discourse precisely because everybody repeats it and everybody seems to think it's a real problem. Now consider the public opinion poll. It provides useful information—and objecting to such polls is, again, very much like objecting to the weather. On the other hand, note that public opinion polls implicitly and subconsciously (because it's not thought about) establish and regulate the content and form of important political issues. The political import of public opinion polls is not in the information they provide, but in the organization of the questions they ask. The same sort of thing is true of standard rhetorical moves. The impor-

this sur-pragmatic description of context and the social actors, the question is how does our own social construction, our own rhetoric enable or disable us from helping the poor or the powerless (women and minorities, children and those who are ill)?

Now this strikes me as a *serious* way of asking the question: *who* are you talking to? What can they *do*? And what (if anything) is or could be *done* here? But pragmatists would not ever raise these questions seriously. They would not raise them precisely because to pose this question in this way requires an upsetting of the conventions of legal thought. Because pragmatists understand themselves as constituted by convention and because pragmatism furnishes little in the way of critical moves to upset or displace convention, they cannot pose this question in this way.

If pragmatism "means," it is because the pragmatist subject makes it "mean." And if the pragmatist subject makes pragmatism mean something, it is because he or she arrives on the scene already conventionally constituted with a series of pregiven political aims. It is pragmatism's conventional depiction of the field of action, of thought, and of plausible political aims that leads the pragmatist subject to make pragmatism mean something.

It is the security of a conventional depiction of the field, of the subject, and of plausible political aims, that make pragmatism seem attractive to certain kinds of legal thinkers. And it has to be acknowledged that, given a certain conventional picture of law and jurisprudence, pragmatism can seem very attractive. Pragmatism is attractive if the judge is a Holmes or Cardozo or Brandeis; if law is a self-conscious, self-critical enterprise; if culture is produced by thoughtful or artistic or wise artisans of meaning; if social institutions echo the needs of the self. But . . .

This is not our context. This is simply one of our contexts—the standard legal academic romanticization of the scene of legal thought. It is our convention to pretend that judges have the wit, the intelligence and the craft of an Oliver Wendell Holmes. But once the romance stops, we see the judge for what he or she usually is: a harried bureaucrat of limited intellectual and perceptual faculties. This is a man or a woman whose mind has been addled by Restatements and C.F.R., and (what now amounts to the aesthetic equivalent) the constitutional opinions of the Supreme Court. It is our convention to pretend that law is a self-conscious, self-critical enterprise, but in fact its meaning is largely instrumental and performative; that is, governed by its ability to deliver the

tance of the standard performative contradiction move lies not in whether one has a solution to it or not, but rather in regulating the kinds of theories and ideas that can even be thought and published and heard from in the first place.

goods—goods whose identities are largely decided upon elsewhere. It is our convention to pretend that culture is produced by artisans of meaning, but culture is now shaped by the techno-bureaucratic service strategies of the mall, the HMO, the school, the prison, and the day-care. It is our convention to pretend that social institutions are or should be subject to the needs of individual selves, but the dominant configuration (and thus the potential) of the individual self are themselves the product of institutional mechanisms and devices that appear, in large part, to work of their own accord.

Who or what is the subject in such a world? Currently, every human contact between selves who are declared, *ab initio*,<sup>368</sup> to be self-directing and already free is mediated and constructed by techno-bureaucratic strategies. There is no human participation in the creation of culture or relations with others that is not already an instance of the regimen of techno-bureaucratic strategies: Sesame Street, MTV, Federal Express, malls, HMO's, word processing, endless ratings, endless polls, endless interest groups, endless reflexive commentary on commentary, endless processing of services, endless differentiation of culture, and endless celebration of difference, all ironically leading to a regime of pervasive sameness:<sup>369</sup> the radical de-differentiation of life and meaning,<sup>370</sup> the context of no context, the crash.

So the problem of the subject for the pragmatist also arises in very stark terms. The pragmatist subject, understood in pragmatic terms, is the shopper at the universal mall making meaning with the commodified signs of our traditions and culture while the social aesthetics of techno-bureaucratic strategies are making him think he means something.<sup>371</sup> Everything else is just nostalgia.

## V. Cultural Conservatism Twenty Minutes into the Future

"Yet if the only form of tradition, of handing down, consisted in following the ways of the immediate generation before us in a blind or timid adherence to its successes, "tradition" should positively be discour-

368.

In first grade,  
In the declaration of independence  
And on t.v.

369. Note the exquisite post-modern differentiation of that quintessential modernist emblem: Coke is it. Only now, Coke is Classic Coke, to be distinguished from New Coke. I haven't done the homework, but I strongly suspect that each of these sub-brands already has strong sub-brand consumer allegiance.

370. Or in short, mud. See Lash, *Discourse or Figure? Postmodernism as a "Regime of Signification?"* 5 CULTURE, THEORY & SOCIETY 311, 333 (1988).

371. This is definitely not the subject initially contemplated by pragmatists.

aged. . . Tradition is a matter of much wider significance. It cannot be inherited, and if you want it you must obtain it by great labour."

—T.S. Eliot<sup>372</sup>

The classic problem of the subject for conservatives poses itself as a question of time.<sup>373</sup> Conservatism implies a slowing down of time. It is a call to retain for the future by action in the present what the past has provided. But no one lives in the past except through the mediation of the present. The perennial problem for the conservative is thus whether the present allows any sort of action that might preserve a cherished past. In our terms, the question is whether there is any subject capable of sustaining this cherished past—capable of sustaining it in a way that does not transform it into a mere image of itself, a mere simulation.

Anthony Kronman's recent article illustrates the point well.<sup>374</sup> Taking a neo-Burkean approach, Kronman distinguishes "a world of culture" from "a world of thought." The world of culture is accumulative and susceptible to ruin if not maintained.<sup>375</sup> The world of thought, by contrast, "differs from the world of culture in two decisive ways, in its unchanging sameness and its invulnerability to ruin."<sup>376</sup> The two worlds are thus defined as rigorously separate. Indeed, "whenever a person begins to think he leaves the cultural world behind, and enters a different realm in which progress and loss do not exist."<sup>377</sup>

Given that the world of culture needs to be protected from ruin and that the world of thought is rigorously separated from the world of culture, it is no surprise to discover that "the activity of thinking encourages an indifference to the world of culture as a whole and to its accumulation of decaying artifacts."<sup>378</sup> It follows, then, that the world of thought is a threat to the world of culture—a corrosive influence.<sup>379</sup>

372. T.S. ELIOT, *Tradition and the Individual Talent*, in *THE SACRED WOOD: ESSAYS ON POETRY AND CRITICISM* 48-49 (1950).

373. See Cornell, *Time, Deconstruction, and the Challenge to Legal Positivism: The Call for Judicial Responsibility*, 2 *YALE J. L. & HUMANITIES* 267 (1990).

