The Metaphysics of American Law

Gary Peller

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The Metaphysics of American Law

Gary Peller†

It is a commonplace that law is "political." Ever since the realists debunked "formalism" in legal reasoning, the received learning has been that legal analysis cannot be neutral and determinate, that general propositions of law cannot decide particular cases. Some policy judgment or value choice necessarily intervenes. It is "transcendental nonsense"[1] to believe that it could be any other way.

Like the realists, I also contend that legal reasoning is "political." My argument, however, is not a repetition of the point that policy or value judgments inevitably confront legal decisionmaking. Rather, it is an attempt to keep the realist project going in the context of a legal world in which "we are all realists now" by exploring the "politics" of the "law is politics" assertion.

In retrospect, the historical development of American legal thought has been amazingly rapid. It has moved from the liberty of contract era to the realists' corrosive notion that purportedly apolitical legal reasoning actually masks political ideology (or oedipal impulses) and then to the confident belief that policies and values at stake in legal decisionmaking can be brought under control and incorporated into the professional discourse.

But the demonstration of the inherent indeterminacy of legal rules would at first glance seem to apply just as easily to attempts to ground legal decisionmaking in the identification and application of purposes, policies, and principles. If the application of formal legal criteria to particular cases requires the intercession of policy judgments, as the realists contended, so does the application of a general policy to a particular

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Many colleagues and friends have commented helpfully on earlier drafts of this essay. Duncan Kennedy, James Boyle, David Trubek, Toni Pickard, William Eskridge, Peter Gabel, Ted White, and Robert Scott were extraordinarily supportive and generous with their time. Adelle Kimmel and David Given provided invaluable research assistance.

This study was inspired by M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860 (1977); Gabel, *Reification in Legal Reasoning*, 3 RESEARCH L. & SOC. 27 (1982); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method of Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979).

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

case. There is an infinite regress implicit in the need for a second policy with which to identify and apply a given policy.

Despite the purported acceptance of the realist claim that law is political, something called legal reasoning continues to be used at judicial proceedings and taught in law schools. Legal reasoning is still perceived as a distinct way of thinking about (and being within) the social world. Boundaries segregate legal discourse from political rhetoric, poetry, or late night conversations with friends. These boundaries are marked by signs at the borders of the discipline which announce what kinds of appeals will be taken as persuasive.

The integration of legal realist insights into mainstream American legal thought and the continued understanding of legal reasoning as a distinct and relatively closed mode of argumentation and analysis have resulted from the domestication of much of realist work. The realist assertion that "law is politics" has ceased to threaten the legal world. This has happened not because the law side of the equation somehow has been determinately reconstructed, but because the politics side has been unpoverished. The conventional interpretation of politics as value-or-policy-balancing is itself a political view as to the possibilities for social choice. It reduces the conception of politics from the wide notion of struggle over the exercises of contingent social power to the narrow conception of how to adapt to the limited possibilities presented by the functional necessities of social life. And it assumes some way to identify and apply policies and values that is not itself a contingent institutionalization of social power. The patrol of borders is still a political act.

My aim is to demonstrate that legal reasoning is political and ideological in the manner in which legal discourse excludes (or suppresses) other modes of discourse, the way in which it differentiates itself from "mere" opinion or will. In exploring this aspect of law, I focus on the transformation from the so-called liberty of contract era of the late nineteenth century to the heyday of legal realism and its incorporation into mainstream legal discourse.

One part of this Article reexamines this historical development of American legal thought. The standard history describes the liberty of contract era as evincing the sins of formalist reasoning. Legal realism then is presented as an exposure of the implicit political content of the formalist practice and a critical transformation of legal argumentative modes from "formalism" to "instrumentalism."

Many parts of the received learning are correct. But despite the discontinuities and transformations which undoubtedly mark the development of American legal thought, I am struck by the similarities in the modes of rationalization used in each period. There is a similarity, for example, in the liberty of contract distinction between public and private,

and free will and coercion, and in the realist distinction between facts and values, and the "is" and the "ought." As one works through each dominant conception of legitimate legal discourse, the same argument seems to appear over and over, albeit through different terms and in a different vocabulary.

My thesis is that the liberty of contract approach and the assimilated legal realist approaches are similar. The coherence and persuasiveness of each rests on the implicit acceptance of a deep metaphoric structure for interpreting the social world. I refer to this structure as the subject/object dichotomy, the notion that the social world can meaningfully be described by separating subjective and objective realms of social life. The transformation from the formalism of the late nineteenth century to the incorporation of legal realism into mainstream legal thought commonly is described as a radical shift. But this shift occurred within the confines of shared conceptual categories which were not transformed, but merely reordered.

Specifically, I argue that legal thought in the liberty of contract era can be understood as resting on the metaphysical belief in a transcendental subjectivity. Liberty of contract era analysis took place within a metaphoric organization of the conceptual space which took individual subjects as the ultimate source of social relations, as prior to and constitutive of objective social structures. The realist practice, at least as incorporated into mainstream legal discourse, did not alter this categorization of the social world into subjects and objective social structures. Realism merely flipped the order of the terms so that objective social structures (or "contexts"), were viewed as prior to and constitutive of subjective practices. Realism projected a transcendental object, outside of the subject, as the source of subjectivity.

Through the study of the transformation from liberty of contract to realism this Article considers the manner in which legal discourse is constructed. Its premise is that legal thought can be understood as a language for communicating about the social world. As such, it relies on metaphors for perception and representation which orient the reasoning process and underlie the assumed likenesses and differences in cognition. Legal thought distingnishes itself from open-ended ideological discourse by implicitly denying the contingency of the representational metaphors, such as the public/private or fact/value distinctions, on which its persuasiveness depends. When these background structures are taken as that which "goes without saying," they work as metaphysical assumptions about the world.

In order to satisfy the requisite neutrality, rationality and determinacy of the "rule of law," legal representational practice cannot distort the meaning of the social events with which it is concerned. But the

inevitable reliance on socially created background categories of perception and communication inevitably filters the legal representation of social events through contingent metaphors. These assumptions rest on particular substantive visions of the possibilities for social life and share a common inability to recognize various forms of social power. This Article explicates the various historical modes of legal thought by attempting to reconstruct the background metaphors of each approach in order to understand why each approach seems plausible to its adherents. The subject/object dichotomy is only the most general and abstract of the various interpretative metaphors underlying legal representational activity.

Rationality purportedly distinguishes legal discourse from other ways of thinking. The rule of law is identified with reason, whether *a priori* or instrumentalist, and is contrasted with passion or will, which in turn is associated with arbitrariness or discretion. "Rational" argument is supposed to have cognitive content accessible to all thinking people; "passion" is subjective and ungroundable. Indeed, it is a common rejoinder to critical attacks on legal thought that, whatever the imperfections of legal analysis, a commitment to the rule of law is preferable to rule by will or passion, associated with, for example, the fascism of the Nazi regime or the lynch mobs of the American South. The purported rationality of legal discourse distinguishes it from these "irrational" kinds of social force.

The study of the underlying metaphysical assumptions of legal thought suggests that the purported distinction between rational legal argumentation and irrational emotional appeal is incoherent. Legal thought is merely one instance in a series of arational attempts to capture social experience in reproducible form. It is not qualitatively different from what it excludes as irrational. Dominant legal thought in recent American history merely institutionalizes particular visions of the social world. These visions cannot be justified under legal thought's own criteria of rationality. Thus, the violence of legal thought consists in the arbitrary exclusion of other ways of understanding the world, other knowledges, and in the re-definition of violence itself.

I do not mean to deny the authenticity of the sensation that doing legal reasoning feels different from writing poetry or participating in a riot. But legal "rationality," the felt necessity with which one proposition seems to follow from another, is based on underlying structures of meaning. These instituted codes of "common sense" freeze the argumentative play of analogy by providing categories that form boundaries for "real" similarity and difference. These metaphors for organizing perception and communication, however, cannot themselves be justified as rational rather than rhetorical. For example, the rich and thickly tex-

tured experiences of getting evicted from an apartment in Carver Homes and selling bonds on Wall Street may be connected through the notion of property rights. This connection is metaphoric—the property concept relates the two existential moments through an abstraction which implicitly claims that the two experiences are alike in some meaningful way. The characterization of this similarity as rational as opposed to rhetorical, real as opposed to metaphoric, or legal as opposed to political, depends on a suppression of socially created and contingent metaphors upon which the connection rests. It is an act of social power to the extent it excludes as "merely" subjective, personal, or primitive all the ways that we experience the two events as different. In the name of "reason," other knowledge gleaned through other discourses and other metaphors for articulating social life are marginalized.

"Rationality" refers to the felt necessity with which one proposition seems to follow from another. This felt necessity occurs once particular metaphors for categorizing likeness and difference in the world have become frozen, or institutionalized as common sense. The presentation of legal activity as "reasoning" depends on the institutionalization of metaphysical beliefs about the social world and thus legal reasoning may be seen as an instance of social mythologizing.

The assertion that legal discourse is political or mythical is not meant to be derogatory in itself. These characterizations would apply to any other method of social decisionmaking. The point is that the attempt to exclude other discourses from the legal world because they are "merely" myths, poems, or opinions is mistaken. Legal reasoning itself depends on metaphor and myths of origin. Legal thought historically depends on what it purports to exclude. There are signs at the borders, but they don't refer to anything inside the discourse that is different from what is kept outside.

In addition to exploring the particular transformation from the liberty of contract era to legal realism and the general metaphysical infrastructure of legal discourse, the third main theme of this study is a consideration of the relationship between the experience of social life in liberal society and the law's representation of those social relations. Legal thought differentiates itself from politics by suppressing the socially contingent metaphors upon which the legal representation of the social world depends. This process is mirrored in the social world itself as the experience of alienation. The denial of the socially created representational metaphors in legal discourse is reflected in day-to-day experience when the socially created character of the language of social roles and relations is suppressed. In such experience, the dependence of existing social hierarchies on a contingent articulation of the social space is replaced by a vision of social patterns as having a life of their own,

independent of the people who create and reproduce them. In short, the error of mainstream legal thought, the mistaking of particular myths about the world for neutral and necessary truth, is not merely some intellectual dereliction which could be cured by substituting other premises or different rationalizations. The organization of legal knowledge about the social world and the organization of the social world itself are inseparable. I will describe this continuous relationship through the notion of "reification."

Reification refers to the process by which social reality is experienced as fixed or objective. Social relations are reified when their socially created, contingent character is forgotten or suppressed. In such circumstances, members of a social group conceive of the social group as an objective entity, external to and autonomous from the group members themselves. Each group member experiences reified social relations as objective constraints to which she must adapt and subordinate herself if she is to participate in the life of the group. The group is experienced as alien to the self. The group member perceives the forms of association within the group as pre-given roles into which individuals step. The member does not see the forms of association as socially created relations shaped by group members and constituting the members' identities.

Think, for example, of the fork rules at a formal dinner party. The rules of etiquette are one of the myriad ways that the social relations at the dinner party are structured. They are part of the web of various cultural codes, which include diction, dress, permissible topics of conversation, etc., that constitute the group as a particular set of social relations and that distinguish the group from other groups which follow different codes and strnctures. But these rules are not "merely" social conventions. They also mediate the relations between guests at the dinner party as invisible distancing devices, so that in some sense when the guests speak, they are not simply speaking as individuals to one another. In addition, the cultural group or the professional class also speaks as the guests reproduce the characteristics of the group through their obedience to the cultural codes.

The cultural codes demarcate roles for the group members. These roles seem to limit the scope of members' possible relations as they express the self-understanding of the social class. ("We party this way and not that way.") But to each of the group members, the cultural codes do not exist as expressions of themselves. The codes are simply "just the way things are" in the group experience. The structure of group relations takes on a life of its own as each of the group members merely steps into the roles as a way to be within the group. The contingency and exclusivity of the conventions would be apparent to anyone from a different social group. To group members, however, the conven-

tions become invisible mediators of their relations. The cultural codes give social actions a meaning distinct from any particular intent of the participants.[2]

More generally, social alienation might be described as the inability to see one's self in one's products and one's world. Social alienation is a false experience of social life to the extent that the social world can never really be alien to us since we create it and it is dependent on us to keep going. But reification also dignifies current institutionalized forms of social relations insofar as those social relations are taken as noncontingent, as external to the participants themselves, as just "the way things are."

Reification describes the continuous link between the legal representation of social life on the one hand and the process of social alienation and disempowerment in institutionalized group relations on the other. The suppression of the contingent social basis of existing social roles is experienced as social alienation. This experience is mirrored in legal representational thought by the suppression of the contingent social character of the background metaphors underlying legal reasoning. Like the experience of social alienation, the claimed rationality of legal thought depends on subordination to socially created forms. In both instances we mistake our own products for objective things.

The discussion will proceed as follows. First, the notion that legal thought constitutes a discourse that mediates the social relations it purports to represent will be explored through an analysis of the way modes of discourse generally act to order perception and communication. The focus will be on language and the interpretation of texts. I will explore various attempts to form closure with respect to meaning as I argue that meaning is necessarily indeterminate. Second, the notion that legal discourse works as a mediating language will be explicated through illustrations of legal representational activity. Third, I will discuss the liberty of contract and legal realist approaches in a search for the underlying metaphoric structure through which each of the approaches might be seen as plausible. The discussion then will focus on the continuity of the subject/object metaphor in legal representational practice and the ideological significance of that metaphor. Finally, I will explore the homology between the categories of legal thought and the experience of social life through a discussion of reification in institutionalized social relations.

2. For example, it means something in the group to speak loudly, or to burp without saying "excuse me," regardless of whether the speaker or burper intended that particular meaning. This meaning is socially created and dependent on social subjects for its reproduction. Yet none of the particular members had a part in the construction of the general cultural codes, nor have they any particular reason to identify with the codes. The codes appear as past social creations which exist in the present divorced from any visible social agency.

I

REPRESENTATION, MEDIATION, AND EVERYDAY POLITICS

An important assumption of the distinction in liberal thought between reason and will[3] is the notion that the available forms of communication are neutral to the content being communicated. Rational argumentation is thought to occur when ideas are accepted or rejected through the free work of critical reason rather than through coercion or faith. This implies that the terms in which the argument is set are not themselves the products of will or power and accordingly do not bias the resolution of the argument. This conception of rational argumentation embodies the idea that the conventions of communication are "mere" tools, adopted for convenience but having no effect on substance. They are pure vis-à-vis content.

The concept of the "marketplace of ideas" captures this understanding of the separability of knowledge and power, and of form and content. That concept appeals to the image of an open forum where any idea may be articulated and then may be chosen or rejected based on substantive merit. The structure of this marketplace is conceived as a neutral medium which merely reflects or represents the ideas under consideration.

In law, before decisions as to the applicable policy or principle are reached, the social event at issue must be communicated. The means by which events are represented make up a language or discourse. Like the liberal notion of reason as distinct from will and knowledge as distinct from power, the distinction between law and politics includes the notion that the form of legal argument does not itself contain contingent political visions. Legal theory consistently appeals to the image of legal discourse as a neutral medium which merely reflects social events. Arguments about policy or principle are thought to take place using pure and determinate representational conventions, e.g., the categories of free will and coercion in the liberty of contract era, or the categories of allocation and distribution in law and economics discourse.[4]

The argument of this section is that representational practice, whatever its form, inevitably is ideological. There is no pure form of communication which merely represents rather than creates content; form and content are inseparable. As such, representational practice can

3. I take the distinction between reason and will to be a characteristic of post-Enlightenment Western discourse at the level of the intellectual elites and political legitimation, although I recognize that it is transformed in each of its manifestations. *See* M. HORKHEIMER & T. ADORNO, DIALECTIC OF ENLIGHTENMENT 3-119 (J. Cumming trans. 1972). *See generally* H. MARCUSE, REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY (1st ed. 1954); R. UNGER, KNOWLEDGE AND POLITICS (1975).

4. *See infra* text accompanying notes 68-141.

never be neutral; representational activity, of which legal discourse is a part, performs politically.

The notion that legal representational activity is ideological will be developed in the following pages through an analysis of the mediating characteristics of language. "Language," as the form of communication, can never escape its own textuality.[5] It is intertwined with the content of communication and contains its own substantive messages apart from that which it purports to represent.

A. The Social Construction of Knowledge[6]

Language is conventionally considered a transparent vessel for

5. In other words, there is nothing beyond "interpretation." "If interpretation is a never ending task, it is simply because there is nothing to interpret. There is nothing absolutely primary to interpret because, when all is said and done, underneath it all everything is already interpretation." H. DREYFUS & P. RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 107 (2d ed. 1983) (quoting Foucault, *Nietzche, Freud, Marx*, in NIETZCHE (1971)). *See generally id.* at 104-25.

6. There is a rich scholarly literature on the issues of language and meaning which treats the subject in far more detail than I do here. My very general and summary treatment is intended simply to provide the context for the particular approach I take to legal discourse, and to suggest the connectious between issues of indeterminacy in textual analysis and issues of legitimacy in political and legal argument. For another treatment of these interpretive issues in relation to legal thought, see Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984); D. Kennedy, International Legal Structures (1984) (unpublished manuscript on file with author).

The discussion of language, as well as the general interpretation of the metaphysics of American legal thought, has benefited from the work of Jacques Derrida. *See* J. DERRIDA, OF GRAMMATOLOGY (G. Spivak trans. 1976); J. DERRIDA, SPEECH AND PHENOMENA, AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS (D. Allison trans. 1973); J. DERRIDA, WRITING AND DIFFERENCE (A. Bass trans. 1978); Derrida, *Limited Inc abc . . .*, 2 GLYPH 162 (1977); Derrida, *Signature Event Context*, 1 GLYPH 172 (1977); Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in THE STRUCTURALIST CONTROVERSY: THE LANGUAGES OF CRITICISM AND THE SCIENCES OF MAN (R. Macksey & E. Donato eds. 1977); Derrida, *The Supplement of Copula: Philosophy Before Linguistics*, in TEXTUAL STRATEGIES: PERSPECTIVES IN POST STRUCTURALIST CRITICISM 82 (J. Harari ed. 1979); Derrida, *The White Mythology: Metaphor in the Text of Philosophy*, 6 NEW LITERARY HIST. 7 (1974). For general introductions to Derrida's work, see J. CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM (1982); C. NORRIS, DECONSTRUCTION, THEORY AND PRACTICE (1982). For a good introduction to the issues of meaning as they have been developed in literary theory, see F. LENTRICCHIA, AFTER THE NEW CRITICISM (1980); T. HAWKES, STRUCTURALISM AND SEMIOTICS (1977). In general, I connect issues of literary and legal discourse by associating the liberty of contract discourse's focus on the free will of a contracting party with literary approaches geared toward the author as the unique creator of a text, and the legal realist focus on context and science with literary approaches, broadly called "structuralist," which look to the text as context-based, incorporating social structures of meaning. Of course, many of the ideas presented are by no means unique to a deconstructive approach, and there has been no attempt made to remain faithful to anything like a "deconstructive method" or "Derrida's philosophy," whatever such things would be.

My utilization of elements of Derridean analysis departs from the focus of his work in that I attempt to relate the insights from Derrida's study to political and ideological issues. My intention is to use the deconstructive approach in order to describe the process by which the status quo of social life is reified, or, in the terms of another tradition, how "false consciousness" is constructed. This treatment of the methodological issues raised by a deconstructive approach to meaning as related to

expressing meaning. We understand what other people mean *through* words. Words are treated as invisible transporters of intended meaning, but not themselves constructive of meaning. Stated in other terms, the relation between the present experience or thought of the speaker, and the representation, the later communication, is assumed to be immediate, free from the influence of the form of communication itself. The expression is treated as merely re-presentation rather than as interpretation.[7]

Upon reflection, however, it becomes apparent that a series of linguistic conventions separate the speaker and the listener. If the expression is to make sense in the social world, the speaker must articulate her thought through the categories for communication available in the linguistic community. If the listener is to comprehend the speaker, he must reconstitute the meaning through the speaker's objective manifestations, the words and sentences chosen. The linguistic conventions stand as a mediating screen between the speaker and the listener, between the

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what in other traditions has been called "ideology" is influenced by the excellent discussion in M. RYAN, MARXISM AND DECONSTRUCTION: A CRITICAL ARTICULATION (1982).

The discussion of the connection between the deconstructive approach to meaning and political and legal issues of legitimacy is informed by the tradition known as the "sociology of knowledge." *See generally* P. BERGER & T. LUCKMAN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1st ed. 1966); M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 27-28 (A. Sheridan trans. 1979); M. FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE (A. Sheridan-Smith trans. 1972); M. FOUCAULT, THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES (1970); M. FOUCAULT, *Truth and Power*, in POWER/KNOWLEDGE (C. Gordon ed. 1980); J. HABERMAS, LEGITIMATION CRISIS (T. McCarthy trans. 1975); J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (J. Shapiro trans. 1971); K. MANNHEIM, IDEOLOGY AND UTOPIA: AN INTRODUCTION TO THE SOCIOLOGY OF KNOWLEDGE (1936). The "sociology of knowledge" tradition itself has its intellectual background in the rejection of epistemology as a foundational discipline separate from social theory. *See* H. MARCUSE, *supra* note 3, at 258-62; Taylor & Montifore, *From an Analytic Perspective*, in METACRITIQUE (G. Kortian ed. J. Raffan trans. 1980). I have chosen to argue in terms of linguistics in order to start from what seems to me to be the least controversial aspect of the argument that knowledge and social power are inseparable.

Another important influence on this essay might broadly be termed "the critique of reification." While the linguistic approach to these issues tends to emphasize the spatial, synchronic aspects of inscription and encoding, other approaches have attacked what in many respects are the same issues from a more time-based, diachronic perspective. There are, as I see it, two main approaches: on the one hand the critique of the repressive underside of liberal freedom exemplified by the work of the Frankfurt School, *see* J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS, *supra*; M. HORKHEIMER & T. ADORNO, *supra* note 3; M. JAY, THE DIALECTICAL IMAGINATION (1973); G. LUKACS, HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS (R. Livingstone trans. 1971); H. MARCUSE, NEGATIONS: ESSAYS IN CRITICAL THEORY (J. Shapiro trans. 1968), and on the other hand, the phenomenologically oriented work of existentialist philosophy, *see* J. SARTRE, BEING AND NOTHINGNESS: AN ESSAY ON PHENOMENOLOGICAL ONTOLOGY (H. Barnes trans. 1956); J. SARTRE, SEARCH FOR A METHOD (H. Barnes trans. 1963); J. SARTRE, THE CRITIQUE OF DIALECTICAL REASON (J. Ree ed. A. Sheridan-Smith trans. 1976).

7. The notion of a "re-presentation" is intended to convey the image of representational practice as a direct reflection of something which preexists the practice itself. The idea is that the form of communication is neutral to the content being communicated so that, in this image, language and meaning are separate; language is the plastic tool open to the expression of any message.

"present" experience or thought of the speaker and its re-presentation to the listener.

The necessary fact that communication occurs through language (of which linguistic usage is merely one kind) raises the possibility that meaning is dependent on language rather than language's being subordinate to meaning. That is, if we define meaning as what is intended by the speaker,[8] the necessity of communicating through language reveals that such meaning is always beyond grasp because linguistic conventions constrain subjective intent into objectively given forms.[9] The possibility arises that a communication is interpreted through social meanings that attach to the communication apart from the intention of a particular speaker. Furthermore the intent of a speaker itself may be shot through with the marks of these outside influences. When we look

8. There is no necessary reason to think of meaning in terms of subjective intent. The discussion takes this conception simply as a convenient and accessible starting point from which to develop the problematic conception of meaning.

9. Use of the term "conventions" to describe the manner in which external, public meaning invades internal, private intent is misleading to the extent that it suggests that linguistic practices have determinate referents. *See* Derrida, *Signature Event Context*, *supra* note 6. The point here is that the linguistic practices through which speakers communicate not only influence the range of possible communication, since communication must occur through social forms, but also that meaning cannot be reduced to the intent of a speaker because social meaning is attributed to communication beyond the intent of speakers, as a function of the forms through which the communication is objectively manifest. Moreover, to the extent that the speaker conceptualizes his own meaning in terms of the available linguistic referents for categorizing communication and perception, the social practice of signification not only acts to "constrain" meaning at the point that the speaker speaks, but also at the earlier point that the speaker thinks or perceives. That is, there is no point of private or individual intent that is separate from the social representational practices. The origin of meaning projected as the speaker's intent is always inseparable from the possibilities of meaning inscribed in the social linguistic practices.

I take this insight to be the starting point of a "structuralist" interpretative approach, which focuses on the preconditions for meaning in a communicative context, the conventions and codes which make the expression coherent and intelligible to the listener or reader, rather than on the thematic content of expressions. This focus unifies structuralist approaches to interpretation in various fields. *See, e.g.*, R. BARTHES, MYTHOLOGIES (A. Lavers trans. 1972); R. BARTHES, ON RACINE (R. Howard trans. 1964); E. BENVENISTE, PROBLEMS IN GENERAL LINGUISTICS (M. Meek trans. 1971); J. LACAN, SPEECH AND LANGUAGE IN PSYCHOANALYSIS (A. Wilder trans. 1981); E. LEACH, CULTURE & COMMUNICATION (1976); C. LEVI-STRAUSS, THE RAW AND THE COOKED (J. Weightman & D. Weightman trans. 1970); C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (C. Jacobson & B. Schoepf trans. 1968); C. LEVI-STRAUSS, TRISTES TROPIQUES (J. Weightman & D. Weightman trans. 1974); J. PIAGET, STRUCTURALISM (C. Maschler trans. 1970). *See generally* R. COWARD & J. ELLIS, LANGUAGE AND MATERIALISM: DEVELOPMENTS IN SEMIOLOGY AND THE THEORY OF THE SUBJECT (1977); J. CULLER, STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS AND THE STUDY OF LITERATURE (1975); T. HAWKES, *supra* note 6; F. JAMESON, THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM (1972); F. JAMESON, THE LANGUAGES OF CRITICISM AND THE SCIENCES OF MAN: THE STRUCTURALIST CONTROVERSY (R. Macksey & E. Donato eds. 1970); F. JAMESON, THE STRUCTURALISTS FROM MARX TO LEVI-STRAUSS (R. de George & F. de George eds. 1972). I will contend below that, just as meaning cannot be reduced to intent, it also cannot be reduced to the grammar of language structure identified in structuralist work, since structures themselves are indeterminate.

to the intent of a speaker to determine the meaning of a particular expression, we may find the marks of the social system of signification rather than any "pure" meaning intended by the speaker.

On one view, the meaning of an expression may be found by conceiving of the linguistic categories as immediately reflecting a direct correlation with the objects or thoughts to which they refer. This view imagines the world as naturally divided into a multitude of objects and concepts to which linguistic categories immediately refer. Accordingly, the apprehension of meaning is simple. The listener merely substitutes for the words their conceptual referents, and thereby knows what the speaker intended to convey.

The view that representational terms, "signifiers," have a direct correlation with the concepts represented, their "signified" meaning,[10] depends on a premise I will call the assumption of positive content. By the term "positive content," I mean the notion that the signifier, the representational term, acquires meaning because it is filled up by the content of the signified, which determines its meaning. For example, the word "tree" ordinarily is taken to have a positive, fixed content determined by the signified, the thing that grows in the ground with bark and leaves. If linguistic signs are understood as correlates of underlying concepts, the word "tree" is viewed as a "real" thing referring to something "real" in the world. A natural tie between the word and the thing is assumed.[11]

Within this view of language as adequation of concept and representational term, the attribution of meaning is determinate and free from the mediation of interpretation. But the adequation view is problematic. An initial problem is that any study of other languages reveals that the word "tree" is an arbitrary sign for the thing-tree. Other languages use other words to refer to what we call tree. Thus, the choice of sounds or graphic images for "tree" is not determined by the thing, but by convention. To be sure, this convention is institutionalized in our language, so that we are not free to use just any word to refer to trees. But the notion that the meaning is governed by a natural connection between the word and the concept is belied by the arbitrariness of the convention. To the extent we understand a speaker, intelligibility depends, at least in the first

10. In the terminology of semiotics, the "sign" is made up of two parts, the "signifier" which stands as a symbol in the social language for what is being represented, and the "signified," the concept or thing that is represented by the signifier. *See* R. BARTHES, ELEMENTS OF SEMIOLOGY 35-53 (A. Lavers & C. Smith trans. 1967); J. DERRIDA, OF GRAMMATOLOGY, *supra* note 6, at 10-73; T. HAWKES, STRUCTURALISM AND SEMIOTICS 25-26 (1977); F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (C. Bally, A. Sechehaye, & A. Reidlinger eds. W. Baskin trans. 1959).

11. The tree example is borrowed from F. DE SAUSSURE, *supra* note 10, at 65-70. The conception of a natural and determinate connection between the signifier and the signified contrasts with the notion that the connection is the effect of a social and contingent process, or artifactual and created rather than found.

instance, on shared conventions and codes of meaning built into the language structure, rather than on any natural tie between representational terms and the concepts they signify.[12]

By suspending the everyday connection drawn between representational terms ("siguifiers") and the objects or concepts to which they purport to refer ("signifieds"), we can see that the meaning generated by linguistic conventions is negative and differential rather than positive and fixed. The meaning of the word "tree" is *artificial* in that it does not flow from anything in the nature of the word itself. Instead the meaning flows from the word's relationship to other words within the socially created representational practice. It acquires its meaning from not being another word, say, "bush" or "woods." Accordingly, re-presentation is constituted by a negative *absence* of content rather than by the positive presence of meaning imagined in the notion of language as adequation. It is not some substantial plenitude which determines the meaning of a representational term, but rather a lack of meaning which points elsewhere, outside of itself, to other terms of signification which it is not.[13]

12. "The bond between the signifier and the signified is arbitrary. . . . The term [arbitrary] should not imply that the choice of the signifier is left entirely to the speaker . . .; I mean that it is unmotivated, i.e. arbitrary in that it actually has no natural connection with the signified." F. DE SAUSSURE, *supra* note 10, at 67-69. This conception that the contours for the possibilities of meaning are ingrained in the "grammar" of a langnage, the "codes" of social groups, the "unconscious" of an individual, or the "dialectic" of economic relations, each of which pre-exist individual events as the frame within which the events gain significance, is the starting point for the approach to social or textual analysis known as "structuralism." *See supra* note 9.

13. As Saussure put the idea, "in language there are only differences *without positive terms*." F. DE SAUSSURE, *supra* note 10, at 120. The notion that social meaning is dependent on the process of differentiation might be clarified by consideration of the signifying possibilities for sounds within a language. For example, the difference in meaning between the words "bat" and "mat" is established by the difference in the initial sounds of each word. The meaning of each word is dependent on the difference between the meaning of its sounds and the sounds of other words. Here the English language registers the contrast between *b* and *m* as capable of generating meaning. However, not every possible contrast between sounds is capable of generating meaning within a particular language. For instance, the *p* sound in "pin" is different from the *p* sound in "spin." Unlike speakers of some other languages, native English speakers do not ordinarily recognize the difference in sounds since the difference is not used to distribute meaning. Of the various similarities or differences in sounds that "actually" oceur, only those which the language makes meaningful are registered. The signification conventions abstract from the universe of differences and similarities to establish an ordering system for the distribution of meaning. The sounds that are present in a given speech act are by themselves arbitrary and meaningless; they depend for their meaning on sounds that are absent as they gain meaning through the differentiation with those other sounds. *See* T. HAWKES, *supra* note 6, at 22-24.

This conception of differentiation, starting from the premise that no specific expression has meaning by itself, but instead derives significance in a *relational* contrast with others, absent possibilities, has been described in the following terms:

> [*Différance*] is a structure and a movement no longer conceivable on the basis of the opposition presence/absence. *Différance* is the systematic play of differences, of traces of differences, of the *spacing* by means of which elements are related to each other. This spacing is the simultaneously active and passive (the *a* of *différance* indicates this indecision as concerus activity and passivity, that which eannot be governed by or distributed between the

Upon the realization of the artifactual character of language, one might nevertheless attempt to fix meaning by assuming that, whatever the vagaries of the signifier, it has ultimate reference to a signified, to some reality out there, separate from our own construction of meaning. For example, it might be assumed that trees really are distinct things "out there" regardless of the arbitrary and differential character of the representational conventions by which they are signified. Trees exist separate from subjects and consciousness. But the same negative differentiation characterizes the attempt to ground meaning in the signified concept. The signified concept is itself never *present* but always already a *re*-presentation. This re-presentation is a signifier containing traces referring to other signifiers within a chain of differentiation. There is nothing in the object tree that marks it off as an object separate from the woods and bushes surrounding it. Its status as a tree, separate from bushes, is not something about which we could say that its treeness is in it. Rather, its distinctiveness is dependent on differentiation through a conceptual language. The meaning of "tree" is generated through the socially created system for dividing things in the world. Tree is contrasted with bush, sky, supper, etc. A tree is recognized as a distinct object to the extent that our language treats certain attributes, such as bark and leaves, as significant and therefore capable of distributing meaning. The concept is not determined by positive substantiality, but rather by negativity, by the absence of the other concepts of the conceptual system.[14]

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terms of this opposition), productiou of the intervals without which the "full" terms would not signify, would not function.

J. DERRIDA, POSITIONS 27 (A. Bass trans. 1981).

14. That is, there is no escape from the differential play of the signifier, the social process of inscribing meaning that mediates time and the space between any "present" and its representation. Any attempt to ground meaning in the concept, separate from the signifier, fails because the concept itself is revealed to be an effect of the same process of differentiation through a signification practice that characterized the signifier as a signifier. The concept "tree," like the word "tree," acquires meaning by negative differentiation from other concepts. In other words, there is nothing beyond "interpretation" because there is nothing but interpretation to be interpreted. *See* H. DREYFUS & P. RABINOW, *supra* note 5, at 107 (quoting Foucault, *Nietzche, Freud, Marx*, in NIETZCHE (1971)). This infinite play of signification whereby the traces of absent terms lead themselves to other traces of other absent terms with no stopping point has been described in the following manner:

> [T]he trace is not a presence but the simulacrum of a presence that dislocates itself, refers itself, it properly has no site—erasure belongs to its structure . . . . The paradox of such a structure, in the language of metaphysics, is an inversion of metaphysical concepts, which produces the following effect: the present becomes the sign of the sign, the trace of the trace. It is no longer what every reference refers to in the last analysis. It becomes a function in a structure of generalized reference. It is a trace, and a trace of the erasure of the trace.

J. DERRIDA, MARGINS OF PHILOSOPHY 24 (A. Bass trans. 1982), at 25; *see also* J. DERRIDA, *supra* note 13, at 27.

When we try to look behind representational language, what we find is more language, more traces of differentiation which seem to preexist any positive term of which they are traces. One implication of the inability to ground interpretation or representation in a source that is not itself an interpretation or a product of contingent signifying practices is that the notion of rhetoric or lan-

Language cannot simply represent the world; it necessarily interprets it according to the economy of difference within the language structure.[15]

Now it might be said that trees *do* naturally exist as objects precisely because they have bark and leaves while other things in the world do not. Since they are the only objects with bark and leaves, it may seem natural to group them under a single concept like "tree" regardless of the arbitrariness of the name we give the concept. But why choose bark and leaves as a means for categorizing things in the world? Why not choose,

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guage as the mere vehicle for the expression of something else, be it reason, intent, or things, is revealed as a denial of contingency and a metaphysical projection of positive content. Thus there is no way to separate the message from the medium, the rational from the rhetorical, the philosophical from the poetic, and so on. *See* P. DE MAN, ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE AND PROUST (1979); P. DE MAN, BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM (2d ed. 1983); J. DERRIDA, OF GRAMMATOLOGY, *supra* note 6; R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979); Derrida, *The White Mythology: Metaphor in the Text of Philosophy,* 6 NEW LITERARY HIST. 1 (1974); Rorty, *Philosophy as a Kind of Writing: An Essay on Derrida,* 10 NEW LITERARY HIST. 141 (1978). In this study, the textuality of legal representational practice is used to deny the purported distinction between politics as contingent ideological struggle and law as rational.

15. The concept that meaning is derived negatively, through differentiation, is intended to suggest a common thread to the critique of positivism, whether that critique is embodied in linguistic theory, philosophy, sociology, social theory, or politics. That common thread is that positivism in all these guises denies the presence of the social subject in its interpretation of the given, and accordingly reifies its object by effacing the extent to which the "being" of the object is inscribed with the "nothingness" of what the object is not in the social signification practice. This might be termed the synchronic side of the positivistic reification of objects. From this position, positivism systematically suppresses the contingency and social construction of its objects of study, including the analyst's own participation in and influence on the analysis. The suppression of the social construction of the objects of study gives them an image of substantiality that denies their dependence on the reproduction of existing social practices. Stated in diacronic terms, positivism abstracts its objects of study from the full manifold of their existence, including their past construction by subjects interacting with other social objects and the future potentialities of the object in its interactions with subjects that are always imbedded in its present moment as potentiality, as traces pointing toward subjects. In this manner, positivism achieves apparent determinacy simply by suppressing the indeterminate social aspects of the objects, the extent to which the objects are the effects of past social practices which could have been different, and the extent to which the objects contain indeterminate possibilities that they will be different in the future as social practices change. *See* H. MARCUSE, *supra* note 3, at 121-68, 323-401.

Positivism then takes this version of the object, with its subjective constitution and future dependence on the actions of subjects already suppressed, as itself objective, rather than a metaphor that the object so abstracted in the positivist representational practice is like the object as it exists separate from the observer. In terms of the process of differentiation, this is a denial of the possibility of subjects negating the given object and thereby transforming it, either in the future or as one of the past contingencies in the construction of the object. It is this emphasis on "difference" as a negation of the given or positive in both its temporal and spatial dimensions, *see* J. DERRIDA, WRITING AND DIFFERENCE (A. Bass trans. 1978), that I draw upon to connect the deconstructive practice of Derrida with Sartre's phenomenological emphasis on the existential inevitability of subjective negation, *see* J. SARTRE, THE CRITIQUE OF DIALECTICAL REASON, *supra* note 6, and with the critical theory of the Frankfort School, and its vision of reason as the subjective negation of the given, *see* H. MARCUSE, *supra* note 3, at 66-68, 71, 106-14, 124-54. *See generally* T. ADORNO, NEGATIVE DIALECTICS (E. Ashton trans. 1973). The effacement of difference in the reification of representational metaphors is thereby seen as related to social passivity. *See infra* Part V.

say, a categorization system consisting of: (*a*) things that smile; (*b*) things that burn; (*c*) things kept in boxes; (*d*) etc.; and (*e*) things belonging to the neighbors?[16] Bark and leaves are themselves only attributes to the extent they are recognized as meaningful within a system of representation in which bark is distinguished from stem and leaves from buds. Indeed, even if we imagined the thing tree as being signified by pointing rather than by the word "tree," the meaning of what was being indicated would still be dependent on the representational convention in which tree was distinguished from bush and ground.[17]

Representational categories, such as the one denoted by the term "tree," establish within language metaphoric connnections between things so that it comes to feel natural to slice experience in particular ways. Representational metaphors abstract particular features from the otherwise thick texture of the world. But there is no *necessary* reason to abstract some features rather than others; the connection between various experiences of "trees" as essentially similar is a socially created connection that places all the ways that the experiences might be different.