374. Kronman, *Precedent and Tradition*, 99 *YALE L.J.* 1029 (1990).

375. *Id.* at 1058.

376. *Id.* at 1061.

377. *Id.* at 1063.

378. *Id.*

379. Compare Steven Winter's more generalized objection to historicism:

A common thread runs through each of these distinctions: some things are dependable, others not; some things are solid, others ephemeral. Mostly, of course, reality, the rules, and the past are (relatively) solid and reliable. On the other hand, values are contingent; the spirit or purpose of the inherited rules are unknowable; and contemporary people are unreliable. If any of this sounds vaguely familiar, it is because it replicates the subject/object dichotomy. The object—that is, reality, the rule, the past—is good. The subject—that is, current values, the intention behind the rules, present-day humans—is subjective and bad.

## The Problem of the Subject

Kronman, in his own way, wants us to recognize the importance of our embeddedness in culture, in history, in the past. In an equally if not more important sense, he also wants us to recognize that culture, history, and the past are embedded in us. Kronman's argument can easily be understood as a cultural conservative's caution against the corrosive rationalism of the contemporary world of thought.<sup>380</sup> Kronman seems to *want* to say that "the distinctiveness of our humanity is tied to our participation in the world of culture"<sup>381</sup> and that "[t]he world of culture makes us who we are."<sup>382</sup> But he never quite manages to say just that: the quotes above have been taken out of context. They have been removed from their original rationalist<sup>383</sup> envelope. What Kronman *does* say is this:

We must, if we are to be human beings at all *adopt* toward the past the custodial attitude Burke recommends. . . . We must respect the past because the world of culture *that we inherit from it* makes us who we are. . . .<sup>384</sup>

The world of culture is thus something we *inherit*—something like a legacy—and towards which we must *adopt* a custodial attitude. It seems, then, that our connection to this world of culture is mediated by a realm allowing us to choose what attitude to adopt toward this legacy of the past. And what is this realm that allows us to *choose* our stance toward the world of culture? Well, what could it be other than the world of thought?

In fact, this is precisely the conclusion that Kronman is somewhat uncomfortably driven to advance: "The past," he says, "cannot enforce its claim against us if *we choose* to disrespect it."<sup>385</sup> But what would allow us to choose to disrespect this past, if not the world of thought? That is to say, despite Kronman's best intentions, the world of culture is nested in, is enveloped in, is mediated by the rationalist world of thought. And indeed, Kronman's article is a performative confirmation of this very point. His article is a sustained rationalist argument in favor of our thinking of ourselves as "cultural beings, as opposed to animals or thinkers."<sup>386</sup> And that creates a serious problem for him. Indeed, while

Winter, *Indeterminacy*, *supra* note 7, at 1511.

380. For other arguments against the corrosive character of rationalism, see Nagel, *Rationalism in Constitutional Law*, 4 CONST. COMM. 9, 15-22 (1987); Nagel, *supra* note 155, at 182.

381. Kronman, *supra* note 374, at 1066.

382. *Id.*

383. "Rationalist" in the sense explored in Schlag, *Missing Pieces*, *supra* note 7, at 1197 n.7 (using "rationalism" to "refer generally to a cognitive perspective that privileges ego-centered reason as its foundation").

384. Kronman, *supra* note 374, at 1066 (emphasis added).

385. *Id.* at 1067 (emphasis added).

386. *Id.* at 1066.

Kronman would like to say that it is "the world of culture" that "makes us who we are," his text ends up saying something quite different—namely, that it is our thinking about the world of culture that makes us who we are.

Once again, we see that this kind of argument presupposes a subject. This subject's identity is neither secured nor exhausted by culture—the very thing that is, according to Kronman, supposed to make her what she is. We have at the heart of Kronman's thought a free agent whose identity cannot be pinned down by the world of culture, but whose thought is absolutely necessary to Kronman's project of conserving that world of culture.

We have already seen that thought must come to the rescue of culture. We have already seen how problematic this position is for Kronman's argument. It remains now to consider the character of the subject that is to do this thinking. Kronman acknowledges that "[t]hinking always begins within the context of a particular cultural milieu."<sup>387</sup> Even though the questions—and therefore the structure of thought—may be determined by the culture a person inhabits, it is nonetheless "a *person* [who] *chooses* to think about [them]."<sup>388</sup> It is precisely that inoment of unconstructed, undetermined, unspecified *choosing* that allows the subject to "leave" the world of culture for what Kronman calls the activity of thought—an activity that "is *wholly disconnected* from [that] world."<sup>389</sup> In fact, the two realms are so separate that you have to "leave" one in order to "enter" the other.<sup>390</sup>

The realms of culture and of thought are thus conceived on the spatial metaphor of two contiguous, bounded, nonoverlapping realms.<sup>391</sup> They are, in this sense, objectified spaces, like rooms in a mansion through which the individual subject can pass. Indeed, this metaphor of a mansion is apt, because Kronman recursively describes culture in the image of a building.<sup>392</sup>

387. *Id.* at 1059.

388. *Id.* (emphasis added).

389. *Id.* at 1058 (emphasis added).

390. *See id.* at 1058-59. *See also supra* text accompanying notes 376-77.

391. They are not unrelated—but their relations are relations of exteriority. One realm provides the context for the other. One realm may *depend* upon the other. One realm may even *determine* the other. *Id.* at 1059.

392. "[A] separate world of culture thus depends on . . . a constant effort at *upkeep and repair* . . . . This is easy enough to see in the case of *physical structures like buildings* . . . ." *Id.* at 1053 (emphasis added). "To the extent that he views himself . . . as adding to or refining the achievements of his predecessors in that tradition, *contributing so to speak a few bricks of his own to the construction of some common edifice* . . . ." *Id.* at 1057-58 (emphasis added). "To begin with, the world of thought, unlike the world of culture, does not need to be kept up as a building or a legal system does." *Id.* at 1060 (emphasis added).

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Now, if the role of the subject is to maintain culture in the way that one maintains a building,<sup>393</sup> then what we have here is a vision of the subject as concierge.<sup>394</sup> Implicit in this vision is not only the duty of upkeep and repair, of devoting “considerable resources” to preserve the world of culture, but also of passing it on from generation to generation for the benefit of the occupants.<sup>395</sup>

No doubt for conservatives there is an appeal to the notion of subject as concierge—to the idea that the present generation serves basically to transmit the productions of the past as faithfully as possible. The appeal of this vision is that the past is merely forwarded without transformation, without perversion, without deformation. And yet in this conservative vision the past has already made a problematic contribution to the present—namely, in its the notion that the past can be contained in object-form and transmitted by a subject who does nothing more than play the role of concierge. And ironically, this contribution of the present is itself corrosive of culture. One has only to think here of the effect of the Restatements, with their big, block, object-like Roman letters, on the practice of common-law lawyering to recognize that culture is not transmittable in object-form.<sup>396</sup>