This analysis suggests that meaning is created socially through the economy of difference within representational contexts. Thus, there is no re-presentation, only interpretation. And meaning is indeterminate to the extent that it is never positively present in an expression; it is always deferred or absent. The attempt to fix the meaning of an expression leads to an infinite regress. One must follow traces pointing away from expres-

16. This way of putting the problem is borrowed secondhand from Borges through the Preface to Foucault's book, *The Order of Things*:

> This book first arose out of a passage in Borges, out of the laughter that shattered, as I read the passage, all the familiar landmarks of my thought—*our* thought, the thought that bears the stamp of our age and our geography—breaking up all the ordered surfaces and all the planes with which we are accustomed to tame the wild profusion of existing things, and continuing long afterwards to disturb and threaten with collapse our age-old distinction between the Same and the Other. This passage quotes a "certain Chinese encyclopedia" in which it is written that 'animals are divided into: (*a*) belonging to the Emperor, (*b*) embalmed, (*c*) tame, (*d*) sucking pigs, (*e*) sirens, (*f*) fabulous, (*g*) stray dogs, (*h*) included in the present classification, (*i*) frenzied, (*j*) innumerable, (*k*) drawn with a very fine camelhair brush, (*l*) *et cetera*, (*m*) having just broken the water pitcher, (*n*) that from a long way off look like flies.' In the wonderment of this taxonomy, the thing that we apprehend in one great leap, the thing that, by means of the fable, is demonstrated as the exotic charm of another system of thought, is the limitation of our own, the stark impossibility of thinking *that*.

M. FOUCAULT, THE ORDER OF THINGS xv (1970)

17. As Culler puts it,

> even when we try to imagine the "birth" of language and describe an originary event . . . we discover that we must assume prior organization, prior differentiation. . . . If a cave man is successfully to inaugurate language by making a special grunt signify "food," we must suppose that the grunt is already distinguished from other grunts and that the world has already been divided into the categories "food" and "nonfood." Acts of signification depend on differences, such as the contrast between "food" and "nonfood" that allows food to be signified . . . .

J. CULLER, *supra* note 6, at 96; *see* J. DERRIDA, OF GRAMMATOLOGY, *supra* note 6, at 101-268; *see also* C. NORRIS, *supra* note 6, at 37-41.

sions to other terms, which themselves contain traces leading to still other terms, and so on. Meaning does not "exist" anywhere; it is constructed in differential relations, in the blank spaces and silences of communications.[18]

Each move to fix meaning fails because no essential or necessary meaning adheres to either the expressions or the things they signify. First, there is no necessary connection between word and object; the connection is conventional and socially created. The word only "means" with reference to other words in the play of difference in the socially created system of signification. Meaning cannot adhere to the word "tree" because its meaning depends upon other words. Second, the object is always already a representation and cannot act as the basis for determinately grounding meaning. Language does not re-present a world already differentiated into categories that representational metaphors match. Neither the essential nature of "tree" nor the necessary reasons for its categorization as tree can be located except by reference to other objects differentiated through a social representational system, to all the things tree is not.

The purported distinction in liberal thought between reason and will—and, I will contend, law and politics—depends on the denial of the contingency of representational categories. The distinction constitutes the implicit institutionalization of what Jacques Derrida has termed the "metaphysics of presence."[19] In the metaphysics of presence, the artifactual character of representational categories utilized in purportedly

18. The blank spaces of a graphic text and the silences of spoken language provide the loci of textuality, of the ability spatially to contrast and temporally to defer other signifiers. Silence and blankness therefore are not merely empty supplements to the full positive substantiality of sounds and graphic images, but instead are full of indeterminate meaning and the very point of the possibility of meaning anything; in the nothingness is the possibility of many meanings, the erotic mystery of the text. *See generally* R. BARTHES, A LOVER'S DISCOURSE: FRAGMENTS (1978); J. CULLER, FLAUBERT: THE USE OF UNCERTAINTY (1974).

19. J. DERRIDA, OF GRAMMATOLOGY, *supra* note 6, at 49. This metaphysics is characterized as:

> 1. The hierarchical axiology, the ethical-ontological distinctions which do not merely set up value-oppositions clustered around an ideal and unfindable limit, but moreover *subordinate* these values to each other (normal/abnormal, standard/parasite, fulfilled/void, serious/non-serious, literal/non-literal, briefly: positive/negative, and ideal/non-ideal); . . . .
>
> 2. The enterprise of returning "strategically," ideally, to an origin or a "priority" held to be simple, intact, normal, pure, standard, self-identical, in order *then* to think in terms of derivation, complication, deterioration, accident, etc. All metaphysicians, from Plato to Rousseau, Descartes to Husserl, have proceeded in this way, conceiving good to be before evil, the positive before the negative, the pure before the impure, the simple before the complex . . . etc. . . . . The purity of the within can henceforth only be restored by *accusing* exteriority [such as the signifier vis-à-vis the signified as an exterior reference back to the signified] of being a supplement, something inessential . . . . This is the gesture inaugurating "logic" itself, that good "sense" in accord with the self-identity of *that which is*: the entity is what it is, the outside is out and the inside in.

Derrida, *Limited Inc abc . . .*, *supra* note 6 at 236, 247-48.

rational thought processes is denied. Meaning is traced to a source supposedly immediate and pure rather than socially produced through contingent mediating categories. In the metaphysics of presence, meaning is ultimately determinate and positive. The concept tree, for example, is believed to refer to some self-present source— "it's really out there"—so that the concept is differentiated from other concepts not by merely being different from them. Instead, a plenitude, a substantiality of being is assumed to fill up the realm of treeness. This plenitude then pushes other concepts out of the realm by giving positive content to the concept "tree." Language or thought re-presents the self-present source.[20]

The analysis above suggests, however, that meaning is ultimately indeterminate. There is no substantial plenitude which can be expressed and delineated which is not always already a re-presentation, an effect of differentiation within a socially created and contingent system of organizing perception and communication. Every assertion of positive content, a true thing that "is," belies itself as every articulation contains "traces" of its own artifactuality pointing to other things which the thing in question is not and to the social and contingent structure of metaphors within which it resides.[21]

Accordingly, the meaning of a concept or event appears as a *produced effect* of the play of social representational practice. And such representational practice itself has no fixed origin in positive content. The ideas and objects supposedly signified by representational categories are never present apart from the categories, because the ideas and objects are the effects of the categories rather the source of them. The signified content of representational practice has no positive existence apart from this practice. The "being" of things that are supposed to "exist" out there is inscribed with the "nothingness" of the trace of differentiation pointing away from the "thing" to social practices.[22]

The image of true knowledge's being determined by the world "out there," as separate from consciousness, as objective rather than subjective, depends on the image of a meaning that is self-present, "there" somewhere, rather than representational and artifactual. But the search for such meaning leads back to contingent social practices rather than to objective "reality." These social practices embody contingent choices concerning how to organize the thick texture of the world in consciousness.[23] "Knowledge" is not an adequation of consciousness to the

20. *See* J. DERRIDA, OF GRAMMATOLOGY, *supra* note 6, at 6-23; R. RORTY, *supra* note 14, at 45.

21. *See* J. DERRIDA, OF GRAMMATOLOGY, *supra* note 6, at 18-19; 44-73.

22. I use this terminology to suggest a connection between the Derridean critique of presence and origins and the left existentialist critique of reification. Common to both is the notion of negation as the suppressed element in assertions of closure, determinacy, knowledge, being, and truth.

23. The fact that we perceive all snow as basically alike while Eskimos have a multitude of

world. What gets called "knowledge" is the produced effect of social power institutionalized in social representational conventions.[24]

The world does not consist of people posed against and perceiving objects separate from themselves who then communicate their perceptions through the conventional labels of a "community of interpretation." Rather, objects are constructed as they are perceived since perception itself occurs through the medium of representational categories. Knowledge does not flow from a free subject perceiving independently existing objects; it is constructed in the relationships *between* things, in the metaphors we create.[25] The notion of a determinate "truth" depends on the effacement of this metaphoric base. "Truth" requires that meaning be presented as positive rather than differential, as ruled by the "real" nature of words or things or an original presence that exists prior to the mere conventionality of re-presentation. "Truth" accordingly depends on the exclusion of other ways of dividing up the world, other metaphors for the way the world is experienced.[26]

The point here is not that there is no world separate from consciousness; of course there is. But there is no determinative way to *know* this world separate from the socially created representational systems through which we approach the world. Knowledge and social power are inseparable. Similarly, I am not arguing that we never communicate or understand each other when we speak or act. That would be absurd. Rather, there is no way to achieve *closure* with respect to the meaning of expressions or events. The distribution of meaning depends on socially *created* and *contingent* representational conventions. Each attempt to fix meaning is belied by the dependence of meaning on language. Meaning is dependent on artificial and differential signification practices.[27]

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terms and conceptual categories for various kinds of "snow" is the already trite example of the contingency of the particular representational categories. By describing the process in terms of "social choice," I do not intend to suggest that representational categories originate in some kind of group decision that occurs at some specific time, but rather that representational practice is both social and contingent on subjects.

24. *See generally* M. FOUCAULT, *Truth and Power*, *supra* note 6; R. BARTHES, CRITICAL ESSAYS, *supra* note 26.

25. *See* T. HAWKES, *supra* note 25, at 17.

26. *See generally* R. BARTHES, CRITICAL ESSAYS (R. Howard trans. 1972) (the exclusion of other meaning by the institution of structures of reference is a form of generalized and institutionalized violence); F. LENTRICCHIA, *supra* note 6, at 32-146, 192-208; M. FOUCAULT, MADNESS AND CIVILIZATION (R. Howard trans. 1965) (sanity is socially produced by what it excludes as insane); M. FOUCAULT, *Truth and Power*, *supra* note 6.

27. At this point, the discussion of language as linguistic practice can be seen as an analogy for the way that the social world is constructed generally through linguistic as well as productive, emotive, cultural, literary, and other signifying practices. *See* R. BARTHES,, *supra* note 10; R. BARTHES, MYTHOLOGIES, *supra* note 9.

B. Literary Interpretation and Original Sources

Contingent interpretation poses as simple representation by suppressing the mediation of social practices for articulating the world, in short, the mediation of language. In the process, a positive source of meaning independent of the interpreter's representational conventions is projected in attempts to fix meaning. This process may be illustrated through a short survey of the major approaches to textual exegesis. Each attempt to achieve a determinate interpretation of a literary text purports to proceed from some independent source, such as authorial intent or communicative context. These sources are imagined to be positive, actually existing somewhere and thus available as a ground for the interpretive or critical practice.[28]

One method of interpreting a text refers to the intent of the author.[29] Authorial intent is conceived in this approach as the source of the meaning of the text. The problem with this textual strategy is that the author's intent is already an effect rather than a pure source for meaning. The analysis of linguistic and conceptual codes shows that there is no unitary meaning in a text injected by an intending author and discoverable by an innocent reader. Both the author and the reader are situated within history and accordingly within their respective representational practices. These practices do not merely transmit messages; they also shape them. A text has significance beyond the intent of the author as it reflects social representational practice; unintended meanings are socially attached regardless of the particular author's intent.

The author's intent is not a pure starting point for interpretation in one sense because it is itself largely an effect of the representational system in which the author works. The intent is not private and individual, but to a large extent socially created. The author conceives his thought in terms of the socially created conventions for categorizing and describing the world. The public representational system in which the work is written is prior to and constitutive of the private and individual intent of the author. The text contains traces which point to the absent terms of the public representational system as a necessary part of its meaning. There is no self-present subjectivity at the moment of authorial expression which is not always already inscribed with the absent, external elements of the representational conventions.[30]

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28. *See generally* J. CULLER, *supra* note 6.

29. E. D. Hirsch, Jr. is probably the most notable literary critic still arguing that authorial intent determines textual meaning. *See, e.g.*, E. HIRSCH, VALIDITY IN INTERPRETATION (1967); E. HIRSCH, THE AIM OF INTERPRETATION (1976).

30. The vast topical literature on reader response theory has partly developed these analytical difficulties. *See, e.g.*, H. BLOOM, A MAP OF MISREADING (1975); W. ISER, THE ACT OF READING: A THEORY OF AESTHETIC RESPONSE (1980).

The author's intent is an effect rather than a source in a second sense also. The reader's attempt to discover the author's intent depends on a re-presentation of the intent. But since the reader views the intent from the outside, the reader necessarily constructs the intent he purports to discover according to the reader's own representational system. In the reader's representational system certain objective manifestations (in contracts at one time, a seal or signature or an offer and acceptance) are taken to signify intent, to the exclusion of other possible manifestations of intent. The interpreter abstracts from the infinite traces of meaning according to his own structure of meaning, or according to the manner in which his own representational practice tries to re-present the author's representational practice.[31]

Thus the intent which this approach to literary interpretation takes as its starting point is constructed both at the moment when it is supposed to be self-present, when the author writes, and at the later moment when the intent is re-presented by the interpreter. Intent is not an original, positive source of meaning, but a negatively differentiated construct.

One response to the inadequacy of author's intent as a source of meaning is to conclude that meaning is contextual and can be determined by specifying the context of a text.[32] This approach supposes that the context "exists" around the text, to be discovered by the interpreter as the source for the meaning of the text. But the problems of indeterminacy are not avoided by this approach. Any attempt to fix the meaning of a text by the specification of context runs up against the problem that any given context is open to further description. Context does not *exist* somewhere. Context is constructed by the interpreter according to her calculus of relevance and irrelevance. A particular description of the context involves screening the text through representational terms used by the interpreter. It is an effect of the interpreter's differentiation of

31. The "hermeneutic circle" refers to an interpretive strategy by which the interpreter attempts to understand by getting within the terms of the discourse of the object of study (whether it be a text, a cultural group, or a historical period) in order to comprehend the meaning that texts or actions have within the context in which they occur. The "circle" refers to the process by which the interpreter constantly shifts back and forth from attempts to reconstruct another's web of meaning to his own belief system as he moves closer to achieving a sympathetic understanding of the object of analysis. Wilhelm Dilthey is generally credited with the earliest refinement of the procedure; it was elaborated in M. HEIDEGGER, BEING AND TIME (J. Macquarrie & E. Robinson trans. 1962) and has been further developed in H. GADAMER, TRUTH AND METHOD (1975); C. GEERTZ, THE INTERPRETATION OF CULTURES (1973); T. KUHN, THE ESSENTIAL TENSION: SELECTED STUDIES IN SCIENTIFIC STUDIES AND CHANGE (1977); R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE (1979).

32. *See, e.g.*, J. CULLER, STRUCTURALIST POETICS: STRUCTURALISM, LINGUISTICS AND THE STUDY OF LITERATURE 126-27 (1975); C. NORRIS, *supra* note 6, at 2-8. This development in literary interpretation has its correlate in linguistics. See, for example, the attempt to determine meaning despite the indeterminacy of words themselves by reference to the context within which words are used in J. AUSTIN, HOW TO DO THINGS WITH WORDS (2d ed. 1975).

what outside the work counts and what doesn't. Accordingly, context is the result of the interpreter's activity rather than the ground for it.[33]

The common response to the recognition that the text in significant respect cannot simply be a product of the author's subjective intent because of the mediation of social language is to conceive of the text as the effect of underlying representational structures which are imagined to animate it. In these "structuralist" approaches, it is supposed that meaning can be determined by specifying these underlying codes, which are seen as the significant context of the text. But representational structures can never be conclusively determined; their relational meaning depends on the representational practice in which they are found. Any description of the representational structure within which meaning is generated is merely a re-presentation of the structure according to the language of the interpreter, the way that the interpreter distinguishes relevance from irrelevance. The description itself has meaning only in terms of another structure, since it is itself situated within a created representational practice. Short of the creation of some pure metalanguage, no immediate, self-present identity of a description of a structure on which meaning depends with the structure being described ever is reached. There is no center or orienting point, no neutral metaprinciple of abstraction which itself escapes structurality, from which to specify the structure. The possibilities for meaning overflow any attempt to specify the structure on which meaning depends.[34]

The mediating properties of particular representational systems are seen clearly in attempts to interpret historical texts. For example, recent scholarship has articulated the problems of constitutional interpretivism.[35] Since the social universe was conceived by the Framers according to representational conventions different from our own, the attempt to determine the meaning of the Constitution requires a reconstruction of the Framers' conceptual universe and then a translation into the terms of our conceptual universe. Such a reconstruction and translation seems

33. *See* J. DERRIDA, SIGNATURE EVENT CONTEXT, *supra* note 6; Derrida, *Limited Inc abc . . .*, *supra* note 6.

34. *See* J. CULLER, *supra* note 6, at 110-34; J. DERRIDA, WRITING AND DIFFERENCE, *supra* note 6, at 160; Derrida, *Structure, Sign and Play*, *supra* note 6. The point here might be summarized as follows. The image of meaning as flowing from the intent of an "author" (of a text or a social action) is belied by the dependence of meaning on social structures of signification; but social structures of signification are not themselves endpoints or givens—"they" only "exist" as representations and representations of representations. Thus, the structuralist moment that recognizes the dependence of intention on structure belies the liberal image of autonomous subjectivity, but it cannot replace that image with some other determinate meaning. This recognition has been called the post-structuralist moment. *See generally* J. CULLER, *supra* note 6; F. LENTRICHHIA, *supra* note 6; Heller, *supra* note 6.

35. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST 1-43 (1980); Levinson, *Law as Literature*, 60 TEX. L. REV. 373 (1982); Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983).

indeterminate for the same reasons that it is impossible to translate exactly some concepts from one language to another. Each stage requires the mediation of interpretative constructs to tell us what the Constitution meant to the Framers, what objective manifestations of their understanding we should take as relevant. We must then decide how to correlate those meanings with present terms.

For instance, even a seemingly determinate clause such as the minimum age for presidents remains indeterminate. It is possible the age thirty-five signified to the Framers a certain level of maturity rather than some intrinsically significant number of years. If so, it is open to argument whether the translation in our social universe of the clause still means thirty-five years of age. It may be that a younger age should be used since children today, through mass media, are more worldly at an earlier age. Or it may be an older age should be used since children are actually given less social responsibility than in revolutionary times.[36] The choice between the "literal" and "functional" interpretation is indeterminate, as is the application of the abstract choice in the terms of a particular social field.

Some approaches to literary interpretation recognize this problem of indeterminacy in the interpretation of historical texts. But these approaches assume that the same problem is not found in the "present" (or within the confines of a given historical period) because "we," the "community of interpretation," share representational conventions. Here the origin of interpretation is said to be found in the given community that interprets or in the "competent" readers of texts.[37] However, the same kinds of mediation characterizing historical interpretation also occur in contemporaneous searches for meaning. Both "community" and "competency" are constructed on the basis of their exclusions, not by any positive, fixed content. First, any attempt to describe the conditions for meaning in the present constitutes a re-presentation of the present. The description of the present establishes a point of mediation between the "actual" present and the later representation of the present.[38] Moreover, this temporal indeterminacy is matched by spatial mediation according to the geography of position in the contemporane-

36. I have simply substituted a functionalist standard (maturity) for a particular signifier (thirty-five years of age) to demonstrate that interpretation required that a position be taken that cannot be gleaned from the text itself. The text does uot dictate whether a functionalist approach or some other approach should be adopted. Even after we have made that decision, we can arrive at exactly opposite answers when the attribute function is "translated" to our social context.

37. *See, e.g.*, J. CULLER, *supra* note 32; S. FISH, IS THERE A TEXT IN THIS CLASSROOM (1980); White, *Law as Language: Reading Law and Reading Literature*, 60 TEX. L. REV. 415, 434-38 (1982) (arguing that particular legal interpretations derive their validity from the bonds of the legal, cultural commuuity); White, *The Text, Interpretation, and Critical Standards*, 60 TEX. L. REV. 569, 586 (1982) ("Elite status is . . . linked to training and competence.").

38. Stated in other terms, even if we assume that such a "community" or a "competency"

ous social field. For instance, within various socioeconomic groups there are signaling codes that are not shared with other classes. These codes concern dress, diction, eating habits, topics of conversation, etc. These distinctions make it useless to determine meaning in the interpretative constructs "we" share. Any definition of "we" simply reproduces the mediation of some interpretative construct signalling who is to be included or excluded from the relevant community. That signal cannot itself be grounded in shared meanings since it is supposed to operate as the source of shared meanings. (Think of the cocktail party. Is it the bartender or the cocktail party guest whose knowledge counts? Who is "competent" to "know" what happened at the event?) The "community" or the "competent reader" are not things that exist independent of the representational practice; they are the effect of differentiation through which some social actors are excluded from the relevant community as incompetent or irrelevant or off the wall.[39]

C. *Ideology and Representation*

Both linguistic and literary theory highlight the problematics of meaning and origin in representational and interpretative activity. But to this point, none of this makes an obvious difference in the conduct of our social affairs. However, the discussions of language and textual interpretation do suggest the manner in which we are never simply "present" with respect to the meaning of social events. Our experience of the world is constructed through the adoption of particular metaphors and the exclusion of other metaphors for organizing perception and communication.

This Section extends the notion that we mediate experience through language by relating that idea to the conduct of social relations. The premise here is that, just as the interpreter of a written text constructs what he purports to represent, social life is never directly and immediately experienced by its participants. Instead, any "present" experience is always already an interpretive history of the present as it is mediated and interpreted according to a socially created metaphoric structure for attributing meaning to social events. In other words, our "direct" experience of the world is a social construct. But to the extent that this dependence on social language is suppressed, we come to associate social conventions with "true knowledge" and accordingly lose sight of the contingency of status quo social patterns. The ideological significance of this process may become clearer with a short example.

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simply exists (without the necessity of choosing between communities or competencies), its representation depends on the same criteria as it purports to re-present, leading to an infinite regress.

39. *See* J. CULLER, *supra* note 6, at 151-56; M. FOUCAULT, MADNESS AND CIVILIZATION, *supra* note 26.

When asked to describe the difference between chess and arm-wrestling, we might "naturally" respond that chess is an intellectual contest while arm-wrestling is a physical contest. Such a response seems both coherent and rational. But this coherence and rationality is dependent on certain dichotomies that underlie our representational practice. The response to the question has meaning only to the extent that we already accept the mind/body dichotomy as a way of establishing analogies.

At issue here is the status of the mind/body dichotomy. To the extent that the response to the question about arm wrestling and chess is seen as unproblematically rational, the mind/body dichotomy must be seen as a representational category that is free from social mediation. But this outlook ignores the fact that the dichotomy is a contingent metaphor that imposes order by abstracting and isolating particular aspects of experience. The effacement of the metaphoric character of the mind/body dichotomy suggests that the terms merely reflect some reality that exists prior to the terms, and that the content of the terms is positive and fixed rather than relational and socially created. The socially constructed world is thereby naturalized. Once the mind/body dichotomy is naturalized, it exists as a metaphysical assumption of the representational system. This assumption not only organizes responses to questions about chess and arm wrestling. It also makes, for example, the division of labor between mental workers and manual workers appear natural and necessary rather than contingent and socially created. Imbuing the term "tree" with positive content is trivial in the sense that no social practice seems to depend on it. But other representational categories, such as the mind/body dichotomy, form a metaphysical infrastructure legitimating contingent social practices such as the division of labor.[40]

Representational categories such as the mind/body dichotomy mediate the way we grasp the world. Indeed, it is difficult to conceive of direct apprehension of an event. Our apprehension is always already a re-presentation of the event resting on particular representational metaphors that mediate or "tilt" the apprehension. The search for absolute meaning founders upon the infinite regress of both language and the objects or concepts purportedly represented by language to their relational status in communicative and symbolizing systems. Hence, "reality" is not an objective realm existing independent of representational practices. "Reality" is not carved up into categories that representational systems happen to match. Rather, "reality" is constructed in the very process of description or representation.

Representation depends on prior categories within which events are taken as similar or dissimilar. When the categories are taken to reflect a

40. *See* M. RYAN, *supra* note 6, at 29-38, 117-31.

reality that exists prior to the representational system, the analogical reasoning within the categories appears natural and necessary rather than artificial and contingent. But the representational categories actually *project* a particular way of carving up the thick texture of the world; they institute contingent social choices as to how the world will be described.[41]

The assertion that communication is dependent on preexisting linguistic conventions suggests that language speaks through us, rather than that we speak through language.[42] But such an image of language overlooks that linguistic conventions are *social* creations. If representational practice is accepted as the direct reflection of the world it comes to have an "anaesthetic grip." People come to see representational practice as "artless and natural."[43] The contingent aspect of representational practice is suppressed in favor of a "knowledge" which has become institutionalized. The description of representational and conceptual practice as inscribed as a lack, a negativity, rather than as filled with positive content, is meant to connote the historicity and social contingency of particular representational conventions.

It is difficult to articulate the simultaneous pregiven and external aspects of representational conventions with their socially contingent, political aspects. This is due in part to a deep assumption of our conceptual practice that things external to the self, such as representational categories, are objective. Without any visible subjective agency, such as individuals or the State, it is difficult to conceive that contingent *social* choices are being made. This difficulty is a sign of the endurance of the classical liberal view of the social world within which power outside the state is seen as individual, rather than *social*, choice. The social power that I am evoking in the explication of the metaphysics of discourse is external to the self and more diffuse than the formal power of the state. This diffuse social power typically is translated as either objective and natural or individual and subjective.

Because our dominant conceptual scheme translates nonformal social power as either individual or objective, the attempt to reclaim such practices as a focus of social, political struggle requires that we pursue

41. By describing the process in terms of "social choice" I do not intend to suggest that representational categories originate in some kind of group decision that occurs at some specific time, but rather that representational practice is both social and contingent on subjects.

42. I am here evoking the issue of the relationship between structure and subject. I have up to this point used the structuralist view of representational categories as preconditions of meaning in order to displace the deeply-held view that meaning flows from freely-intending, self-present subjects. The structuralist perspective, however, gives rise to the image that language, as opposed to subjects, speaks, since the possibility of meaning is encoded within linguistic structures. This view of the autonomy of "structures," however, suffers from the same metaphysical pretense as the notion of the autonomy of subjects.

43. T. HAWKES, *supra* note 10, at 14.

two strategies simultaneously. On the one hand, it is necessary to resist the image of social relations as simple products of individual intent and choice. Rather, we must recognize and articulate the social and external aspects inherent in so-called private relations. The image of private social relations and "individual" choice depends on the metaphysic of presence. "Private" relations are "private" to the extent that they are represented as not constituted or influenced by "absent" public or social forces; "individual will" is "individual" to the extent that it is self-present and not dependent on the practices of others. The metaphysic of privacy and self-presence accordingly denies the politics of the social construction of the self and the other by finding the origin of the relation in a source for social practices existing prior to social practices, in a mythical moment of purity from the public world.

On the other hand, we must take care to avoid attributing the same positive presence to the group or public realm. Against the notion that communication and social relations objectively develop as if by some "natural" force autonomous from people, it is necessary to pose the dependence of this social power on social subjects, on people actually acting and conceiving of the world.

With respect to this second aspect, it is important to acknowledge that representational systems do not exist except as they manifest themselves in particular representational activities. But even that statement is misleading. There is no "system" as such. There are only particular representational activities carried out by particular people within the context of prior representational practice. And that context is never static; it is inscribed with negativity, pointing outward in traces to other contexts and other times.[44] Representational conventions inevitably are transformed as they are used by various people in various concrete social relations. While conventions are external to individuals in the sense that they exist before and outside of particular people, representational conventions are not objective in that they are social and temporal. Representational conventions are contingent not only in the sense that alternative ways to divide up the world are imaginable and exist in other communities, but also in the sense that they are social creations which continue to exist only if they are reproduced by people in daily life.[45]

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44. *See supra* text accompanying notes 33-34.

45. That is, there is no "structure" without events, no language without individual expressions. The structuralist image of event and expression as derivative effects of structure and language is accordingly misguided—there is a reciprocal and dialectical relation between language and parole. As Barthes put it:

> [A] language does not exist perfectly except in 'the speaking mass'; one cannot handle speech except by drawing on the language. But conversely, a language is possible only starting from speech; historically, speech phenomena always precede language phenomena . . . and genetically, language is constituted in the individual through his learning from the environmental speech.

I have used the purely linguistic notion of language as oral and graphic communication as a point of reference only. I do not mean to suggest that the base of social power exercised outside the confines of the State and individual choice is linguistic. Such a notion would suggest that a change in language usage would change society, a preposterous position. And such an approach would project language as some metaphysical source of our sense of self and the other. Rather, linguistic usage is an analogy for the way social relations proceed from a social construction of the world which provides the conceptual and material territory within which people act by framing the meaning of social relations and the possibilities for transformation.[46] The frozen nature of representational practice as reflected in the identification of a positive content with representational terms is only one *effect* of the institutionalization of a social power. The origin of this power is nowhere in particular and its continued existence is at stake everywhere, in every place where social relations are carried on.[47]

Thus, with respect to the liberal image of "private" social relations as products of individual choice, the notion of language could be generalized to refer to all social relations, including self-consciousness. We represent the world both to ourselves and in our relations with others according to "absent" and "public" representational categories which are manifested in the language of social roles. They shape even our self-consciousness so that, in a sense, we are never alone with ourselves. Self-consciousness, the representation of ourselves to ourselves, contains traces of social power since we conceive of ourselves in terms of categories provided through social relations. A person thinks "I am a father, son, teacher, lover, etc." These social constructs mediate our consciousness of ourselves so that we are never in a present self-consciousness purged of absent social relations.[48]

R. BARTHES, *supra* note 10, at 16; *see also* J. CULLER, *supra* note 32, at 8-10; F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS 18 (C. Bally, A. Sechehaye & A. Reidlinger eds. W. Baskin trans. 1959) ("[L]anguage is necessary if speaking is to be intelligible and produce all its effects; but speaking is necessary for the establishment of language, and historically its actuality always comes first."); J. DERRIDA,, *supra* note 13, at 41-42. The structure, in short, is not itself ever-present; it is in indeterminate historical transformation at each instant.

46. *See* M. RYAN, *supra* note 6, at 117-31.

47. That is, the social power being evoked here does not consist of an assertion of the will of an individual or group against others; it is more like the authority exercised in the very texture of social relationships which serves to constitute individuals as individuals and groups as groups. This conception of social power as divorced from social will finds social meaning, devoid of specific intent, reproduced in the smallest, most local aspects of social interaction, e.g., in glances on the street, in doctor/patient encounters, in workplace relations. *See* M. FOUCAULT, *Two Lectures*, in POWER/KNOWLEDGE 78 (C. Gordon ed. 1980); *Afterword—The Subject and Power*, in H. DREYFUS & P. RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS (2d ed. 1983).

48. That is, intent cannot provide the origin for social roles since intent is always already inscribed with and constituted by social relations. *See* M. RYAN, *supra* note 6, at 22-28.

Similarly, social power enters into every experience with others. Social relations are conceived by actors according to institutionalized modes of representation. For example, the relations between men and women in society proceed largely on the basis of what it means to be a man or woman within the particular language of social roles. The power of the representational conventions is reproduced each time particular relations are carried out in the context of the conventional terms, i.e., on the street, at the dinner table, in the bedroom, and at work. To the extent that there is no *necessary* reason to represent a particular social relation in a particular way (just as there is no necessary reason to treat bark and leaves as the significant attribute for dividing up plants), its conventional representation in everyday experience reflects a silent political force embodying a contingent exercise of social power.

The underlying choice to represent and act out gender relations in a certain way is supressed as the terms describing gender are taken to have positive content. A man or a woman is conceived of in a certain way, and their relations proceed in a certain fashion, because that's the way men and women "are." But there is no "is" to these terms; they are effects of the social system of differentiation, of contingent social practice that has no stable origin. Gender relations are a particularly appropriate example since only recently the status quo of gender relations reflected in the economic, cultural, sexual, and political degredation of women was taken as just the way things are. Existing gender relations were not perceived as political issues, and indeed, were not perceived as a distinct social category. They were translated as originating either in some private choice (the image of individual consent) or as a natural social process (the image of social necessity). Only at the margins of consciousness did the traces of the social construction of gender relations appear. Recent feminism has articulated the silent politics of gender relations in social practices formerly conceived as individual, private, and free of social power in sexual relations in ordinary conversation, in family roles, in the language of glances on the street.

The fantasy that social relations have some positive, substantial content separate from social differentiation and power effaces the socially-created, metaphoric character of social relations. Social relations are reified. The traces of contingency in existing social relations become invisible so that the possibility of choice does not enter consciousness as a political question. But because representational practice is social, it never can be totally established as noncontingent and simply present. Representational practice always leaves traces of its contingency, of the exclusions and differentiations on which its silent assertions of necessity and truth depend. Thus, it is possible to "deconstruct" the construction of social relations to reveal their contingency, to articulate and con-

cretely demonstrate the marginalized sense that things could be otherwise.[49] While social power enters every social relation, it is a social power we reproduce or resist in particular relations. The dominant knowledge which presents itself as positive, as knowledge itself, is perpetually threatened by its own traces of artificiality and contingency.

In sum, there is no unmediated context or subjective intent in which to ground the interpretation of texts or events. Each interpretation rests on representational conventions which are ungrounded assumptions about the proper way to categorize the world. In this sense, every description or interpretation is prescriptive or ideological; every description depends on the prior acceptance of interpretive constructs that treat the description as relevant to what it describes. Just as the novelist abstracts from the infinite data of everyday life to provide a structure that determines which particular details are relevant in her story, the interpretive constructs of an ideology abstract from the thick texture of the world to provide a structure that determines which particular aspects of the world are seen as meaningful, and finally which aspects are seen. When particular representational categories for dividing up the world are reified and achieve a hegemony in a particular community, description is taken as fact rather than "mere" opinion or ideology. In such a context, the social conventions for representing the world are viewed as flowing from the way the world really is. Their contingent and provisional status is supressed. Fiction is presented as truth.

II

LEGAL THOUGHT AS REPRESENTATIONAL ACTIVITY

The insights of linguistic and literary theory can be applied to legal practice by demonstrating the indeterminancy inhering in legal texts, taking the term "texts" in its commonsense meaning. For example, one might analyze judicial interpretation of the Constitution, statutes, precedent, contracts, or wills to show that no innocent reading of them is possible. Such applications debunk the claims that legal interpretation is ruled by objective, determinate meaning residing in a written text.

Rather than pursue such a course, this Article seeks to explicate the underlying representational constructs of legal ideology through an examination of how dominant American legal thought has attempted to

49. The traces of contingency "exist" in time, in the history of institutionalizations of social practices whose scars "point" to past struggle (the memory, for example, of the violent institutionalization of the division of labor which exists as a trace that the mind/body principle of categorization is not universal or natural). They exist also in space, at the margins of current practice, in the loose ends that always escape the attempts at closure and point elsewhere, to difference and a lack of necessity (the "other" degraded knowledges, such as "poetic" knowledge in relation to "rational" knowledge). The exclusions, supplements, margins, and subjugated knowledges all point to the constructed quality of practices which present themselves as natural or true.

distinguish legal from political discourse. The pretension of legal practice to find determinate meaning in written texts is only one aspect of legal ideology, and one that has largely been surpassed, at least in superficial respects, by the dominant versions of legal thought since the 1950's.[50] As we saw earlier, legal interpretation of written texts cannot be disinterested. But a similar analysis ordinarily is not extended to a discussion of the nature of "legal reasoning" as a distinct mode of discourse. Furthermore, such an analysis ordinarily does not consider the presuppositions of the belief that disinterested interpretation is a possible and a valuable enterprise in the first place.

I propose to analyze legal thought as itself an interpretation of the "text" of social relations. As such, legal thought is a representational discourse which purports to re-present social relations in a neutral manner. But like language generally, legal discourse can never escape its own textuality. Legal discourse *projects* mediating constructs onto the social events it considers. And like literary interpretation legal thought establishes itself as a distinct discourse through assertions of closure and determinacy which are based on metaphysical assumptions of a pure origin of meaning. Just as one approach to literary interpretation purports to proceed on the basis of an authorial intent to ground interpretative activity, one mode of legal discourse imagines that individuals in society are authors of social relations and consequently treats contractual intent as a ground for legal practice. Just as one approach to literary interpretation looks to communicative context to determine the meaning of a text, another legal approach treats social context as the primary source for legal results. As with the analysis of language and communication, the argument here is that legal discourse can present itself as neutral and determinate only to the extent that it denies its own metaphoric starting points and instead pretends to reflect the positive content of social relations. Each mode of legal discourse, however, leaves traces of its own artifactual character which point outside of the expressed content of legal analysis.

Legal discourse is a mode of representation in much the same way as language itself. The terms of legal discourse, such as "contract," "damage," and "criminal intent," denote representational conventions which purport to reflect some positive content, independent of the terms themselves. The contractual relation between people, or the occurrence of a loss, or the criminal's malign state of mind, are supposed to exist "out there," as characteristics of reality, prior to and independent of the way reality is represented in legal discourse.

50. *See, e.g.*, H.M. HART & A. SACKS, THE LEGAL PROCESS (tent. ed. 1958); Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967); Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

For instance, the notion of a "loss" within the Learned Hand negligence formula has meaning in legal discourse because it "goes without saying" that some consequences of social interactions are not losses.[51] For the Hand formula to be determinate and apolitical, the distinction between "loss" and "no loss" must exist "out there" in the world prior to and independent of the judicial application of the negligence calculus. Otherwise the negligence determination will end up in hopeless circularity—the determination of whether something is a legally significant loss would always depend on whether it resulted from negligence, which could not be determined until one knew whether it was a legally significant loss. The negligence calculus cannot itself determine what constitutes a cost without an infinite regress of evaluating the costs and benefits of counting particular consequences as costs and benefits.[52]

By treating the differentiation of "loss" and "no loss" as if it were ruled by some positive reality existing independent of differentiation in legal discourse, the Hand negligence calculus (like all assertions of economic "efficiency") effaces its own construction of what it purports simply to represent in a neutral and determinate manner. By suppressing its own reliance on contingent ways of categorizing the social field, it presents itself as a legal rather than political inquiry.

This process by which "legal reasoning" suppresses the metaphoric character of legal discourse can also be illustrated with an example from jurisprudential theory. Henry Hart and Albert Sacks argue in their *Legal Process* materials[53] that the proper way to understand law is to separate the substantive content of social arrangements from the procedures for settling disputes about the arrangements. They contend that the processes for resolving dispute are separate from and "*more fundamental*" than disagreement about the content of social arrangements "since they are at once the *source* of the substantive arrangements and the indispensable means of making them work effectively."[54]

The Hart and Sacks attempt to fix the understanding of the legal system around proceduralism and notions of institutional competence is encapsulated in the "principle of institutional settlement."

> Implicit in every such system of procedures is the central ideal of law—an idea which can be described as *the principle of institutional settlement*. . . . The alternative to disintegrating resort to violence is the

51. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

52. The issue whether emotional distress should be compensable is merely the tip of the iceberg with respect to the contingency of any particular convention as to the meaning of loss. This indeterminancy of the categories of costs and benefits is analogous to the aspect of the debate about law and economics literature focusing on the content of the category of "externality." *See* Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

53. H.M. HART & A. SACKS, *supra* note 50.

54. *Id.* at 5 (emphasis added).

> establishment of regularized and peaceable methods of decision. The principle of institutional settlement expresses the judgment that decisions which are the duly arrived at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed.
>
> . . . When the principle of institutional settlement is plainly applicable, we say that the law "is" thus and so, and brush aside further discussion of what it "ought" to be. Yet the "is" is not really an "is" but a special kind of "ought"—a statement that, for the reasons just reviewed, a decision which is the duly arrived at result of a duly established procedure for making decisions of that kind "ought" to be accepted as binding upon the whole society unless and until it has been duly changed.[55]

The "principle of institutional settlement" provides the base for the rest of the *Legal Process* materials, which largely develop a rationale for the current institutional framework of American government through a categorization of kinds of disputes and types of institutions whose procedures are rationally related to resolving the particular kinds of disputes. As such, the "principle of institutional settlement" occupies a central place in the project. Hart and Sacks have utmost confidence that the principle is not controversial; it is either logically self-evident or a matter of universal consensus that peaceful dispute resolution is preferable to violence.[56] And, stated as an alternative to violence, peaceful institutional settlement does seem noncontroversial. Accordingly, the ground for the Hart and Sacks project appears as a rational starting point for the analysis of the "legal process," regardless of any disagreement we might have with their particular working out of the system.

But this apparent rationality rests on rhetoric. By deconstructing the statement "the alternative to disintegrating violence is the establishment of regularized and peaceable methods of decision," one can unpack the metaphoric associations upon which the formulation rests. Underlying this statement are two dichotomies. One is the peace/violence dichotomy and the other the order/disorder dichotomy (contained respectively in the notions of "regularized" methods of decision and "disintegrating" resort to violence). The formulation of the principle of institutional settlement not only asks the reader to prefer peace to violence, the aspect of the principle which establishes its appeal, but further asks the reader to associate violence with disorder and peace with order. The underlying metaphoric structure groups are law, order, institutionaliza-

55. *Id.* at 4-5.

56. *Id.* at 123:

> Are the positions . . . taken thus far in these materials conventional and generally accepted? Might a representative chairman of the Republican National Committee, for example, be expected to agree with them? A chairman of the Democratic National Committee? A representative union leader? . . . A representative member of the Soviet Russian Politburo? A younger professor of anthropology in an American university . . . ?

tion, and peace on one side and nonlaw, disorder, noninstitutionalization and violence on the other. These metaphoric connections between the dichotomies silently exclude the possibility that disorder may be peaceful and that order can be violent. In the process, the Hart and Sacks rhetoric implicitly delegitimates insubordination as it exalts subordination.

Subordination is exalted as the concept of order is associated with peace. Order refers to things or people taking their proper places in a series. As such, it implies the process of subordination, where some are above or before and others are below or after in the series. But the active process of subordination implies the possibility of violence to enforce the instituted order. Accordingly, rationality demands no necessary connection, such as that drawn by Hart and Sacks, between order and peace. The implicit association of peace with regularity is metaphoric.

Moreover, the association of violence with disintegration rhetorically places "order" and "integration" prior to "disorder" and "disintegration." Order thus represents some original peace and violence, a fall from the presence of peace and unity. This trace of the Hart and Sacks argument implicitly institutes a benign perspective on the status quo. It associates ordinary, "regular" social relations with peace and associates attempts to abolish or change the order with violence, which "disintegrates" the prior integration. The rhetorical structure of argument excludes the possibility that the ordinary, regular, "integrated" order of things may institutionalize violence. For example, the regular order of things institutionalizes violence against women as it "integrates" the objectification of women in consciousness through work assignments, advertising imagery, and general codes of gender relations which are expressed in elevators, street corners, workplaces, and bedrooms. With gender relations, the "disintegrating" move would be a move from order toward peace, and against violence, even if the move necessitates the "violence" of destroying the existing order.

The controversial character of the association of peace with order and violence with insubordination became obvious soon after the *Legal Process* materials were written, in the context of the Vietnam War draft resistance. The message of the principle of institutional settlement was that draft resistance was illegitimate. "Decisions which are the duly aimed at result of duly established procedures of this kind ought to be accepted as binding upon the whole society unless and until they are duly changed . . . ." Accordingly, a draftee could write his Congressperson, but until the war and the draft were "duly" terminated, he was to participate since he was bound. In that context, the metaphor established by Hart and Sacks paradoxically associated participation in war with peace

and avoidance of war with violence.[57]

To be sure, the association of violence with disorder does reflect some part of our experience. We have some experiences in which lack of formal order leads to fistfights, shouts, and disappointed friends and lovers. But the association also excludes other possible ways to represent social life, the knowledge people have of order as violent domination and of insubordination as legitimate. Our knowledge of the legitimacy of insubordination extends from the general collective memory of French resistance fighters' insubordination to the Nazi order to familiarity with more particular and local resistance to the instituted order in our workplaces. For example, a knowledge of the legitimacy of the resistance to authority exists in the crevices of the instituted hierarchy of many restaurants where particular servers and kitchen workers resist "the order" through ridicule and belittlement of the manager, or through hidden evasions of "proper" work procedures. In short, it is not that the association of order with peace and disorder with violence is never appropriate. Rather, it is a contingent and local question, depending on local circumstances and political choices of interpretation. The associations are not amenable to rational argumentation at the grand level of the relationship between the abstract concepts of Peace, Order, Violence, and Insubordination.[58]

The Hart and Sacks metaphors are posed as real and noncontroversial. But when they are articulated in the context of the workplace, they become the discourse of Management-Speak, the orderly authority posed against "disintegration." The discourse represents the established order—the division of labor and the distribution of the social product—as "peace" and "integration," while it represents worker insubordination, such as "wildcat" job actions, as "disintegrating" violence.[59] The cogency of the metaphor depends on the exclusion of the other knowledges of the workplace and on the political choice of one metaphoric interpretation over another. When the Hart and Sacks argument is contextualized to the workplace, it sides with the instituted division of labor and work hierarchies.

The principle of institutional settlement is presented in the Hart and Sacks project as a rational starting point for an analysis of legitimate

57. I do not know the explicit positions taken by either author on draft resistance. I am here simply trying to provide the metaphysical infrastructure for the argument presented at the time that the draftee had a duty to obey the law, or at least a duty to serve time in prison, to indicate the ultimate legitimacy of democratic system as a whole.

58. *See* M. FOUCAULT, *Truth and Power*, *supra* note 6.

59. Indeed, this is the sense of the application of process theory to labor relations with the purported aim of achieving "industrial peace." *See* Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981).

exercises of official power. But this veneer of rationalism obscures the exclusion of other knowledges about the world implicit in the metaphors that get the Hart and Sacks project going. The metaphors Hart and Sacks implicitly accept exclude the knowledges of waitresses, dishwashers, busboys, and customers that along with the "peace" of the regularity that freezes and stereotypes their relations is a violence that represses or marginalizes their urges to break through the order. The "rational" starting point of the analysis is actually a contingent and partial description chosen by Hart and Sacks.

At this point, the Hart and Sacks argument appears to be at war with itself. If the association of order and peace reflects a chosen rather than a universal ground for analysis, it is a choice that is entitled to no credence according to the principle of institutional settlement. That principle demands that such choices be made institutionally. That is, processes for resolving disputes cannot be "more fundamental" than "the source" of the content of social arrangements since, as posed by Hart and Sacks, they already contain visions as to the appropriate content of "substantive arrangements." The inside, "the principle of institutional settlement," is invaded by the outside, "the content of substantive arrangements." Process can only be kept separate from substance by the reification of the Hart and Sacks metaphors, the assumption of positive content to the associations of peace/order and violence/disorder and to the range of each term. Accordingly, since Hart and Sacks propose the institutionalization of a choice that has not passed the test of institutional settlement, their argument is an instance of "disintegrating violence" within the terms of their own discourse. And it's not that the invocation of order in the formulation of the principle of institutional settlement is some trivial rhetorical slip. The concept of orderliness, of things in their proper hierarchical place, is the regulative principle behind the whole scheme of institutional competence theory, the assignment of the proper kind of question to the proper kind of institution.

In the Hart and Sacks text, an "absent" representational system through which peace, violence, order, and disorder are differentiated and associated serves to provide the positive, "present" facts supposed to exist prior to the legal representational system. These posited "present" facts are taken in turn to provide the ground for the representational practice.

The legal representation of "rape" is an additional example of this process of reification. In legal discourse rape represents coercive sexuality—sexual intercourse that is not consensual. Rape law constitutes the realm in which the state will protect the autonomous, private choice not to engage in sexual intercourse.

Sexual consent, like authorial intent, is presented as a positive entity

that preexists the later legal determination of whether consent existed in a particular instance. The determination of consent, however, faces the same obstacles as the determination of authorial intent. Consent can be expressed only in external signals that depend for their meaning on the preexisting social system of communication. Accordingly, an individual woman's communication of consent or no consent must be articulated through objective manifestations which are already inscribed with meaning in the public representational practice. "Consent" can only be determined from the "outside" through particular objective manifestations which are taken to re-present a woman's self-present consciousness at a prior time.

But the interpretation of a woman's objective manifestations is mediated by the interpreter's representational calculus which assigns a particular meaning to a woman's objective acts. Whether a particular woman consented to an act of intercourse can be determined only through the interpreter's reconstruction of what the woman must have "meant" given her objective manifestations. For example, if she said, "No, I do not want to have intercourse," the words might be taken as a statement of nonconsent. The interpreter's own constructs, however, necessarily filter what particular objective manifestations mean. To cite one egregious example, if the interpreter holds the once-prevalent belief that women always say "no," even if they mean "yes," the signifying effect of the words will be different than if some other interpretative construct is held.[60]

Thus, the consent which is supposed to determine whether rape occurred is not the source for the legal interpretation of the sexual event, but rather the effect of the legal representation. Consent is a construct of interpretative activity, rather than a ground for the activity.

The possibility of duress, of saying "no" while meaning "yes", or vice versa, reflects the inherent indeterminacy of language, triggering the move to contextualization. If the word "yes" was uttered while a man held a gun to a woman's head, the context would suggest to the interpreter that the woman did not mean "yes" and therefore did not consent. Meaning becomes relative to context, so that the word "yes" has a meaning in relation to the gun to the head that is different from "yes" in relation to, say, wine and flowers. The "gun to the head" signifies coercion

60. "Obviously a man should not be convicted of this very grave felony where the woman merely put up a little resistance for the sake of 'appearance,' so to speak, taking care not to resist too much. . . . The absence of consent is necessary for this crime. And even where the resistance is genuine and vigorous in the beginning, if the physical contact arouses the passion of the woman to the extent that she willingly yields herself to the sexual act before penetration . . . it is not rape." R. PERKINS, CRIMINAL LAW 161-62 (2d ed. 1969) (citing Adams v. Commonwealth, 219 Ky. 711, 294 S.W. 151 (1924)); *see also* Reid v. State, 290 P.2d 775 (Okla. Crim. App. 1955); Wade v. State, 37 Ga. App. 121, 138 S.E. 921 (1927).

rather than consent in the interpreter's representational system. "Wine and flowers" signifies normal courtship.

Contextualization, however, still requires the screening of the event through the interpreter's own representational system. By analogy, the contexts in which the word "yes" was uttered but not "meant" could be multiplied to include all situations similar to threats of death or severe injury. Depending on the interpreter's representational system the analogies with the gun to the head would stop at some point. An objective schemata of contexts would be reached whereby some expressions of "yes" would be taken to really mean yes (the wine and flowers context) and others as meaning no. But this calculus is not determined by any positive content of the concepts of consent and coercion. It is determined by interpretative constructs which mediate the attribution of meaning. For example, the point where the analogy to fear of severe injury stops in American law is at the limits of physical threats. Statutes that limit the finding of coercion to situations where a woman *physically* resisted a man's sexual advances or where a women was threatened with *bodily harm* seem coherent because of the interpretative construct of the mind/body dichotomy. To the extent this dichotomy is accepted, physical pressure appears qualitatively different from economic, psychological or cultural pressure.[61]

Stopping the play of analogy at any particular context seems an arbitrary freezing of the difference between consent and coercion. Any grouping of contexts amounts to a formalization into general and objective rules of a determination supposedly based on individual, particular circumstance. The reliance on context is just as formalistic as reliance on words such as "yes" or "no." The differentiation of contexts also depends on *a priori* constructs, such as the mind/body dichotomy or the conception of sexual violation as limited to physical penetration. The question purportedly resolved by the interpreter is "did this woman consent," but the only way to answer the question is by reference to a general representational system through which some contexts are viewed as consensual and others as coercive. This representational system is external to the individual event and yet it purports to re-present it.

Thus, the legal interpreter constructs the context which is supposed to provide the ground for representing the event. The specification of context, like the attribution of intent, contains traces of its own artificiality which point away from the "positive" event to the socially constructed representational conventions on which the determination of meaning depends.

Finally, any attempt to ground the representational structure for the

61. *See, e.g.*, MODEL PENAL CODE § 213.1 (Proposed Official Draft 1962).

differentiation of consent and coercion by reference to what the relevant woman believed promises total circularity. To the extent that she has internalized the reigning public representational scheme as to what constitutes consent and coercion, even her expressed consent is already invaded by social power. The realm of a woman's manifested consent is inseparable from the social meanings as to consent and coercion. One cannot ground the representational system by reference to her present understanding of the event, because any such understanding is never simply present; it always contains traces pointing toward the social language generally.[62] To the extent that the public representational system takes economic dependence or cultural degradation as a context consistent with free sexual consent, a woman's actual agreement at the time of intercourse exists only within the context of that representational system and therefore cannot provide the origin for the representational system itself. To the extent that she has internalized the public representational system, she also may conceive of her sexual relations as consensual simply because there was no physical coercion. Similarly, if the relevant woman has internalized the once prevalent social belief that being a "wife" entails sex with the husband as a "wifely duty," then her actual consent to sexual intercourse with her husband cannot be taken merely as *her* consent; it is also the expression of the social power reflected in the language of social roles.

From this perspective, the representational system cannot be said to re-present some preexisting consent since the social conventions provide the referents through which the "private" actor conceptualizes the event in her own mind. There is no way to ground a finding of consent in a private or present moment existing independent of the public system of differentiation. Every relation between a "husband" and a "wife" is social, rather than private, to the extent that it is influenced by the public meanings of "wife" and "husband." Any consent to a sexual encounter proceeds in the context of the public representational system that defines consent and coercion.

Thus, "rape" is an artifact of the legal representational process whereby some sexual relations are called coercive and others are called consensual. The contingency of the representational process is implicitly denied by the apparent rationality in the distinctions drawn between contexts. But ultimately these distinctions are metaphysical; they rest on a particular metaphoric way of dividing up the world. The sphere of duress conceivably could be continued indefinitely by, for example, interpreting the general context of gender relations in American society as

62. This is analogous to the manner in which an author's intent is never "original," but always socially created to the extent that the author conceives of the work in terms of the socially created conventions for perceiving the world. *See supra* text accompanying notes 28-30.

coercive given the male domination of women in economic wealth, political power, cultural imagery, etc. But through the prism of the mind/body dichotomy, physical attacks on a woman's body are represented as abnormal and exceptional instances of bad, coercive sex, while other sexual acts are implicitly represented as normal and noncoercive.

One ideological message projected by the legal representation of "rape" is that consensual sexuality is consistent with male domination in society. The mind/body dichotomy is the metaphysical assumption which legitimates the run of "ordinary" sexual relations in society. It is the background convention which establishes the meaning of sexual consent and coercion, since there seems to be no necessary basis for distinguishing the contexts from within the concepts of consent and coercion. The concepts themselves suggest a never ending relational process whereby consent appears as whatever is not defined as coercion and vice versa.[63] The mind/body dichotomy serves to freeze this relational play. But there is no rational reason not to recognize a much greater degree of coercion in sexual relations than currently is identified; sexual relations in the typical American marriage also may be coercive. To the extent that the legal representation is taken as positive rather than socially contingent, this other coercion appears in our conceptual space as consent and its violence as the norm. The knowledge of particular women that they are raped in "normal" sexual relations is marginalized as irrational, ideological, or emotional, since it depends on a different representational calculus.[64]

III
FROM THE TRANSCENDENTAL SUBJECT TO THE TRANSCENDENTAL OBJECT

The discussions of the Hart and Sacks *Legal Process* text and conceptions of rape suggest the dependence of legal thought on metaphors that are effaced as the attempt is made to ground legal analysis in some origin or starting point, whether it be the sexual consent of a woman or the association of peace with order. In this section, I will approach

63. *See supra* text accompanying notes 10-14.

64. I do not mean to trivialize in any way the experience of women who are raped (in the current representational terms) by suggesting that that experience is somehow essentially like the experience of ordinary sexual relations. I mean to suggest that so-called normal sexual relations may share attributes with "rape" that are obscured when rape is presented as a naturally distinct category associated with deviation.

For further discussions of the ideological construction of the category of coercive sexuality, see MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 656 n.46 (1983); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEX. L. REV. 387, 428 (1984); Comment, *Shifting the Communication Burden: A Meaningful Consent Standard in Rape*, 6 HARV. WOMEN'S L.J. 143, 146-49 (1983).

American legal thought more systematically in an attempt to describe the conceptual framework within which the liberty of contract and legal realist approaches to legal reasoning operated.

My argument is that each historical approach to legal thought rests on interpretative constructs[65] which mediate the legal representation of social events. These interpretative constructs, such as the public/private dichotomy in the liberty of contract era, are metaphors for organizing what is seen as alike or different in the social world. The representational constructs can be seen as *spatial* metaphors in the sense that they constitute, at any particular moment, the available categories for dividing up the social world. That is, the metaphors organize the conceptual territory of the representational practice or discourse within which particular analogies seem persuasive or unpersuasive. In addition to the spatial metaphors, each legal approach institutes a *temporal* metaphor which orders the spatial terms into a particular sequence. For instance, in the liberty of contract era the public/private dichotomy constituted a metaphor for organizing perception of the social world in a spatial sense. But the liberty of contract era discourse also instituted a particular temporal relationship between the terms of the dichotomy, so that the private realm was seen as prior to and constitutive of the public.[66]

In addition, each of the representational oppositions echo other oppositions within each legal discourse because each is a mediation of a deeper interpretative construct, the subject/object dichotomy.[67] My thesis is that the transformation of legal discourse from the liberty of contract era to the legal realist approaches occurred within the confines of this representational term, which has not itself been transformed. Rather, the liberty of contract approach took the subjective side of the dichotomy as primary, and thus instituted within the discourse the metaphysical notion of a transcendental subject, the individual. Legal realism in large part merely changed the temporal sequence of the terms of the

65. I am borrowing the term "interpretative constructs" from Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981). I use it to refer to the background metaphoric structures within which reasoning appears constrained and necessary, as discussed in Part I.

66. I do not mean to suggest that the space/time manifold exhausts the dimensions in which representational activity is constructed, nor that this manifold is itself a universal structure of interpretation which stands outside particular representational practices and thereby provides a ground for analysis. I have focused on the spatial and temporal aspects of representational activity because they seem to me to be important dimensions of the representational practices considered here with respect to the issue of the contingency of social relations.

67. The description of the subject/object metaphor as a "deeper" interpretative construct unfortnnately tends to suggest that dichotomy as the source, origin, or root of the representational practice. As indicated above, *see supra* text accompanying notes 43-49, I imagine the relationship as one of imbeddedness rather than priority; the subject/object metaphor is not therefore the *source* of the representational practices, but rather a common metaphor found in various regions of discourse which have no origin in any particular place.

dichotomy by projecting objectivity as transcendental. For instance, a large part of the realist critique of the liberty of contract era consisted of showing that public rules of law were prior to and constitutive of what had been formerly represented as "private" market relations. This is not to say that the transformation in discourse was not important, or that it did not signify new possibilities for imagining the contours of a legal regime. For instance, the rise of administrative agencies as a legitimate form of regulation seems intimately connected to the transformation in legal discourse. My argument, however, focuses on the continuity of the institutionalization of the subject/object dichotomy in legal representational thought. The institutionalization of the subject/object dichotomy, I contend, symbolizes the social world as existing separate from its social construction by individuals and groups. Accordingly, it tends to naturalize the status quo, even as it is utilized in reformist practice, such as legal realism.

A. The Liberty of Contract Era

> [T]he law, in its high and just regard for the contractual rights of parties, will not permit any contracts to be binding but such as are made by persons who are entirely free to act in making or refusing such contracts.[68]
>
> . . . We do not mean to say, therefore, that a State may not properly exert its police power to prevent coercion on the part of employers towards employe[e]s, or *vice versa*. But, in this case, the Kansas court of last resort has held that Coppage . . . is a criminal . . . under this statute simply and merely because, while acting as the representative of the Railroad Company and dealing with Hedges, an employe[e] at will and a man of full age and understanding, subject to no restraint or disability, Coppage insisted that Hedges should freely choose whether he would leave the employ of the Company or would agree to refrain from association with the union while so employed. . . . [T]he State of Kansas intends by this legislation to punish conduct such as that of Coppage, although entirely devoid of any element of coercion, compulsion, duress, or undue influence, just as certainly as it intends to punish coercion and the like. . . .[69]

These two passages are from the so-called formalist era of American legal thought. This era is associated with the well-known decisions in *Coppage v. Kansas*, where the Supreme Court struck down a Kansas statute forbidding employers to make nonunion affiliation a condition of employment, and in *Lochner v. New York*,[70] where the Court struck

68. Hartford Fire Ins. Co. v. Kirkpatrick, Dunn & Co., 111 Ala. 456, 465, 20 So. 651, 654 (1896).

69. Coppage v. Kansas, 236 U.S. 1, 15 (1915).

70. Lochner v. New York, 198 U.S. 45 (1905).

down a New York statute limiting the workday of bakers to ten hours. The era is commonly condemned today on the ground that the Justices imposed their personal belief in laissez-faire capitalism on their interpretation of the constitution, or that they focused on the forms rather than the reality of social relations.[71] Either way, the Court was acting "politically" rather than "legally."

Such criticism implies that the Court in *Lochner*, *Coppage*, and the other liberty of contract cases was either result-oriented or simply ignorant in comparison to modern theorists. When critics of the decisions say that the Court overstepped its institutional bounds or failed to conform the law to reality, they imply that there is some method of social decisionmaking that would be "legal" as opposed to "political," or "real" as opposed to "conceptual." These critics thus adhere to the fantasy at the heart of the liberty of contract cases themselves.

The liberty of contract cases were every bit as "legal" as law gets. While the opinions rested on metaphysical assumptions, within the representational metaphors of the legal discourse the decisions were not subjective or political choices to favor, say, laissez faire ideology over welfare state ideology, or owners over workers. Rather, the legal representational language gave to the opinions a coherence and a sense of rational necessity similar to the coherence and rationality that our responses to the question about the difference between chess and arm-wrestling seem to embody once the mind/body metaphor is reified in our representational practice. The dismissal of the period with the assertion that it manifested a "laissez faire" ideology or a "formalist" method ignores the judges' apparently genuine belief that they were neither ideological nor formalist. I propose to explain the process by which people can have an "ideology" and yet believe their discourse is nonideological. My method will be to follow the metaphoric root system of the liberty of contract discourse in an attempt to discover what representational terms must be reified for the decisions to feel rational, legal, and necessary.[72]

1. The Spatial Metaphors

There are difficulties in such an explication. From a contemporary

71. *See, e.g.*, J. ELY, DEMOCRACY AND DISTRUST (1980); G. GILMORE, THE DEATH OF CONTRACT (1974); K. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 38-40 (1960); L. TRIBE, AMERICAN CONSTITUTIONAL LAW (1978); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908). My treatment of the period is greatly influenced by the work of Duncan Kennedy. *See* Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter cited as Kennedy, *Form and Substance*]; Kennedy, *Toward a Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RESEARCH L. & SOC. 3 (1980).

72. In pursuing this approach, I am following the suggestions made *supra* at text accompanying notes 7-27, 40-49.

perspective, it simply seems incredible that people could genuinely believe that an employee was under "no restraint" to accept an unfavorable employment contract and that he was, in the terms of one court, "entirely free to act in making or refusing such contracts."[73] We tend to see the late nineteenth century employee in the context of a social structure in which labor and capital generally enjoyed different bargaining power. We see an employee's "freedom" to refuse a proferred labor contract as restrained by the need to work to support a family, by his limited access to capital, by the structure of the labor market in the industry and the region, by his socioeconomic position, and so on. But the liberty of contract theorists operated within a conceptual space in which individual intent was seen as the source and origin of social *context*. The conclusion that a laborer was "entirely free" within the context of the market seemed "rational" given that way of organizing perception and communication.

In current understanding such a structure of interpretation continues to be reflected in the common notion that "normal" sexual relations result from purely private choices.[74] The dominant understanding of normal or noncoercive sexual relations is that women are entirely free to consent or not consent to sexual relations, regardless of the general distribution of power in gender relations.[75] The connection between currently dominant notions of sexual consent and liberty of contract notions of contractual consent is captured by the term "private." In each instance, the social relations are imagined to take place outside the context of public power, in a private realm in which the individual is self-present.[76] In this private realm, the individual is at liberty to pursue private ends, no matter how arbitrary, so long as others are not harmed. This conjunction of freedom and privacy is contrasted with the "public" sphere, which connotes the absence of self-presence, where we are not free to simply "be ourselves," but must conform to external demands. The public realm is thus to a certain extent "coercive," regulated by "others."[77]

73. Hartford Fire Ins. Co. v. Kirkpatrick, Dunn & Co., 111 Ala. 456, 465, 20 So. 651, 654 (1896).

74. One way to understand the assertion in *Coppage* that each party to an employment contract was free to accept or refuse a proferred contract is to substitute for "laborers" the term "women," and substitute for market context the general context of gender relations today, including economic power, cultural imagery, and the language of social roles.

75. *See supra* text accompanying notes 61-64.

76. That is, in this metaphoric context the individual subject is seen to be self-present to the extent the individual is a source of social meaning, rather than a differentiated effect of social practices. Privacy in these terms has the same connotations as does the notion of presence in our general discussion of the metaphysics of representational practice. The individual as self-present does not depend on a negative social differentiation, but instead is free-standing and positive, separate from the social practices. *See supra* text accompanying notes 61-64.

77. This image of the public realm as coercive and other-oriented, usually although not always associated with formal state power, is common to classical liberal representations of political struc-

The public/private metaphor for representing the social world was one of the primary representational constructs for the liberty of contract jurisprudence. The representational practice of the liberty of contract era assumed that the social world was divisible into "public" and "private" spheres of action, implicitly corresponding to the "presence" or "absence" of the individual's free will.[78] When conduct was "purely" private, an expression of the autonomous free will of the affected parties, there was no basis for the imposition of legislative power. Legislation was limited to "public" concerns. In the words of a state court,

> When the subject of a contract is *purely and exclusively private*, unaffected by any public interest or duty to person, to society, or government, and the parties are capable of contracting, there is no condition existing upon which the legislature can interfere for the purpose of prohibiting the contract or controlling the terms thereof.[79]

It was this "purely and exclusively private" space that the Court in *Coppage* imagined itself protecting; Hedges was "a man of full age and understanding, subject to no restraint or disability,"[80] and therefore

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tures. *See, e.g.*, J. HOBBES, LEVIATHAN (Oxford ed. 1957); J. LOCKE, TWO TREATISES OF GOVERNMENT (Laslett ed. 1960).

78. *See* M. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780-1860, at 262 (1977); Kennedy, *Form and Substance*, *supra* note 71, at 1728-30, 1754. The public realm represented the absence of the individual free will, where the individual had to conform to the regulations of others. In the private realm, the individual's will was present, so that private behavior could be seen directly to reflect the will of visible actors. As the argument will be developed, the link between the association of the private realm with presence and the public realm with absence was the institution of the present, undifferentiated side of the dichotomy as the source or origin for the other side. In the temporal metaphor, the private side was seen to be the original term and the public a derivative supplement to the private. *See infra* text accompanying notes 122-40.

The centrality of the public/private dichotomy to late nineteenth century legal thought is discussed in Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); McCurdy, *Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez Faire Constitutionalism, 1863-1897*, in AMERICAN LAW AND THE CONSTITUTIONAL ORDER 246, 261-64 (L. Friedman & H. Scheiber eds. 1978).

79. Leep v. Railway Co., 58 Ark. 407, 421, 25 S.W. 75 (1894) (emphasis added). In *Leep*, the Court conducted an extended analysis of the public power to regulate contracts, in each instance relating the exception to the general liberty of contract to the public nature of the business, the incapacity of a party, or the possibility of fraud. *See* Budd v. New York, 143 U.S. 517 (1892) (distinguishing regulable and nonregulable contractual relations on the basis of the presence or absence of a public interest); Munn v. Illinois, 94 U.S. 113 (1876) (same); Commonwealth v. Perry, 155 Mass. 117, 28 N.E. 1126 (1891); San Antonio & A.P. Ry. v. Wilson, 19 S.W. 910 (Tex. Ct. App. 1892) (striking down legislation interferring with the freedom to contract); State v. Goodwill, 33 W. Va. 179, 10 S.E. 285 (1889) (same).

In *Leep*, the Court held that a state statute requiring that railroad employees be paid in full upon discharge violated the constitutional liberty of contract with respect to natural persons but not with respect to corporations since, unlike natural persons, corporations derive the right to contract from the legislature which created them and reserved the right to amend the corporate charter. Needless to say, this specific analysis was not universally adopted. The point here is that, even in judicial opinions upholding public regulation, the legitimacy of the regulation was seen to depend on the ability to categorize the subject matter as public rather than private.

80. 236 U.S. at 15.

should be permitted to "freely choose."[81]

The Court, in *Adair v. United States*,[82] faced with a similar Congressional regulation of "yellow-dog" contracts, conceded that contracts "inconsistent with the public interests or . . . hurtful to the public order or . . . detrimental to the common good"[83] could be regulated or banned. But so long as no "public" interests were involved, the parties were in the autonomous private realm. In that realm it "was the right of the defendant to prescribe the terms upon which the services of Coppage would be accepted, and it was the right of Coppage to become or not, as he chose, an employe[e] of the railroad company upon the terms offered to him."[84] Quoting *Cooley on Torts*, the Court continued:

> "It is a part of every man's civil rights that he be left at liberty to refuse business relations with any person whomsoever, whether the refusal rests upon reason, or is the result of whim, caprice, prejudice or malice. With his reasons neither the public nor third persons have any legal concern. . . . [I]f he is wrongfully deprived of this right by others, he is entitled to redress."[85]

The *Adair* Court implied that, since the contract was "freely" entered into and no "public" interests were at stake, the congressional action was analogous to the common law tort of interference with contractual relations.

The metaphoric division of the world into "private" and "public" spaces underlay the conception of the general relationship between individuals and the government. The public realm began where the private realm ended. The government was accordingly authorized to act in the "public" sphere of social life. And, just as the private sphere was associated with the *presence* of individual free will, the public sphere was associated with the *absence* of individual free will.[86] Accordingly, the Court in *Coppage* assumed that if the state legislature were regulating contracts that were the result of "coercion, compulsion, duress, or undue influence," the legislation would have been constitutional, precisely because, in such instances, it would not be invading the "private" sphere of action. The problem with the legislation at issue in *Coppage* was that

> [w]e have nothing to do with any question of actual or implied coercion or duress, such as might overcome the will of the employe[e]. . . .

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81. *Id.*

82. 208 U.S. 161 (1908).

83. *Id.* at 172.

84. *Id.* at 172-73.

85. *Id.* at 173 (quoting T. COOLEY, A TREATISE ON THE LAW OF TORTS 278 (1st ed. 1880)).

86. For example, the public realm was implicated in coerced relations discussed in *Coppage*, in relations with parties incapable of exercising rational free will, in contracts having external effects or "public" consequences on others who did not consent, or in areas where individual intent could not achieve the common good (the construction of public highways and the like). *See supra* cases cited at note 79.

> [T]here is nothing to show that Hedges was subjected to the least pressure or influence, or that he was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests . . . .[87]

In the private sphere the individual was free and autonomous and thus government power only would be exercised based on the individual's consent, manifested in a contract, a criminal wrong, or a negligent tort.[88] Similarly, when the government acted, its actions were legitimate only to the extent that it stayed within its sphere of power. Since the governmental realm was defined by its "public" nature, the government could not help some "private" parties at the expense of others; such "class legislation" would invade the private sphere of free will and amount to coercion. If the state were not neutral, the individual would be subject to the will of another, aided by the State. The two realms, the public and the private, were conceived as separate from each other and exhaustive of the social world.

Accordingly, the Court in *Lochner* saw itself concerned not with the choice of one ideology or another, but rather with the simple determination whether a particular act fell into the private or public sphere of life. Justice Peckham began the opinion by excluding "coercion" as one of the bases for the imposition of public power with respect to employment contracts between bakers and their employers since, like *Coppage*, the case was not concerned with "physical force being used to obtain the labor of an employe[e]."[89] Rather, a "voluntary" contract "between persons who are *sui juris* (both employer and employe[e])" was at issue, and the "right to purchase or to sell labor is part of the liberty protected by this [the Fourteenth] amendment, unless there are circumstances which exclude the right."[90] Such circumstances defined the power of the government, limiting it to matters of general public concern or to instances where the free will was absent. Having established that the contract was not coerced, the only question for the *Lochner* Court was whether the contract had public consequences. Unless the uncoerced contract affected the "safety, health, morals [or] the general welfare of the public"[91] the government simply had no power to act.

The modern understanding is that the categories of public and private areas of life constitute a continuum. Consequently, the issue facing the *Lochner* court would require a balancing or a line drawing between poles. We therefore imagine that the *Lochner* Court implicitly balanced

87. 236 U.S. at 8-9.

88. *See* Kennedy, *Form and Substance*, *supra* note 71, at 1728-30.

89. 198 U.S. at 52.

90. *Id.* at 53-54.

91. *Id.* at 53.

the public and private interests at the point where particular social acts were categorized as public or private. The liberty of contract discourse, however, did not treat the terms "public" or "private" as mere metaphors representing matters of degree, alluding to a state of affairs that never "actually" exists. Instead the terms were taken to re-present *qualitative* distinctions out there in social life, not merely judgments as to the relative *quantity* of factors present more or less in all relations.[92] Contracts were either voluntary or coerced. Hence contracts were made by people "who are entirely free to act,"[93] or there was duress or coercion which "compels a man to go against his will, and virtually takes away his free agency."[94] A particular issue either concerned the public, or it did not. Hence it was possible to invoke a subject matter "purely and exclusively private" as opposed to "some object directly affecting the public welfare."[95] The statute at issue in *Lochner* was amenable to a similar either/or analysis: "Is this a fair, reasonable and appropriate exercise of the police power of the State, or is it an unreasonable, unnecessary and arbitrary interference with the right of the individual to his personal liberty . . . ?"[96] The term "reasonable" should be understood in the context of this qualitative, either/or construction. "Reasonable" did not refer, as it does in the modern legal usage, to a judgment as to relative costs and benefits. Rather, it referred precisely to the question amenable to "reason"—whether the statute was within the sphere of governmental power, the public sphere, or whether it invaded individual rights, the private sphere.

In the liberty of contract discourse, the terms "public" and "private" were taken to have a direct, determinate correlation with objective things. That is, the terms were not considered to be metaphors at all. They were labels that applied to aspects of social life inherently divided in a manner that the labels matched. "Private" acts were distinct from "public" acts and shared characteristics with each other. "Private" acts exhibited the presence of free will and the absence of external effects that would inhibit the autonomy of others. These shared characteristics made

92. The notion that the liberty of contract discourse projected qualitative as opposed to quantitative distinctions is intended to convey what elsewhere has been characterized as the "on-off," "deductive," or "vacuum boundaries" of the discourse. *See, e.g.*, Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Polities*, 28 BUFFALO L. REV. 383 (1979); Kennedy, *supra* note 71; Mensch, *The History of Mainstream Legal Thought*, in THE POLITICS OF LAW (D. Kairys ed. 1982); Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909); Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908).

93. Hartford Fire Ins. Co. v. Kirkpatrick, Dunn & Co., 111 Ala. 456, 465, 20 So. 651, 654 (1896).

94. Joannin v. Ogilvie, 49 Minn. 564, 566, 52 N.W. 217, 217 (1892); *see also* Hale, *Bargaining, Duress and Economic Liberty*, 43 COLUM. L. REV. 603, 616 (1943) and cases cited therein.

95. Leep v. Railway Company, 58 Ark. 407, 421, 25 S.W. 75, 79 (1894).

96. Lochner v. New York, 198 U.S. 45, 56 (1905).

all "private" acts essentially alike. The same was true for the "public" realm. Accordingly, the conceptual world and the real world were merged; the analogies drawn in the legal argumentation were neutral because they were "real."

Thus, in *Lochner* it was "not a question of substituting the judgment of the court for that of the legislature. If the act be within the power of the State[,] it is valid . . . ."[97] If the bakers were physically coerced, as already noted, the statute would be valid. The employment contract then would not reflect the presence of the will of the employee. Similarly, if the bakers were not parties competent to exercise their will, the legislation would pass muster. But the Court observed there was

> no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State . . . . They are in no sense wards of the State . . . . [T]he interest of the public is not in the slightest degree affected by such an act."[98]

The same reasoning marked the determination of whether the statute was valid with respect to the health of the bakers. Occupations fell into two categories, one presenting the normal health risks and one presenting extraordinary health risks. Unless some relevant *qualitative* distinction existed between baking and other occupations, no basis existed for upholding the law as a health law. But, "looking through statistics regarding all trades and occupations,"[99] the Court found baking no more unhealthy than the normal run of occupations. Since every occupation arguably carries some health risk, the mere presence of a health aspect could not define the scope of legislative power since legislative power then would be limitless. "It might be safely affirmed that almost all occupations more or less affect the health. . . . But are we all, on that account, at the mercy of legislative majorities?"[100] On the other hand, the limitation of work hours in *Holden v. Hardy*[101] was distinguished based on the "kind of employment, mining, smelting, etc., and the character of the employe[e]s in such kinds of labor . . . ."[102] That statute applied "only to the classes subjected by their employment to the *peculiar* conditions and effects attending underground mining . . . ."[103]

The Court in *Coppage* similarly analyzed the constitutionality of legislation forbidding discharge on the basis of union membership in terms

97. *Id.* at 56-57.
98. *Id.* at 57.
99. *Id.* at 59.
100. *Id.*
101. 169 U.S. 366 (1898).
102. *Lochner*, 198 U.S. at 54.
103. *Id.* at 55 (emphasis added).

of the public/private dichotomy. In the process, the Court demonstrated its sensitivity to the "formalism" with which liberty of contract practice commonly is charged. There the state declared that the purpose of the legislation was to repress coercion, duress, and undue influence of employers over employees.[104] But the Court refused to be satisfied by the form of the legislation. The right to contract cannot be violated "by merely applying to its exercise the term 'coercion.' "[105] "[T]he decision is not to depend upon the form of the state law, nor even upon its declared purpose . . . . Nor can a State, by designating as 'coercion' conduct which is not such *in truth*, render criminal any normal and essentially innocent exercise of personal liberty or property rights . . . ."[106]

In the Court's view, behind the forms lay the "truth" which was that the employee was "free to exercise a voluntary choice."[107] Therefore legislative interference with the contract invaded the private realm, regardless of how the legislation was formally designated or rationalized. And the statute could not be saved as an attempt to strengthen unions, either, since they "are not *public* institutions, charged by law with public or governmental duties, such as would render the maintenance of their membership a matter of direct concern to the general welfare."[108] Unions are "voluntary organizations," like other "voluntary associations,"[109] and indeed like the employment relation itself: "[S]ince the relation of employer and employe[e] is a voluntary relation, as clearly as is that between the members of a labor organization, the employer has the same inherent right to prescribe the terms upon which he will consent to the relationship . . . ."[110] The argument that the legislation was necessary to protect the employees' exercise of their free will to join a union, a " 'personal and private affair' of the employe[e],"[111] simply proved too much—the employer had the same *private* right to choose employees, and therefore the legislation invaded the private sphere of social life.