If one understands culture as a building (as opposed to, for instance, designs for a building, or the knowledge for constructing buildings, or the understanding of how buildings affect the patterns of social life), one is likely to think of culture as substance (forgetting form) and as outcome (forgetting process). One is likely, in other words, to devote all of one's efforts to preserving cultural artifacts, while neglecting the process of cultural signification within which the artifact might have meaning.<sup>397</sup> Certainly, that is precisely the sort of tendency that Kronman exhibits—a concern for artifacts and a lack of attention to the process that invests them with meaning. As Kronman himself puts it: “In all these cases, a ceaseless effort at preservation is required if the *artifact* in question is to retain its meaning within the system of signs that constitutes the world of culture: if, that is to say, it is to survive as a *cultural artifact* at all.”<sup>398</sup>

393. See Winter, *supra* note 116, at 1600 (discussing the conventional metaphor that *theories are buildings*).

394. The Harvard Law School equivalent is the subject as custodian. See R. DWORKIN, *supra* note 182, at 239 (portraying the legal subject as the legendary and mythic cleaner of Aegean stables—a.k.a. Hercules).

395. Kronman, *supra* note 374, at 1054.

396. Unless, of course, it is a kind of dead culture.

397. Or as David Luban suggests, missing from Kronman's account is the recognition that cultural construction itself requires action—a creative moment, a break with tradition. Luban, *Legal Traditionalism*, 43 STAN. L. REV. 1035, 1041 (1991) (“[T]he artifacts of human culture require constant tending.”).

398. Kronman, *supra* note 374, at 1053 (emphasis added).

We see here the irony that is the conservative ambition: preservation of the past depends upon the contributions of the present. And when the social aesthetics of the present are not kind to the past, the past is preserved in a museum, as dead culture.<sup>399</sup> The problem for conservatism is that whenever the conservative impulse arises, whenever it becomes focused on a specific desire, it is always already too late. The culture is already ready for the museum. It is, in a word, already dead.<sup>400</sup>

The problem of the subject for conservatism is that it conceives of the subject as a concierge. This is a very restrained and highly regulated job description. After all, the concierge as the keeper of artifacts is a kind of bailec, subject to a stringent standard of care. Cultural conservatism needs to presuppose this sort of subject. The arch-enemy of cultural conservatism is the artist, who with unforgivable arrogance believes that he or she might actually create something, something life-giving. The last thing conservatism wants is to acknowledge that the subject might be an artist. Art implies change, and that is what the cultural conservative fears most. So the pre-given role of the subject among cultural conservatives is that of concierge. But making past culture continue to live is simply not part of the present job description of a concierge.

The underlying problem with conservatism is that it always wants to stay the same, and it never can. From its own perspective, conservatism is always already twenty minutes into the future—and, thus, without a clue as to what subject it might entrust with its mission.

## VI. Recursive Recursions

The problem of the subject arises for various approaches in different ways. For rule-of-law thinkers, it arises as a recognition that the problem has been misstated. Rule of law is traditionally fixated on restraining and constraining deviant individual subjects.<sup>401</sup> Yet the most significant problem for rule-of-law thinking is not that some deviant subject may get out of control—but rather that there is no longer a subject on the scene who is normatively and epistemically competent to practice

399. See *supra* text accompanying note 372.

400.

To adopt the self-conscious attitude of traditionalism requires historical distance from the traditional—a sense of loss, indeed a sense that one has become cut off from the past. Thus, traditionalism waxes as tradition itself wanes; like Hegel's owl of Minerva, traditionalism always arrives on the scene too late. It is the political counterpart of what individuals experience as nostalgia for lost innocence.

Luban, *supra* note 397, at 1057.

401. That is, the judicial equivalents of Felix Cohen or Duncan Kennedy.

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and realize the rule-of-law vision in the first place. The mistake of rule of law was in presupposing the continued presence of a competent subject in the first place.

Ironically, critical legal thought borrows much from the rule-of-law aesthetic and tends to repeat the same mistake. Replicating the Sartrean metaphysic, critical legal thought presupposes that the subject is O.K. and needs only to be liberated from objectified thought-structures to become politically and intellectually free. But again, this is not all that is needed. The Sartrean individual subject may be equipped to take stands on colonial wars, racism, or other “grand” political issues, but he is strikingly ill-equipped to deal with the political framework defined by technobureaucracies. What’s more, as a political matter, rather than liberating the existentialist subject, critical legal thought tends to reinforce the dominant cultural aesthetic that constructs individuals as free-choosing beings who are compulsively driven to choose and to require others to choose. “What should we do?”, “What do you think should be done?”, “What would you put in its place?”, etc.—in a virulently recursive sort of way.

For neopragmatism, the problem of the subject announces itself as the recognition that all of its answers ultimately refer back to the pragmatist subject—and this subject has yet to be understood in a cogent pragmatic manner. For neopragmatism, then, the subject is a creature of context. But neopragmatism keeps treating the subject as the context of all contexts. Currently, this subject finds itself in the context of all contexts—shopping at the cultural-intellectual mall without a clue as to what its place might be in the free play of signifiers. Neopragmatism thus encounters the problem of the subject in the recognition that pragmatism doesn’t have much to offer the subject—that the work to be done is perhaps in *becoming* a subject in the first place.

Starting too late turns out to be the problem of the subject for cultural conservatism. For conservatism, as for all the other approaches, the problem of the subject announces itself as a recognition that the available subjects are not adequate to the tasks required. Cultural conservatism needs a subject to conserve the past. Unfortunately, the past has not been very forthcoming in producing such a subject. What cultural conservatism faces, then, is a present rudely taken out of context: “the extraordinarily unappetizing prospect”<sup>402</sup> that “we are all we have.”<sup>403</sup>

402. Leff, *Unspeakable Ethics, Unnatural Law*, 1979 DUKE L.J. 1229, 1249.

403. *Id.*

Clearly, the problem of the subject is conceptualized and arises for these various approaches in many differing ways. One difference has to do with the ways in which the various approaches represent themselves as advancing a vision of the *full* or *empty* subject. Indeed, as Merleau-Ponty suggested, "There are at bottom only two ideas of subjectivity—that of empty, unfettered, and universal subjectivity, and that of full subjectivity sucked down into the world—and it is the same idea . . . ."<sup>404</sup>

For instance, both rule-of-law and critical legal thought privilege a representation of the individual subject as empty.<sup>405</sup> For rule of law, the individual subject is empty and thus cannot have any positive contribution to make to the field of law. The individual subject is to submit to or efface himself before it; he is thus outside the jurisdiction of the rule of law. He is off-scene, out of jurisprudential sight. To the extent he appears on the scene at all, it would be as an interloper, a trespasser. Critical legal thought also privileges the empty subject. But now this emptiness is given a positive valuation: the subject is empty, ineffable, and thus cannot be reduced to its legal context. Thus, the individual subject is a source of intellectual and political promise rather than a threat. Both neopragmatism and cultural conservatism also place the subject beyond inquiry, but they do so by privileging an individual subject that is so full of convention that he has neither the motive nor the distance necessary to engage in anything but the most conventional sort of self-understanding.<sup>406</sup> There is no access to the subject because the subject is already saturated by convention.

Ironically, in American legal thought the full subject understands his fullness as having been chosen freely, autonomously, through a series of well-considered, conscious choices. Also ironically, the empty subject is a completely conventional cultural construction. I have tried to capture this phenomenal construction of the self under the rubric: "the relatively autonomous" self—a not altogether inappropriate name considering that the expression "relative autonomy" is traceable to Sartre<sup>407</sup> and that Sartre's conception of the self is traceable to a conventional liberal conceptualization of the subject.<sup>408</sup>

Now, neither the full nor the empty subject is a particularly stable entity. On the contrary, the empty subject needs to be stabilized and

404. M. MERLEAU-PONTY, *supra* note 1, at 154.

405. This, of course, does not mean that rule-of-law and critical legal thought *invariably* represent the individual subject as empty. See *infra* text accompanying notes 407-08.

406. This, of course, does not mean that neopragmatism and cultural conservatism invariably represent the individual subject as full. See *infra* text accompanying notes 407-08.

407. J.-P. SARTRE, SEARCH FOR A METHOD 68-70 (1963).

408. See *supra* text accompanying notes 267-71.

filled up. The full subject, by contrast, needs to account for its own subjective experience. Thus, in both areas which arguably privilege the empty subject—rule of law and critical legal thought—we see a tendency to seek out a full subject. Conversely, in cultural conservatism and legal neopragmatism, both of which privilege the full subject, we see a sort of longing for transcendence manifested in a tendency to achieve the state of the empty subject.

For all the differences I have insisted upon in describing how the problem of the subject arises for these various modes of contemporary legal thought, there is ironically a certain sameness nonetheless. In each case, we find that the problem of the subject arises in the unwelcome recognition that the approach already presupposes the existence of a particular subject—and that this subject is nowhere to be found. This can, of course, be a disturbing recognition. Each approach goes to great lengths to avoid this recognition. Each approach, when it is engaging with intellectual challenges, rhetorically reinscribes its own subject-object aesthetic in a way that systematically elides the recognition that the very kind of subject it presupposes is missing.<sup>409</sup> The subject can be missing in different ways. It can be missing in the sense that it is undertheorized, incompetent or simply no longer viable. These recognitions are routinely elided in one of two ways—in the presupposition of an empty subject or in the presupposition of a full subject. Hence, the subject can be depicted as empty, such that there really is nothing to say about the subject. Or, the subject can be depicted as “us” and “we” (as full subjects, extensions of a rich interpretive community), and *we*, of course, are always O.K..

Even the most critical strategies of American legal thought succeed in re-inscribing and re-instating the subject as beyond inquiry. The two basic critical moves in American legal thought are to dissolve a purported objectivity back to the actions of a constituting subject or to show that the transcendental subject is really a fraud, a masquerade, an intellectual lightweight. In either instance, however, the critical move is arrested at precisely the point where the new presupposed subject can begin to do its work. Thus, the legal realists arrest their deconstructive critique at the point where Langdellian conceptualism is destroyed and law can be reconstructed by a subject competent in functional, purposive think-

409. For a brief illustration of this process, see Schlag, *Normative and Nowhere to Go*, *supra* note 7, at 173-80 (showing how normative legal thought routinely defuses postmodernist challenges by reformulating them within its own normative aesthetic). For a discussion of the workings and implications of this process, see generally Schlag, *Politics of Form*, *supra* note 7 (describing how normative legal thought reproduces itself and its aesthetic political effects).

ing and social science. Similarly, critical legal thinkers arrest their deconstructive critique at precisely the point where the newly freed existentialist individual subject emerges as a "choosing being" who takes responsibility for her choices. Legal neopragmatists arrest their critique of rationalist metaphysics at precisely the point where all theoretical questions are thrown back on the mediated mediating mediator, the pragmatist subject. In all three instances, despite the critical ambitions of these movements, we have an arrested critique which leaves unexplored and untroubled the space occupied by a presupposed competent individual subject.

Now, all of this prompts several questions. First, what is the character of this unexplored space of the subject?<sup>410</sup> Second, how is it that legal thought seems systematically to avoid not only exploring but even noticing this space of subjectivity? Third, what are the implications of this kind of subjectivity? Fourth, how might we move beyond this type of arrested political and intellectual practice?

#### A. *The Liberal Subject*

First, if we are to understand how the subject is constituted, we must understand how the space he inhabits is constituted. Absent a lapse into a naive philosophical idealism, we cannot simply take what various jurisprudential approaches say about their own contributions at face value. The question, then, is not what these approaches say substantively about the subject. The question is what relations does their rhetoric establish between author and reader. What kind of author and reader are imagined and instituted by these various approaches?

Once we ask the questions in this way, it becomes evident that all of these approaches presuppose and construct the subject as a conscious, sovereign individual subject—the conventional liberal subject. In his most educated moments, this liberal subject understands that he is socially and rhetorically constructed, but nonetheless retains his autonomy to decide just how constructed or autonomous he really is. This divided individual subject<sup>411</sup> is precisely the kind of subject rhetorically presupposed by virtually all contemporary American legal thought. The supposition is that the individual subject is essentially—a word deliberately chosen—autonomous, coherent, self-directing, integrated, rational, and originary. This means that what might seem on the level of "substantive

410. If I speak here of the subject in the crypto-objectivist metaphor of "space," it is because that is the way contemporary legal thought (with its objectivist tendencies) first represents the problem of the subject to itself.

411. See *supra* note 360 and accompanying text.

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propositional content” to be a dominant conventionalist or constructivist moment in legal neopragmatism and cultural conservatism is as a matter of rhetoric, practice, and form, subordinated to the actions, rule, and rhetoric of the sovereign individual subject. This also means that the apparent total erasure of the individual subject in cls and rule-of-law thinking is an ineffectual erasure—one that leaves the conscious sovereign individual subject untroubled, unquestioned, and in charge.

This sovereign individual subject—this relatively autonomous self is a kind of default subject—one that is routinely re-enacted and reproduced in legal thought. Because the relatively autonomous subject is in its very configuration unstable, it enables a series of other kinds of subjects or selves to be represented in substantive propositional legal thought. In other words, the very instability of the relatively autonomous self enables its own rhetorical reproduction even as it accommodates different and potentially destabilizing representations of the subject. Only rarely, then, will we find legal thought itself attempting to establish a radically different kind of subject in its very form, practice, or rhetoric.