The public/private dichotomy relied on in *Lochner* and *Coppage* was not merely concocted for use in constitutional argumentation, nor simply with reference to employment contracts. Constitutional protection of the "private" realm depended on the assumption that at common law the courts were merely ratifying individual intent rather than impos-

104. Coppage v. Kansas, 236 U.S. 1, 8-9 (1915).
105. *Id.* at 9.
106. *Id.* at 15-16 (emphasis added).
107. *Id.* at 9.
108. *Id.* at 16-17 (emphasis added).
109. *Id.* at 16.
110. *Id.* at 20.
111. *Id.* at 19.

ing objective rules.[112] The common law was imagined to be facilitative rather than regulative through the very same public/private representational structure. This dichotomous structure, based on the presence or absence of free will, was echoed in each of the common law fields.

Private law generally was conceived as the realm where the judiciary carried out the prior intentions of social actors. Accordingly, obligations between individuals could not be objectively imposed in a regulative manner; instead, judicial power to compel one individual to give money or specific performance to another was dependent upon the individual's consent. This consent was manifested in the assent to contractual terms or the subjective fault of an intentional or negligent tortfeasor. Similarly, an individual's criminal liability rested on the subjective intent to commit a crime, which implicitly manifested consent to public sanctions. So long as the individual made no subjective move outside the "private" sphere, neither the government nor the courts had grounds to exert power. In private law, the judiciary was conceived as a neutral mediator for the enforcement of individual intent, just as in constitutional law legislative power was limited to the neutral public interest. The representational language that shaped constitutional law also ensured neutrality at common law as judges simply identified the presence or absence of free will.

The private/public dichotomy informed the relationship between private law fields and the doctrinal distinctions within the fields themselves. For example, the categorization of social relations as matters of either contract or tort echoed the relation between individuals and government generally as it repeated the basic public/private metaphor. Contract represented the area of social life where people knew each other and where their relations were marked by the presence of will; contract law embodied the "private," self-present side of the public/private dichotomy. Torts, on the other hand, represented the area of social life where people did not know each other and therefore could not contract, or where they knew each other but had not contracted. Tort law therefore was essentially supplementary. It filled in where free will was absent. Therefore tort law, vis-à-vis contracts, stood on the public side. Just as the legislature could regulate matters relating to the common welfare, since individual contracts would be insufficient for such public ends, torts existed in private law as a public supplement where private contracts could not govern the relations. Just as the legislature could regulate contracts that were the result of coercion, because in such circumstances free will was absent, the courts could regulate social relations through the

112. If courts were imposing common law regulative duties in contract cases, constitutional protection of the contractual realm could not be seen as the protection of individual free will. For a discussion of the integration of constitutional and common law contract doctrine that focuses on the notion of individual free will, see Kennedy, *Form and Substance*, *supra* note 71, at 1728-31.

tort doctrines of assault, false imprisonment, fraud, and misrepresentation, each of which identified the absence of free will.[113] And just as the legislature acting beyond its powers would invade the private realm, tort law had to be neutral to private ends in its protection of the private sphere of action. This essential similarity of the relation between the individual and the government and the relation between contract and tort was captured by the *Adair* court's analogy between legislation invading the right to contract and tortious interference with contract.

This representational structure was also reflected in the internal organization of each field. Within contracts, "[t]he first and most essential element of an agreement is the consent of the parties. There must be the meeting of two minds in one and the same intention."[114] To determine this consent, the courts presumed the free will of a competent party and would only interfere in the absence of free will, in circumstances involving duress or undue influence. The presence of free will signified the private self-determination of the party.[115] The absence of free will signified that assent had been gained by the infliction of pressure from the "outside," from someone else's will, say someone who threatened instigation of prosecution to induce another to settle an insurance claim (duress)[116] or someone who exercised a peculiar power over the party because of a special nonmarket relationship (undue influence).[117] Thus, the free will/coercion dichotomy, like the general constitutional division between the purely "private" and the "public", was based on a *qualitative* presence or absence of the "private" individual, who was free from the domination of the will of others. Each contract either revealed the presence of free will or its absence, just as each piece of social legislation either reflected public concerns or invaded the purely "private" realm. The judicial decision to enforce some contracts accordingly was con-

113. *See* 2 T. COOLEY, A TREATISE ON THE LAW OF TORTS §§ 346-67 (D. Haggard 4th ed. 1932). The point is not that torts or the other common law areas were organized in a radically different way than they are today; rather, it is that the perceived logic of that ordering derived from imbedded metaphors for the representation of social life. In other words, the categorization of tort doctrines could be seen as sharing unifying characteristics with more general notions of social ordering.

114. *See* S. WILLISTON, PRINCIPLES OF CONTRACT AT LAW AND IN EQUITY 3 (3d ed. 1906).

115. Free will characterized "persons who are entirely free to act in making or refusing such contracts." Hartford Fire Ins. Co. v. Kirkpatrick, Dunn & Co., 111 Ala. 456, 465, 20 So. 651, 654 (1895).

116. *Id.*

117. "The influence which suffices for the avoidance of a conveyance . . . is such as dominates the grantor's will and coerces it to serve the will of another . . . ." Adair v. Craig, 135 Ala. 332, 335, 33 So. 902, 903 (1902). "The undue influence . . . must be such . . . that the party making it has no free will . . . ." Conley v. Nailor, 118 U.S. 127, 134-35 (1886). *See generally* S. WILLISTON, *supra* note 114, at 732-47; Dawson, *Economic Duress—An Essay in Perspective*, 45 MICH. L. REV. 253 (1947).

ceived as neutral and apolitical, the result of objective classification rather than policy balance.

The determination of contractual competency involved similar reasoning. Certain categories of people were competent by virtue of the presence of rational free will; others, such as infants, lunatics, and drunken persons, were incompetent because they lacked the capacity for rational consent. These qualitative differences existed in the categories themselves.

> [T]o set aside any act or contract on account of drunkenness, it is not sufficient that the party is under undue excitement from liquor. It must rise to that degree which may be called excessive drunkenness, where the party is utterly deprived of the use of his reason and understanding; for in such a case, there can, in no just sense, be said to be a serious and deliberate consent on his part . . . .[118]

Torts reflected a similar division. For private acts with no general public consequences, liability would not be imposed without negligence. Negligence was conceived of as subjective fault and thus an implicit consent to public sanctions.[119] For activities having general public consequences, such as the business of common carriers or ultrahazardous activities, strict liability, an objective and public standard, was imposed.[120]

This general survey of common law tort and contract should reveal how the spatial public/private dichotomy organized broad areas of legal discourse, integrating the vision of the world in the representational practice. The sense of this practice at the constitutional level was reinforced by its reproduction at common law. Just as "private" and "public" were oppositional metaphors in constitutional political theory, the common law was built upon the same dichotomies. In constitutional theory the dichotomies defined the relation between the individual and the state, while at common law it defined the boundaries of contract and tort. At common law each field in turn was internally organized according to the

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118. Cook v. Bagnell Timber Co., 78 Ark. 47, 51, 94 S.W. 695, 697 (1906) (quoting 1 J. STORY, COMMENTARIES ON EQUITY JURISPRUDENCE § 231).

119. *See generally* 3 T. COOLEY, *supra* note 113, §§ 478-501; Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908) (arguing that the negligence standard is an individual fault standard that reflects modern ethical notions of moral blameworthiness); O.W. HOLMES, THE COMMON LAW 77-84, 88-96 (1881) (arguing that, just as damages in contract are based on consent, tort damages under a negligence standard are based on choice, hence the requirement that consequences be foreseeable). Professor Morton Horwitz has suggested that in his early work Holmes viewed custom as a mediating category between individual choice and social regulation, given the view that custom consisted of individually chosen behaviors that had become near-universals. Horwitz, Rosenthal Lectures at Northwestern University Law School (1981) (unpublished lectures on file with the author.)

To the extent that custom was viewed as rooted in individual choice, there was no inconsistency in basing obligations in private law on consent and in instituting negligence on the standard of care theory where there was no explicit contractual relation. *See* M. HORWITZ, *supra* note 78, at 202-03.

120. *See generally* 3 T. COOLEY, *supra* note 113, §§ 453-77.

same dichotomy. Within contracts there were doctrines representing both the presence and the absence of free will. Within torts, social activities were divided by their private or public nature, roughly corresponding to the imposition of an objective or subjective standard of liability.

The spatial metaphor was reflected at each level of legal consciousness as it was a deeply engrained convention about the proper way to re-present social relations. Its plausibility in any particular doctrinal field was confirmed by the organization of the other areas along the same metaphor. In turn the other areas were confirmed by its presence in any particular area. In some way, then, each part of the discourse was a microcosm of the totality of the representational structure as it pointed toward that totality for its claim to "reason." The public/private dichotomy itself was never demonstrated to be the appropriate way to categorize social activities; the dichotomy existed as part of "what goes without saying." In short, it was an interpretative code for the re-presentation of social life that was not itself subject to question in the cases. The dichotomy was imbedded into the texture, the grammar, of the discourse. It was part of the background structure within which argument took place and within which particular assertions of likeness and difference appeared "real" as opposed to "merely" metaphoric.

Accordingly, the Court in *Lochner* approached the constitutional issue by resorting to the stages of a common law analysis. It first determined whether the contract was the "private" expression of free will by determining the existence of an offer and acceptance, the competency of each party, and the lack of any duress or coercion. In *Adair*, it was relevant to cite tort law when discussing the relationship between the public power of government and the private power of the individual. Tortious interference with contractual relations was an appropriate analogy for the constitutionality of legislation because the issues were essentially the same—the relation of private to public, free will to coercion, contract to tort, negligence to strict liability.

The general relation of spatial terms provided the grounds for determining what in the conceptual space looked alike and what looked different. Thus, within the background representational conventions, the acts of joining a union and obtaining employment analogized in *Coppage* shared essential attributes. In each case, the individual was "privately" assenting to the terms and conditions of a particular relationship. And in *Adkins v. Children's Hospital*, where the Court struck down minimum wage legislation, the employment relationship was essentially like the relationship between a shopkeeper and a customer. As Justice Sutherland wrote:

> In principle, there can be no difference between the case of selling labor and the case of selling goods. If one goes to the butcher, the baker or

> grocer to buy food, he is morally entitled to obtain the worth of his money but he is not entitled to more. If what he gets is worth what he pays he is not justified in demanding more simply because he needs more; and the shopkeeper, having dealt fairly and honestly in that transaction, is not concerned in any peculiar sense with the question of his customer's necessities . . . . [A] statute which prescribes payment . . . solely with relation to circumstances apart from the contract of employment, the business affected by it and the work done under it, is so clearly the product of a naked, arbitrary exercise of power that it cannot be allowed to stand under the Constitution of the United States.[121]

This reification of metaphoric terms within the liberty of contract era legal discourse made any particular decision appear nonideological, at least in the sense that no fully conscious political choice was being made; rather, each decision seemed natural within the texture of the representational language. Within that language, certain analogies seemed based in objective reality rather than mere legal interpretation. The similarity of joining a union and working for a railroad, the similarity of buying food and buying servants, or the similarity of the relation between the individual and the government, contract and tort, and the opposition of free will and coercion, or private and public activities, seemed necessary, ruled by qualitative differences and likenesses existing in objective reality. The legal representational language mediated the re-presentation of the world. This re-presentation then was treated as the neutral and determinate meaning of social events. The participants in the legal discourse socially constructed a language of representation and then collectively imagined that the metaphors were real.

But the explication of the public/private representational categories doesn't fully explain the "rationality" of the liberty of contract decisions within the representational practice. Given only the spatial metaphors, each liberty of contract case could have been "rationally" decided the other way. Since every occupation affects health, the *Lochner* Court, consistent with the public/private representational practice, could have held that all employment relations were in the public sphere of health, safety, and morals. And in *Coppage*, the Court recognized that protection of employees' private decisions to join a union would infringe on the free choice of the employer. The Court just as rationally, within the spatial categories, could have concluded that the exercise of "private" rights contradicted one another. The Court then could have endorsed legislative mediation, since the exercise of the "private" free will of one person infringed the "private" free will of another, establishing "public" consequences. Yet the fact that all occupations have health aspects was used

121. Adkins v. Children's Hosp., 261 U.S. 525, 558-59 (1923), *overruled*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937); *see also* Charles Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522 (1923).

as a reason to forbid the maximum hour legislation in *Lochner*. The fact that protection of the employees' private choices infringed the employers' free will was used as a reason to strike down the labor legislation in *Coppage*. In order to comprehend how these arguments could have been taken as rational and persuasive rather than as totally circular and vacuous, it is necessary to examine another dimension of the representational practice, the dimension of *time*.

2. *The Temporal Metaphors*

The representational language of legal discourse served not only to place things in their proper taxonomic places. It also established a sense of social relations in time, a sense of history. Accordingly, the public/private dichotomy did not merely describe social regions external to and exclusive of each other in a spatial sense. The representational practice also projected a particular temporal relation between the two realms. One realm was seen as a source of the other. An extended passage from *Coppage* is instructive in this regard.

> No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not equally unhampered by circumstances. This applies to all contracts, and not merely to that between employer and employe[e]. Indeed, a little reflection will show that wherever the right of private property and the right of free contract co-exist, each party when contracting is inevitably more or less influenced by the question whether he has much property, or little, or none; for the contract is made to the very end that each may gain something that he needs or desires more urgently than that which he proposes to give in exchange. And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary *result* of the exercise of those rights.[122]

Now, it is possible simply to dismiss this passage as apologetic rhetoric. The issue in *Coppage* was whether the legislature could forbid employers from refusing to employ union members. Such a proscription would increase the bargaining power of union employees generally. On one level, then, the Court's response here was entirely circular; it was question begging to say that the bargaining power of employers and employees cannot be changed because it is "inevitable" that "some persons must have more property than others." The very issue in the case was who would have more and who would have less. And the inevitabil-

122. Coppage v. Kansas, 236 U.S. 1, 17 (1915) (emphasis added).

ity of inequality of fortune whereby some contracting parties were "more or less influenced" by the distribution of property suggests that each contract was in the public sphere since each assent to contract would occur within the context of such "external" influences.

This recognition of circularity in the *Coppage* argument depends on the modern understanding that the distribution of wealth and bargaining power is a social decision. Accordingly, we see the legislative attempt to alter the balance of bargaining power as simply another social decision, not qualitatively different from the status quo. Such an interpretation, however, reverses the *temporal* order of representational terms in the liberty of contract discourse. Within the metaphoric structure in which the private realm is considered as the origin and source of the public realm, the *Coppage* argument was not circular, but dramatically logical. The distribution of wealth between employers and employees did not coerce the individual because the individual created the economic context. So long as contracts were products of individual intent, "purely and exclusively private," the inequalities of wealth and bargaining power between employers and employees were simply the *derivative effect* of individual choices, rather than objectively imposed conditions restraining individuals.

Accordingly, the inequality of bargaining power between employer and employees could not justify ameliorative labor legislation because "it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary *result* of the exercise of those rights." [123] Social context was seen to flow from individual intent, not the other way around. Prior and "purely private" subjects freely engaged in contractual relations from which inequality of fortune resulted. Since free subjects were the *cause* of the market context in which inequality of bargaining power existed, that inequality could not itself be the *cause* of their consent to contract. Bargaining inequality was not a prior objective restraint limiting the freedom of subjects, but was instead a result of the freedom of subjects. As such it was a derivative and supplementary context, derivative of a prior, pure freedom.

This temporal relation between the spatial terms of "public" and "private" oriented the representation of social relations. The temporal metaphor provided a structure for an integrated, mythic history of society, which, like the spatial metaphor, was echoed and reinforced in each doctrinal subdivision.

The historical myth began with the temporal priority of free, unregulated individuals. Original and unsituated private subjects came before

123. *Id.*

the formal public realm and created that realm, just as private, free individuals created the economic context. The public realm therefore derived from a place where the individual was self-present, free from external influence. This temporal relation made it possible to see the government as the intended result of a broad social contract—formerly free individuals came together and rationally agreed to forego some of their unbounded freedom for the fruits of social cooperation. The public realm of government therefore was secondary and derivative of the original private realm. This causal view of society was reflected in the notion that the Constitution embodied the original social contract and "caused" the government to exist.

This representation of the origin of the public sphere provided the basis for the distinction between coercive and legitimate public power. Coercion was rooted in the subordination of the self to the will of the other. When the social contract was made, private individuals gave up their formerly unbounded freedom on the condition that government would not favor some persons over others ("class legislation"), but rather would be neutral to the private sphere. The governmental sphere was supplementary, necessary to achieve public ends that the succession of individual contracts could not accomplish.

If, however, the government (here either the legislature or the judiciary) was nonneutral, and thus favored some private interests over others, it became coercive. Thus legitimate, noncoercive public action would simply be a *re-presentation* of the self-present will of the private individuals who brought the government into being at the constitutional level, and a re-presentation of the self-present will of parties in common law practice.[124] With respect to tasks that the social contract had delegated to the formal government, the individual was not coerced. With respect to such public activities, the government represented the original will of the private realm, just as a contract re-presented the prior intent of a contracting party. When the government overstepped its bounds, however, it no longer re-presented the self-present free will of formerly private individuals. Instead, government then subordinated the private will to the will of others; the government became the source of duress as it overcame rather than re-presented the will of the individual.

This vision of the distinction between legitimate and coercive public power clarifies why economic context could not be coercive. Coercion, conceived as the subordination of one will to another, had to be rooted in another's will. But no one willed the economic context. It was not

124. Re-presentation, in this context, as in the context discussed in the beginning of this Article, refers to a process whereby the positive object being represented is not differentiated in the representation. To the extent that differentiation is associated with absence and external power, re-presentation is associated with freedom from social coercion.

analogous to the overbearing will of party using duress, the undue influencer, the defrauder, or the overreaching State. Instead, the distribution of bargaining power was analogous to the legitimate formal government, where social power originated in self-present free will and was a re-presentation of that free will. Like government operating within its public bounds, the economic context within which employers and employees bargained was itself a neutral medium that re-presented the original free will of private parties. Economic context was the *result* of the exercise of privately held rights.

This temporal metaphor for the representation of social life ordered the perceived relationship between the individual and the economic context, as evidenced by the *Coppage* discussion, as well as the relationship between the public and private spheres generally. The temporal convention was reflected at each level of legal discourse. Like the spatial public/private dichotomy, it provided an orienting point for the representation of particular social relations. The temporal metaphor appeared in the representation of the primacy of the individual over society, of contract over tort, of free will over coercion, of competency over incompetency, and the primacy of negligence over strict liability. In practice, the temporal convention served as a principle of construction a judge could use to distinguish the two realms in each of the fields.[125]

This temporal ordering of the spatial metaphors was reflected in the subdivisions of the private and public spheres themselves. In the governmental sphere, the subdivision of state and federal powers reflected this metaphoric order. The state, closer to individuals, was vis-à-vis the federal government closer to the private realm. Accordingly, the states possessed the general power to legislate for the public good.[126] And just as the governmental realm itself supplemented individual will, picking

125. I do not mean to suggest that the "principle of construction" provided any determinate answers in particular cases. To the contrary, as I suggested earlier, the terms "public" and "private" themselves could have been used to reach exactly the opposite results in *Coppage* and *Lochner*. The addition of the temporal priority of the private side of the analytic only gives a sense of how the spheres might be generally conceived. Its application in any particular case was indeterminate. *Compare* Lochner v. New York, 198 U.S. 45 (1905) *with* New York Cent. R.R. v. White, 243 U.S. 188 (1917) (holding that the New York Workmen's Compensation Law, imposing strict liability on the employer and limiting recovery by employees, did not violate freedom of contract because it related to a public interest in the health and safety of individual workers); *compare also White with* Ives v. South Buffalo Ry., 201 N.Y. 271, 296, 94 N.E. 431, 440 (1911) (striking down the same statute as violating the due process clause by "taking the property of *A* and giving it to *B*" based simply on the "legislative fiat" that an occupation is "inherently dangerous."). In light of *White*, the symmetry of the constitutional and common law that I have described was not total. The basic common law contract doctrines were incorporated into constitutional law, and thus the common law doctrines of incompetency, duress and fraud generally overlapped the legislative regulatory power. However, the basic common law tort structure that distinguished negligence (as consent and applicable to private relations) and strict liability was never so constitutionalized at the federal level, though it was in some states.

126. There are many statements of this general police power to legislate with respect to the

where individual agreements could not generate publicly desired goods, the power of the individual states could not reach some generally desired goods, such as the regulation of interstate commerce and the conduct of foreign affairs. The federal government therefore had the same relationship vis-à-vis the states as the government generally had vis-à-vis the individual, namely as a supplement to a primary source.[127]

The representation of the private sphere was similarly constructed. The division between tort and contract mirrored the public/private and federal/state divisions. Contract, reflecting the self-present will of the parties, was primary and private. Tort law operated where the contract realm functionally could not. The Court's sympathetic treatment of attempts to avoid tort liability by contract reflected this temporal division.[128] Just as governmental power began where the private sphere ended, tort began where the contractual sphere ended. Tort accordingly included general doctrines relating to the imposition of one party's will on another (fraud, misrepresentation, false imprisonment, etc.) and doctrines that defined extra-contractual relations (the general duty to refrain from negligence in private-type activities, the imposition of strict liability for public-type activities).

Tort was internally organized along the same temporal metaphor. Negligence, conceived as the *fault* of the individual, was the primary standard for private activities. Strict liability was limited to public activities, which had to be neutral to the private sphere and therefore could not impose costs on private actors. Most activities were assumed to be private. The public category consisted of clearly defined and exceptional activities (for example, transport by common carriers and ultrahazardous businesses). This structure accorded with the general primacy of the private sphere and supplementarity of the public sphere.

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health, safety, and morals. *See, e.g.*, Douglas v. Kentucky, 168 U.S. 488 (1897) (state under its police powers, may revoke lottery grant to protect public morals).

127. This interpretation is consistent with the Court's relatively strict reading of the commerce clause during the liberty of contract era. *See, e.g.*, Carter v. Carter Coal Co., 298 U.S. 238 (1936); Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935); Hammer v. Dagenhart, 247 U.S. 251 (1918), *overruled*, United States v. Darby, 312 U.S. 100, 117 (1941); Kidd v. Pearson, 128 U.S. 1 (1888); *see also* United States v. Butler, 297 U.S. 1 (1936) (similar analysis with respect to the spending power); Child Labor Tax Case, 259 U.S. 20 (1922) (taxing power).

128. Such contracts could be either explicit or implied. *See, e.g.*, Hartford Fire Ins. Co. v. Chicago, M. & St. P. Ry., 175 U.S. 91 (1899) (contract for excluding liability from negligently ignited fires held enforceable); Bush v. Bremner, 36 F.2d 189 (8th Cir. 1929) (provision absolving carrier from liability for injury to passenger riding on free pass held valid). Sometimes such contracts were implied, normally through an assumption-of-risk theory. *See, e.g.*, Narramore v. Cleveland, C.C. & St. L. Ry., 96 F. 298 (6th Cir. 1899); Quinn v. Recreation Park Ass'n, 3 Cal. 2d 725, 46 P.2d 144 (1935) (voluntary spectators assumed risk of being hit by batted ball); Standard Steel Car Co. v. Martinecz, 66 Ind. App. 672, 113 N.E. 244 (1916); Ehrenberger v. Chicago, R. I. & P. Ry., 182 Iowa 1339, 166 N.W. 735 (1918); O'Maley v. South Boston Gaslight Co., 158 Mass. 135, 32 N.E. 1119 (1893); Scanlon v. Wedger, 156 Mass. 462, 31 N.E. 642 (1892) (voluntary spectators assumed risk of danger of fireworks).

Contract incorporated the same temporal ordering. The spatial division between public and private was identified by the presence or absence of free will as reflected in the duress and undue influence doctrines. This spatial division was temporally ordered so that free will was primary and lack of free will was exceptional and derivative. Accordingly, the individual's will was presumed to be free, unless someone affirmatively restrained it.[129] The same temporal ordering held with respect to competency doctrine. Since the presence of free will was primary, its absence was exceptional and secondary. Thus in general, parties were presumed to be competent. Only in exceptional, delineated groups would lack of contractual competency be found.[130]

This temporal construct of priority and supplementarity explains how the arguments in the liberty of contract cases could be perceived as noncircular. Against a background construction of the priority of private over public, the *Lochner* Court could view the potential of all occupations to affect health as placing occupations generally in the private rather than the public sphere. Just as common law contract practice presumed free will and competency in the absence of some exceptional and qualitatively different circumstances, occupations were presumptively private unless some exceptional and qualitatively different attribute distinguished a particular occupation from employment generally. The ultrahazardous mining activity in *Holden v. Hardy*[131] satisfied this test of qualitative difference. The "ordinary" health aspects of baking, however, could not justify public legislation without reversing the temporal metaphor. Such a reversal would have placed public power over the general run of social activities, rather than limiting such power to a supplementary, exceptional, and derivative role. And in *Coppage*, the fact that the employer's private choice to hire whom he pleased affected the employee's private choice whether to join a union could not justify the exercise of public power to protect the employee's choice. Otherwise it would have reversed the temporal orientation that posited that all such choices had their source in private, individual intent, not in public context. Analogously, the fact that all contractual consent was influenced by the distribution of wealth was not a basis for the exercise of public power

129. *See generally* S. WILLISTON, *supra* note 114, at 727-71. The effect of the narrow and categorical duress doctrine conversely was to represent ordinary contractual relations as products of free will, in much the same way as the delineated categories of coercion in rape law represent ordinary sexual relations as consensual. *See supra* text accompanying notes 61-64.

130. *See generally* S. WILLISTON, *supra* note 114, at 57-147. Parties deemed incompetent included minors, married women, lunatics, drunken persons, and convicts. As with duress doctrine presumptions, the limited exceptions for those deemed unable to exercise the rational free will placed other parties at the norm, where contracts were presumed to be the result of rational free will.

131. 169 U.S. 366 (1897).

so long as the distribution of wealth could be seen as originating in private rather than social choices.

The spatial metaphor, which provided the available categories for representation, and the temporal metaphor, which ordered the relationship between the categories, were unstated rules of construction for the representation of social life in liberty of contract legal discourse. When a judge approached a new area, his perception was mediated by these representational metaphors so that, in a sense, the area already was constructed before the judge approached it. The judge already knew how to organize perception and representation of different regions of social life. He did not have to make "subjective" judgments or "ideological" choices or ignore the "reality" of the social relations. The representational language constructed reality itself.[132] The integration of the spatial and temporal metaphors into the texture of the legal discourse provided a source of confidence for legal actors. The existence of the metaphors in one area confirmed their reality for each other area of law. Each legal relationship—between individual and government, contract and tort, free will and coercion, competency and incompetency, negligence and strict liability, state power and federal power—was analogous to each of the other legal relationships since each was organized around the same metaphoric categorization. The relation of the individual to the government in constitutional law was premised on the same considerations as the determination of coercion or duress in common contracts. Legislative power to regulate was supplementary to the basic private nature of social relations. Analogously, imposition of tort duties was essentially supplementary to the presumption of the primacy of contracts. Finally, the distinction between negligence and strict liability standards of care mirrored the distinction between free will and duress in contracts and between public and private interests at the constitutional level.

This representational language thus served to distinguish legal language from political language within the liberty of contract era. Law was not political because it was not ideological—it contained no bias toward any particular societal group. Legal decisions flowed rationally once the particular spatial and temporal metaphors were imbedded in the representational discourse. The right to contract, as the courts continually emphasized, protected the free will of *both* employers and employees. And, as the *Coppage* opinion makes clear, the judges were aware of the dangers of formalist interpretation. But they were convinced that they were in touch with the true meaning of the social relations with which they dealt, the truth about whether coercion or free will existed in particular instances.

132. *See supra* text accompanying notes 6-49.

The point of explicating this metaphorical discourse is to demonstrate that the judges' assertion of access to the determinate and neutral meaning of social events actually rested on the institutionalization of contingent and socially created metaphors. These metaphors constructed the "reality" that within the legal discourse was supposed to exist out there, in social relations themselves. This reification of representational practice denied the manner in which legal discourse actually constructed the world it purported to represent.[133]

The purity of legal representational practice rested on the projection of a pure source for that practice, an individual self-present at the moment of contracting, free from external influences. This self-present individual provided the representational category through which dramatically different social experiences—buying groceries, joining a union, obtaining a job, forming a government, investing in futures contracts—appeared "[i]n principle"[134] the same. The term "contract" related these various experiences through their essential similarity, the immediate self-presence of the contracting party. And the form of association referred to as "contract," while metaphoric in that it grouped different experiences together and asserted they were alike, was itself not merely metaphoric. In a significant sense the form of association was "real" in that it was grounded in the identical self-presence of the individual that characterized all such experience.[135]

In order to appreciate the metaphysical infrastructure of the liberty of contract consciousness, it is useful at this point to see that the legal representational language projected a particular relationship between the more general representational metaphors of subjectivity and objectivity. Each concept associated with the "private" realm—the self, the individ-

133. This social construction of reality proceeded on much the same basis as a literary interpretation that focuses on the intent of an author, or a linguistic theory that is organized by a conception of the adequation of signifier to signified. In each case, the representational practice embodies the "metaphysics of presence" described above. For the representation of social relations in the liberty of contract era to be seen as legal rather than political, rational rather than poetic, and neutral rather than ideological, representational practice had to purport merely to re-present aspects of social reality that were self-present and not merely the result of particular metaphors for representing and communicating about social life. The source of this self-presence in the liberty of contract era was projected as the private realm of free will, in which the individual was imagined to exist prior to any social context as the source for social contexts generally. This stable source provided a ground from which to identify presence and absence—the qualitative differences between realms of public and private, free will and duress, and the like.

134. Adkins v. Children's Hosp., 261 U.S. 525, 558 (1923), *overruled*, West Coast Hotel Co. v. Parrish, 300 U.S. 379, 400 (1937).

135. Thus, while contract law abstracted from the particularities of various social experiences so that, doctrinally, they were all the same, as long as there was an offer and acceptance of terms between competent parties, *see* M. HORWITZ, *supra* note 78, at 262-65, this abstraction need not have been viewed as a formalist suppression of the "reality" of the social relations. Instead, it rested on a particular metaphysical infrastructure for which the most "real" aspects were the identity of the contracting subject and the contractual form of association across contexts.

ual, presence, free will, contract, negligence, and the state—correlated with the subjective, internal side of each dichotomy in which it was found. Each concept associated with the "public" side of the dichotomies—the other, society, absence, coercion, public space, tort, strict liability, and the federal government—correlated with objectivity and externality. Thus, vis-à-vis the self, the other is objective; vis-à-vis contracts, tort is objective, and so on. Each term associated with the private realm suggested subjectivity in the sense of internality, of self-presence uncontaminated by external influence, of self-direction unregulated by social relations. Each term associated with the public side suggested objectivity in the sense of externality, of outside influences restraining the free subject. The priority of the subjective side in liberty of contract representational practice made each objective term seem essentially supplementary to the subjective term. The objective term appeared to add on to the already self-contained subject without being contained in the subjective term itself.

This division of the conceptual categories along the lines of subject and object suggests more general metaphysical roots of the discourse. The relation between man and nature and mind and body mirrored the relation between private and public as it reproduced the general subject/object metaphor. Man was subjective and nature represented the objective limitations of the social world. The mind was subjective and the body was objective, a part of the natural, material world and thus subject to restraint. Restraint and coercion in contract doctrine thus seemed analogous to the natural limits on social freedom, or to the subordination of the physical self to the material world. This infrastructure of dichotomies provided the sense for the manner in which the individual could be prior to social relations and therefore presumptively free, while at the same time subject to objective limitations to his exercise of will. Just as nature provided an outside limit to the social world but was not itself implicated in the core of social relations, and just as the body provided an outside limit to the mind's free choice without itself constituting choice, the individual's self-presence was limited by objective constraint. But such limits were at the margins. They were not implicated in the private sphere itself.

The qualitative distinctions between the subjective and objective realms, together with the temporal priority of the subjective realm, implied a belief in "transcendental subjectivity." The subject was believed to exist prior to social context and therefore was not constituted by context but instead was the source and origin of context.[136] Given the vision of the individual as a transcendental subject, every social relation

136. The subject was transcendental in this sense insofar as the subject transcended context and accordingly was unaffected by it.

was translated as a creation of individuals, who were free to join or not to join the social relation. This perspective on the relation between social actors and their relationships gave sense to the analogies drawn in *Coppage*, for example, between joining a union and agreeing to contract terms with an employer. Earlier nineteenth-century practice had divided up legal categories according to the subject matter of the relation (for example, master/servant, landlord/tenant, bailor/bailee). Each relation was conceived to carry substantive rights and obligations. In contrast, each relation in the liberty of contract era was conceived as essentially the same, unified around contract as a universal form of social relation. Social relations were supposed to flow from the subject rather than to preexist the subject as a social context with preset content. The vision of the transcendental subject was accordingly a vision of consumption. The individual was seen to choose social relations as he chose products in a grocery store—each social relation, while grounded in subjective intent, was qualitatively different from that subjectivity. Social relationships appeared objective, existing outside of and independent from the individual, to be consumed.[137]

The universalizing aspects of the metaphoric structure of liberty of contract discourse reflect the formalism of the liberty of contract discourse. At first glance, the metaphor of the individual contractor as the source and origin of social context seems to establish social causation and agency at an extremely local and particular level, in the private and unique will of visible social actors. The sources of the social relationships in society were individuals close at hand, the individuals carrying out those relations, rather than the distant, external forces of "the economy," or the "subconscious" structures of individual psychology, or a socialization process—sources attributed by twentieth-century explanatory structures.[138] But the grounding of representational practice in the metaphor of the transcendental subject actually generalized and universalized the attribution of meaning to social relations as it centralized the finding of intent and free will. Localization required the effacement of external influence. This effacement of externality tended to create the opposite of localization—a universal subject purged of situatedness in place and time.

The positing of the subject as transcendental—as the source of the social relations unaffected by particular context—was consistent with a

137. *See* Lukacs, *Reification in the Consciousness of the Proletariat*, in HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS (R. Livingstone trans. 1971); H. MARCUSE, ONE-DIMENSIONAL MAN: STUDIES IN THE IDEOLOGY OF ADVANCED INDUSTRIAL SOCIETY (1964).

138. In such structuralisms, the individual subject is seen as the effect rather than the source of larger structures of social life. *See generally* THE STRUCTURALISTS: FROM MARX TO LEVI-STRAUSS (R. de George & F. de George eds. 1972). *See supra* notes 9, 12 & 34.

belief that the forms through which individuals related were essentially the same, regardless of context. A contract was a contract, whether for groceries, futures, or employment, because it was a universal form of association correlated with the transcendental subjectivity of the individual. Similarly, the meaning of the words of the contract and the determination of whether the contract was consensual also were amenable to an objective, universal practice. Accordingly, the objective theory of contractual construction, which generally forbade contextual evidence of contractual intent, could be viewed within the liberty of contract metaphors as consistent with the notion that the judiciary was realizing subjective intent rather than imposing tort-like obligations on parties who had used language which might induce reliance.[139] The metaphor of

139. *See* S. WILLISTON, *supra* note 114, at 307-20. Professor Horwitz explains that the objective theory of contracts emerged from the will theory as a result of a desire for predictability in dealings among the commercial classes brought about by the emergence of uniform national markets. M. HORWITZ, *supra* note 78, at 194-201. This, in turn, left a glaring contradiction in the legal ideology. On the one hand, substantive decisions at both the common and constitutional law levels were justified as based on the ratification of the subjective free will of the individual. This provided the ideological rationalization for abandoning notions of just price and objective value. But on the other hand, the manner of ascertaining the subjective intent within the terms of objective contract theory was external to subjective intent and appeared more like objective regulation. Indeed, this inconsistency was one of the primary means utilized by the legal realists to debunk this legal ideology. *See infra* text accompanying notes 142-99.

One way to explain the contradiction would be to see constitutional law and the common law as out-of-sync. The constitutional liberty of contract practice assumed that at common law the judiciary was simply ratifying subjective intent, but the objective theory of contracts was regulative rather than facilitative.

I think the relationship was more subtle than this theory of contradiction suggests. That is, I see the congruence between the objective contracts theory and the notion that subjective free will guided both constitutional and common law practice as explicable from within the terms of the metaphysical structure of legal ideology. Within the reigning metaphysics of the relationship between subjectivity and objectivity, there was no contradiction at all. The objective theory of contracts did not restrain subjective intent because objective manifestations of meaning were subjectively chosen by the parties like commodities and were ultimately rooted in subjective choices, like custom in negligence analysis, *see supra* note 119, or the inequality of bargaining context in the *Coppage* analysis, *see supra* text accompanying note 122.

Indeed, there is a deep link between the objective theory of contract construction, the negligence standard in tort, narrowly-drawn duress and incompetency doctrines, and the notion that law existed to protect subjective free will by delineating private and public spheres. If individual free will was the criterion, one would have expected an individualized inquiry into whether free will was exercised or capacity existed. The will of some individuals—for example, thin-skulled plaintiffs—might well be overborne by conduct falling short of that proscribed in duress doctrines. Similarly, some minors, more mature than others, might well have the functional capacity to contract. In short, all the basic elements of contract doctrine should conceivably have been individualized in order to satisfy the subjectivist premises of contract practice. Similarly, the general negligence standard in tort could be seen to be regulative rather than facilitative to the extent it imposed nonconsensual duties through the external, customary notions of the reasonable man. Here also, an individualized practice, focused on the capabilities of the particular defendant, might seem more in line with the legitimating premise that private law was concerned with facilitating individual free will.

But such an individualized practice would have contradicted the notions of equality contained in the vision of the rule of law. Equity and discretion would have predominated. An individualized

qualitative differences between the subject and the objective context, including the available forms of communication, suggested that the subjective intent was not constrained or regulated by the necessity of using language that carried "formal" and objective legal meaning separate from the meaning intended by the individual. The subject chose the language as a neutral medium for communicating intent. The objective manifestations of intent in contractual language could thus be read in a rule-like, nondiscretionary fashion by the judges since the manifestations of intent had objective, determinate meaning, just as the gun to the head had objective, determinate meaning in the determination whether the contract was the result of free will. Objective manifestations of intent had "positive" meaning; they were noncontextual because they were nonrelational—meaning filled up the terms with content and thus context was simply irrelevant.[140] Words directly referred to things "out there" regardless of context, just as the subject was the same regardless of social context, and contract as a form of association was essentially the same regardless of context. Since the subject preceded and created objective structures, he was not restrained by the necessity to communicate contractual intent in objective manifestations. Instead, the subject chose objective manifestations of meaning, just as the subject chose forms of relations.

There appears to be no source except the metaphysical assumptions themselves for the particular representation of social life created by the liberty of contract era legal actors. It is not as if the spatial and temporal metaphors were established as valid or useful in one area and thereby

practice would have belied the image of law as the mediating form between self and other, between private and public. The rule form, reflected in the categorical structure of duress and incompetency doctrines and in the objective approach to contractual interpretation, was more deeply intertwined with the metaphysical representation of social life than the attribution of contradiction in the liberty of contract discourse suggests. In order for the collectivity, here judges as state officials, to represent the subjective free will of contracting parties, the judicial practice could not be discretionary; it had to be contained in a rule structure. Delineated rules were necessary within the terms of the ideology in order to ensure free will. The individual could choose on the basis of terms known in advance and thus consent to any imposition of public enforcement power. *See* Kennedy, *Form and Substance, supra* note 71 (discussing the relationship between the rule form and the ideology of individualism).

The "contradiction" between the objective theory of contracts and the subjectivist premises of legitimacy was not perceived as such within the terms of the liberty of contract ideology since the so-called objective meaning was subjectively chosen. In this respect, the objective theory of conracts rested on a vision of consent similar to that which was used in torts where the negligence standard was seen to be rooted in choice rather than external regulation. Objectivity, whether the reasonable man standard in tort or contractual interpretation, was rule-like, knowable in advance, and ultimately derivative of subjective consent. And just as categorization of duress and competency doctrines was not regulative to the extent it reflected things "out there," so the objective theory of interpretation was conceived to reflect meanings "out there," preexisting judicial practice.

140. *See supra* text accompanying notes 6-27. The indeterminacy of the process of negative differentiation is imagined to be halted by the attribution of positive content to words.

assumed to be valid analogies for the interpretation and representation of other areas of social life. Nor does it appear that one area was primary, and the other areas followed in the construction of the representational scheme. The integration of the representational language did not flow from, say, a decision to achieve a particular result with respect to constitutional questions or with respect to the relationship between labor and capital. Rather, it appears that the metaphors were part of a metaphysical root system that had no particular origin. No part of the discourse demonstrated that it was positive and freestanding without the rest of the representational practice to orient and confirm it. Each analogy pointed to another, which itself pointed to another.

Thus, while the metaphoric representation of the social world was consistent with the broad outlines of the political theory of Lockean liberalism, it would completely miss the mark to simply describe the period as an attempt to institute classical liberal political theory. It is more accurate to say classical social contract theory itself depended on the metaphoric root system described above.[141] The liberty of contract approach was not a deduction from the premises of a political theory, but rather was an embedded representational structure for perceiving and communicating about the world.

B. Legal Realism

> Ferment is abroad in the law. The sphere of interest widens; men become interested again in the life that swirls around things legal. . . .
>
> The ferment is proper to the time. The law of schools threatened at the close of the century to turn into words—placid, clear-seeming, lifeless, like some old canal. Practice rolled on, muddy, turbulent, vigorous. It is now spilling, flooding, into the canal of stagnant words. It brings ferment and trouble. So other fields of thought have spilled their waters

141. Explaining liberty of contract discourse as simply an attempt to institute classical liberal political theory fails to explain why such a political theory would be persuasive vis-à-vis its competitors, or how the abstract terms of such a political theory could be applied in more concrete settings.

Indeed, the abstract and general requirements of a political theory could not be applied in concrete situations without such conventions of application providing the means to categorize public and private, free will and coercion, etc. My conclusion that legal knowledge about the world was organized around the public/private representational metaphor is not meant to suggest that the terms were in some sense operative, as if the words themselves denoted specific realms of social life or kinds of social relations. As the discussion of language suggested, *see supra* Part I, Section *A*, there is nothing within the words of a language that determines what is signfied by them. The distinction between public and private was a legal construction, not a reflection of some code preexisting the legal practice. Rather than explicate a determinate structure which animated the discourse, I have offered what may be best described as a table of contents or an indexing system. However described, the framework I have proposed is meant only to suggest the manner in which the general organizational forms of representational practice influenced the conception of what social life was about. There are, of course, many loose ends that escape this particular metaphoric structure and point to other ways to read the liberty of contract texts.

> in: the stress on behavior in the social sciences; their drive toward integration; the physicists' reexamination of final-seeming premises; the challenge of war and revolution. These stir. They stir the law. Interests of practice claim attention.[142]

Legal realism has become a caricature in current legal discourse. The realists typically are invoked to signify some point or holding—such as rules don't determine cases, or law is political, or the law depends on what the judge had for breakfast. Like most caricatures, there is some truth to each of the stereotyped "holdings" attributed to the realists. But in the common usage, realism comes to feel like a thing, as if "it" did something in the legal world. It has a beginning date and an ending date in the traditional histories, which attribute to it particular and determined messages. Such reification tends to treat realism as a stage in the development of modern legal discourse, one necessary to rid the legal world of the "formalism" of the liberty of contract era but then safely tucked away to the background, a step in the chronology of ideas leading to our own. But such an outlook misses the fire of the realist practice, the sense as one works through many of the realists' texts that more was felt to be at stake than simply the intellectual task of demonstrating the inadequacies of legal formalism, the Langdellian case method, the Willistonian approach to contracts, or the order of chapters in the contracts casebook. Rather, it is apparent that the realists felt an immediacy and urgency to their work, a belief that they were part of a larger transformation extending across disciplines, a historic undermining of the dominant ideology. In short, much of the realist work is marked with the impatient sense of engagement in struggle.

One of the ironies of the current political configuration of legal discourse is that both the right-wing law and economics adherents and the left-wing critical legal studies movement claim a realist heritage.[143] By focusing on two strands of legal realist work, I will attempt in this section to shed light on why such ideologically opposed camps could both look to realism as an antecedent.

It should be clear from the discussion of language and literary interpretation that, given the projection in liberty of contract discourse of the self-present and private intent of the individual as a pure source for the era's representation of social life, two responses were possible with respect to the metaphors of space and time. On the one hand, a deconstructive approach could have proceeded to demonstrate that the meta-

142. Llewellyn, *Some Realism About Realism—Responding To Dean Pound*, 44 HARV. L. REV. 1222, 1222 (1931).

143. *See, e.g.*, Kitch, *The Intellectual Foundations of "Law and Economics,"* 33 J. LEGAL EDUC. 184 (1983); Mensch, *supra* note 92; Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983).

phors in the liberty of contract discourse that referred to something "out there" in fact had no positive content but instead were relational and socially created. The belief that the representational terms actually represented things existing independently of the representational practice would then be said to constitute "transcendental nonsense,"[144] the belief that *a priori* categories for perception and communication magically matched categories immanent in reality. On the other hand, a contextualist response would affirm the possibility of achieving determinate and neutral representation by changing the focus from intent to context, from the subject to the object. Here meaning would be found simply by displacing the temporal relation of the liberty of contract's spatial metaphors.

A deconstructive approach would focus on the transcendental subject. The contention would be that no such pure source is available as a basis for representational activity. The source, instead, is always already an effect, already differentiated by social practice and constructed by the representational practice itself. In our literary interpretation and rape law discussions, this approach suggested that the author of a text or the woman in a sexual relation could not be the pure and original source for the representational practice oriented toward "authorial intent" or "sexual consent." There is no purely private individual unaffected by the social representational practice, which is an inseparable part of the private "intent" or "consent." The earlier discussion suggested that the author's intent is itself formed through the medium of the external, absent, social representational categories in which he conceives and articulates the work; a woman's sexual consent occurs in the context of a social language of gender roles or in the context of social and contingent meanings of consent and coercion and thus cannot provide the source for that social practice.

Moreover, it was suggested in our literary theory and rape law discussions that the author's intent or the woman's consent could not be the source for representational practice in a second sense because intent and consent never "exist" separate from the representational practice itself. In this second sense, the intent or consent is not the self-present source for the representational practice, because the representational practice constructs what it purports to find outside of itself through its own social and contingent process of differentiation. A deconstructive approach would view the attempt to ground the representational practice in a pure source as a manifestation of the "metaphysics of presence," that is, taking socially constructed metaphors for the interpretation and differentiation of experience and reifying them into things actually existing prior to

144. Cohen, *supra* note 1.

the representation. This approach to the liberty of contract discourse would accordingly emphasize the inevitable ideological character of representational activity, the textuality of attempts simply to re-present social life through a purportedly pure medium. It would debunk the false sense of necessity inherent in the reification of representational terms.

One strand of realist practice reflected this deconstructive approach. Not surprisingly, it is this strand of realism that commonly was dismissed in mainstream legal discourse as nihilistic, morally relativistic, and nominalist.[145] It is this same strand that supports the claim of critical legal studies practitioners that they are the heirs of realism. This critical realism focused upon indeterminacy, contingency, and contradiction to debunk the claims of liberty of contract discourse that law merely re-presents and facilitates preexisting private will. Rather, many realists argued, the private will (or rights or legal rules) that was supposed to provide the source for the legal practice was itself an effect of the legal practice in both senses discussed above.

First, the critical argument went, the private sphere could not be prior to and the source of the public sphere because the private sphere already was constituted by the public sphere. For example, the bargaining power which influenced the contractual consent was itself not private, but the result of public power manifested in legal rules defining property and granting owners the power of exclusion. The property rights themselves reflected contingent and social decisions as to what to protect as property. They thus could not themselves be rationalized as flowing from and matching something "out there." The dichotomization and prioritization of free will and coercion in the liberty of contract discourse were similarly deconstructed by demonstrating they were merely relational in that free will was created by coercion.[146] Consent could not be taken as the self-present, private, and undifferentiated source for a contract. The self's consent was, in fact, shot through with the traces of the other; consent at the time of contracting was the derivative effect of the social, public power manifest in the privilege of the property owner to force the other to unpleasant alternatives. Private law therefore was con-

145. *See, e.g.*, L. FULLER, THE LAW IN QUEST OF ITSELF (2d ed. 1940); Cohen, *Justice Holmes and the Nature of Law*, 31 COLUM. L. REV. 352, 357-58 (1931); Dickinson, *Legal Rules: Their Function in the Process of Decision*, 79 U. PA. L. REV. 833 (1931); Fuller, *American Legal Realism*, 82 U. PA. L. REV. 429 (1934); Harris, *Idealism Emergent in Jurisprudence*, 10 TUL. L. REV. 169 (1936); Kantorowicz, *Some Rationalism About Realism*, 43 YALE L. J. 1240 (1934); *cf.* Mechem, *The Jurisprudence of Despair*, 21 IOWA L. REV. 669, 672 (1936); Miltner, *Law and Morals*, 10 NOTRE DAME LAW. 1, 8 (1934); Pound, *The Future of Law*, 47 YALE L.J. 1, 2 (1937); Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931).

146. "[T]he instances of more extreme pressure were precisely those in which the consent expressed was *more* real; the more unpleasant the alternative, the more real the consent to a course which would avoid it." Dawson, *supra* note 117, at 267 (footnote omitted).

cerned with the delegation of coercive power from the state to private parties. This coercive force established the context within which any consent or free will was manifested. There was, in short, no such thing as "private" law.

This strand of realist practice also reflected the second sense of deconstruction described above—the demonstration that the liberty of contract discourse actually constructed what it purported to represent. Deconstruction here consisted of demonstrating the circularity of legal reasoning: decisions which purported to proceed from the prior legal "rights" of the parties actually constructed the rights. Without the judicial enforcement of one or another party's right, he had no such legal right. "Rights" or "rules," it was argued, do not exist as things with positive content separate from the legal discourse, but rather are the result of judicial decisions and thus cannot be the ground for the decisions. All legal results were in this sense said to be the result of consequentialist policy, not derived from anything preexisting the decision itself.

Similarly, the determination whether coercion or consent existed in a particular instance could not flow from the "reality" of consent and coercion. Consent was whatever was not marked off as coercion in the legal discourse, and vice versa. Consent or coercion could not preexist a legal decision since they were created by the decision. And contractual intent or meaning was dependent on the legal representational practice for the same reason. The legal discourse constructed the meaning it purported to find outside of itself by treating only some possible manifestations of intent as relevant or irrelevant, to the exclusion of others. Drawing upon Hohfeld's work, the argument was deepened to demonstrate the contradictory nature of legal argument.[147] Given the zero-sum nature of legal exposures, every legal decision necessarily recognized a right to be free from harm or a privilege to harm, and nothing in the concepts of rights or privileges determined which should be recognized in any particular instance.

This deconstructive, debunking strand of realism seemed inconsistent with any liberal notion of a rule of law distinct from politics, or indeed with any mode of rational thought distinct from ideology, as it emphasized the ideological components of any analogical reasoning. Both the vertical move from the general rule to the particular case and the horizontal move from one case to another required mediation through a representational structure within which the particular was like

147. For Hohfeld's seminal text, see Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). *See also* Cook, Privileges of Labor Unions in the Struggle for Life, 27 YALE L.J. 120 (1917); Corbin, *Jural Relations and Their Classifications*, 30 YALE L.J. (1921).

the general or one case was like another. This introduced political and ideological social choices regarding the delineation and extension of representational categories which would define the bounds of similarity and difference. In place of determinacy and necessity signified by a realm of law separate from politics, this approach emphasized contingency and open-ended possibilities as it exposed the exercises of social power behind what appeared to be the neutral work of reason. It was deconstructive precisely to the extent that it exposed the contingent construction of the social world in the liberty of contract discourse that claimed to be reflective and re-presentational, a pure and passive medium rather than an active and political practice.

On the other hand, my discussions of language, literary theory, and rape law also suggest another critical stance with respect to the attribution in the liberty of contract discourse of a pure source of meaning in individual, private intent. This second approach concedes the inability to ground the meaning of expressions or events by focusing on the pure intent of subjects, but it does not go as far as the deconstructive conclusion that representational practice is inevitably indeterminate and ideological. Instead, the indeterminacy of language is taken to suggest a change in emphasis from intent to context, from the subjective to the objective, from language to something beyond language. At the beginning of this Article, this response to the indeterminacy and metaphoricity or representational practice was reflected in the attempt to determine the meaning of a text by reference to the context in which the text was created or the representational structures in which the author operated.[148] In the rape discussion, this type of analysis appeared in the attempt to determine whether a woman consented to intercourse by specifying the context in which the act of intercourse occurred.

This "constructive" response depends on a new metaphysics of presence. It categorizes context in the same manner that liberty of contract discourse formalized private intent. It assumes that context simply "exists" around social events separate from the representation of context in discourse. Context, this approach assumes, is itself a self-present and undifferentiated source for meaning rather than the derivative effect of the representational practice in which some elements of social life are said to constitute the context or structure to the exclusion of other aspects.

The metaphysics of contextual presence accordingly reverses the metaphor of subjective priority into one of objective priority. Thus meaning does not flow intrinsically from the words or the intent of the subject, but extrinsically from factors outside the subject which are seen

148. *See supra* pp. 1156-58.

to constitute subjective meaning. The inside, the text, is seen to originate in the outside, the context. This outside, as a self-present and undifferentiated source or origin, thus is taken as a transcendental object, existing prior to and separate from the social construction of context.

The second strand of legal realism takes this contextualist approach to the projection in liberty of contract discourse of the private self as the origin and source of social meaning. The demonstration that private contractual consent occurs within the context of coercive public rules that determine the bargaining power of the parties suggested in the constructive realist practice that the public is the origin of the private, the social is the origin of the individual, the other precedes the self, the national precedes the local, torts precedes contracts, and so on. In this strand of legal realist practice, the basic dichotomies of the liberty of contract discourse were not debunked on the basis that they constituted "transcendental nonsense." Instead, the constructive realist practice proceeded as if liberty of contract discourse simply had reversed the temporal metaphor. Accordingly, each of the liberty of contract metaphors was reordered to reflect this flip in the determinate ground for legal discourse from subjective intent to objective context.

In this strand of realist argument one finds assertions that the problem with the liberty of contract practice was that the law did not reflect the "actual conditions" of social life since it applied formalist reasoning in the face of the real facts.[149] The "actual conditions" or real facts were supposed to be self-present, separate from their representation in discourse, simply existing around people as an objectively definable and observable context. The implication was that one would get to these objective facts as soon as one had shorn (or washed in cynical acid) the subjective and value-laden *a priori* categories with which formalist practice approached social events.

Rather than look for the basis of social events in *a priori* antecedents, this second strand of realism conceived that social meaning could be determined by looking at the consequences of legal decisions. Rather than a transcendental belief in qualitative, categorical distinctions between, say, free will and coercion, the notion was that the categories constituted a continuum in which each element of the dichotomy was present in varying degrees.[150] The judicial method was therefore no longer seen exclusively as the either-or application of hard-edged rules to qualitatively different phenomena, but rather as the purposive, standard-oriented weighing of quantity, the balancing test. In contrast to the deconstructive strand of legal realism which denied that any social phenomena could be rationally or neutrally grouped under generalities, this

149. *See* Pound, *Mechanical Jurisprudence*, *supra* note 92.

150. *See, e.g.*, Holmes, *Privilege, Malice, and Intent*, 8 HARV. L. REV. 1 (1894).

approach implicitly accepted the possibility of neutral generality, insofar as it was ruled by objective reality. Moreover, the effacement of the subjective elements of social experience in the search for the real facts borrowed generally from the burgeoning literature of the social sciences. The positive paradigm of the split between facts and values was reflected in the call for an explicit legal science through which law would be guided by objective facts of social life. In this "constructive" realist practice, the reigning metaphor for the interpretation of social life was the fact/value dichotomy. This spatial metaphor, like the public/private metaphor in liberty of contract practice, was taken to signify a qualitative difference flowing from the objective nature of facts and the subjective nature of values.

It is this second strand of legal realist practice that has been incorporated into mainstream legal discourse. This second strand was less threatening to the legal world because its implication of a determinate, objective discourse for the representation of social life was amenable to the notion of a neutral and determinate rule of law. Under this conception, determinacy existed in consequences rather than antecedents. Objective consequential analysis, it was imagined, could ground law as an instrumentalist discourse which would carry out purposes and policies provided by elective bodies or made apparent by the social field itself. Law was "political," as the deconstructive arguments suggested, but "politics" itself was re-translated from the notion of wide-open, subjective ideology to closed, determinate issues of technique. Stability could be found in the science of consequences.

These two strands of realism are not exclusively or necessarily associated with particular realists. In most realist work, both strands are evident. And there is nothing to suggest that the realists themselves conceived of their practice in this way; while something like this division separated those who were thought to be "extreme" realists from others, I have found no discussion in realist work of the divergent political implications that I have associated with the two strands. Instead, the separation of these aspects of realism is a construct of an interpretive interest in evoking what strike me as two different feelings one gets from the realist work—on the one hand a sense of engaged and passionate struggle, and on the other hand a sense of dry and lifeless disengagement and observation. In the following pages, a few examples of realist work will be discussed in order to enrich the analysis of these two strands.

1. Realism as Critique

> *Legal concepts* (for example, *corporations* or *property rights*) are supernatural entities which do not have a verifiable existence except to the eyes of faith. *Rules of law*, which refer to these legal concepts, are not descrip-

> tions of empirical social facts . . . nor yet statements of moral ideals, but are rather theorems in an independent system. It follows that a *legal argument* can never be refuted by a moral principle nor yet by any empirical fact. *Jurisprudence*, then, as an autonomous system of legal concepts, rules, and arguments, must be independent both of ethics and of such positive sciences as economics or psychology. In effect, it is a special branch of the science of transcendental nonsense.[151]

Felix Cohen's 1935 article, *Transcendental Nonsense and the Functional Approach*, exemplifies many of the deconstructive modes of legal realist practice discussed above. Cohen's main critical argument against the then traditional jurisprudence was that legal concepts such as "corporation," "trade name," "fair value," and "due process," utilized in judicial decisions as if they were real things, actually were empty abstractions. These representational terms did not signify anything when used in judicial decisions because they could themselves only be defined in terms of legal consequences. By what Cohen termed "thingifying" (what I have referred to as "reifying") the concepts, the decisions purported to proceed on the basis of something external to the decisions themselves, as if, for example, the invocation of "corporation" referred to something out there in the world separate from the judicial determination whether a corporation existed.[152] Accordingly, he argued, those judicial decisions were entirely circular.

Cohen's first example was the case of *Tauza v. Susquehanna Coal Co.*,[153] in which the issue was whether the plaintiff could sue the Pennsylvania chartered corporation in New York, where it did some business. Cohen wrote, "on the basis of *facts* revealed by such an inquiry, and on the basis of certain political or ethical *value judgments* as to the propriety of putting financial burdens upon corporations, a competent legislature would have attempted to formulate some rule as to when a foreign corporation should be subject to suit."[154] Cohen criticized the court for failing to consider these practical issues, and instead attempting to resolve the issue by asking " 'Where is a corporation?' "[155] That formulation was a metaphysical question "without roots in reality" since it was not amenable to "empirical observation."[156] The court's approach, by assuming that the corporation "travels about from State to State," was "supernat-

151. Cohen, *supra* note 1, at 821.

152. Cohen provides an example of "thingifying": "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, 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." Cohen, *supra*, note 1, at 811.

153. 220 N.Y. 259, 115 N.E. 915 (1917).

154. Cohen, *supra* note 1, at 810.

155. *Id.*

156. *Id.* at 810-11.

ural" as it "thingified" the corporation in order to conclude that it was "in" New York[157]. Since language is " 'primarily a prerational function,' "[158] Cohen asserted, the language of the opinion must be taken as a myth "inducing certain emotions and attitudes in a political or a judicial audience."[159] Cohen argued that the "thingification" of the metaphoric representational categories of legal discourse served to suppress the social power inherent in the "rational" application of legal rules.

> When the vivid fictions and metaphors of traditional jurisprudence are thought of as reasons for decisions, rather than poetical or mnemonic devices for formulating decisions reached on other grounds, then the author, as well as the reader, of the opinion or argument, is apt to forget the social forces which mold the law and the social ideals by which the law is to be judged.[160]

Cohen concluded that traditional legal reasoning was circular because there is no preexisting, positive content to abstractions like "corporations" or "unions." Since those metaphors were socially constructed in legal discourse, they had no content separate from the discourse. Their content depended on what judges decided to include within them. Thus, when the United Mine Workers made the "metaphysical argument"[161] in the *Coronado Coal*[162] case that the union was not subject to tort liability for strike damage to the employer because, as an unincorporated association, it was not a "person," the argument ceased to carry weight when the Court declared it was subject to suit.[163] Cohen pointed out that the Court argued that the union could be sued because " 'it is, in essential respects, a person, a quasi-corporation.' "[164] But since the metaphors "person" and "quasi-corporation" had no content independent of the consequences attached by the law, "[t]he realist will say, 'a labor union is a person or quasi-corporation because it can be sued; to call something a person in law, is merely to state, in metaphorical language, that it can be sued.' "[165] As Cohen pointed out, the Court's formulation depended on the reification of "union" and "person." It therefore appeared to justify its conclusion as following from some objective attributes of corporation existing independently of the decision itself.[166] But the reification suppressed value questions since such attributes are not objective; they "*can not be confirmed or refuted by positive evidence or by*

157. *Id.* at 811.
158. *Id.* at 812 (footnote omitted) (quoting E. SAPIR, LANGUAGE, at 14 (1921)).
159. *Id.*
160. *Id.*
161. *Id.* at 813.
162. United Mine Workers of America v. Coronado Coal Co., 259 U.S. 344 (1922).
163. Cohen, *supra* note 1, at 813.
164. *Id.*
165. *Id.*
166. *Id.* at 814.

ethical argument."[167] On the other hand, putting the Court's conclusion in the realist formulation made clear that the decision did not constitute its own justification since it stated a tautology. "[T]he question of whether the action of the courts is justifiable calls for an answer in non-legal terms. To justify or criticize legal rules in purely legal terms is always to argue in a vicious circle."[168]

This analysis of the circularity of the attempt to reach legal conclusions based on concepts which themselves have meaning only in legal terms was next applied by Cohen to the identification of property in legal discourse. Cohen's doctrinal example was the issue of the protection of trade names. According to Cohen, the law of trademark and tradename protection was based on the " 'thingification' of property"[169] whereby courts could avoid "taking sides upon controversial issues of politics and economics" by appearing as "not creating property, but . . . merely *recognizing* a preexistent Something."[170] As Cohen described it, the standard justification advanced for the legal protection of trademarks and tradenames was that they were entitled to protection because they were a thing of value and things of value were property. Thus the creators of the trademarks and tradenames were protected against third parties who sought to deprive them of the property.[171] Such an argument purported to base legal protection on a source outside of and independent of the legal conclusion—economic value. This economic value was taken to exist in the "private" sphere, separate from and prior to its re-presentation in the legal discourse.

But such reasoning constituted a "vicious circle,"[172] because there is no such economic value available as the source for the legal rule. Economic value itself is a function of the legal protection the trademark will receive. If it is not legally protected as a particular firm's property, it will have no more economic value than any other common mode of advertising or packaging. Since in such circumstances the trade name would have no economic value to any particular firm, it would not be judicially regarded as constituting property.

> In other words, the fact that courts did not protect the word would make the word valueless, and the fact that the word was valueless would then be regarded as a reason for not protecting it. Ridiculous as this vicious circle seems, it is logically as conclusive or inconclusive as the opposite vicious circle, which accepts the fact that courts do protect private

167. *Id.* (emphasis in original).

168. *Id.* "When the court rejected the argument and held the union liable, the union became a person—to the extent of being suable as a legal entity . . . ." *Id.* at 813.

169. *Id.* at 815.

170. *Id.*

171. *Id.*

172. *Id.*

> exploitation of a given word as a reason why private exploitation of that word should be protected.[173]

Here Cohen's argument, if read in the terms with which we described the liberty of contract discourse, can be seen to challenge the public/private metaphor for the representation of social life. It suggests that the private realm projected by traditional jurisprudence as the origin of its practice which its discourse re-presented actually is an effect of the public legal discourse itself. The private sphere which is to provide the ground for the public rules itself is constituted by the public rules. Since "private" economic value is inseparable from the "public" legal rules, the legal rules can not simply re-present "Something" inhering in reality itself. The private sphere, which liberty of contract discourse had projected as the source for legal representation, is actually the derivative effect of the representational activity. The purported neutrality of merely representing suppressed the political choices inherent in the fact that such representation is social and contingent, not determined by any source outside of itself.

According to Cohen, once "property" and "economic value" are seen as social constructions rather than immediate, self-present signifieds, the social choices inherent in the decision to grant property protection to trademarks and tradenames becomes apparent. A whole range of factual questions and policy issues are brought to the fore: Is there an unlimited supply of attractive names for commodities? If not, should the first occupier be granted the commercial advantage of a monopoly in the name without payment to the state? Is such a "homestead" right to the language necessary as an incentive for the first occupier to choose an attractive name? Does differentiation by product name and advertising help the consumer buy wisely or work to deceive consumers?

> Without a frank facing of these and similar questions, legal reasoning on the subject of trade names is simply economic prejudice masquerading in the cloak of legal logic. The prejudice that identifies the interests of the plaintiff in unfair competition cases with the interests of business and identifies the interests of business with the interests of society . . . will not be recognized or formulated so long as the hypostatization of "property rights" conceals the circularity of legal reasoning.[174]

In *The Ethical Basis of Legal Criticism*,[175] Cohen generalized his argument that any legal reasoning which presented itself as based on something outside of itself necessarily reified its socially created metaphors. He argued that all legal decisionmaking is political in that all decisionmaking requires moral and ethical judgments which are not dic-

173. *Id.*

174. *Id.* (footnotes omitted).

175. 41 YALE L.J. 201 (1931).

tated by any preexisting rule or case. According to Cohen, since a judicial decision is a command, a fact in the world rather than a proposition about the world, the attributes of evaluation that apply to propositions about the world, such as "truth" or "consistency," are inapposite.[176] And even if such attributes could apply to the facts of cases, they could not reveal how to decide them, for consistency is relevant "only as an indication of the interest in legal certainty, and its value and significance are ethical rather than logical."[177] The model was false that portrayed law as the application of rules which are followed until they run out, when the "emergency factor" of legislative policy is utilized. The decision to follow a rule simply because it is a rule was itself a policy decision that "in every case the following of precedent or statute does less harm than any possible alternative."[178]

Cohen further argued that the notion was false that precedent contains rules or holdings with which a decision in any particular case could be logically consistent or inconsistent. Any formulation of such a rule was an ethical interpretation of the facts of the case, not directed by the facts themselves. It depends on social and contingent categories for grouping similarity and difference, and in turn relevance and irrelevance.

> The ethical responsibilities of the judge have so often been obscured by the supposed duty to be logically consistent in the decision of different cases that it may be pertinent to ask whether any legal decision can ever be logically inconsistent with any other decision. In order to find such an inconsistency we must have two judgments, one for the plaintiff and one for the defendant. But this means that we must have two cases, since a second judgment in the same case would supersede the first judgment. And between the facts of any two cases there must be some difference, so that it will always be logically possible to frame a single legal rule requiring both decisions, given the facts of the two cases. Of course such a rule will seem absurd if the difference between the two cases is unimportant (e.g., in the names or heights of the two defendants). But whether the difference is important or unimportant is a problem not of logic but of ethics, and one to which the opposing counsel in the later case may propose opposite answers without becoming involved in self-contradiction.[179]

According to Cohen, any set of judicial decisions will be "consistent" with an "infinite number of different general rules . . . . Every judicial decision is a choice between different rules which logically fit all past decisions but logically dictate conflicting results in the instant

176. *Id.* at 214-15.

177. *Id.* at 215.

178. *Id.*

179. *Id.*

case."[180] The contingency of the metaphors used to categorize legal decisions and to draw analogies between them belie the pretension that judicial decisions are dictated by objective rules. Although the traditional concept of the rule of law requires that like cases be treated alike, in fact no two social events or cases are ever exactly alike. Every assertion that one case is dictated by a prior rule suppresses the fact that the treatment from case to case is based on rhetoric, on analogies not grounded in logic or "reality." Underlying the practice of analogizing between cases is a policy judgment that the differences between the cases are not sufficient to warrant different treatment. From Cohen's perspective, the liberty of contract discourse suppressed this metaphoric ground by reifying its metaphors for the interpretation and representation of social events, in the belief that the qualitative distinctions drawn in the legal rules reflected "Something" out there in social reality.

Of course, Cohen was not the first to make these deconstructive points with respect to legal reasoning. As early as 1897, Holmes had argued that the liberty of contract discourse could not be based on the private, subjective will of the contracting parties.[181] The objective theory of contractual interpretation provided that the court would interpret the contract in terms of what the words objectively "meant," regardless of whether such an interpretation matched either party's actual subjective understanding. Accordingly, Holmes concluded, "all contracts are formal . . . the agreement of two sets of external signs" that gain significance only in terms of the public, objective meaning which the law attaches to the signs. And these meanings are themselves not the product of an objective logic, but rather "a judgment as to the relative worth and importance of competing legislative grounds. . . . The duty (to weigh competing policies) is inevitable."[182]

The same deconstructive perspective used by Holmes and Cohen to debunk liberty of contract discourse was used in other realist work directly against the dominant metaphor of the liberty of contract discourse, the public/private distinction. The coherence of the liberty of contract practice depended on the notion that the private sphere was separate from and prior to the public sphere. Robert Hale's 1923 article, *Coercion and Distribution in a Supposedly Non-Coercive State*,[183] vividly argued that the private sphere was itself a derivative effect of the public

180. *Id.* at 216.

181. Holmes, *The Path of the Law*, 10 HARV. L. REV. 451 (1897); *see also* Holmes, *supra* note 150 (each tort case necessitates the policy choice between the contradictory claims of the freedom of action and the security from injury which cannot be resolved by *a priori* rules of law or by reference to subjective characteristics of the actors, such as intent).

182. Holmes, *The Path of the Law*, *supra* note 181, at 464, 466.

183. 38 POL. SCI. Q. 470 (1923) [hereinafter cited as Hale, *Coercion*]; *see also* Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149

sphere, rather than the other way around. Hale also demonstrated the relational, rather than positive, character of legal concepts such as free will and coercion which had been utilized to define the private sphere.

As has been seen, the liberty of contract discourse was based on the temporal metaphor that the subject was prior to the object, intent was prior to the context, private was prior to the public, free will was prior to coercion, and, doctrinally, contracts was prior to torts. Hale, however, demonstrated that each of the temporal metaphors could be displaced. In summary, his argument was that contracts could not be seen as the reflection of the free will of private individuals, because those individuals agreed to contractual relations only in the context of a preexisting regime of property rules which determined their relative bargaining power. Property was conceptually prior to contract. Moreover, the property rules themselves gave the property owner the right to coerce nonowners of the property. Accordingly, each contract was the result of mutual coercion rather than free will. Also, the property rules were not dictated by any "natural" division of things in the world, but were created by contingent public choices. According to Hale, property was prior to contract, public was prior to the private, and context was prior to intent.

Hale's argument explicitly challenged laissez faire theorists who advocated nonintervention in "the natural working of economic events."[184] Hale contended that there is no such natural or private market. In the laissez faire doctrine, Hale asserted, government was simply to enforce contracts and protect property, to prevent coercion exercised by one private person over another, to protect incompetents, and to provide for the public good. This scheme appeared to expose individuals to a minimal amount of coercion by the government and no coercion by other private individuals.[185] But, Hale argued, the scheme necessarily exposed individuals to coercion from both private individuals and the government. Once a legal regime was in place, every market reflected coercive social power manifest in the legal rules of property and exchange. "The systems advocated by professed advocates of laissez-faire are in reality permeated with coercive restrictions of individual freedom and with restrictions, moreover, out of conformity with any formula of 'equal opportunity' or of 'preserving the equal rights of others.' "[186]

The protection of any property right by the government, Hale stated, constituted the coercion of nonowners because it forced them not to use the property without the owner's consent. Every right to property

(1935); Hale, *Value and Vested Rights*, 27 COLUM. L. REV. 523 (1927); Hale, *Rate Making and the Revision of the Property Concept*, 22 COLUM. L. REV. 209 (1922).

184. Hale, *Coercion*, *supra* note 183, at 470.

185. *Id.*

186. *Id.*

entails a corresponding duty on the part of others not to use the property. This imposition of legal duties amounted to the regulation of nonowners of the property, in contrast with the nonregulation imagery of laissez faire discourse.[187] Moreover, since the owner in his discretion could absolve the duty of noninterference which the law imposes on nonowners, the law enforced the subordination of the will of the nonowner to the will of the owner.[188]

Similarly, Hale argued, the employment contract was necessarily the result of private coercion enforced by law, rather than the reflection of the free will of the parties. Here he challenged the conceptual and metaphoric underpinnings of liberty of contract discourse, which justified the striking down of ameliorative labor legislation to protect of the private free will of employers and employees. Hale contended that the employment agreement was a function of the coercion established by public rules of property. If the worker refused to comply with a particular owner's conditions for lifting the duty with respect to the owner's money, he had to either comply with another employer's commands or go without wages. "If the non-owner works for anyone, it is for the purpose of warding off the threat of at least one owner of money to withhold that money from him (with the help of the law)."[189] If the worker refused "to yield to the coercion of any employer,"[190] and had no money of his own, the law would compel him to starve unless he could produce his own food. "While there is no law against eating in the abstract, there is a law which forbids him from eating any of the food which actually exists in the community—and that law is the law of property."[191]

Accordingly, the source of the economic context in which the employee contracts with the employer is not, as imagined in the liberty of contract representational practice, some "natural" market existing independently of law as the result of private contracts. "It is the law that

187. *Id.*

188. That is, the refusal of the owner to lift the legal duty "may . . . have unpleasant consequences to the non-owner—consequences which spring from the law's creation of a legal duty. To avoid these consequences, the nonowner may be willing to obey the will of the owner, provided that the obedience is not in itself more unpleasant than the consequences to be avoided." *Id.* at 472. In Hale's example, when the possessor of a bag of peanuts is granted a property right by the law, nonowners come under a correlative duty to refrain from eating the peanuts. The law coerces them not to eat the peanuts without the owner's permission. If they want the peanuts, the consequence of the legal duty is unpleasant. If they decide to accede to the will of the owner, and pay him the five cents he demands to lift the duty, it is only because the unpleasant consequence of parting with the five cents is less unpleasant than going without the peanuts. In neither case is the private decision independent of the public rules of law which give the owner the right of exclusion. Such rights of exclusion provide the coercive context in which the individual choice between the nickel and the bag of peanuts is exercised. *Id.*

189. *Id.*

190. *Id.*

191. *Id.*

coerces him into wage-work under penalty of starvation—unless he can produce food."[192] And the employee's ability to produce food in turn was dictated by the "law which forbids him to cultivate any particular piece of ground unless he happens to be an owner."[193] Similarly, his ability to avoid wage work by producing and selling products was constrained by the need for machinery with which to produce goods in sufficient quantity to support himself. But with respect to this kind of property as well, the law granted to the owner the right to set terms for lifting the nonowner's duty of noninterference. Usually such terms included an abandonment of any claim to ownership of the resultant goods. "It is the law of property which coerces people into working for factory owners—though, as we shall see shortly, the workers can as a rule exert sufficient counter-coercion to limit significantly the governing power of the owners."[194]

Hale contended that the political and legal representation of this mutual market coercion as freedom derived from the common belief that anything that could be called "coercion" should be prohibited. Distinctions were therefore made between coercion and other forms of influence. For example, Hale noted, "promises" and "threats" were distinguished on the basis that a threat was thought to constitute a stated intention to do a positive harmful act unless paid, while a promise was thought to be an expressed intention to act beneficially for money. But failures to act also could be seen as threats. If one asked for money to obey a duty already imposed by law (such as the duty of reasonable care or the duty to fulfill a contractual obligation), it was considered a coercive threat despite its form as an omission to act beneficially rather than as a positive harmful act.[195] But the distinction between threats and promises thus could not provide the basis for legal duties, because the distinction itself depended on the prior existence of legal duties.

Here, Hale asserted, the circularity of reasoning on the basis of any distinction between coercion or free will was revealed.

> If an act is called "coercion" when, and only when, one submits to demands in order to prevent another from violating a legal duty, then every legal system by very definition forbids the private exercise of coercion—it is not coercion unless the law does forbid it. And no action which the law forbids, and which could be used as a means of influencing

192. *Id.* at 473.

193. *Id.*

194. *Id.* Hale emphasized the public, coercive nature of the owner's power by comparing it to a tax on the products of, say, a factory. The owner's right to exclude consumers from using his products unless they pay him constituted compulsion enforced by law. It was the same kind of compulsion as a sales tax on products such as tobacco. In either case, the "tax" can be avoided by going without the item. While "the penalty for failure to pay" is light in each case, "it is sufficient to compel obedience in all those cases where the consumer buys rather than go without." *Id.*

195. *Id.* at 476.