### *B. The Langdellian Paradigm*

How is it that legal thought has managed to create this space of the subject that seems to systematically survive any critique untroubled and unexplored? Each approach objectifies the world in order to make it safe for its own favorite individual subject. The subject-object relations are frozen at some highly abstract level, and this frozen relation is then replayed recursively throughout the jurisprudential approach.<sup>412</sup> In effect, this frozen subject-object relation eclipses the problem of the subject; it puts the problem of the subject beyond consideration. How does

412. Rule of law, for instance, attempts to locate legal meaning in the doctrines, rules, and policies and concerns itself with the subject only as something that needs to be constrained and restrained. Rule of law is thus fixated on perfecting “law” in a so-called objective realm demarcated by appellate doctrine, rules, and other reified thought-spaces.

Critical legal thought concerns itself with liberating the individual subject from reified thought structures and thingified social roles. Ironically, this subject-object picture is itself a captive of rule-of-law thought and, although the valences get reversed, the subject-object aesthetic and separation remain the same.

Legal neopragmatism, unlike rule of law and cls, is not primarily informed by a spatial representation of subject-object relations. On the contrary, legal pragmatism is informed by a dominant temporal metaphysics. Indeed, the stock move of legal pragmatism is to dissolve and refer all theoretical questions back to a prior moment of agency: the character of the pragmatist subject, the one who “mediates”—or more accurately the already mediated mediating mediator.

Cultural conservatism is a sort of intense reification of the pragmatic recognition of the constitutive character of convention. Like legal neopragmatism, cultural conservatism refers identity and meaning back to an agency. Here the agency turns out to be the past itself. Hence, cultural conservatism attempts to restrain the space of the subject as much as possible.

this happen? More to the point: how is it that this happens over and over again?

We must remember how we got here. Langdell said early on: I have tried to do my part towards making the teaching and the study of law in that school worthy of a university . . . .

To accomplish these objects, so far as they depended upon the law school, it was indispensable to establish at least two things—that law is a science, and that all the available materials of that science are contained in printed books.<sup>413</sup>

We must remember that the enterprise that we as legal thinkers have been engaged in from the very start has been to construct and reconstruct law in the image of a discipline worthy of the university—in other words, to legitimate and institutionalize our work and our selves.<sup>414</sup> In a sense, then, from the very beginning we have tried to construct and to create the study of “law” as something that would be independent of the particular individuals who would study that law.

One of the attractive features of the Langdellian orthodoxy for legal thinkers is the extraordinarily flattering role that it carved out for them. Inasmuch as the Langdellian orthodoxy required the conceptual subordination of case decisions to the harmonious arrangement of legal principles, the legal thinker (as the discoverer of the principles of law) enjoyed a privileged intellectual position relative to that of the judge (the author of case decisions). In contrast to the modern dominance of court positivism,<sup>415</sup> the Langdellian thinker reserved for himself the right to pronounce whether or not some judicial decision in an actual case was or was not law. Whether or not a decision was law would depend (within the Langdellian universe) on its conformity to the principles of law.<sup>416</sup>

413. *Harvard Celebration Speeches*, *supra* note 17, at 123-24.

414.

I think Langdell's world was attractive to legal academics because it gave them a piece of the academic division of labor that no one else claimed, and gave them a distinctive method, the hallmark of any modern science, from which they could build a professional identity much as had other academic disciplines like history or economics around the turn of the century. From this perspective, the choice to renounce Langdell's legacy is an implausible one, for in so doing the legal academic would renounce his or her own professional identity.

Schlegel, *Langdell's Legacy or, The Case of the Empty Envelope*, 36 STAN. L. REV. 1517, 1533 (1984).

415. See Powell, *Constitutional Law as Though the Constitution Mattered* (Book Review), 1986 DUKE L.J. 915, 915 (reviewing W. MURPHY, J. FLEMMING & W. HARRIS, AMERICAN CONSTITUTIONAL INTERPRETATION (1986)) (“[T]hat perception of the meaning of constitutional law leads to what might be called ‘Court-positivism’—the almost automatic assumption that the Constitution is indeed ‘what the judges say it is.’” (citations and footnotes omitted)); see also *supra* note 70 (discussing the Langdellian subordination of case law to principles).

416. Schlegel, *American Legal Theory and American Legal Education: A Snake Swallowing Its Tail* in CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE, *supra* note 119, at 52.

The custodian of these principles and their harmony was, of course, none other than the legal thinker—whose task it was to continually arrange legal decisions and legal rules in accordance with the architecture of Langdellian principles.

Most legal thinkers will represent legal thought as having come a long way from the days of Langdell. No doubt, the substantive propositional content of legal thought has changed greatly since Langdell. The institutional role of the legal thinker, however, has remained much the same.

Indeed, much of the epistemic structure of contemporary legal thought was already in place in Langdellian times. The classical orthodoxy developed by Langdell, Beale, and the other legal formalists established the identity of the legal thinker, his role, his audience, their relation, the proper modes of communication, the relation of theory to practice, and basic notions of historical and political agency.<sup>417</sup> While it would be crude to claim that the Langdellian paradigm has remained unchanged to the present, there is not much risk—at least among legal academics—of falling into that type of error. On the contrary, given widespread contemporary hostility to the Langdellian approach, legal academics have, if anything, been too quick in disclaiming or denying the continued hold of the Langdellian orthodoxy.<sup>418</sup> Indeed, it is striking as we look at the role of the Langdellian legal thinker how much that role is our role. The explicit (and widely known) tenets of the Langdellian orthodoxy—for instance, the view of legal study as a science or the depiction of law as autonomous—had very specific (and relatively unnoticed) *formative* implications for:

- the relation between the academy and the courts
- the identity of the audience
- the identity of the author
- the relation between the author and the audience
- the role of the text in legal culture
- the relation between theory and practice.

1. *The Relation Between the Academy and the Courts.*—One effect of placing the legal academic in this position was to make the legal academic the judge of judges. The legal academic was superior to the judge (at least potentially) in the sense that if the judge's decision did not accord with the Langdellian architecture, it simply was not law and could thus be treated as some sort of pathological departure. In some sense

417. See Winter, *Indeterminacy*, *supra* note 7, at 1455-56.

418. Grey, *supra* note 25, at 57 (noting that "[a]part from the balancing idiom, legal discourse largely retains its orthodox form").

then, the ultimate pronouncer of the law was not the judge, but the legal thinker himself.

But if the Langdellian academic enjoyed an epistemic privilege over the courts, he was also their *ally*. The Langdellian academic was an ally in several senses. As the primary custodian of the principles of law, the Langdellian academic furnished ultimate guidance on what counted as law and what did not. The Langdellians discharged this duty by producing copious and cleanly integrated treatises that organized the law in a manner that was fiercely hierarchical and thoroughly coherent.<sup>419</sup> These treatises, of course, were aimed at realizing in case law the Langdellian view of law as coherent, gapless, and hierarchically arranged. Inasmuch as cases were the raw materials for the science of law, it was part of that science to show that the case law did have the coherent, hierarchical, gapless order that the Langdellians claimed it had. Thus, it was necessary to the Langdellians that the Langdellian architecture be realized not just in the treatises, but in the case law as well. While the Langdellian thinker may have enjoyed an epistemic privilege relative to the courts, the acquiescence of the courts in the Langdellian pronouncements was still quite necessary.