> another, can fail to be coercion—again by definition. Hence it would be idle to discuss whether any legal system forbids private coercion. And if an act is called "coercion" when and only when, one submits to demands in order to prevent another from violating a *moral* duty, we get right back to the use of the term to express our conclusion as to the justifiability of the use of the pressure in question; with the ensuing circular reasoning of condemning an act because we have already designated it "coercive."[196]

Since the distinctions between coercion and free will do not refer to anything except legal decisions regarding permissible kinds of pressure, the entire distribution of income in society can be seen as the result of legally sanctioned power of coercion. There is no "natural" or private independent basis upon which to rest the "protection" of property, the enforcement of contracts, or the "inevitable inequality of future" at issue in *Coppage*.[197] Consequently, the laissez-faire claim that the government should be constrained from "intervening" in the economy was false. There is no private economy "free" from public constraint. The economy necessarily was already the derivative effect of the constraint of public coercion manifest in the decision to create a duty on the part of nonowners. And, following Hale's argument, there was no "objective" basis upon which to determine what is or is not property subject to these rights and duties. The property concept had no determinate meaning or positive content. It was a contingent decision whether the owner of the factory machinery should also own the products of the factory, or whether the owner also should control the management of the plant.

> [T]he 'productivity' of each factor means no more nor less than this coercive power. It is measured not by what one actually *is* producing . . . but by the extent to which production would fall off if one left and the marginal laborer were put in his place—by the extent, that is, to which the execution of his threat of withdrawal would damage the employer. Not only does the distribution of income depend on this mutual coercion; so also does the distribution of that power. . . . This power is frequently highly centralized, with the result that the worker is frequently deprived, during working hours and even beyond, of all choice over his own activities.
>
> To take this control by law from the owner of the plant and to vest it in public officials or in a guild or in a union organization elected by the workers would neither add to nor subtract from the constraint which is exercised with the aid of the government. It would merely transfer the constraining power to a different set of persons. . . . Whether Mr. Carver's scheme of things would be more or less "free" (in the sense of giving people greater power to express their wills) than would a state of

196. *Id.*

197. *See supra* text accompanying note 123.

> communism, depends largely on the economic results of communism respecting the character of factory work. Neither can be said to be any "freer" than the other in the sense that it involves less coercion on the part of other human beings, official or unofficial.[198]

The radical nature of the deconstructive strand of realism is suggested by Hale's conclusion that, with respect to productivity or freedom, there is no qualitative difference between communism and capitalism. To be sure, Hale was no communist. And Hale was writing in the context of a political debate between a strict laissez faire approach and what we today call the social welfare state. But his arguments against the claim that private ownership would increase freedom or productivity went well beyond a critique of the laissez faire approach. His arguments suggested that no instituted social order rationally could be legitimated by appeals to freedom or efficiency. If free will, coercion, productivity, and property were all reified metaphors, none was available to justify a particular state of affairs.

To be sure, Hale's arguments effectively debunked the liberty of contract claim that law protects a private realm of liberty by re-presenting a prior, self-present, and undifferentiated private will. Both at the constitutional and the common law levels, liberty of contract discourse was taken as distinct from political practice to the extent that the law was seen to proceed from a source outside of itself and neutrally to enforce the prior will of private actors. So long as the critical polarities between public and private, and free will and coercion, referred to something "out there," separate from the manner in which they were represented in legal discourse, the judicial enforcement of some contracts freely consented to (which re-presented the private will) and the refusal to enforce other contracts (where the will was absent) could be seen as the neutral and apolitical ratification and representation of private will rather than as regulation according to public rules. Similarly, the judicial enforcement of some legislation, which re-presented the prior will of the private actors who brought the state into being, and the refusal to enforce other legislation, which was coercive to the extent it invaded the private sphere, could be seen as neutral and apolitical to the extent that public and private characteristics were distinguishable.

But the implication of Cohen's and Hale's arguments extended beyond an attack on the specific liberty of contract metaphysics. Their contention was that the distinctions between the terms public and private, free will and coercion, were constructed in the very opinions which purported to proceed from them. Free will and coercion did not exist "out there" in the world in categorical form, nor were they logically deducible from the concepts themselves. Instead, free will and coercion

198. Hale, *supra* note 183, at 477-78.

were rhetorical symbols which only had meaning as the opposite of the other term, and thus free will was whatever was not called coercion and vice versa. The "private" sphere of contract was permeated with the "public" rules of property; the contracting party's free will contained inseparable traces of the absence of coercion as socially defined. There was no pure presence to any of the terms that did not refer outside of itself to the absence of its other.

Combining the arguments of Hale and Cohen and generalizing from them, the critical realist approach could be seen as a general affirmation of contingency in social relations. Any representation of social relations, it could be argued, was necessarily social and contingent given that both the perception of and communication about these relations were shaped by the conventional metaphors for organizing the texture of experience. Cohen's image that a rule could always be found within which any two legal results could be seen as consistent suggested the plasticity of the categories for interpreting social events. This analytic free-play of terms like "public"/"private" or "free will"/"coercion" was only limited by the political and contingent convention that some differentiations between legal results were relevant and others were not. But determinations of relevancy could not be generated from the terms themselves. Instead, socially instituted conventions froze the relational play of the terms of the categories. These conventions denied their own plasticity by implicitly affirming the immediacy of the relation between the representational term and the "Something" out there to which the term referred. As Cohen concluded, legal discourse was mythical.

In the terms of this deconstructive realism, when issues in legal argument were posed in terms of freedom, productivity, or regulation, they were not simply ideologically based; they were incoherent. The terms did not refer to anything except their relational play within the representational discourse. Thus neither political nor legal argument could proceed by determining the absence or existence of one of these factors, because they did not "exist" independent from the social construction of their boundaries in the legal discourse. It was not simply a matter of comparing laissez faire and regulation, capitalism and communism, free will and coercion, or public and private according to the criteria of freedom and productivity. Ideological differences did not consist merely in applying different values to shared criteria. The criteria themselves were part of the ideological struggle. In other words, the deconstructive realist arguments did not imply merely that the social welfare state was preferable to the laissez faire state, but rather that the very structure of the debate, set in terms of a choice between the intervention of collective and coercive power and the free play of the market, was incoherent. The market or legal rules or individual rights were insepara-

ble from collective and coercive power, whether such power was manifest in the context of publicly defined rules of property, or in the objective rules of contractual interpretation which necessarily saw "intent" from the "outside" according to the social signification practice, or in the formal doctrines distinguishing duress from free will.[199]

Hale argued that private property had no necessary relation with capitalist ownership of the products of factories. Cohen contended that private property could not be based on the preexisting economic value of an interest. The contrary assertion that the metaphors of legal discourse could re-present preexisting social reality was, in terms of our language discussion, an assertion of a presence unmediated by the differential play of contingent social practices. But any such presence contained traces of its differentiated social construction. The "private" contractor acted on the basis of absent public rules which established the context in which intent was manifest. Contractual assent therefore was never the pure representation of the self-present individual; it was always permeated with the social power manifest in the legally regulated context. The private realm never "existed" separate from social regulation; it was created by that regulation. The terms contract, corporation, free will, coercion, regulation, and the rest had no meaning, no positive content, separate from the relational play within the legal discourse where they were differentiated. Each metaphoric connection drawn in the liberty of contract discourse could be burst apart, deconstructed, as each was revealed to be social and contingent.

But these arguments applied not only to the formalism of the liberty of contract era. They suggested that the law/politics distinction was itself dependent on the myth of reification. There could be no rational, as opposed to ideological, content to legal reasoning once the inevitably contingent and indeterminate character of the representation of social events was revealed. Legal reasoning required that the events be grouped into general categories of similarity and difference. But all such categories, according to the critical realist arguments, were simply rhetorical; they were not determined by any objective reality. Since the rhetorical categories themselves had no positive content, the application of the categories to particular events necessarily involved political and ideological choices. This critical stance suggested the indeterminacy of all representational activity and the political nature of "rational" or "legal" discourse. The deconstructive strand of realism thus made the serious political charge that all legal rationalizations offered for the existence of a

199. *See supra* text accompanying note 48. Many of the critics of the liberty of contract practice focused on the objective theory of contract interpretation to debunk that practice's pretension that it merely ratified individual intent. *See, e.g.*, Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 575-78 (1933); Holmes, *supra* note 181.

particular state of affairs were ideological myths which denied their own contingency and the contingency of the social relations which they purported merely to represent. These rationalizations had no inherent necessity. No apolitical reason could dictate determinate and neutral resolutions of social conflict. Things could be otherwise.

2. *Realism as Science*

> [T]hose involved are folk of modest ideals. They want law to deal . . . with things, with people, with tangibles, with *definite* tangibles, and *observable* relations between definite tangibles—not with words alone; when law deals with words, they want the words to represent tangibles which can be got at beneath the words, and observable relations between those tangibles. They want to check ideas, and rules, and formulas by facts, to keep them close to facts. They view rules, they view law, as means to ends; as only means to ends; as having meaning only insofar as they are means to ends. They suspect, with law moving slowly and the life around them moving fast, that some law may have gotten out of joint with life. This is a question in the first instance of fact: what does law *do*, to people, or for people? In the second instance, it is a question of ends: what *ought* law to do to people, or for them?[200]

The critical strand of realist practice emphasized contingency and indeterminacy, implicitly denying the possibility of any re-presentation of social life that was not an interested interpretation. The representational metaphors of free will and coercion, public and private, individual and social were incoherent because neither side of the dichotomy had meaning without the absent other. Their coherence in mainstream discourse depended on their reified association with particular groups of experiences. This reification formed the metaphysical underside of the myth that social relations deemed in the "private" realm were derived from individual free will.

The constructive side of realist practice, as reflected in the above excerpt from Llewellyn's *Some Realism About Realism—Responding to Dean Pound*, contradicted these aspects of the liberty of contract discourse critique. Rather than pursue the notion that all representation is political and interested, that knowledge and power are inseparable, Llewellyn's rhetoric sought a new source for "representation" in the "tangibles which can be got at beneath the words." The image of such positive, determinate realities "beneath" the "words alone" suggested a way to reconstruct legal knowledge around a common and undifferentiated ground, as well as a way to identify and limit the indeterminacy that the deconstructive critiques of traditional legal discourse had identified. While there was no determinate content to the "words alone," and thus

200. Llewellyn, *supra* note 142, at 1223.

the "paper rules"[201] of law could always be interpreted to dictate contradictory results in particular cases,[202] the facts were "definite," "tangible," "observable," and a question of the "is" rather than the "ought." In short, the facts were positive, out there as a substantial plenitude rather than merely the projection of a representational discourse of words.

Moreover, the image of facts containing a substantial, positive being separate from "words" was reinforced by Llewellyn's metaphor of distance. The verbal superstructure of "ideas, and rules, and formulas" could be "close to facts" or far from facts; the "words alone," devoid of content and determinacy, were free-floating. On the other hand, facts, the content, were self-present, there somewhere, and accordingly available as an orienting point for determining accuracy, viewed as the proximity to the source, of the words. While "words" were inscribed with the differentiability of linguistic practice, facts existed separate from this social inscription.

According to this approach to the liberty of contract discourse, the deconstructive critiques applied only to something called "formalism," a practice in which the verbal and conceptual categories for the legal representation of social life had gotten too general and abstract, had floated too far from the facts. The "old categories . . . are all too big to handle. They hold too many heterogeneous items to be of any use."[203] In formalist practice, according to the constructive strand of realist practice, the "words alone" had been treated as if they had meanings in themselves rather than as re-presentations of elements of "real," observable experience. Formalism mistook the words or rules, the forms of representation and discourse, for the content of reality. But since "the classification of raw facts is largely an arbitrary process," the formalist judges' "refusal to look beyond words to things" resulted in "uncertainty."[204] The solution was "narrowing the categories of description"[205] to relate them directly to the positive content which they signified, to ensure that the categories of legal re-presentation did not get "out of joint with life."[206]

In Llewellyn's conception, the indeterminacy of legal argument resulted from the lack of congruence between verbal legal categories and

201. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431, 451 n. 18 (1930).

202. Llewellyn, *supra* note 142, at 1239 (citing as demonstrations W.W. Cook, *The Utility of Jurisprudence in the Solution of Legal Problems*, in 5 LECTURES ON LEGAL TOPICS, ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK (1923-24) 337 (1928); Powell, *Current Conflicts Between the Commerce Clause and the State Police Power (pt. 2), 1922-1927*, 12 MINN. L. REV. 470 (1928)).

203. Llewellyn, *supra* note 201, at 457.

204. Llewellyn, *supra* note 142, at 1253.

205. *Id.* at 1250.

206. *Id.* at 1223.

the underlying phenomena they represented. Judicial opinions purported to set forth the reasons for the decision, but in fact they were largely post-hoc rationalizations that had no necessary relationship to the process by which the case was decided. Instead, the opinions were "intended to make the decision seem plausible, legally decent . . . indeed, legally inevitable. . . . But the line of inquiry via rationalization has come close to demonstrating that in any case doubtful enough to make litigation respectable the available authoritative premises . . . are at least two, and that the two are mutually contradictory as applied to the case at hand."[207] In other words, "deduction does not solve cases, but only shows the effect of a given premise; and if there is available a competing but equally authoritative premise that leads to a different conclusion—then there is a choice in the case; a choice to be justified; a choice which *can* be justifed only as a question of policy—for the authoritative tradition speaks with a forked tongue."[208] Therefore, Llewellyn stated, the realists believed in the "worthwhileness of grouping cases and legal situations into narrower categories . . . connected with the distrust of verbally simple rules—which so often cover dissimilar and nonsimple fact situations."[209]

Indeterminacy accordingly was confined to the "words alone," the "available authoritative premises" in "traditional legal techniques." Determinacy could be achieved by focusing on the objectively observable tangibles presented in the cases, which determined the true similarity or difference that the legal categories obscured. Legal activity then could be seen as determinate to the extent that it was a derivative function of these facts. "[T]he search is for correlations of fact situation and outcome which . . . may reveal *when* courts seize on one rather than another of the available competing premises."[210]

The image of determinacy resting on a correlation of "fact situation and outcome" suggested a way to define the law as the pursuit of one or another social policy. While "the standard authoritative techniques of dealing with precedent" left a "leeway in interpretation of precedent . . . nothing less than huge . . . . only policy considerations and the facing of policy considerations can justify 'interpreting' (making, shaping, drawing conclusions from) the relevant body of precedent in one way or another."[211] A policy focus would not be limited to the formal parties to the case, but would look to the "effects of rules on parties who not only are not in court, but are not fairly represented by the parties who are in

207. *Id.* at 1239.
208. *Id.* at 1252.
209. *Id.* at 1237.
210. *Id.* at 1240.
211. *Id.* at 1253.

court."[212] These effects, since they were observable, could form the basis for knowledge as opposed to mere speculation.

The basis for this true legal knowledge of the world was the observable facts in the world, separate from their subjective components. What mattered about legal decisions was the conjunction of facts and observable official action (and thus the focus on the administration of law and remedies as opposed to doctrine). To the extent that an explanation of law matched with this correlation, it re-presented the law. The judge's opinion, the subjective account of the reasons for the decision, was simply a superstructure obscuring the underlying animating structure of determinacy. Her "reasons come after action as explanations instead of before action as determining factors. . . ."[213] Her action was not subjectively determined by words, but rather by objective context.

This notion of knowledge independent of "mere words" depended not only on an effacement of the subjective elements in law, for example, the rationalizations offered by the judge, but also on the suppression of the subjective elements brought in by the observer. Llewellyn accepted Pound's phrasing that "fidelity to nature, accurate recording of things as they are, as contrasted with things as they are imagined to be, or wished to be,"[214] characterized realist approaches. The "traditional approach is in terms of words . . . [i]f nothing be said about behavior, the *tacit* assumption is that the words do reflect behavior, and if they be the words of rules of law, do influence behavior."[215] The traditional legal discourse falsely represented social relations by describing them in terms of legal categories which did not correspond to the "things as they are,", but which purported to reflect reality. For example, the association of free contractual will with the lack of any of the attributes associated with the definition of duress mistook the conceptual category of free will in the legal differentiation with the actual existence of free will in the world.

Accordingly, Llewellyn asserted that one of the characteristics distinguishing the realists was

> the *temporary* divorce of Is and Ought for purposes of study. By this I mean that whereas value judgments must always be appealed to in order to set objectives for inquiry, yet during the inquiry itself into what Is, the observation, the description, and the establishment of relations between the things described are to remain *as largely as possible* uncontaminated by the desires of the observer or by what he wishes or thinks ought (ethically) to be.[216]

In terms of our linguistic discussion, Llewellyn's conception of lan-

212. *Id.* at 1255.
213. *Id.* at 1224.
214. *Id.* (quoting Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931)).
215. Llewellyn, *supra* note 201, at 443.
216. Llewellyn, *supra* note 142, at 1236.

guage and representational practice attempted to achieve determinacy by shifting the focus from the signifier, the words, to the signified, the concepts or things that were supposed to exist apart from the indeterminate and arbitrary representational practice. Regardless of the arbitrariness of the word "tree," meaning is determined and conceived by the tangible and observable thing out there with bark and leaves. There is an implicit assumption that the "observations" of demarcated tangibles are not themselves inscribed with "words," with the social language for determining what is an attribute or a thing separate from other attributes and things.[217] In the scientistic metaphors relied on by Llewellyn, knowledge was achieved by effacing the linguistic representational terms to get at the real things that the categories were supposed to re-present.

While conceding that "[t]he sense impressions which make up what we call observation are useless unless gathered into some arrangement" and that "to classify is to disturb,"[218] the notion was that there was some self-present and immediate experience where "observation" was simply "sense impressions." This experience was separate from and independent of the linguistic process of classification. In terms of Llewellyn's metaphors, in this preclassified state were "raw facts."[219] The social process of interpreting the "facts" came after the "sense impressions" themselves, as a necessary but separable supplement. In terms of temporal sequence, the sensuous impression was prior to the social process of differentiation.[220]

In *A Realistic Jurisprudence—The Next Step*,[221] Llewellyn again argued that the traditional focus of legal study on "words" was misplaced. Here, however, he explicitly connected his critique of word-centered legal representation with the notions of legal rights and rules, following the same structure of analysis he used with respect to language.

217. *See supra* text accompanying notes 12-27.

218. Llewellyn, *supra* note 201, at 453.

219. *Id.*

220. This temporal priority was reflected further in Llewellyn's diagnosis of the historic genesis of the formalist practice. The linguistic categories of formalist practice "originally" were derived from sense impressions. Their original source was observable, concrete phenomena. "[A]lthough originally formulated on the model of at least some observed data, they tend, once they have entered into the organization of thinking, both to suggest the presence of corresponding data when these data are not in fact present, and to twist any fresh observation of data into conformity with the terms of the categories." *Id.* That is, the categories and concepts "take on an appearance of solidity, reality and inherent value which has no foundation in . . . the fact model from which the concept was once *derived*." *Id.* at 453-54 (emphasis added). This flip from the signifier to the signified denied the universal aspects of forms of relations such as "contracts." Since "contract" was merely the "word," the signifier for groups of experiences, it contained no necessary content. The "rules" of contract law could thus be disaggregated, or recategorized as Hale suggested with respect to property conceptions. But, unlike suggestions in the deconstructive realist arguments, such a reconstitution would not itself be indeterminate since it would be checked against "the facts." Form would be subordinate to content rather than vice versa.

221. Llewellyn, *supra* note 201.

As Llewellyn told the story, early stages of legal thought viewed legal rules as concerned with remedies. Just as words and concepts originally were connected to actual data, Llewellyn suggested that legal rules were originally seen as directly connected to remedies, to what a court would do in particular circumstances, to what people "could observe."[222] But later thinkers saw remedies in terms of "a *purpose*," as "protections of something else," that is, of "*rights*, substantive rights."[223] At that point, legal rules were viewed as defining rights, and remedies as merely the means for carrying out rights. Just as words and concepts lost their real world correlates as they became reified, Llewellyn contended that rights and rules eventually lost their connection with remedies, their empirical base, and came to be seen as actual things prevailing in social relations, separate from the question of enforcement.[224]

But, Llewellyn argued, just as words had meaning only to the extent that they referred to observable things, rights had meaning only in terms of remedies, broadly conceived as the real-world possibilities of enforcement.[225] Like the "things" to which words referred, the remedy was determinate because it was observable, unlike substantive rights, "which you cannot see" and which "are not answerable to fact."[226] Rights, to the extent that they were not reduced to remedies, were indeterminate and free-floating, having "a shape and scope independent of the accidents of remedies."[227] According to Llewellyn, the de-reification of rights and rules "forces law on the attention as something man-made, something capable of criticism, of change, of reform . . . according to standards vastly more vital found *outside* law itself, in the society law purports both to govern *and to serve.*"[228]

This conception of the significant methodological aspect of realist jurisprudence—that it "reverses, it upsets, the whole traditional approach to law"[229] by changing the focus from "words" to "behavior"—was shared by other realists. For example, in the second part of Felix Cohen's *Transcendental Nonsense and the Functional Approach,*[230] this orientation to legal representation was unified around what Cohen called the "functional approach," which attempted to redefine "concepts and problems in terms of verifiable realities."[231] This approach consisted

222. *Id.* at 436-37.
223. *Id.* at 437.
224. *Id.* at 437-38.
225. *Id.*
226. *Id.* at 438.
227. *Id.*
228. *Id.* at 442.
229. *Id.* at 443.
230. 35 COLUM. L. REV. 809, 821-34 (1935).
231. *Id.* at 822. Cohen saw this shift, in his terms from the conceptual to the real, as the unifying thread connecting transformations in "philosophy, mathematics, and physics, as well as by psy-

of ridding discourse of transcendental conceptions to get at their reality in the world. It was summed up as " '[a] thing is what it does.' "[232] This division, between "transcendental nonsense" and "verifiable" facts,[233] was further reflected in Cohen's embrace of the fact/value distinction, as shown by his suggestion that we "carefully distinguish between the two problems of (1) objective description, and (2) critical judgment."[234]

Cohen's text also reveals, at a general level, the manner in which the temporal metaphor of the priority of behavior over language or concepts correlated with a re-ordering of other metaphors for the representation of social life. In liberty of contract discourse, a critical aspect of the temporal priority of the subject over the object was the notion of social context as a derivative, supplementary effect of a prior individual subjectivity. In the economic sphere, the private intent of the contracting party purportedly gave rise to the economic context in which the parties contracted. In Cohen's analysis, however, functionalism started from the premise that context was the source of meaning, rather than the other way around: functionalism "seeks to discover the *significance* of the fact through a determination of its implications or consequences in a given mathematical, physical or social context."[235]

This notion of the priority of context (or structure) over individual event was the ground for Cohen's criticism of some realists' conclusions that, given the indeterminacy of legal rules or precedent, judicial decisions must be seen as "simple unanalyzable products of judicial hunches or indigestion."[236] The realist notion that law was simply a "function of

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chology, economics, anthropology . . . . Functionalism, operationalism, pragmatism, logical positivism, all these and many other terms have been used . . . to designate a certain common approach to this general task of redefining traditional concepts and traditional problems." *Id.*

232. *Id.* at 826.

233. *Id.* at 822.

234. *Id.* at 841. Like Llewellyn, Cohen saw sensuous behavior as the prior ground for concepts. "[I]nstead of assuming hidden causes or transcendental principles behind everything we see or do, we are to redefine the concepts of abstract thought as constructs, or functions, or complexes, or patterns, or arrangements, of things that we do actually see or do." *Id.* at 826. Explicitly following Wittgenstein's logical positivism, Cohen asserted that "[a]ll concepts that cannot be defined in terms of the elements of actual experience are meaningless." *Id.* According to Cohen, functionalism provided the sense for the realists' incorporation of Holmes's theory of law as the prediction of official behavior. Behavior could be empirically observed in the sensuous world, unlike the "ghost-world of supernatural legal entities." *Id.* at 828. Accordingly, functionalism required the "redefinition of every legal concept in empirical terms." *Id.* "Washed in cynical acid, every legal problem can thus be interpreted as a question concerning the positive behavior of judges." *Id.* at 840.

235. *Id.* at 829; for a reiteration of the view that meaning is indeterminate until it is contextualized, see Cohen, *Field Theory and Judicial Logic*, 59 YALE L.J. 238 (1950).

236. Cohen, *supra* note 230, at 843. The most notorious statement of the "hunch" theory of law was probably contained in Hutcheson, *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 274 (1929). Hutcheson stated the realist critique of formalism in the same general terms that we have considered, describing a process in which he as a judge "had a slot machine mind. I searched out categories and concepts and, having found them, worshipped them. . . . Every case presented to me only the problem of arranging and re-arranging its facts until

judicial decisions" liberated the realist from the "supernatural mists" and enabled him to deal with law in "objective, scientific terms."[237] The next scientific step was to find the determinants of the decisions themselves. Like Llewellyn's notion that judicial decisions are correlates of fact situations, Cohen's approach sought to efface the subjectivity in the phenomena of judicial decisions by finding their cause in the objective context rather than in the subjective wishes of the judge. The problem with the "hunch" theory of law was that it magnified "the personal and accidental factors in judicial behavior."[238] Such an approach projected the subject, the judge, as the source for the law. But Cohen argued that the judge's decision was an effect of the social context in which the judge operated, a context which was itself amenable to scientific systemization through an analysis of the "significant, predictable, social determinants that govern the course of judicial decision."[239] In other words, the proponents of the hunch theory of law were still stuck in the old, prescientific metaphors for the representation of social events within which some individual subject, such as a contracting party in the liberty of contract discourse or the judge in the hunch theory of law, was projected as the source for social results. In Cohen's approach, judges were themselves the derivative effects, rather than the sources, of social contexts that existed outside of themselves.

> A truly realistic theory of judicial decisions must conceive every decision as something more than an expression of individual personality, as concomitantly and even more importantly a function of social forces, that is to say, as a product of social determinants and an index of social consequences. A judicial decision is a social event . . . an intersection of social forces: Behind the decision are social forces that play upon it to give it a resultant momentum and direction; beyond the decision are human activities affected by it. . . . Only by probing behind the decision to the forces which it reflects, or projecting beyond the decision the lines of its force upon the future, do we come to an understanding of the mean-

I could slip it into the compartment to which it belonged." *Id.* at 274-75. He described the law from that formalist perspective as a "thing" that had no "life or growth." *Id.* at 275. Unlike the scientistic and determinacy-oriented language of Llewellyn and Cohen, however, Hutcheson described the judicial decision in open-ended terms where the subject, here the judge, was seemingly unconstrained. Rather than the "body" or "social forces" as determinants, Hutcheson wrote "that the instrument for all of this change, this adaptation . . . is the power of the brooding mind, . . . that sixth sense, that feeling, which flooding the mind with light, gives the intuitional flash necessary for the just decision. . . . I decide the case more or less offhand and by rule of thumb. . . . [I] give my imagination play, and brooding over the cause, wait for the feeling, the hunch—that intuitive flash of understanding which makes the jump-spark connection between question and decision . . . ." *Id.* at 276-78. Indeed, Hutcheson even resorted to religious imagery of transcendence to describe the process of decision. "It is such judicial intuitions [that,] like a great white way, make plain in the wilderness the way of the Lord for judicial feet to follow." *Id.* at 287-88.

237. Cohen, *supra* note 230, at 842.

238. *Id.* at 843.

239. *Id.*

ing of the decision itself.[240]

This view of legal decisionmaking as a function, a derivative effect, of social context, established an instrumental theory of law under which judicial lawmaking was seen as adaptive to social forces or social needs existing prior to the decision.[241] Thus, Cohen suggested what almost amounted to a theory of natural selection in common law development. While some judicial decisions might be "peculiar" in that they reflected the personal or idiosyncratic attributes of a judge, the "decision that is 'peculiar' suffers erosion— unless it represents the first salient manifestation of a new social force, in which case it soon ceases to be peculiar."[242] This view that "social forces . . . mold the course of judicial decision"[243] in turn required legal science to categorize and chart the elements of social context which were determinative.[244]

The constructive realist discourse incorporated a metaphoric structure similar to that of the liberty of contract discourse, albeit through different terms. The rhetoric of Llewellyn and Cohen was marked by dichotomies between:

things	words
tangible	intangible
determinate	uncertain
observable	metaphysical
facts	values
description	evaluation
concrete	abstract
policy	rules
remedies	rights
means	ends
scientific knowledge	speculation
sense impressions	linguistic categories
social context	individual intent
is	ought

240. *Id.*

241. *See generally* R. SUMMER, INSTRUMENTALISM IN AMERICAN LEGAL THEORY (1982); Gordon, *Critical Legal Histories*, 36 Stan. L. Rev. 57 (1984).

242. Cohen, *supra* note 230, at 843.

243. *Id.* at 845.

244. Although Cohen complained that insufficient work had been done on such subjects, he was confident that "dominant economic forces play a part in legal decision, that judges usually reflect the attitudes of their own income class on social questions, that their views on law are molded to a certain extent by their past legal experience as counsel for special interests, and that the impact of counsel's skill and eloquence is a cumulative force which slowly hammers the law into forms desired by those who can best afford to hire legal skill and eloquence." *Id.* While Cohen went on to add other "influences," such as "aesthetic ideals," *id.*, the general tenor of his argument was that the judicial decisions, and the judges as social actors, were determined by external and objective factors that could be "charted" in systematic fashion through observation by the legal scientist.

These rhetorical oppositions each incorporated the spatial metaphor of the liberty of contract discourse in that each divided up the representation of social phenomena by contrasting the objective and subjective realms of social life.[245] Thus terms on one side of the dichotomies were analogous to each other in that they all related to determinacy, objectivity, and observability. As determinate objects, each term suggested restraint and external limits to subjectivity. In addition, each of these terms was viewed as separable from its opposite, as existing outside of the indeterminate free play of subjective signification through contingent mental categories for organizing experience. For example, the contrast between subjectivity and objectivity was reflected in the dichotomy between things and words. Words were imagined to be the contingent results of arbitrary subjective decisions to group things in a particular manner. Things, however, existed independent of the play of the signifiers, the categories and concepts through which social subjectivity was inscribed onto the facts. Things were the objective source of determinate, noncontingent sense impressions. Similarly, rules and rights were indeterminate, subjective conceptualizations of prior legal practice. Policy and remedies were observable through the objective senses of the body. They existed separate from rules and rights as "raw data."[246]

The terms on the other side of the constructive realists' rhetorical polarities were associated with subjectivity, which was conceived of as unrestrained indeterminacy. Thus words, values, ends, the ought, and the individual event all shared similar attributes. They were associated with the contingent and arbitrary practice of social inscription, by which meaning was given to things according to the "wishes" of the subjective interpreter or the contingent conventions of language rather than according to the determinate reality of sitnations. Unlike the external restraint of things, context, facts, and the is, the subjective terms were seen to flow from within the subject, unrestrained by objectivity.[247]

Insofar as the rhetorical categories of constructive realism were organized around the same subject/object dichotomy imbedded in the liberty of contract representational grammar, the "truth" of representational practice still required separating out the objective and subjective

245. *See supra* text accompanying notes 136-38.

246. Llewellyn, *supra* note 201, at 431, 453.

247. It should be noted at this point that the ability to associate the two terms of each categorical polarity with one or the other side of the subject/object dichotomy depends on the term's relational status vis-à-vis another term. Thus, for example, body appears on the object side when opposed to the term mind. In the interpretative construct which relies on such a dichotomy, mind represents subjectivity, freedom, Man, etc. while body is associated with the objective constraints imposed on man by his substantive participation in the natural, material world. But it is possible to imagine the term body moving to the subject side of the chart when it is opposed to another term, say inanimate matter. In such an opposition, body comes to be associated with man, self, inside, etc., while inanimate matter appears to reflect objectivity, nature, etc.

elements of social phenomena. But unlike the liberty of contract discourse, the constructive realists' claims of neutrality and nonideology were based on the objective rather than the subjective sides of each dichotomy. The objective realm became the source which the discourse purported merely to re-present.[248] In short, the rhetorical dichotomies in the constructive realist discourse were analogous to each other, not only because each reflected a contrast between subjectivity and objectivity, but also because each dichotomy placed the objective prior to the subjective term as the latter's source and origin.[249]

But, despite this difference between constructive realist discourse and liberty of contract practice, they were alike insofar as they both projected a pure, self-present source, free from the play of social inscription, as the ground for legal representational activity. In the liberty of contract discourse, this transcendental source was the individual subject who was imagined to exist separate from and prior to the influence and inscription of social context. For this realist strand the source was the transcendental object separate from social power, which ordered each of the constructive realist rhetorical polarities so that each objective term was taken as prior to the subjective term. Thus, while words were themselves empty abstractions, they could be made determinate to the extent that they referred to the "tangibles which could be gotten at beneath the words," and the "observed data" from which conceptual categories originally derived. Similarly, the existing facts were separable from and independent of the ought, the value judgments. The means for carrying out ends could be determinately identified in a manner separate from the consideration of the ends themselves.

The focus of the above discussion on jurisprudential, linguistic, and methodological issues is not intended to suggest that discourse at such a level of abstraction in any way *determined* the way that the day to day practice of realist legal discourse proceeded. Rather, the realist discourse about such issues is presented as merely one manifestation of the new temporal metaphor for organizing the conceptual space which the legal representation of social life occupies. The conception of the relation between language and what language re-presented was one *effect* of the

248. *See infra* Part V.

249. Thus, in Llewellyn's story about words and things, it was conceived that things exist separately from their social inscription through language and that words had their original source in direct sense impressions of things. The outside, external context of things was seen within the representational metaphor of objective priority as the source of the internal, subjective language. Knowledge about the world, as opposed to speculation, therefore consisted of peeling away the social inscriptions, the rules, rights, words, concepts, post hoc rationalizations, and categories, to get at the pure, self-present facts, which would then be re-presented by the legal scientists. The facts, as the original source of the representational practice, were projected as undifferentiated, as "there" somewhere in a positive, substantial plenitude separate from the process of differentiation.

more general institution in constructive realist discourse of the transcendental object metaphor. The point of the discussion is to evoke the manner in which the representational metaphors relied on in the liberty of contract discourse were not displaced in constructive realist practice, but were merely reordered.

This reordering of the temporal relation representation between the subjective and objective elements of social phenomena underlay the legal realist aphorism that a judicial decision was the result of what a judge had for breakfast. This aphorism captures the element of constructive realist practice which placed the body, associated with the objective and sensuous aspects of the self, before the mind, the subjective and nonsensuous element which categorized, at a separate and later point in time, the raw facts provided by the body. With respect to the association of the body with Nature and the mind with Man, the metaphor of the transcendental object suggested that the subject and the mind were ultimately ruled by naturally derived functions and limitations. The new temporal priority of the objective over the subjective suggested that the judge's decision was a function of objective factors outside the judge's mind, factors in some sense analogous to the body in the material, constraining world.[250]

As in the liberty of contract discourse, the spatial metaphor for the

250. The body is objective vis-à-vis the mind insofar as it is subject to natural constraint. The image of the judicial decision as an effect of physiological factors can be seen as a metaphor for the more general metaphoric flip of realist discourse and the institution of a structuralist explanatory practice within which each subjective event could be seen as the effect of some larger objective structure. The structure might be economic forces, as in Cohen's article, or the functional needs of social groups, as in Pound's sociological jurisprudence and his notions of social engineering, *see* Pound, *The Scope of Sociological Jurisprudence,* 25 HARV. L. REV. 489 (1912), or the play of psychological forces, as in Jerome Frank's Freudian explanatory structure, *see* J. FRANK, LAW AND THE MODERN MIND (1930).

The most extreme versions of such a behavioristic approach to judicial action in constructive realist practice were perhaps manifest in Herman Oliphant's notion that the judicial decision should be seen as a determined reaction to a set of stimuli provided by the facts of the case. *See, e.g.,* Oliphant, *A Return to Stare Decisis,* 14 A.B.A. J. 71, 159 (1928). Similarly to Cohen's argument about precedent, Oliphant first suggested that there is always some difference between cases, and therefore that grouping the cases together under a single rule or principle required an abstract classification which can be made on various levels of generality, giving rise to the manipulability of precedent as it is read narrowly or expansively. This manipulability did not exist in earlier times because the "great multitude of writs and this greater definiteness of pleading [resulted in] much greater particularity and minuteness in the classification of human transactions for legal treatment." *Id.* at 73. Moreover, "[t]ransactions were simpler and more nearly homogeneous" and since there were "few fundamental changes in the structure and operation of English domestic, industrial and political life," the "[a]bstractions once made fitted longer." *Id.* at 74. Stare decisis in early English common law was therefore a "radical empiricism" because the courts "shaped [the law] to the life affected" since the legal categories were so particularistic with respect to the social organization. But as social life grew "more and more complex" there occurred in legal categories an "orgy of overgeneralization," resulting in "an ever-decreasing feeling for its realities." *Id.* But while law was commonly talked about as if these generalizations were determinant, Oliphant suggested that "judges, responding to the needs of current life, had frequently departed from the confines of that

separability of the subject and the object and the temporal metaphor for ordering the terms provided constructive realist practice with the organizing texture for its discourse. This texture was manifest not only in linguistic conceptions, but also in other realms of realist discourse as it constituted an ingrained metaphor for the organization of the conceptual space in which the realists operated. The positivist definition of law as the observable point of contact between officials and lay people (and the consequential focus on remedies and administration),[251] the call for empirical methodology in legal studies,[252] the instrumental conception of the law as a means to carry out ends provided elsewhere,[253] and the focus on social policy over individually-oriented rights and principles[254] were not simply unconnected positions taken with respect to various intellectual issues. The positions taken on each question were analogous because, within the terms of the subject/object metaphor for representational activity, the questions all looked the same. They all involved ordering the temporal relations between objective and subjective poles.

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classification though still stating and justifying their results in terms of it." *Id.* at 76. Thus, while studying the generalizations of the law would be fruitless,

> there is a constant factor in the cases which is susceptible of sound and satisfying study. The predictable element in it all is what courts have done in response to the stimuli of the facts of the concrete cases before them. . . . [T]he battered experiences of judges among brutal facts . . . is the subject-matter having that constancy and objectivity necessary for truly scientific study.

Id. at 159. Accordingly, Oliphant called for lawyers to have a "comprehensive knowledge of the whole social structure . . . viewed comprehensively as an interrelation of processes," and a "reclassification of most of law in terms of the human relations affected by it." *Id.* at 159-60. The idea was that the study of the social structure would reveal the appropriate subdivisions of human relations, which the legal categories could then be based upon. "The categories of that reclassification emerge from the suggested study of the whole social structure." *Id.* at 160. After such reclassification, the doctrine of stare decisis could be continued, according to Oliphant, on a truly empirical basis. For Oliphant's thoughts on the character of such a legal science, see Oliphant, *Facts, Opinions, and Value-Judgments*, 10 TEX. L. REV. 127 (1932). Underhill Moore similarly attempted scientifically to explain banking law decisions that were not derivable from legal rules themselves by reference to the external banking context and the degree of deviation of each case from the normal institutional context. Moore & Sussman, *Legal and Institutional Methods Applied to the Debiting of Direct Discounts—I. Legal Method: Banker's Set-off*, 40 YALE L.J. 381 (1931).