Accordingly, within the Langdellian paradigm the relations between the academy and the judiciary were exceedingly cordial. The Langdellian thinker addressed his thoughts to the courts to inform them as to what was and what was not the law. In turn, the courts and the bar were expected to listen and to heed the pronouncements of the legal thinker whose taxonomic efforts lent coherence, order, and legitimacy to the law. Legal thinkers wrote for judges, and judges were supposed to listen.

2. *The Identity of the Audience.*—One implication of writing for judges, of course, is that judges (as the audience) were accorded the typical respect that an author—at least an author bent on persuasion—reserves for his anticipated audience. Persuasive rhetoric typically entails respecting the self-image of the reader and, at the very least, avoiding statements that will injure that self-image. For the Langdellian thinker, this meant that the self-image of the judge as an intelligent, well-meaning, autonomous, and even wise individual had to be respected. And this image had to be respected not only as a matter of substance, but as a matter of form. For the Langdellian, of course, this was hardly a difficult problem. Given that law was an autonomous discipline, it was natural for the Langdellian thinkers to treat judges as conscious sover-

419. See, e.g., 1-3 J. BEALE, *supra* note 31; C. LANGDELL, *supra* note 19.

eign individual subjects—individuals beyond the reach of the insulting knowledges of social science, psychology, economics, and their (quasi-) determinist structures. Indeed, little could have been further from the Langdellian mind than to treat judges as an object of study—either generally or more particularly, as a class of bureaucratic decision makers whose rhetorical and cognitive patterns are prompted by the relatively intense socialization processes of law schools and law firms. The very fact that Langdellian thinkers wrote for judges thus established as a matter of form the tacit image of judges as self-directing, autonomous, rational individuals. The judge, of course, was not the only figure to receive this beneficent treatment. To some extent, this image of the autonomous, self-directing individual was extended as a matter of form to all persons engaged in the enterprise of law. Indeed, one of the consequences of treating law as an autonomous discipline is that, at least for purposes of doing law, the participants in the discipline are also treated as autonomous individuals—including, of course, the Langdellian thinker himself.

3. *The Identity of the Author.*—The Langdellian thinker was a “scientist” in the nineteenth-century sense that his discovery of the principles of law from the data (the cases) was grounded in a secure sublimation into a transcendental order of the object or the subject. The Langdellian scientist discovered principles already extant in the law.<sup>420</sup> Accordingly, no reason ever arose to question the identity of the professional self of the legal scientist. It was beyond question—normatively, socially, psychologically, and so on.

4. *The Relation Between the Author and the Audience.*—Within the Langdellian orthodoxy, the author and his audience are complicitous in confirming their own epistemic privilege. The author’s implicit assumption that he is addressing self-directing, autonomous individuals in a rational manner, of course, implicitly extends that status to his readers. Interestingly, in the very act of addressing such a community, in the very act of claiming to be a part of this community, the author performatively confirms his own status as an autonomous, self-directing individual. Ironically, it is the readers who constitute the author in this way. Inasmuch as the readers already view themselves as autonomous, self-directing, and rational, they rhetorically compel the author to write in precisely that voice. In a formal and formative sense, the Langdellian orthodoxy tacitly imagines and thereby constitutes a community of self-

420. See *supra* notes 24, 413 and accompanying text.

directing, autonomous, rational individuals bound by the common enterprise of law.

This symbiotic fantasy is largely stable and self-perpetuating. In order to escape the fantasy, the author would have to do one of two self-destructive things. He would have to question (and thus injure) the self-image of his readers as autonomous, self-directing individuals. Or he would have to question (and thus injure) his own self-image as an autonomous, self-directing, and rational individual. Either tactic is likely to prompt some sort of regulatory rhetorical response: a thought-police action. As will be seen later, the stability and appeal of this symbiotic fantasy makes it extremely difficult to discard as a structural or formal matter even though, of course, most modern thinkers would agree that the fantasy is substantively ludicrous.

5. *The Role of the Text in Legal Thought.*—Viewing law as an autonomous discipline with its own rational order, the Langdellian orthodoxy views the text of legal thought as the medium for clarifying the order and for redressing isolated deviances. Thus, the Langdellian treatise and Langdellian thought equivocate between what moderns might call descriptive and prescriptive scholarship. In Langdellian orthodoxy, the two are not firmly separated. Law has a certain order quite independent of what particular courts may do. The description of that order, however, carries the implicit suggestion that courts ought to bring their decisions in line with that order. In turn, any prescription offered to courts on an unsettled problem purports to be description. In this manner, the legal text conflates description and prescription.

It is easy to see how such a conflation might occur within the Langdellian framework. Because law is an autonomous discipline, the hierarchical and coherent *arrangement* of the principles, rules, and decisions is to be accomplished immanently through the use of *legal* argument—the very sort of argument to be used by judges and lawyers. Thus, legal argument is itself part of law. To engage in Langdellian legal arguments is at once to describe and prescribe a particular doctrine. Thus, the text within the Langdellian scheme is at once descriptive and prescriptive—rarely distinguishing between the two.<sup>421</sup>

As a matter of form, the great Langdellian treatises and articles were clearly designed to guide judges in decision making. Langdellian thought was principally addressed to the judges and to the bar with

421. It is precisely this conflation of the is and the ought in the very definition of law that was criticized by Felix Cohen. Cohen, *supra* note 50, at 838 (criticizing Blackstone's definition of law for conflating what the sovereign commands with what is right and wrong).

whom the Langdellian scholars identified.<sup>422</sup> Relative to modern thought, there is thus an apparent lack of critical distance between Langdellian thought and judicial or lawyerly argument. Consistent with the view that they were engaged in the scientific discovery of the principles embedded in the case law, the Langdellian scholars had virtually no self-conscious apprehension of the constitutive role of their own jurisprudential commitments. Indeed, the Langdellians were gifted with an amazing capacity for lack of self-awareness. Consistent with the view that law is an autonomous discipline, Langdellian thought shows no awareness of the psychological or social dimension of legal communication. On the contrary, the Langdellian text aims to be transparent to autonomous, self-directing, rational individuals. Hence, the Langdellian text is relentlessly rationalist. Consistent with the Langdellian constitution of the author and the reader as self-directing, autonomous selves, Langdellian texts seek to persuade by giving rationalist reasons *for belief*.