251. *See, e.g.*, Holmes, *The Path of the Law*, *supra* note 181; *see also* Handler, *False and Misleading Advertising*, 39 YALE L.J. 22 (1929); Klaus, *Identification of the Holder and Tender of Receipt on the Counter- Presentation of Checks*, 13 MINN. L. REV. 281 (1929); Llewellyn, *supra* note 201, at 454-62; Llewellyn, *supra* note 142, at 1240, 1246-47.

252. *See, e.g.*, Bingham, *What is the Law?*, 11 MICH. L. REV. 1 (1911); Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927); Moore, *Rational Basis of Legal Institutions*, 23 COLUM. L. REV. 609 (1923). For a few specific examples, see Clark, Douglas & Thomas, *The Business Failures Project—A Problem in Methodology*, 39 YALE L.J. 1013 (1930); Douglas, *Some Functional Aspects of Bankruptcy*, 41 YALE L.J. 329 (1932); Douglas & Thomas, *The Business Failures Project—II: An Analysis of Methods of Investigating*, 40 YALE L.J. 1034 (1931). For a discussion of this social science aspect of realist praetice, see Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 459 (1979).

253. *See* Schlegel, *supra* note 252; Gordon, *supra* note 241.

254. *See, e.g.*, Holmes, *The Path of the Law*, *supra* note 181.

This sense of connection among disparate intellectual issues was exemplified by Cohen's and Llewellyn's references to quantum physics, logical positivism, pragmatism, behavioralism, and relativist anthropology as correlates to realist legal work.[255] The ability to see links among these wide-ranging fields depended upon the metaphor of the transcendental object within which the questions presented in the various fields, and within the fields with respect to various questions, all looked the same.

The institutionalization of the transcendental object in constructive realist practice provided a new authority for claims of knowledge about the world separate from the inscription of contingent social power. In contrast to the deconstructive strands of realist argument which suggested the inseparability of legal and political discourse, the metaphor of the transcendental object was conceived as the pure ground for a legal discourse that could re-present the objective realm in a scientific manner. Accordingly, constructive realism could avoid the implications of the deconstructive critique that legal discourse was distinguished from "ideological" discourse only through the "thingification" of its representational categories. Constructive realism viewed the critique of reification as valid, but applicable only to the "conceptualism" at the heart of the liberty of contract approach. The liberty of contract practice had reified its representational discourse by mistaking socially created products—the concepts, words, metaphors, and categories—for real, objective things, and thereby ascribing to them determinate and necessary characteristics. Such a mistake could be avoided without rejecting the notion of reason separate from power, or of law separate from politics. "Beneath" the superficial phenomena of signification through language was a determinate, undifferentiated structure of facts, a place that existed apart from the continency of metaphor and language, a positive source rather than the effect of a negative differentiation between analytically relational terms. Unlike politics, law could be determinate because it could be ruled by the facts, the predictable, observable, real-world consequences of particular decisions in the objective social world.

To be sure, the claims of this legal science were "modest;" law would simply involve "means" rather than "ends." It would be concerned with technical and objective questions about how to get from *A* to *B* rather than in the normative and subjective questions about the ends themselves. In short, law in the constructive realist discourse was inevitably "politics," in the sense that it inevitably involved consequentialist policies. But the identification and application of policies was determinate and objective; it was apolitical.

The projection of the transcendental object as the source of legal

255. Cohen, *supra* note 230, at 822, 826; Llewellyn, *supra* note 201, at 454.

representational practice not only served in a general manner to perpetuate the distinction between legal and political discourse, but also to provide the basis for a reorganization of doctrinal analysis. While the debunking aspects of realist discourse could be taken to deny the coherence of representing social life according to the categories of self and other, public and private, free will and coercion, regulation and the free market, and the individual and the social, within the metaphor of the transcendental object the debunking arguments alternatively were read to imply that the objective term of each dichotomy was the primary source for legal representation. For example, Hale's debunking of laissez-faire ideology could be interpreted to imply that the purported private realm of free will was actually a public realm of coercion. The public realm, context and coercion could accordingly be taken to be prior to the private realm, individual intent, and free will.

This possibility of reversing the temporal order of the liberty of contract metaphors, rather than changing the metaphors themselves, came to fruition in the reconceptualization of doctrinal areas as realism was integrated into dominant legal discourse. In constitutional law, the reversal of temporal priorities meant that the public was presumptively the source of the private realms of social life. Thus, arguments which had formerly been rejected became persuasive. For example, at issue in the 1934 case of *Home Building & Loan Association v. Blaisdell*[256] was the constitutionality of a state law permitting local courts to extend the period for redemption from foreclosure sales. Under a liberty of contract approach, such legislation would invade the private sphere to the extent that it permitted public intervention to change the terms of private contracts. But the Court in *Blaisdell* flipped the relation between public and private spheres and upheld the statute. Rather than view the private sphere as primary, the Court viewed the public and social realms as the basis for the private and individual.

> The policy of protecting contracts against impairment *presupposes* the maintenance of a government by virtue of which contractual relations are worthwhile . . . . The settlement and consequent contraction of the public domain, the pressure of a constantly increasing density of population, the interrelation of the activities of our people and the complexity of our economic interests, have inevitably led to an increased use of the organization of society in order to protect the very *bases* of individual opportunity. Where, in earlier days, it was thought that only the concerns of individuals or of classes were involved, and that those of the State itself were touched only remotely, it has later been found that the fundamental interests of the State are directly affected; and that the question is no longer merely that of one party to a contract as against another,

256. 290 U.S. 398 (1934).

> but of the use of reasonable means to safeguard the economic structure upon which the good of all *depends*.[257]

The Court transformed the subject matter from a private concern to a public concern by contending that private rights in general were derivative of the public sphere in the sense that they "presuppose" and "depend" on the functioning of the public context within which the "private" rights were exercised. In contrast to the metaphor in the liberty of contract discourse of the priority of the individual over the social, here the notion was that the State was the source of rights and of "individual opportunity." Rather than the State being the effect of prior individual freedom, individual freedom was the derivative effect of State power. This reversal of the metaphors for social causation, with its imagery of interdependence rather than independence, established an orientation within which legislative action formerly thought to violate liberty could be seen as legitimate. And, consistent with the instrumental and adaptive notions of law in constructive discourse, the Court rationalized this change as reflecting changed conditions in society, rather than as merely a change in the representation of social relations.[258]

Moreover, this shift in perspective in questions concerning the relation of the individual to the State correlated with a shift in perspective in the relation between states and the federal government. The liberty of contract discourse considered the states to be closer to the self and therefore more subjective than the federal government. The priority of the subjective over the objective therefore presumptively entitled the states to regulate. The federal government was supplementary, entitled to regulate where of necessity state power could not reach. But this relation was flipped in postrealist doctrinal practice. The federal government, the objective entity in the state/federal dichotomy, came to be seen as the primary regulator of social life, and the states the derivative and residual governors.[259]

One would expect that, like the liberty of contract discourse, the

257. *Id.* at 435, 442 (emphasis added).

258. This incorporation of the metaphor of the temporal priority of the social, contextual, and public with respect to the individual, intentional, and private terms of the spatial metaphors in turn established the priority of questions of policy over questions of right, which was manifested at the constitutional level in a general deference toward legislative action. *See* McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. The principle cases are Steward Machine Co. v. Davis, 301 U.S. 548 (1937) (spending power); NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (commerce clause restriction and overlap with police power overruled); West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937); Nebbia v. New York, 291 U.S. 502, 536 (1934) ("[T]here is no closed class or category of businesses affected with a public interest. . . . The phrase 'affected with a public interest' can, in the nature of things, mean no more than that an industry, for adequate reason, is subject to control for the public good."); Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398 (1934).

259. *See, e.g.*, Katzenbach v. McClung, 379 U.S. 294 (1964); United States v. Kahriger, 345 U.S. 22 (1953).

realist metaphor structure would be apparent not only at the constitutional law level, but also in the conceptualizations of "private" law. In the liberty of contract discourse, tort was conceived as a supplement to contract. The relation between contract and tort was analogous to the relation between the individual and the government and the state and federal governments. Tort began where a private agreement could not govern the relationship. The liberal use of the assumption of risk doctrine and the refusal to impose duties on a party in a nontortious context where there had been no contract were the doctrinal manifestations of this relationship between common law fields. A reversal of the ordering of the two fields meant that tort became primary and contract supplementary. In doctrinal terms, the fall of the assumption of risk defense, the rise of a host of nonwaivable contract terms, the recognition of the reliance interest as a basis for liability, the rise of implied contracts, and the general recognition of contractual enforcement as presenting issues of social policy rather than individual rights all reflected the new possibilities under the temporal reversal of legal metaphors. Social obligations to others could be imposed as a primary matter, without the rationalization that they emanated from the free will of the self.

This reversal was also manifest within the fields of tort and contract. In torts, the prior conception was that negligence was a subjective, fault-based standard, so that in some sense the liability of the tortfeasor could be seen as ultimately based on subjective consent.[260] In private areas of social life, therefore, the negligence tort standard was appropriate. Strict liability, the objective standard, existed as a supplement reserved for public-type activities. In constructive realist practice, the negligence standard was restated in explicitly objective terms, as embodying the regulatory policies of the collectivity. This explicitly objective view toward negligence was introduced into doctrine with the Learned Hand negligence formula, which treated negligence as a question of the evaluation of costs and benefits, independent from their evaluation in the private marketplace.[261]

Moreover, once negligence was reconceived as objective, there was no strict line demarcating a qualitative difference between negligence and strict liability. The rise of strict liability as an alternative tort standard thus is related to the temporal flip.[262] If there was no qualitative difference between the two standards, the determination of when one rather than the other was appropriate was simply a question of social policy, not of individual liberty. In some areas, strict liability would be appropriate

260. *See supra* note 119.

261. United States v. Carroll Towing Co., 159 F.2d 169 (2d Cir. 1947).

262. *See* Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

because it forced cost "internalization," or spread losses throughout society, or deterred defendants. In other areas, negligence would be appropriate because no loss spreading would occur, or cost internalization would discourage investment. In other words, the common law determinations did not present questions of private justice, but rather questions of public policy.

In contract, the rise of the objective side of the representational dichotomies was most striking with respect to parol evidence rules. Formerly, contractual meaning was seen to flow from the self, from the immediate choice of formal manifestations for communication. Accordingly, evidence of meaning in context generally was excluded.[263] With the flip of the temporal metaphors, however, context was seen to precede and constitute individual intent. The liberalization of the parol evidence rule reflects the reversal of the notions of the source of meaning. Now meaning was to flow extrinsically, from the context in which signs were used, rather than intrinsically, from the intentional choice of the contracting party.[264] While words were indeterminate, meaning could be grounded by reference to the context in which words were used. Along with this reversal of perspective was a more general reconceptualization of contracts to stress social obligations to others rather than chosen duties. One manifestation of this reversal was the altered conception of when contractual duties arose. Rather than base duties on manifestations of individual intent and free will, duties would be based on the reasonable expectations of the other—thus the rise of liability based on promissory estoppel[265] and unjust enrichment.[266] Where the other reasonably relied, the self would be liable, regardless of consent. Duties to the other were more primary than the will of the self.

In sum, constructive realism still viewed legal discourse as separate from political rhetoric, just as words were conceived as separate from things and sense impressions. In constructive realist discourse, each area of social life, as in the liberty of contract practice, was already con-

263. *See, e.g.*, RESTATEMENT OF CONTRACTS (1932) § 237 ("[T]he integration of an agreement makes inoperative to add to or to vary the agreement all contemporaneous oral agreements relating to the same subject-matter . . . ."); *see also* 2 S. WILLISTON, THE LAW OF CONTRACTS, §§ 616-617, 631-632 (1st ed. 1920).

264. "But a writing cannot of itself prove its own completeness, and wide latitude must be allowed for inquiry into circumstances bearing on the intention of the parties." RESTATEMENT (SECOND) OF CONTRACTS (1979) § 210 comment b; *see also* 3 A. CORBIN, CORBIN ON CONTRACTS, §§ 558, 577, 581-583 (2d ed. 1960) (extrinsic evidence is admissible to ascertain the meaning the parties intended for the writing). Interform Co. v. Mitchell, 575 F.2d 1270 (9th Cir. 1978) provides an excellent discussion of the courts' general rejection of Williston's restrictive view in favor of Corbin's liberal reading of the parol evidence rule.

265. *See* RESTATEMENT (SECOND) OF CONTRACTS (1979), § 90; *see also* Hoffman v. Red Owl Stores, Inc., 26 Wis. 2d 683, 133 N.W.2d 267 (1965). *See generally* G. GILMORE, THE DEATH OF CONTRACT (1974).

266. *See generally* RESTATEMENT (SECOND) OF CONTRACTS §§ 370-377 (1979).

structed for the analyst. The terms of that construction, however, had changed, so that the social was prior to the individual, the public prior to the private, the federal government prior to the states, and tort prior to contract. Within tort, the objective was prior to the subjective, and within contract, the other was prior to the self. The transformations in each doctrinal field, the correlation between the rise of strict liability in tort, the emphasis on the reliance interest and the use of extrinsic evidence in contract, and the deference to legislation and national power in constitutional law, were not parallel by accident. Each shift made sense and provided support for the other within the confines of the transcendental object metaphor. The transcendental object was authority for law as a separate, determinate and neutral discourse. Law would simply be a means of carrying out the ends apparent from the needs of society or dictated by elective bodies. Its authority would consist in the science of consequences, in the expertise of objective prediction.

The liberative aspect of constructive realist discourse was its emphasis on the contingency and plasticity of past metaphors for representing the social field. Its repressive underside was the spectre of technocracy, which suggested that the scientific observer, the judge or the administrator, was separate from social inscription and in touch with the real facts of social life. Constructive realism proclaimed a new metaphysics of presence geared around the signified, the context. Society was conceived as a natural organism with determinate and universal functions which could be observed and measured simply according to some neutral calculus of sense impressions.

Law could accordingly be seen to adapt to the functional needs of the economy, commercial practice, and social relations in general. The realist legal historian thus was able to discern in the development of legal doctrine adaptations to those social forces that preexisted the law itself. The legal scientist could glean from ongoing social practice the functional purposes and needs that the law could satisfy in instrumental fashion. In short, in the constructive realist vision, the problem with the liberty of contract discourse was that it had attempted to impose its vision of social life from the top down—from the logic of words to the reality of social life. Realism would move in the opposite, proper direction, and gear law to social reality. Social science would provide the means for a determinate legal discourse by identifying the functional requirements of the ongoing social order; law would instrumentally adapt to those needs.

While its metaphysics provided the infrastructure for the reconceptualization of doctrine as described above, this constructive realist project was itself never fully incorporated into the mainstream of legal discourse. Rather, as the brief discussion above suggests, it took its place

alongside the former concepts of the liberty of contract discourse. Policy debate in legal discourse became legitimate, but social science and instrumentalism did not completely displace the former mode of argument. Instead, they simply existed alongside one another as alternative bases of appeal. Indeed, by the 1950's, the relationship between the modes of discourse had lost the flavor of contradiction and challenge. Hart and Sacks articulated the new pluralism of substantive legal argument by suggesting that it was marked by a "reasoned elaboration" which included both principle (conceived as *a priori* theory) and policy (conceived as consequentialist social science). This pragmatic integration of argumentative modes in the Hart and Sacks approach was itself subsumed in the more general category substantive argument, all of which was seen to be derivative of and secondary to the principle of institutional settlement; process was prior to substance. In any event, the realist constructive project would later be taken up again by the law and economics adherents, who would attempt to achieve the social science vision of a determinate and instrumental law through market theory and institutional economics.

IV

THE METAPHYSICS OF PRESENCE IN LEGAL THOUGHT

The legal realist movement is commonly depicted as a dramatic transformation of American legal consciousness. Realism is typically contrasted with the liberty of contract approach in various conceptual terms. It is described as a move from formalism to instrumentalism; from universals to particulars; from qualitatively differentiated categories to quantitatively continuous data; from individualism to collectivism; from laissez-faire to social welfare; from absolute first principles to consequentialist policy analysis; from clear rules to flexible standards; and from individual rights to social purposes. And there is little doubt that each of the characterizations is accurate, at least from within modes of consciousness where the choices between formalism and instrumentalism, universals and particulars, and rules and standards seem like the significant ones in setting the contours of legal discourse.

Still unanswered, however, is the question of where these categories for contrasting the modes of discourse originate. Why is the difference between "formalism" and "instrumentalism" seen as significant? What are the assumptions and the political and existential motives of a mode of representation that sees the critical decisions as choices between intent and context, public and private, free will and coercion, and fact and value?

The traditional version of the transformation of American legal thought integrates realism into modern legal thought by emphasizing the progress "we" have made since the liberty of contract era in "leaving

political questions to the legislature" or in "recognizing the policy dimensions of legal analysis." By focusing on the differences between realism and the formalism of late nineteenth century legal thought, the traditional incantations of the realists' ignore the similarities between realism and the liberty of contract discourse and, beyond that, the similarities between each of the dominant modes of legal discourse since. In the process, the two discourses' shared project of liberal legalism, the delineation of a discourse of authority separate from will and ideology, is obscured.

In this respect, it is necessary to distinguish between the critical and constructive strands of legal realism. The distinction compels us to recognize that currently dominant legal consciousness is not the progressive result of some underlying movement toward true enlightenment. Rather, when mainstream legal consciousness tells the story of its own genesis from the realist movement, when process-theorists and law and economics adherents claim to be the natural heirs of legal realism, the fact that things could have been otherwise is suppressed. The realist insurrection against the institutionalized authority of liberty of contract discourse contained the rhetoric for resistance against the metaphysics of "enlightenment" itself—the claims to rationality and knowledge divorced from passion and power and purified from engagement in social struggle. And accordingly, this revisionist version suppresses the knowledge that the present situation is not simply a progression from realism, but the result of political and existential choices to tame realism and to continue the construction of the metaphysics of liberal authority, the claims to impersonality and impartiality.

The two strands of realism differed as to the possibility of a form of legal reasoning purified of the contingencies of politics. Critical realism suggested that the claim to legal legitimacy in liberal thought—the pretension that social life can be represented to public consciousness neutrally and determinately—was inevitably false. The interpretation of social life was contingent through and through, since it depended on metaphoric ways of categorizing social life. These metaphors necessarily projected a particular vision of what was at stake in social life, what was normal and what was open to question, what was alike and what was different, what was free and what was compelled. The institutionalization of these metaphors could not be divorced from social relations and social power.

From this perspective, critical realism contained the rhetoric for a broadly insurrectional movement, revolting against not only the reigning structure for organizing knowledge about social life, but against the very assertions of power implicit in the categorizations of ways of experiencing the world; some as knowledge, some as superstitution. Had this form

of the realist struggle been pursued, it would have posed realism not simply against the particular prevailing liberty of contract consciousness, but more broadly against the metaphysics of legal authority itself. In the liberal vision, law is legitimate only insofar as it is impersonal and impartial, existing outside the play of social differentiation. The critical realist message, however, was that law could not be divorced from politics, nor reason from myth, nor knowledge from power. Each hierarchy depended on the reification of contingent metaphors of representation. There was no escape from interpretation and no possibility of an ultimate ground to support the interpretation. Representation could not be re-presentation. The mediation of politics was inevitable.

On the other hand, the constructive strand of legal realism contained the rhetoric for the construction of a specialized discourse that would be neutral and determinate. It promised a form of knowledge separate from social power. Law could be an instrumental means for carrying out policies identified somehere else, in social consensus or legislative arenas. For constructive realists, the liberty of contract approach was flawed because it was formalist in the sense of being *a priori*, of attempting to re-present social life through a categorical grid of perception and communication that had been created in the mind rather than in actual experience. Merely mental categories had no necessary relation with the true facts of the world. But there was a way to escape this formalism. The body, conceived of as the stable ground of perception, could check the vagaries of the mind.

Constructive realism's commitment to a determinate and apolitical representation of social life connects it to the liberty of contract discourse. Both approaches are part of a wider process of liberal legitimation of social relations. Despite the obvious differences, there is a continual sense of déjà vu as one works through the liberty of contract and realist texts. There is a similarity in the metaphoric moment when the liberty of contract approach imagined an independent contractor, self-possessed and free of social power, and in the moment when constructive realist discourse imagined a realm where facts existed separate from "transcendental nonsense" and free from the distortion of "words" and "categories." A similar moment is repeated in the process-oriented attempt to find a ground of legitimacy in the notion that procedures and institutional frameworks are separate from the substance of social decisionmaking. It also arises in the law and economics notion that there is a critical distinction between determinate, objective allocation and indeterminate, value-laden decisions about distribution.

The similarity between the legal discourses is captured in part by the notion of the metaphysics of presence. Both the liberty of contract and constructive realist approaches were based upon the concept of a self-

present origin, a stable and positive ground for the representation of social life existing apart from the social process of differentiation. Within the liberty of contract metaphors, this point of presence was the contracting party, conceived as existing prior to external influence and as the source of social context. The fantasy was that this contracting party, and the contract itself, had a positive existence independent of interpretation and social articulation. Accordingly, the task of law was simply to represent the self-present moments of the individual. Judicial enforcement of the will merely re-presented the will without the mediation of interpretation. The contract re-presented the *presence* of the individual as a positive entity, existing independently of others, filled up with content and thus fully formed prior to social relations. The being of the individual, in this metaphysical translation, did not depend on the absence of being of the other, on the traces of the other influencing and constituting the self.

The metaphysical belief that perception and communication could be free from social power connects the liberty of contract project to the constructive realist discourse. Both approaches presumed that representation could occur as re-presentation, free from the indeterminate play of rhetoric and metaphor, free from socially contingent ways of projecting similarity and difference, free, in short, from the contingencies of language. Law would seize this place of presence in order to establish its authority vis-à-vis politics, in order to present itself as distinct from the socially contingent opinions and values of lay discourse, in order to align itself with reason over passion, knowledge over will.

This shared belief in the possibility of a determinate and ideologically pure re-presentation of social life helps explain the domestication of the realist project. The full dimensions of the "law is politics" assertion as played out in the critical strands of realism were suppressed as legal realism was integrated into mainstream legal discourse. The assertion was still that law is politics. Now, however, politics was no longer conceived as the open-ended, subjective play of ideology, passion or will. Instead, politics, as policy analysis, was imagined to share the attributes of purity and determinacy formerly associated with law itself. Law was politics, but politics was no longer thought of as an open field for subjectivity. Politics instead consisted of instrumental decisions of how to adapt law to the limited possibilities presented by the functional necessities of social life—the need for efficiency in production and exchange, for example.

The similarity between the liberty of contract and the assimilated realist approach was further reflected in the shared metaphors within the discourses, in the ways that the similarities and differences of social experience were delineated in a spatial sense. As described above, the central representational dichotomy in the liberty of contract discourse was the

public/private distinction. This dichotomy spatially categorized social experience. It was a metaphor for grouping what looked alike or different. Some regions of social life were private because they were unaffected by the other or by social power. Others were public because they were ruled by external necessity and the absence of the self. This general structure of representation formed the basis for other dichotomies of the conceptual space, e.g., the free will/coercion, contract/tort, market/regulation and consent/duress polarities. Within these representational terms, it appeared that the recurring issue of social relations was the threat of externality and objectivity to invade internality and subjectivity. In each representational dichotomy, the first term represented some original unity of the subject, a private and free place which reflected both the ideal and the ordinary in social relations. The second term, on the other hand, represented objectivity as a fall from the ideal, a threat to the purity of presence and privacy, a derivative supplement to the already complete origin, a public invasion. Each second term was conceived as something added on and separable from the first.

Realism relied on similar spatial metaphors. The distinctions between words and things, rights and remedies, the is and the ought, and facts and values echoed the liberty of contract metaphors to the extent that they also depended on a delineation of perception and communication according to subjective and objective spheres of experience. Some realms were objective because they were unaffected by social or individual belief, by the vagaries of the mind. Here externality was pure as it was perceived by the senses. And here the recurring issue was the threat of internality, of subjective belief, to distort pure objectivity. Subjectivity, articulated as value judgments, was conceived of as a derivative supplement, properly added on once all the facts were known but essentially separable from the facts themselves.

Whether in liberty of contract's distinction between public and private, the constructive realists' dichotomy between facts and values, the process approach's reliance on the process/substance polarity, or law and economics' dependence on the ability to isolate allocational from distributive issues, each approach to legal discourse is marked by the belief that the subjective and objective aspects of social experience are inherently distinguishable and that the legitimacy of legal reasoning depends on their appropriate separation. To be sure, the approaches differ in which term is primary and which term is derivative or supplementary. But the critical legitimating distinction in each approach is a dichotomy between subjective and objective poles. The critical task for each approach is to ensure that the subjective and objective terms do not invade each other, that they exist as positive entities rather than as simply effects of differen-

tiation within a conventionalized language structure.[267]

In short, the opposition between the representational dichotomies of legal thought recedes in light of the more general representational metaphor within which the oppositional terms achieve their sense of contrast. The similarity of the distinctions between free will and coercion, private and public, fact and value, and words and things suggest that each way of dividing up the social field was governed by a more general interpretative construct. Underlying these modes of legal discourse was the subject/object metaphor. Each pole of the various dichotomies actually depended on the traits of the other since each acquired meaning as the flip-side of the other within the terms of the subject/object metaphor. The differences in the temporal ordering of the terms are only significant, and only appear as differences, when the more general spatial metaphor of the opposition of subject and object is taken as the normal, noncontingent way to mediate perception and communication.

The metaphysics of presence involves an attempt to organize temporally the relation between the categories for spatial representation by finding a self-present source for representation outside the representational practice itself. If the subject/object metaphor or the other dichotomies were simply constructs of language and representational structure, they would exist in a relation of analytic free-play.

In the liberty of contract discourse, for example, there was nothing inherent in the terms "free will" or "coercion" that determined their range of applicability. As the realists demonstrated, the concept of duress had no substantive content limiting it to clearly marked-off bad acts such as the gun to the head. Looking only at the representational terms themselves, each had meaning only with reference to the other, so that free will referred to anything not called coercion and vice versa. From such a perspective, free will depended only on what was socially chosen through the representational metaphors to be designated as coercion.

With the metaphysics of presence, free will and coercion lost their mere metaphorical character as they became associated with positive entities existing independent of representational practice. The differenti-

267. It is thus worthy of note that the liberty of contract discourse was not marked *solely* by a commitment to the view of the individual as primary and free. The view of the intending subject as self-present was augmented by a view of objective constraint, by a view of the subject as a function of externality. The vision of objectivity was contained in the spheres of fraud, duress, strict liability, and public activities, which existed at the margins of the liberty of contract discourse as a limiting view that subjectivity could be subordinate to objectivity, that the self could be ruled by the other. Likewise, the projection in constructive realist discourse of the self-presence of objectivity was not total. Realism also contained the opposite vision connecting the subjective sides of each dichotomy—values, words, and transcendental nonsense were always there, standing ready to invade the sphere of objectivity.

ation of free will from coercion was imagined to be rooted in a point outside the play of language. This point itself was neither willed nor coercive; that is, not itself internal to the distinction it would define. At this moment of presence, the representational structure lost its sense of mediation and articulation and instead appeared to merely represent distinctions positively existing in the world. Accordingly, the social construction of the metaphors of representation was rooted in a self-present source which was merely re-presented in legal discourse.

Realism, in its constructive phase, was structured similarly. Facts were imagined to exist separate from the calculus of representation through a social language, as positive entities in the world. In the image of realist science, these facts could be collected by the scientist free from values, or free from the vestiges of social power reflected in socially contingent metaphors for grouping likeness and difference. This was the meaning of the methodological step of separating out the is from the ought for the purpose of study.

The metaphoric division of the world into subjective and objective categories, and the ordering of those categories so that one is seen as original and transcendental, form the metaphysical infrastructure for virtually all liberal explanations of social affairs. Thus, the opposition between formalism and instrumentalism, which supposedly distinguished liberty of contract and realist discourse, is echoed in other liberal dichotomies, e.g., the divisions between man and nature, mind and body, thought and experience, theory and practice, form and substance, reason and will, and law and politics. Each of these polarities divides up perception and communication by purporting to categorize the world according to its objective and subjective aspects. While differing in focus, they share the initial metaphor that subjectivity and objectivity re-present the world. And this metaphysic in turn provides the ground upon which theoretical approaches appear as oppositional.

The mainstream modes of liberal interpretation distinguish themselves according to which side of the subject/object dichotomy they take as primary and which they take as derivative. Thus, the same spatial metaphor underlies the opposed epistemologies of idealism and materialism. Idealism, like the liberty of contract approach, treats subjectivity as prior to objectivity. Idealist interpretations consider the subject as the creator of the objective social field in some imaginary moment prior to the subject's becoming situtated in the social field, e.g., the original position of Rawls, the phenomenological reduction of Husserl, the transcendental ego of Kant. In the idealist vision, objects of consciousness are contingent on the transcendental structures of consciousness, which are transcendental in the sense that they are not affected by experience in the sensuous, objective world. Since the structures of consciousness are uni-

versal and shared, truth can be discovered by reflection. The truth that emerges is made up of universal forms of reality from which the contingencies of time and space have been deleted.

Thus, in idealist representational structures, knowledge is not contingent on particular experience but transcends sensuous verification and is the ground for sensuous activity itself. The universal transcendence of subjectivity then translates into rationalism, the concept of a universal reason, the ought, which evaluates the is. This metaphysic forms not only the representational metaphor within which claims to knowledge appear coherent, but also the basis for a group of social theories within which social events are explained by reference to the subject's free intent. The liberal notion of freedom is rooted in idealism's notion of an ontologically free subject which exists prior to the constraining world of experience. This notion of a free subject makes concepts such as free will and intentionality seem plausible. Just as consciousness produces the world according to its own laws, a free party agrees to contract terms, a free individual intends to commit a criminal wrong, the author of a literary text creates its meaning, and history moves by the will of great historical actors or the introduction of new ideas.

Materialism, though generally conceived as the opposite of idealism, is based upon the same subject/object representational metaphor. But like realism in legal thought, materialism reverses the temporal order so that the object is seen as transcendental. Consciousness and knowledge are viewed as derivative and contingent upon the sensuous world which exists independent of the subject. In this representational discourse, belief without material verification is mere subjectivity or empty formalism, since the internal coherence of propositions may have no relation to the real world. Facts are objectively verifiable and thus a ground for knowledge; values are not. Various formal and rational models of the world (or hypotheses) are to be tested in materialist discourse to see which one works in the world. By subjecting and limiting truth value to that which complies with the given, objective world, materialism reverses the subject/object relation between the "is" and the "ought" by privileging the "is" over the "ought." The metaphysic of the transcendental object also forms the infrastructure for a group of social theories within which objectivity is seen as the source and origin of subjectivity. For example, social events are explained by the functional necessities of material production and exchange, or by the necessary structures of group life, or as adaptations to the constraints of nature. Rather than perceive social change in terms of the will of individuals or the influence of ideas, materialism changes the focus from intent to context, from the mind to the body, from choice to necessity.

The subject/object metaphor for the representation of social life

thus forms the metaphysical infrastructure for two stereotypcical stories about the legitimacy of social events, one based on the subjective consent of the participants and the other based on the objective necessity for social life to proceed in a particular manner.

On the one hand, the vision of the transcendental subject gives rise to a myth structure based on a realm of pure subjectivity, where the individual lives as an autonomous, private being, self-constructing her identity on the basis of a personality that is imagined somehow to exist prior to engagement in social relations and to form the basis for consent to those social relations. Moreover, within this metaphysic, it is imagined that the consent of the self-present individual can be identified from the outside according to its essential and universal characteristics.[268] The utopian aspiration of this mode of liberal thought is egalitarian in its universalizing apsect. By effacing the contingencies of situation and context, it promises to achieve an equality to all. It promises that the criteria of this equality—the distinctions between free will and coercion, public and private, and the like—can be impersonally identified and applied because they exist as attributes of the world itself, unaffected by the representation of this world through social categories of perception and communication. As the subject is pure, so too is the observer who identifies instances where the subject has acted. Accordingly, this mythic representation of social life satisfies the ideology of equality and impartiality embodied in the liberal conception of the rule of law. Treating like cases alike becomes a coherent enterprise in modes of consciousness in which identity and difference have transcendental grounding.

On the other hand, adoption of the temporal metaphor of objective priority forms the metaphysical infrastructure which legitimizes social relations through the notion that they are objectively necessary rather than subjectively chosen. The objective and external is privileged as prior to and constitutive of the subjective. Thus, for example, the contractual regime is seen not as the result of the free intentionality of contracting individuals, but rather as an adaptation to objective conditions and shared purposes of social life (e.g., increasing the sum total of societal satisfaction). The dichotomy of man and nature is organized so that nature is placed prior to man and man is the effect rather than the cause of objective social structures. This metaphysic underlies the social sciences generally, which are "sciences" precisely to the extent that they view the social order as ruled by objective laws on a broad analogy to the internal dynamics of the laws of nature, which transcend individual or social will. The stance adopted by social scientists towards the social

268. If such consent could not be identified, the determination of consent in particular instances might reproduce the very political struggles that the attribution of the characteristic of consent is supposed to make irrelevant.

world is accordingly the same as that adopted by natural scientists towards the physical world—to observe the facts and induce the regularities inhering in the facts, with the idea that the scientist has no effect on the data and cannot intervene to change the dynamic of the facts. Social relations are translated as inhering in the necessary attributes of group life or in the objective requirements of production and exchange.

In law, the transcendental object appeared in the guise of policy science or functionalism in the 1950's, and law and economics in the present period. Each views the social field as existing prior to law and containing internal dynamics separate from law. Accordingly, law is imagined to be impersonal and impartial by adapting instrumentally to the social functions or needs existing in the social facts themselves. For example, the sociological jurisprudence of Pound imagined that the social field could be unproblematically divided up into various spheres, each presenting their respective needs according to the social region's essential nature.[269] Thus, the economic sphere of the market simply existed as a given of social life; law could respond to the needs of this sphere by providing clear rules and thus fulfill the need for certainty that the market itself presented. Similarly, Llewellyn's aspiration to move commercial law from the paper rules to the real facts of commercial life presumed that the "reasonable customs" existing in particular commercial contexts somehow simply arose of their own power as adaptations to the objective needs or functions of a particular industry. Llewellyn did not consider whether such practices were themselves inscribed with notions of legality or illegality and with the scars of historical economic struggles, with winners and losers. In the law and economics approaches, the laws of supply and demand as reflected in price theory, or the processes of free-riding and holdout in institutional economics, are seen simply as facts inhering in social relations, to which law can instrumentally and neutrally adapt.

These interpretations of social events depend for their authority on the assumption that the subject/object metaphor for categorizing social relations is itself a noncontroversial and noncontingent way of organizing perceptions and communication. But, when combined with the notion of unmediated presence, the subject/object metaphor reflects an orientation toward the valid representation of social events that continually obscures the events' social character by denying the possibility of a dialectical or differential relation between subject and object. The representational discourses organized around the subject/object metaphor suppress the fact that we are never in a private, self-present place because even self-consciousness represents the self to the self according to absent public repre-

269. *See* Pound, *The Scope and Purpose of a Sociological Jurisprudence* (pts. 1 & 2), 24 HARV. L. REV. 591 (1911), 25 HARV. L. REV. 140 (1911).

sentational categories. These discourses also obscure the extent to which there can be no public realm separate from our private selves since there is nothing to make up this realm except people acting and conceiving of the world in particular ways. In other words, social relations are translated through the subject/object dichotomy and the metaphysics of presence either as the effects of objective, social causes or as the intended creations of autonomous individuals. Individuals are not seen as both constituted by and constituting the world in which they live. Accordingly, each myth based on the subject/object dichotomy suppresses the manner in which social life is always socially constituted: one by saying social power is derivative of individual rather than social choice; the other by denying the contingent aspects of social power in favor of objective necessity.

This belief in the analytic separability of subjective and objective aspects of social life is mirrored in the purported relation between the social world and the representation of the social world. 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 (much like the notion of truth in religious ideology), rather than by a historical, open-ended, and creative process unlimited by any transcendental laws. The modern image of this liberal notion of cognition is the scientist as objective observer. The nineteenth century precursor is the image of the rational man, possessing knowledge through the process of self-reflection independent of experience. Both versions, flowing from the subject/object dichotomization, privilege passivity over activity at the cognitive level by favoring knowledge gleaned from contemplation and observation, or "disinterestedness," over understanding achieved through engagement.

Like the formalist and instrumentalist approaches to law, liberal interpretive practice, whether at the level of idealism, materialism, rationalism, or empiricism, has always rested on the notion that the representational practice is not interpretation, but re-presentation of some positive source which exists separate from the representational practice itself. The representational language purports to achieve a determinacy and necessity that contrasts with the free-play of language, passion, myth, and metaphor.

But this claim to impersonal and impartial authority, whether made in the name of reason, knowledge, or law, is always false. It inevitably depends upon the repression of the socially created character of meaning in favor of a meaning imagined to be free from contingency and the mere

conventionality of language. On one level, the metaphysic of the subject/object analysis is false because it denies its own status as a contingent metaphor for the interpretation of social life. There is no necessity in categorizing social experience according to the subject/object, free will/coercion, public/private, or fact/value representational dichotomies. The critical issues with respect to the tension between individual liberty and collective security, or between the choice of an idealist or materialist explanatory structure, or between a natural law or positivist jurisprudential approach, are significant only within the terms of the subject/object metaphor, which itself is simply a socially created metaphor for grouping experiences. Accordingly, the external, self-present source which liberal discourses purport to re-present is always an effect of the differentiation of the discourse itself. The contracting party or the "consenting" woman are not things existing "out there," but effects of a particular language, a particular way of carving up perception and communication into conventional and contingent representational structures. The interdependence between the representational structure and that which is purportedly represented indicates that the observed and the observer can never be separate; representation is always interpretation based upon the interpreter's metaphors for constructing reality.

The liberty of contract and realist discourses could achieve the authority of law over politics, of reason over will, and of knowledge over power, only by denying the metaphoric character of their own representational structures. They took their socially created language and treated it as a positive reflection of things existing ouside of the play of language. Positivity was achieved by suppressing the manner in which the positive representation actually depended on exclusions of other metaphors for experience. Presence was achieved in a synchronic sense by denying the mediations of social space, the manner in which the impersonal and impartial representation of the social world was the result of subjugations of other knowledges of the world and dependent on a particular and contingent social signification practice. This effacement of language was achieved by associating the representational structure, say the subject/object metaphor, with differentiations actually existing in the world, separate from the free play of metaphor. The projection of presence denied the extent to which any representation of the present is already an interpretation through the mediation of social and contingent ways of categorizing experience. It also denied the extent to which the present is constituted by the absent social representational structure. Once the discourse of presence effaces the differentiality of its own representational structure by associating it with positive content existing independent of the representational practice, it has universalized *space* by denying that the discourse proceeds from a particular place in the social geography.

The claim to the authority of a self-present source in subject/object symbolizations of the social world also is false because it inevitably ignores the *temporal* differentiation of its object. This temporal dimension of the subject/object metaphor thus constructs its "present" by suppressing time, the past and the future. The past is suppressed as the objects of analysis are taken as simply given, divorced from their social construction in the past. The traces of this construction, existing as negative differentiations pointing to contingent social acts in the past which might have been different, are suppressed as the object is abstracted from its constitution and taken as simply given. Similarly, the dependence of the given on the future, on subjects' either reproducing or resisting the present state of affairs, is obscured. The dependence of the given social life on subjects' continuing to act out their social relations according to the particular prevailing language for social interchange points away from the present to its relation with the future, to the traces of the future contingencies which "exist" in the present by pointing elsewhere, to the possibilities that the given, within it at any moment, has potential for change and transformation.

In the context of the metaphysics of presence, then, the subject/object metaphor for the representation of social life achieves authority by universalizing spatial and temporal metaphors. Space is universalized as the representational discourses efface the fact that their own position is merely one interpretation of the social field. The representational discourses efface the fact that they are defined by their exclusions of other metaphors of representation. Time is universalized as the projected source for representation is abstracted from its past construction by subjects and its future dependence on subjects. This universalized source, abstracted from social geography and social history, is then presented not as an abstraction at all, but simply as reality itself. The differentiations of the interpreter, the abstractions based upon the intepreter's own calculus of relevance and irrelevance, are denied.

The realist characterization of the liberty of contract discourse as "formalist" can thus be seen to have depended on looking at the discourse from the outside, in disbelief of the notion that the metaphors of the representational language directly reflected positive content existing in the social field itself. Once the tie between the representational conventions and the objects they were to re-present was broken, it appeared that the attributions of consent and coercion or public and private in the liberty of contract discourse were "merely" formal, in that they proceeded on the basis of external characteristics of events that had no necessary tie to the "reality" of the events. To the realists, then, it seemed that the distinctions drawn in the liberty of contract discourse flowed from an organization of perception and communication that had been

derived in the mind rather than in actual experience. But it is important to note that the liberty of contract adherents did not themselves view their practice in this way. In the liberty of contract era, the authority of legal discourse was based on the reification of particular social events as assoicated with one or the other side of representational polarities. The distinctions drawn were taken as real precisely to the extent that they were thought to re-present distinctions that existed in the social field itself. Accordingly, the belief in what the realists called formalism was actually a belief in positivism in the sense that the liberty of contract representational discourse could be convincing only to the extent that it effaced the socially created character of its method of differentiation in favor of the belief that its categorizations reflected simply the "is," the facts, of social life. Within the mythology of the transcendental subject, consent, the contractual form, and the contracting party were not seen merely as constructs of the social practice of differentiation, but instead were imagined as positive entities.

To be sure, the realists were correct in the sense that what they characterized as "formalism" in the liberty of contract discourse depended on a universalizing of spatial and temporal relations. But in this respect, the realist and liberty of contract discourses were (and are) the same. The positivist approach to representation is just as formalist as formalism in that it reifies socially created metaphors into things actually existing apart from the metaphors. The pretensions that the "is" can be separated from the "ought," and that facts can be represented separate from values are convincing only to the extent that the socially created calculus of perception and communication within which the facts are represented is itself effaced and presented as the direct reflection of positive distinctions existing "out there." This pretension of separability is convincing only to the extent that the "facts" as they are supposed to exist "out there" have been abstracted from the contingencies of time, from their past construction by subjects and their dependence on the future actions of subjects.

Take, for example, the Learned Hand negligence formula. In the common presentation, it purports to achieve a neutral and determinate ordering of social relations by basing legal requirements on an objective comparison of the costs and benefits of social conduct. The basis for its appeal is the myth that objective policy analysis can be rooted in the facts and necessities of social life. But each stage of such a negligence calculus depends upon the reification of its representational metaphors.

First, the notion that the social world can meaningfully be expressed according to costs and benefits is a contingent metaphor that excludes other ways of perceiving and communicating about the social world. The choice of this metaphor over others cannot itself be justified accord-

ing to a cost/benefit calculus since it is the basis for any cost/benefit calculus. Its authority as impersonal and impartial, and not itself a manifestation of social power, depends on avoiding the infinite regress implicit in the need for a cost/benefit calculus to justify the use of a cost/benefit analysis by projecting the accounting metaphor as universal—as not a metaphor at all. This effacement of the social power implicit in the choice of representational metaphors denies that the resulting representation of social life is not a re-presentation, but an interpretation according to a contingent language for perception and communication, a construction of the interpreter.

Second, the Hand negligence calculus depends on an effacement of the social construction of what it purports to re-present in a temporal sense. It must take the costs and benefits it purports to compare as simply givens, rather than as constructions of contingent social practice. Even after accepting the categorization of social life according to the cost/benefit metaphor, the determination of what is a cost and what is a benefit still depends on negative differentiation through a contingent representational system within which a cost appears as anything not defined as a benefit and vice versa. This relational play is frozen by assuming that costs and benefits simply exist as self-present facts inhering in social reality. But the reigning conceptions of what is a cost or a benefit are the result of a social and historical construction of meaning. For example, nothing in the notions of costs and benefits dictates whether the psychic reactions of third parties are to count, nor whether the costs of an employment relation, for example, include the alienation we feel as we objectify ourselves and others as commodities to be traded on an employment exchange. To be sure, such a wide view of costs and benefits would make the calculus indeterminate. But any determinacy in the calculus is the result of a social differentiation of what counts as a cost or a benefit, and not the result of anything flowing from some self-present existence of these "things." Any particular conception of costs and benefits contains traces of its past construction by people imagining the world in particular ways and its dependence on people not imagining the world differently in the future. In short, costs and benefits are never present; they are always constituted by externality and absence, both spatially and temporally.

The appeal of both the liberty of contract and realist approaches depends on the metaphysics of presence. Both seek to find a self-present source for social relations that is unmediated by social differentiation and construction. In one mythic translation, the source for social relations is subjective but asocial. In the other, the source of social relations is social but objective. Thus the realist and the liberty of contract discourse are both positivist and formalist at the same time. Both depend for their claim to legitimacy on the reification of their representational metaphors

as immediately re-presenting some reality that exists apart from representational practice.

The positivist and formalist discourses represented by constructive realism and the liberty of contract approach can be seen, despite their differences, as part of a larger representational complex for perception and communication. Sharing the subject/object metaphor for the spatial representation of social life and the projection of presence for the temporal representation, they both reflect modes of discourse which assert hierarchical superiority over other metaphors for describing the world by effacing their own dependence on social differentiation. This effacement is accomplished through the metaphysical projection of an original unity and source that is supposed to exist prior to difference and derivation. It is this projection of an undifferentiated but determinate source for social relations existing outside the contingencies of social practice that is supposed to provide the basis for distinctions between knowledge and power, reason and will, and law and politics.

But this metaphysical infrastructure is not simply an aspect of intellectual discourse in liberal societies. It forms the infrastructure for reproductions of status quo authority in everyday life as well. Thus the mistaking of socially created things for objective realities is not merely some intellectual defect of liberal theory which could be corrected simply by "recognizing there is no ultimate ground" or by rejecting epistemology in favor of social theory. Rather, it is embedded in the existential texture of life in liberal societies where claims to authority are institutionalized in everyday as well as elite discourse. As the next Part will discuss, at the level of everyday life the effacement of social dimensions of social practices is reflected in the reification of the language of social roles, as we mistake the language of social relations for objective things.

V
THE METAPHORS OF SOCIAL REIFICATION

To this point, the discussion of the metaphysical infrastructure of legal and other liberal representational practices has proceeded largely with the assertion that representations of social life in rational "disciplines," such as law, economics, or sociology, are actually contingent and political interpretations. The argument has been that the claims of these discourses to knowledge or rationality and to superiority over "mere" myth, opinion, or superstition are false because all such discourses themselves depend upon metaphors and projections of original unity or source. The discourses of law, reason, and knowledge are the myths of a particular historical time and of a particular place in the geography of social struggle and differentiation. Accordingly, the argument has gone, the division of discourses according to the reason/passion, or knowl-

edge/power, or law/politics differentiations is actually an act of power through which other ways or understanding and experiencing the world are marginalized as "personal," "ideological," "emotional," or "primitive." The authority of the discourses of "reason" depends on the subjugation of other knowledges of the world as inferior. The authority of law and reason are actually effects of a contingent political struggle whose temporary truce line has become frozen through a retranslation of social struggle into individual choice or objective necessity.

The stark nature of the politics of this translation can be captured by comparing liberty of contract's representation of working life and the union movement as simple products of individual consumptive decisions with the lived struggles of Eugene Debs and the railroad workers of the 1890's. The politics of translation is no less obvious when one compares the discourse of productive efficiency underlying rationalizations for the division of labor or the private property/free contract regimes with the barroom conversations of the factory workers who are the objectifications of the discourse. In other words, the discourse of reason and liberal authority are not simply one retranslation among many. Rather, they reflect collective motivations to reproduce existing forms of power and collective choices to side with institutionalized authority over social resistance. But the dimensions of power are no less real when there is no obvious resistance, when there is no Brotherhood of Railway Workers demonstrating the contingency of the reigning interpretation of social life. This power of the metaphysic of authority, which is all the more successful to the extent that it appears as non-power, will be considered in this Section.

The assertion that the "disciplines" of rationality are contingent interpretations of social life may suggest that they are somehow separate from the actual conduct of social life. It may seem as if there could be two moments, one the experience of social life, the other the representation of social life according to a particular language, to a particular way of representing similarity and difference, the Same and the Other. From such a perspective, the "problem of language," the inevitable mediation of the "present" with the grid of representational structure, would be limited to "language," to attempts to reproduce and communicate about social life through linguistic signs.

I have tried to suggest, however, a conception of language broader than the linguistic notion. In this conception, language is itself only a metaphor for social processes of distributing significance. The refusal to limit "language" (or "negation" or "differentiation") is motivated by an interpretation of social life opposed to the metaphysics of presence. The denial that the "problem of language" can be limited to something called "representation" that could exist at a separate and later moment from

"the present" is a denial that we are ever in such a "present" divorced from absent traces of social construction. In other words, the argument that we are always in language and that language is always interpretation in the sense of a contingent and social process of ascribing meaning to events cannot be limited to the sense claimed by the official discourses of knowledge and authority. Language also constitutes the sense of experience itself, even as we create the language for making sense of experience. Accordingly, the metaphors of authority discussed to this point cannot simply be limited to some "representational" or "ideological" level. They are also the metaphors of the authority of good sense constituting the existential feel of everyday life.

The spatial representation of social life according to the subject/object metaphor, and the temporal projection of a place of unmediated presence, appear in the phenomenology of everyday life as alienation. In the experience of social alienation, the contingency of social roles is suppressed as they are perceived and represented as existing separate from the subjects who create and reproduce them. Thus, the extent to which the "present" is socially constituted and therefore subject to change is denied as socially created things are taken, through the subject/object metaphor and the metaphysics of presence, as objects existing apart from subjects. We then feel alien in the social relations we have created as we imagine them to be ruled by forces external and autonomous from ourselves.[270]

The existential ramifications of the subject/object dichotomization may be summarized at the abstract level as follows. The subject/object representational scheme entails a general exteriorization of all "otherness." Exteriorization occurs as objectivity is seen as independent of the subject. This exteriorization is manifested in a distinction between Man, an intentional being, and Nature, the given, arbitrary, and unintended otherness. Nature (the object without consciousness) is exteriorized as external and unrelated to Man (the subject possessing consciousness). This exteriorization of Nature is rooted in the perception that Man does not see himself in Nature. Nature exists as an objective necessity standing against the freedom of the subject and possessing laws of its own, independent of Man's will and to which Man must subordinate himself. The distinction between Man and Nature is reproduced within the subject/object representational scheme in the dichotomization between mind and body. The body lives in the sensuous, natural world and is subject to the demands of natural laws existing independent of Man's intentionality and over which he has no control. The body is irrational in the same way that Nature is irrational. This representational scheme is further

270. This discussion is influenced by Gabel, *Reification in Legal Reasoning*, 3 Research L. & Soc. 25 (1980); J. SARTRE, THE CRITIQUE OF DIALECTICAL REASONING, *supra* note 6.

reflected in the dichotomizations between reason, associated with the mind, and desire, associated with the body.

This exteriorization of the world outside consciousness continues with respect to the other "objects" of consciousness, including other "subjects," who, like nature, are presented to consciousness in their phenomenal states, as objects-to-consciousness outside and independent of the self. The self does not see itself in the other precisely because the other is an other, an object presenting the threat of objective constraint to the freedom of the self. Since the other appears as an object to consciousness, it is represented in consciousness in phenomenal, formal categories defined by the social conventions for the perception of the other. That is, the other is never immediately "present" to consciousness the way that the self in subject/object dichotomization is taken to be immediately present in self-consciousness. While self-consciousness is taken as private and prior to consciousness of the other (at least in idealist representational modes), consciousness of the other is mediated through public representational categories; the other is re-presented rather than present. Hence, the other appears as parent, student, teacher, friend, boss, employee, colleague, lover, husband, wife, etc. The full existential being of the other is reduced in consciousness to the other's role vis-à-vis the self in the grammar of social relations.

The priority of the self before the other in idealist manifestations of the subject/object dichotomy is an arbitrary interpretative construct which can be reversed by simply applying the description of consciousness of the other to self-consciousness. The temporal order can be reversed by emphasizing the manner in which an individual's self-consciousness is mediated through categories in existing representational practice. An individual's self-understanding is in terms of existing social roles and relations, just as an individual's experience of otherness is filtered through pre-existing classifications. For instance, the self, in relation to the other, undergoes an abstraction and objectification as the self is created as a social being in reciprocal relation to the gaze of the other, for whom the self appears as an other. The other represents in the subject/object dichotomy a restraint to the subject's freedom to create herself in the world according to her intention because the other sees the self, in the context of an objectified world reflected in the social signification system. The other turns the self into an object for another. The self internalizes the other's perception as self-identity, since external referents constitute the only available referents with which to represent the self to the self. Accordingly the public system of signification invades the "private" sphere of the subject, reversing the idealist order of priority by suggesting that the self is constituted by the other and by externality generally in the very moment of self- consciousness. Thus there is no private

sphere or moment of immediate self-presence; self-consciousness is already inscribed with the public representational system.

The public system of signification contains not only categories for perception and self-perception, but also codes for behavior. Each of the social categories in which the other and the self are represented to consciousness carries the baggage of formal, specified limits for the given relationship. A parent, child, boss, employee, etc., act in ways defined by the social category. The social categories and the boundaries for social relationships associated with them in turn demand the objectification of the self in social relations. The subject is constrained to fit her own behavior into the bounded categories for social relationships in order to have social relationships.

This abstract description of the process by which the social world is perceived as alien to the subject may be clarified by consideration of more concrete social relations. We come into society faced with a preexisting grammar of social relations which defines the various social hierarchies. The existing forms of relations between parents and children, men and women, managers or owners and workers, teachers and students, etc., "reign" in the social consciousness as normal modes of relations which exert a force over the relations' current embodiment. These social relations are each marked by a dichotomous structure of representation whereby one side of the relation is privileged over the other as a sovereign who enjoys subjectivity over the realm of the relationship. This subjectivity, however, is only apparant as a power when the relation is viewed from the inside of the relation or from within the subject/object mode of symbolization. From an external view, the mode of relation itself appears to be a mediating subject which transforms both the sovereign of the relationship (the parent, man, manager, teacher) and the other (those who are subject to the sovereign) into its objects, to be ordered and organized according to the relation's dynamic.

For example, students enter a classroom and assume a certain mode of behavior; they act like "students". The teacher enters the classroom and assumes the role of "teacher"; she stands in front of the classroom and teaches the students. Viewed internally, it would appear that the teacher is exercising a sovereign role, determining the nature of the classroom relations by acts of her subjective will. And in fact, in this relation, the teacher is in a favored position in the social grammar as the recognized subject of the relationship. But to end the analysis here would be incomplete, for the teacher is also constrained by her role as teacher and therefore is not actually a sovereign. Her sovereignty is only formal, subject to the mediating sovereignty of the teacher/student relation itself. This relation is a historical social product which preexists the appearance of both the teacher and the students in the particular classroom. As

such, the teacher/student roles appear to particular students and teachers as something outside of themselves and not intended by them as individuals. In short, the roles appear as otherness, as objective facts within which their intentionality is to be exercised. The roles, consisting of various norms of appropriate behavior for each of the actors, form a structure or grammar for the relations which transcends any particular acting out of the roles.

The students perceive themselves as students of the teacher and have interiorized the "normal" (as both regular and prescriptive) behavior expected of them as students. Without having experienced the immediate, particular instance of the teacher/student relation, the students know that they must abstract from their full existential beings and present a certain objectified version of themselves which matches the social conventions of how students act. The teacher is under a similar constraint. Generally stated, the social grammar dictates that the form of the relationship be defined by rationality rather than desire, so that intimacy, empathy, anger, and the other manifestations of desire are to be repressed according to the demands of the public representational scheme.

The categorical structures of social relations thereby come to stand between the participants in the social setting as an invisible distancing device, ensuring the limits of the relations. A student doesn't speak to the teacher as he would to another student since the teacher is the other, the exterior in which the student does not see himself. Instead, the student grants the teacher the deference signified by the structure of the relation, a process of subordination which continues beyond any functional requirements for the transmission of the knowledge purportedly taught by the teacher to the student. The social conventions of the teacher/student relation, a historical product created by past social action, come to be seen as an objective thing, as artless and natural, since they appear without the imprimatur of any particular subject's intention. The basis of the social conventions as a social construction is collectively forgotten, and thus the possibilities for social transformation repressed as the reigning categorizations for social life achieve an anesthetic grip on social actors. The resignation to the status quo, in short, is not even perceived as a decision when the status quo appears as an objective fact rather than a social, subjective construction.

The commercial world reveals a similar objectification of institutionalized social hierarchies. For example, the typical working relationship in a restaurant consists of a hierarchy running from the manager, the sovereign of the sphere, to the dishwasher or busboy, the most subordinate. Each person in the hierarchy assumes his role in the production process, with its appended social significance. The manager is

"in charge" of the others by virtue of his formal authority, which is signified at various levels. The manager, for instance, typically wears a shirt and tie, the attire of social respectability which signifies that deference is in order. The others wear uniforms or functional clothing. The manager's clothing serves to distinguish him as a subject in connection with the customers, who also appear in respectable clothing when they arrive to be served.

The manager's status in the hierarchy is further signified by the fact that he receives a salary rather than an hourly wage. The salary suggests subjectivity according to the ideology of freely negotiated pay, which in turn implies qualitative differences between managers. By contrast, the pay of dishwashers and busboys depends on the strict quantification of the timeclock; it is not negotiated and is based upon quantitative aspects rather than the quality of the person's work. ("A dishwasher is paid x per hour.") The manager is further distinguished in the signifying system by his possession of private work space, in contrast to the others, who work in public view of each other or the customers.

The waiters and waitresses are subject both to the sovereignty of the manager and the sovereignty of the customers. To the customers, they appear as objects subordinate to the customer's subjectivity. Their social significance is indicated by their uniforms which suggest their uniformity and therefore their interchangeability. The waitresses' objective status vis-à-vis the customer is confirmed by the nature of their uniforms, which typically invite the customer to view the waitress as a sexual object, a sterile nurse-like figure, or a little girl. The waiters' objective status is ordinarily manifest in clothing by an exaggeration of various forms of respectable clothing (tuxedo-like, suggesting the butler) or the costume of some mythic figure (cowboy clothing).

The subordination is further reflected in the colloquial "where is our waiter/waitress," the symbolic representation of a proprietary relationship. The proprietary aspect of the relationship extends to the manner of pay. The waiter/waitress typically depends on the discretion of the customer for the tip. The waiter/waitress must be "nice" to the customer according to the social conventions as to what being a nice waiter/waitress means. This ordinarily means maintaining a subordinate role while being "personable," that is, acting *like* a person (rather than merely carrying out the functional duties of taking and delivering orders) while not presuming to be subjects equal to the subjectivity of the customer.

Of course, the customer's subjectivity is only apparent. Like the teacher's subjectivity, it is only sovereign from within the context of the relation between the customer and the waiter/waitress. The customer is also constrained by the grammar of the social roles to act like a customer. He is reciprocally objectified by the waiter/waitress who sees him

in terms of his function in the social system of signification and who accordingly abstracts from his total being to "size him up" and determine the likely size of the tip and possible ways to adjust the manner of service to increase the tip.

Like the teacher/student hierarchy, the restaurant hierarchies reveal the sovereignty of the structures of relations. The social grammar preexists the appearance of any particular manager, waitress, or dishwasher as an objective social product to which the various social actors must conform by a process of abstraction, so that they "play their part" according to the social script. The point of all the signalling devices, such as attire or manner of pay, is that the social actors are not to express themselves when carrying out the role, but instead are to express the role itself. The intentionality of the social actors must occur within the constraints of the roles so that there may be "friendly" or "bossy" managers, "personable" or "surly" waiters, etc. From within the subject/object mode of representation, however, the work categories themselves are perceived as outside the realm of intentionality, as just the way things naturally are in the particular setting. The split between management and ownership further accentuates the objectivity of the structure as given from "out there," as a positive term rather than as the relational product of the intetionality of visible social actors.

Moreover, the notion of playing a part in the public system of signification of the work world extends into, and comes to constitute, the "private" world after work as the social actors begin to identify themselves in terms of the public representational system. Accordingly, in the social relations outside the restaurant, it is not unusual for a waitress, for example, to use the work hierarchy when choosing dating partners, and therefore to see the manager as more desirable than the dishwasher, and conversely for the dishwasher to view himself as unworthy of a waitress above him on the hierarchical order.

These patterns of self-objectification through the grammar of social relations hold in other areas. In corporate and governmental bureaucracies, the message that the worker is filling rather than creating the role is established by manuals which seek to impose uniformity in the way that the role is carried out. In industrial production, division of labor on the production line transmits the same social meaning. The worker is presented with the demands of a machine to which he must subordinate himself and which appears to exist prior to and independent of the subject. In relations between men and women, the gender-based social expectations form the structure which acts as a social power in particular relations.

In sum, the hierarchies of social relations are represented in consciousness through a language which serves to order perception of and

communication within the realm of social relations, and which establishes the categories through which the relation with the social other is mediated. This language is expressed by physical structures, such as the assembly line or the arrangement of seats in a classroom, and by "interior architecture" or materialized social relations, which establish the structural homology of patterns of dress and communication with status in the hierarchies. As a language, these aspects of social ideology establish in advance of immediate experience the categories in which the experience will be translated and the boundaries for the possibilities of particular relations. Thus, just as the assembly line orders social relations in the factory according to stations on the machine, objectified social relations, presenting themselves from the viewpoint of subject/object dichotomization as divorced from the intentionality of social actors and therefore as alien objects to the self, work to order the possibilities for social relations as they become frozen in consciousness. Like the classroom architecture, the objectified social forms mediate social relations as social actors view themselves as objects fulfilling the pregiven role. To the extent that social relations are projected as external to the self, the self must adapt to the relations, just as Man generally must adapt to external Nature. The self, therefore, must become an object to place himself in the external, objective world.

Social roles are taken as objective to the same extent that they are seen to signify some positive, rather than merely relational, term. The teacher is socially created as "teacher" only in relation to the way "students" are socially created. There is no positive content to the roles themselves outside of their relational status. From within the subject/object dichotomization, however, the roles are seen to have positive content, and to exist as objective terms with fixed natures, which foreclose alternative possibilities for social organization. In short, they are reified. Socially created relations between people are perceived as things having a nature and ruled by unintended laws like objects in the natural world. They are viewed as alien to the self, just as the worker's products within the capitalist ownership system and the division of labor are viewed as alien to the worker, since he does not see himself reflected in the objectifications of his labor and comes to see them as having a life of their own, a "phantom objectivity."[271]

The process by which social roles and relations are reified on an experiential level is analogous to the manner in which they are reified in interpretive practice. In each instance, language (whether it be linguistic or the codes of social roles) is effaced in favor of the metaphysics of presence. The contingent, relational and socially created aspects of meaning

271. G. LUKACS, *Reification and the Consciousness of the Proletariat* in HISTORY AND CLASS CONSCIOUSNESS: STUDIES IN MARXIST DIALECTICS 83 (R. Livingstone trans. 1971).

are suppressed in favor of a determinate signification within which, it is imagined, things simply are. Things are made to appear autonomous from any connection to social practices, which mediate meaning and which hold the knowledge that things are not simply present but are created and subject to change. When the langnage of social roles is experienced within the metaphysics of presence, its dependence on temporal and spatial differentiation is suppressed. Thus, reified social roles lose their historical roots as the products of contingent social constructions and appear sinply as givens. And the sense that roles exist as manifestations of power in the social geography is suppressed in favor of a view that the forms of association are simply the noncontingent means for accoinplishing particular and necessary social tasks. From this perspective, the language of social roles is projected to have positive content, just as the word "tree" is projected to have positive content as its socially produced status is suppressed. The language of social relations assumes an objective and transcendental status, acting as the absent third that mediates relations between the self and the other, the subject and the object.

The reification of social roles appears in other regions of institutional life as the various subject/object structures of representation come to form a complex web of relations which contextualize each other. For example, the teacher/student relation is only one of many in the school. Focusing on just that relation reveals the students as apparent objects to the teacher as subject. But the teacher/student dichotomy operates within the parameters of broader dichotomizations. In a university context, for example, there are within the class of teachers various hierarchical statuses following along a general subject/object continuum (e.g., tenured/untenured), and there are various dichotomizations among the students themselves (e.g., white/black, rich/poor, male/female, attractive/unattractive, northern/southern, normal/nerd), each imbued with social significance. Moreover, the teachers and students form a unity of subjectivity when compared with others in the university, say maintenance workers, who appear vis-à-vis teachers and students as pure objects. Comparing the teacher/student dichotomization to the intellectual/manual dichotomy reveals that within the teacher/student relation there is a greater degree of intersubjective recognition than that which occurs at the intellectual/manual level. Teachers see themselves in part as past student, and thus see themselves in the students, and students see in teachers the possibilities of becoming teachers. Each group tends not to see itself in the maintenance workers, so that the typical personal interchanges between student and teacher, however circumscribed by the reification of the roles of teacher and student, will be fuller than

interchanges between teachers and maintenance workers or students and maintenance workers.

Moreover, it should be noted that the language of social relations is itself not positive and simply existing; it cannot be captured by a determinate representation of the hierarchies of social life. Thus, to the extent that the above description implies that we are totally circumscribed by reigning social structures when we relate to each other, it is misleading, for there are loose ends that exist as traces of resistance and insurrection in each of the social regions that have been described.

In the classroom, a lingering sense of the artificiality of the relation appears in the uneasiness that is felt even when carrying out the particular roles. Occasionally the teacher is not perceived to represent subject and authority, but rather is constructed by the student as an object of ridicule. The students may not be perceived as subordinate, but rather feared to the extent that they constitute the means of self-recognition for the teacher. In the restaurant, the appreciation of the artificiality of the relations appears in the form of evasion of work procedures or the episodic sense that everyone in the restaurant is both stuck in the roles and dramatically tied together by the mutuality of being stuck.

To do something like a "sociology of social roles" by analyzing the langnage of social intercourse one must always choose some metaphors of representation to the exclusion of others. Thus, the extent to which social life has been cabined out and yet cannot be so reduced is lost. For example, according to the public/private metaphor as typically applied, sexuality is private and not public. To the extent that this representation is internalized by social actors as an external requirement of social life, social actors repress their sexuality in one sphere as they repress the extent to which their sexuality is socially constituted in the other. But the social language is never total. The public sphere contains traces of desire—invading in momentary glimpses of the erotics of social life and then immediately repressed—and the private sphere contains traces of public power—gender stereotypes, for example. To the extent that the representation of social life excludes these traces by claiming to re-present social life "as it is," it simply reproduces as its own representational metaphors the reifications of social life itself. Such representation ignores the extent to which the feeling of the cold air on the dishwasher's skin while waiting for a bus after the night shift, and the feeling of the muck from the bus trays as it is being absorbed into his skin even as clothes are changed and baths taken, are not "personal" experiences unrelated to the social relations within the restaurant, but are themselves constitutive of the reproduction of the restaurant relations. The "meaning" of social roles in the restaurant as relations between subjective and objective spheres depends on the exclusion of these other traces of, for

example, the all-night bus stop. These margins of experience are constituted as marginal to the very extent that the core of social life invites their repression.

The dialectical nature of the relationship of social roles and social actors may at this point be summarized as follows. On the one hand, the roles preexist the immediate experience of social actors. They appear as objects in the subject/object mode of symbolization since they appear without links to any subjective intention and as forms in which the particular subjects do not see themselves reflected. Yet, on the other hand, the forms of relations can only be reproduced by the action of particular social actors, and therefore their continued existence depends on subjects in history. The role is constituted as a role and reproduced in the very same experience in which it is presented as a preexisting, given form. Like the structures of language, the social role has no existence apart from its implementation in concrete experience. Moreover, like language, social roles are transformed each time they are performed. They are subject to the history of the groups fulfilling them and thus have no transcendental status.

The historical dimension of the structure of social relations reveals its subjective aspects. It is subjective both in the sense of its origin in the social creation of relations by past historical actors and in the sense that its objectivity is contingent and depends upon its being taken as an object and therefore faithfully recreated like an actor's role.

The subjective aspect of the grammar of social roles, however, is lost in the subject/object mode of symbolization and the concomitant reification described above. In the subject/object mode of symbolization, the contingency of the social roles and their dependency on fulfillment by subjects are suppressed through the process by which the givenness of the social role is associated with otherness and nonintentionality. The object thus assumes the characteristics of a sovereign, directing the social actors according to its own dynamic.

The denial of the contingent, historical, and socially created nature of the social structure grants particular forms of association autonomy and divorces them from their social construction. The forms of association become opposed to the persons whose practice constitutes them as an objective limit to the possibilities for social intercourse. The social grammar then acquires an anesthetic grip as it assumes a phantom objectivity collectively fantasized according to the mode of symbolization to have positive content. Because the forms of social relations are objectified as other to the subject, the subject must objectify himself to fit within the constraints of the perceived natural, objective world, and treat himself instrumentally as a means to deal with the given social reality. The socially created aspect of forms of association recedes in a process of

collective symbolization. Group processes are perceived as ruled by forms of association which have a positive existence separate from the group's practice and which rule the possibilities for group association. The rejection of this social reification occurs only at the further risk of losing even the tenuous group bond accorded by participation in the collective fantasy of reified social life.

Liberal interpretative practice has no category which could comprehend the subject/object nature of the structure of social roles. Liberal interpretive practice must remain internal to the process of social alienation because its methodological assumptions share with the existential experience it purports to interpret the grammar of subject/object dichotomization. Moreover, liberal representational practice cannot analyze its own status because it must apply its own interpretative constructs, the only ones available, to itself. It accordingly must suppress the subject/object interpretative construct as a contingent, social, and rhetorical projection and instead view its representational scheme generally as objective and positive, given its independence from any identifiable intentionality. Thus, the subject/object dichotomy is taken as natural, as common sense, while the rhetorical bases in the game of analogy (from "a person is different from a desk" to the social system generally) are suppressed.

The myth of the transcendental subject thus represents the various forms of social relations as subjectively intended by the social actors who participate in them. It ignores the historical structure of relations that precedes the particular actors and within which they act. The subject pole of the dichotomy is privileged. The representational scheme is built on the metaphor of self-presence at some moment prior to social engagement as the social field is explained in consensual, contractual terms.

The myth of the transcendental object represents social relations as a natural process, not the product of social power and therefore not contingent on social recreation. The object pole of the dichotomy is privileged as the social field is represented on a broad analogy to the natural world as prior to the subject. While idealist representation posits the subject as prior to and the creator of the social field, materialism treats the subject as an effect of the structural laws which preexist the subject. Both the idealist and materialist representations reproduce at the interpretative level the pacification experienced at the existential level by, on the one hand, failing to acknowledge the constraints of past historical practice, and on the other hand, failing to acknowledge the contingency of the status quo forms of social relations.

When viewed from within the subject/object dichotomy, the externality of the categories of social relations suggests that they are natural, objective, transcendental mediators of social relations. They order social

relations into a given form in similar fashion to the way language generally orders representations to consciousness. The entire social world assumes objective, constraining characteristics, opposing the subject as a natural, given limit to the exercise of the subject's freedom. Liberal freedom, defined in liberal consciousness as the freedom from objective constraint, accordingly comes to be associated with a constant search for privacy and self-presence, with the total isolation of the self from social relations. This exteriorization of the world outside the self implies a failure or inability to see one's own actions as constitutive of that world, and an inability to see one's self in relation to the world except as another object in the objective world.

The failure of liberal interpretative theories, whether idealist or materialist, to come to terms with the dialectical nature of the power of social forms of association correlates with the failure of liberal political/legal theories to justify these forms of social power. Their continual retranslation in liberal interpretative schemes back into individual intentionality or natural process is accomplished in political/legal theory at the abstract level by the distinction between public and private, de jure and de facto. These distinctions attempt to retranslate social power into private, individual choice or natural group processes as they purport to reflect the possibility that the formally recognized social power, democratic rule, has objective, transcendental limits and may exist independent of whatever happens in the private spheres of social life.

The social power exercised through the ideological grammar of social relations constitutes a significant public force. Moreover, it constitutes a threat to the liberal definition of freedom as the subject's independence from objective restraint. Insofar as the social power of the given forms of association and the mode of their representation in consciousness acts as a structural limit on the possibilities for the exercise of subjectivity, the subject in liberal societies is constrained rather than free. The individual freedom that is supposed to reside in private realms of social life, where the state has been excluded, is itself constituted by a public force manifested in the objective system of signification. The search for some self-present private realm free from public force founders as any self-present realm may be seen, from within the assumptions of liberal consciousness itself, as already invaded by public ideology.

Furthermore, this public constraint seems to return the limits of freedom to feudal conceptions, since the limits are created by the givenness of the status quo, by mere tradition. The contradiction of liberal consciousness is that liberalism's distinction between subject and object makes all social power appear alien to the self and therefore as a constraint on the subject, since the subject cannot see himself in the historical social products constituting forms of social intercourse. Freedom,

the hallmark of liberal social ideology, can therefore only be conceived as pure subjectivity, as the subject apart from and prior to any historical situatedness. Liberalism has no conceptual mechanism for representing the social power of historical social products and no organizational mechanism for controlling this social power, short of the antithesis of liberal organizations, i.e. the totalitarian state, which would regulate the social power of language in all its manifestations. Liberalism therefore must engage in a denial of social power as a social, rather than individual or natural, force.

The private/public distinction encompasses the strategy of denial because it denies the "social" aspects of the range of social relations by labelling them "private." This strategy preserves the liberal promise of freedom by fictively expanding the private realm from total isolation to any social relation not subject to governmental regulation. This characterization is made plausible by translating social power as only that power in which the individual subject can see himself reflected. The democratic political practice is the formal representation of this realm and is represented as having a monopoly on social power. Everything outside the purview of this realm, conversely, is not viewed as an exercise of social power. Thus, at one time, economic relations were considered outside the realm of democratic practice and were translated as the exercise of private, individual wills. At another time, the de facto decisions of private entrepreneurs to exclude particular groups of people from housing, employment, and accomodations were represented as a series of discrete private choices rather than an exercise of social, group power. To the extent that an analysis of social relations suggests that a similar group power operates in every realm of social intercourse, the notion that the democratic state is the embodiment of social power in which the individual may see his subjectivity reflected would imply that every social relation presents political questions. The arbitrary and social process of categorizing social roles extends to the process of categorizing as political or nonpolitical those issues purported to be without social significance. This implication can be avoided only by resting democratic political theory on the ultimate metaphor. The voter becomes a transcendental subject who freely determines his own fate regardless of the constraining structures of "private" power relationships.

While the idealist represents the force of historical social products as asocial and individual, the materialist mode of interpretation accepts the constraining aspects of these social products but iguores their historicity and hence their contingency. Here the public/private and de jure/de facto strategy is pursued by defining a nonpublic, de facto realm in which "natural" group processes, such as consumer market behavior, form the

private realm independent of the coercion of subjective social power, again formalized in the state.

In both idealism and materialism, the state is formalized as the realm in which the only subjective and contingent social power is exercised in a manner which does not alienate the individual subjects because, by the vote, they can see themselves reflected in the democratic process of state governance. Nevertheless, since each approach fails to see the coercive and contingent social force of de facto social relations, each becomes in the end an apology for the status quo social organization. Each denies the political and contingent character of relations. Each conceptualizes nonalienated exercises of social power as occuring within further subject/object hierarchies in the political realm, like the relation of representer and represented. The abstraction of the formally recognized social power, the democratic state, from the existential coercion of everyday life and from the immediate possibilities in concrete relations for the exercise of group self-determinacy, dictates that it too appear as an objective force, standing apart from the subjects and pacifying their potential power into the constrained role of "voter".

In short, the mediation of the public/private, subject/object, and fact/value metaphors, and the metaphysical projection of a source of social relations that exists apart from contingent social differentiation, are not peculiar to the "intellectual" as opposed to the "experiential" aspects of social life. We are never in an immediate, self-present space where we are not re-presenting to ourselves or others. The experience of alienation in liberal societies resembles the representation of social life in elite discourses of authority to the extent that social alienation, the feeling of being strangers in a world we have created, also encompasses the internalization of the subject/object metaphysic. Within that metaphysic, we suppress the extent to which we create the social language that mediates our social relations, and accordingly we subordinate ourselves to our own creations, which we mistake for objective things existing in the world.

CONCLUSION

American legal thought institutionalizes a particular myth structure for representing the social world. At the most general level, the representational structure is characterized by the subject/object metaphor and by the metaphysics of presence. Because of these two features, the distinction between law and politics, like the liberal distinctions between knowledge and power, or between reason and passion, is a particular myth about the social world. Legal thought is inevitably political to the extent that it institutionalizes socially created metaphors for the representation of social life. This political act of power is suppressed within the dis-

course by reifying the particular metaphors, by portraying the metaphors as independent of the play of language and rhetoric.

But this manner of legitimating authority is not peculiar to law. The same process of reification characterizes social life itself in the moments of pacification and alienation when the group sense is lost that things could be otherwise, here and now, that there is no transcendental basis to the existing forms and hierarchies of social relations. Legal discourse is only one area in which the metaphors of alienation are institutionalized.

The transformation of American legal discourse from the liberty of contract approach to the assimilated realist practice occurred within a broader practice of inscribing a determinate and authoritative meaning to social events by suppressing the contingency of social relations. Within this practice, there is a collective denial that we are engaged in politics, in the social construction of our world, with no stopping point, no point at which we are simply present divorced from the traces of social inscription, and no point at which social inscription could exist separate from us.

Accordingly, the "problem" is not language, or the subject/object metaphor, or the objectification of the other. The process by which power is reproduced through its representation as nonpower cannot itself be determinately represented by locating some source for pacification and alienation in some such marked-off aspect of the discourse of authority. Rather, the task is to face the inevitability of politics in the fullest sense, to recognize the extent to which we are inevitably thrown into social struggle as either reproducers or resisters of the reigning order and to face the prospect that we have no guarantees that any specific course is the correct one. We inevitably align with one group or another; there is no place free from the play of social practice, where we could flee from the existential condition that we create our world on the basis of a prior context that we can never fully grasp. 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 self-denial as we filter our perception and communication about social life through the official metaphors of validity.