6. *The Relation of Theory and Practice*.—The Langdellian claim that legal study was a science, legal scholars were scientists, and law was autonomous led to an extremely simple and idealist conception of the relation of theory to practice. The rigorously hierarchical and gapless character of the Langdellian ordering of law reveals much about the Langdellian view of the relation of theory to practice. This relation seems to be virtually unidirectional: theory governs practice in an unproblematic way. Higher level principles control the rules which, in turn, control the case decisions. Within the Langdellian universe, there is not the slightest sense that theory might be embedded in practice, that theory might be epiphenomenal, that theory is itself a practice or anything of that nature. Rather, for the Langdellian, the conceptual structure of law rules legal practice in a straightforward manner. Isolated case anomalies or deviations are simply the result of a lack of intelligence or legal acumen.

Now, it seems to me that, as a matter of substantive propositional content, our contemporary visions of law have arguably changed significantly from this Langdellian paradigm. In terms of the actual practice, rhetoric, and form of contemporary legal thought, however, there has been very little change. What is interesting to note is that, even as change has occurred at the level of substantive propositional content, the

422. See Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 132 (1988) (noting that the Langdellian approach formed lasting and close links with the American judiciary).

Langdellian formal relations nonetheless continue in a slightly different guise.

In fact, perhaps the *only* change from this Langdellian paradigm is that many of us no longer think the courts are listening to much of anything we say or write and that many of us seem to be well on the way to abandoning communication with judges altogether.<sup>423</sup> But even as these changes are occurring, the arguments of legal thinkers about what law is or should be continue to be mediated and channeled by a highly traditional and romanticized image of the kind of reasoning used by the appellate judge. This is evidenced, for instance, in the *Hercules phenomenon*, which aptly symbolizes the apparent legal academic belief that the appellate judge is somehow the central site for the creation and maintenance of the law and its meaning.<sup>424</sup>

Now, I think it is precisely because the reigning configuration of legal thought is embedded in regions and processes that are obscured from the critical reaches of that same legal thought that this rhetoric has been so resilient. The rhetoric has been structured as a kind of forgetting of the forgetting, a repression of the repression. The rhetoric has been inscribed in the legal subject—and that is what has been put off-scene, out of reach, beyond inquiry. In the same way, the problem of the subject has been obscured in virtue of the legal thinkers' construction as a conscious sovereign individual subject, who does not even recognize that the subject is a problem.

### C. *The Subject as Problem*

But the subject is a problem. We have already seen how the subject becomes a problem for various kinds of contemporary legal thought and their projects. The problem arises as each school recognizes that its own intellectual architecture, its own normative ambitions rest upon the presupposition of a subject—a subject whose epistemic, ontological, and normative status is now very much in question.

Now this is not simply an intellectual problem; it has political implications. The political implications are easy to describe. The constitution of legal thinkers and others as conscious sovereign individual subjects produces a politics that works perfectly—assuming that we do indeed

423. See Winter, *Indeterminacy*, *supra* note 7, at 1452-53.

424. For my discussion of the Hercules phenomenon, see Schlag, "*Le Hors de Texte*," *supra* note 7, at 1663-66; Schlag, *Politics of Form*, *supra* note 7, at 845-52. Owen Fiss exemplifies the Hercules phenomenon succinctly when he says, "My conception of adjudication starts from the top—the office of the judge—and works down . . . I start with the conception of power embodied in the judge." Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 41 (1979).

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have conscious sovereign individual subjects situated to control the levers of the social machinery.<sup>425</sup>

Once articulated, however, that vision fast becomes implausible. In the legal academy, this vision of social life is maintained by an elite of legal thinkers who systematically confirm themselves in this vision by relentlessly rehearsing its aesthetic. They seem to be either incapable or unwilling to recognize that this conventional aesthetic of social life is fast becoming unbelievable.

Now, the resistance of legal academics to a reconsideration of the conventional aesthetic of the liberal subject is easy to understand. If the liberal subject disappears from the scene, a number of very troublesome questions immediately surface: who (or what) is controlling the levers running the social machinery?<sup>426</sup> And if there's no one operating the levers, then what has been the effect of all that good, admirable, serious, normative legal thought?<sup>427</sup>

As legal thinkers, we like to think we are doing good, normative legal work—advancing noble causes and the like—but if the liberal subject is no longer operating the levers, our work product can take on a different character. We may simply be rehearsing and reproducing the instrumentalist logic of bureaucratic practices.<sup>428</sup> Indeed, the main significance of noble normative work is in the rehearsal of a false aesthetic of social life—one which falsely represents

instrumentalist strategies as within the control of individual subjects

the unfolding of bureaucratic logic as the choices of individuals  
the discursive mechanisms of coercion as normative dialogue.

Now, there is nothing wrong with instrumental control in and of

425.

This picture is deeply attractive to moderns, both flattering and inspiring. It shows us as capable of achieving a kind of disengagement from our world by objectifying it. We objectify our situation to the extent that we can overcome a sense of it as what determines for us our paradigm purposes and ends, and can come to see it and function in it as a neutral environment within which we can effect purposes which we determine out of ourselves

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1 C. TAYLOR, *HUMAN AGENCY AND LANGUAGE: PHILOSOPHICAL PAPERS* 4 (1985).

426. Of course, if the liberal subject is disappearing from the scene, we will also have to reconsider the related objectivist metaphor of "the social machinery".

427. See Schlag, *Politics of Form*, *supra* note 7, at 899 (characterizing normative legal thought as a "blockage" which prevents "inquiry into the process, form, and practice" of legal thought); Schlag, *Normative and Nowhere to Go*, *supra* note 7, at 173-81 (describing normative legal thought as the bureaucratic routine of the legal academy).

428. See Schlag, *Politics of Form*, *supra* note 7, at 832 (noting that normative legal thought enables legal thinkers to incorrectly assume they are themselves immune from "the bureaucratic power games"); Schlag, *Normative and Nowhere to Go*, *supra* note 7, at 188-91 (noting that teaching normative legal thought may be merely training students to become well-versed in the rhetoric of bureaucratic logic as opposed to humanistic principles).

itself. Indeed, instrumental control is often valued—it bears names like efficiency, effectiveness, and wisdom. But the supposition that instrumental control is desirable presupposes that there is an epistemically and normatively competent subject at the levers. And that is precisely what is being thrown in question: if the subject is constituted by its discourses and its context, who or what is in charge?<sup>429</sup>

Viewed in this light, we can understand normative legal thought not as a noble attempt to criticize and reform the structures and practices of bureaucratic domination, but rather as a kind of discourse that has already been unconsciously captivated by those very same structures and practices. The pathways, the issues, the problems of normative legal thought are already constituted by bureaucratic domination. That is why normative legal thought can seem at once normatively ineffectual and unappealing. Rather than contributing to our understanding or to the realization of the good or the right, all this normative argument simply perpetuates a false aesthetic of social life—one that prevents “us”<sup>430</sup> from even recognizing the sort of bureaucratic practices that constitute and channel our thought and action.

The plausibility of this sort of systemic misrepresentation is evident as one considers that the governing criteria of knowledge in legal thought—of what counts as good argument—are invariably represented in terms of reason, yet are closely linked to a conception of power as instrumental control. Among the regulative criteria for sound legal thought, the following recur frequently:

1. representational accuracy<sup>431</sup>
2. consensual acceptability<sup>432</sup>
3. coherence<sup>433</sup>
4. elegance<sup>434</sup>
5. sweep<sup>435</sup>
6. determinacy<sup>436</sup>
7. realizability.<sup>437</sup>

429. This, of course, is a preliminary (not satisfactory) way of asking the question—one which is still shaped by a certain subject-object aesthetic that is itself being put in question.

430. This is a very problematic “us.”

431. The theory must not rely on assumptions or advance propositions that do not correspond to its referents.

432. The theory must not rely on assumptions or advance claims that are or entail offensive, absurd, or unbelievable implications for the relevant audience.

433. The theory must avoid internal contradiction and performative contradiction.

434. The theory must rely on as few explanatory or justificatory variables as possible.

435. The theory must be as encompassing as possible and must explain or justify all aspects that are within its legitimate scope.

436. The theory must restrict as much as possible the number of relevant and plausible conflicting interpretations it can sustain.

437. The theory must be capable of guiding its own realization in practice.

These aesthetic criteria, which are usually represented as related to the form and content of truth are used to assess the value of theory.<sup>438</sup> These are the regulative discursive criteria that authorize the stock of arguments and objections of much of contemporary legal thought. Yet, these regulative aesthetic criteria are also linked to *instrumental control*.

We can formulate the point in (at least) two interesting ways. *Ex post*: satisfaction of these regulative criteria facilitate deployment—they facilitate activation of the theories that are produced by the existing practices and institutions of instrumental control. *Ex ante*: these regulative criteria channel and shape the kinds of normative, explanatory, and prescriptive theories that will be produced—disabling and devaluing those intellectual efforts that do not comply with the strategies, structures, and practices of instrumental control.

Each of the modes of thought we have considered is (to varying degrees) enabled and delimited by an unconscious construction of what the legal thinker is supposed to do. Implicit in each vision is an understanding that the legal thinker will develop some approach that will allow reason to be used as control. Virtually all legal thinkers are involved in this enterprise, which is why the recursive theme for each generation of American legal thinkers is some (typically formalistic) variant of a struggle between formalism and anti-formalism:

formalism vs. realism  
universalism vs. contextualism  
rules vs. standards  
and so on.

If we understand social aesthetics in this way, then it is easy to recognize that most of the intellectual-political disagreements among the various schools of thought we have discussed are—at least as far as their own substantive propositional content is concerned—epiphenomenal. All these disagreements are grounded upon and made meaningful by a shared misunderstanding of the aesthetics of contemporary social life—a shared misunderstanding that is inscribed in generations of legal thinkers whose stature and dialogic engagement are themselves supported and sustained by this shared misunderstanding.

### D. *The Subject Reconsidered*

Now, if this is right, then the problem of the subject takes on an important significance. Recognizing and addressing the problem of the subject is not simply a question of resolving a particular kind of error in

438. Schlag, *The Brilliant, the Curious, and the Wrong*, 39 STAN. L. REV. 917, 921-22 (1987).

our jurisprudence, our theories, our institutional practices. Rather, addressing the problem begins with the recognition that the sort of subject formation we have been constructed to be is one that systematically reproduces a false aesthetic of social life.

I have tried to show how this subject formation is unconsciously reproduced and maintained by ostensibly very different, even radical and critical modes of contemporary legal thought. These modes of legal thought are nested within a Langdellian form and rhetoric which shapes the kinds of subjects who practice these modes of thought. The result is that regardless of their (good) intentions, these subjects unconsciously replicate the Langdellian paradigm and its subject formation. This is the process that I call *the politics of form*.

What is perhaps most powerful about the politics of form is that it is not and cannot be recognized within our conventional representations of the political or the jurisprudential field.<sup>439</sup> On the contrary, the politics of form *is* the process that shapes us and our aesthetic conceptualization of the political and jurisprudential field. And in shaping us and our aesthetic conceptualizations, the politics of form shapes us to systematically elide the kinds of subject formations we have been constructed to be and the politics of form that has constructed us to become those subject formations.

If the problem of the subject and the politics of form are currently of concern (and possible to articulate) it is because the Langdellian subject formation—that is, the subject formation of the contemporary legal thinker—is intellectually *exhausted*. Indeed, that is in part why so “[i]n]any of the critiques developed over the past twenty years or so seem to have reached, if not dead ends, then at least a measure of exhaustion.”<sup>440</sup> Indeed, there is an important sense in which, for all the differences among the various modes of legal thought discussed here, they all exhibit a prevailing and repetitive sameness.<sup>441</sup> This is the sameness of the Langdellian paradigm—the sameness produced through a subject constructed to rehearse the same social aesthetic, the same form of intel-

439. In this sense, Radin and Michelman's suggestion that the arguments of *Normativity and the Politics of Form*, *supra* note 7, do not conform very well with Radin and Michelman's conventional representation of the jurisprudential field is, in a sense, absolutely right. The politics of form is an account of the politics that shape our very conceptualization of the political (including, the jurisprudential) field in the first place. Compare Radin & Michelman, *supra* note 8, with Schlag, *Stances*, 139 U. PA. L. REV. 1059 (1991).

440. Levinson, *Strolling Down the Path of the Law (and toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1252 (1991).

441. This is a sameness that becomes cognizable once the enablements and disabilities of the Langdellian paradigm and its subject formation have been left behind. For those who remain Langdellian subject formations, it is the differences between the various approaches of legal thought, not their sameness, that remain of paramount significance.

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lectual action, the same rhetorical relations regardless of the substantive propositional content at stake.

What concerns me about this Langdellian subject formation is that despite its exhaustion, it nonetheless remains dominant in the legal academy. Not only does the dominance of this subject formation prevent the development and recognition of other subject formations, but it effectively colonizes and homogenizes otherwise interesting and potentially edifying intellectual approaches.<sup>442</sup> Perhaps most significant is that this Langdellian subject formation is deeply implicated in the reproduction of images of law, society, culture, and politics and their relations that are now *seriously* out of date and positively detrimental to the intellectual and social construction of our world. For instance, the aesthetic that enables the formation and currency of political categories such as "conservative," "liberal," and "radical" is fast being eviscerated. What we have now is simulated conservatism, simulated liberalism, and simulated radicalism.<sup>443</sup> One can bemoan this state of affairs, but, of course, the risk is that this will be simulated bemoaning.

## VII. Conclusion

Sometimes it seems that there is only one story in American legal thought and only one problem. The story is the story of formalism and the problem is the problem of the subject. The story of formalism is that it never deals with the problem of the subject. The problem of the subject is that it's never been part of the story.

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Until now.

442. See, e.g., Schlag, "*Le Hors de Texte*," *supra* note 7.

443. See generally J. BAUDRILLARD, *SIMULATIONS* (1983).

