



# Critical Theory, Structuralism and Contemporary Legal Scholarship.

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# Critical Theory, Structuralism and Contemporary Legal Scholarship

David Kennedy \*

## TABLE OF CONTENTS

I.	BEFORE CRITICAL THEORY AND STRUCTURALISM.....	210
II.	CRITICAL THEORY .....	216
	A. <i>Moments of Reinterpretation</i> .....	217
	B. <i>A Process of Development</i> .....	223
	C. <i>Critical Theory Refuses Positivism and Naturalism</i> ....	226
	D. <i>Critical Theory Aspires to be Liberating and Cognitive</i> .....	230
	E. <i>The Content and Domain of a Critical Theory</i> .....	235
	F. <i>Critical Theory and the Law</i> .....	244
III.	STRUCTURALISM .....	248
	A. <i>Linguistics</i> .....	249
	B. <i>Anthropology</i> .....	252
	C. <i>Literature</i> .....	259
	D. <i>Law</i> .....	266
IV.	BEYOND CRITICAL THEORY AND STRUCTURALISM .....	271
	A. <i>Some Similarities and Differences</i> .....	271
	B. <i>A Common Problem</i> .....	274
	C. <i>Some Departures From Critical Theory and Structuralism</i> .....	276

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## I. BEFORE CRITICAL THEORY AND STRUCTURALISM

After several decades of interdisciplinary nourishment, one can hardly peruse a law journal without encountering references to what once seemed the obscure texts of divergent disciplines: economics, sociology, philosophy, anthropology, literary criticism and beyond. In the years since the New Deal, legal theory has become more sophisticated and the methods of legal scholarship more eclectic. This article explores this expanding eclecticism by introducing two lines of thought which have influenced some legal scholars who have departed from mainstream legal thought: critical theory and structuralism.<sup>1</sup> I

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1. The rather summary treatment given these traditions in this article is intended to whet the reader's appetite for further reading. In order to fit these very diverse projects into a single story line, I have not selected texts and authors for consideration primarily for their representative quality or "historical importance." Instead, I have, throughout, indicated other secondary literature which I find useful for readers who seek alternative accounts of these traditions. I have selected these works either for their clarity or because they tell a different story about the authors I discuss. My hope is that legal scholars who have not yet dipped into these literatures, but who have been at least somewhat intrigued by recent critical strands of legal scholarship, will go beyond these secondary accounts to develop their own understanding of the underlying texts. To assist readers who want to go further, I have tried to indicate the major works of authors I discuss as well as essays or portions thereof which I have found particularly accessible. Many legal scholars who have relied upon these two intellectual traditions are to be found in the critical legal studies movement. Generalizations about the Conference on Critical Legal Studies, founded in 1977, are difficult. The conference has no definitive methodological approach but rather seems a somewhat unstable coalition of legal academics united by their commitment to a form of radical eclecticism reappraising basic approaches to legal scholarship. Some of the conference's work seems grounded in Legal Realism. See, e.g., Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230, 1233 (1981) [hereinafter Freeman, *Truth and Mystification*]; Parker, *The Past of Constitutional Theory and Its Future*, 42 OHIO ST. L.J. 223 (1981); Tushnet, *Post-Realist Legal Scholarship*, 15 J. SOC'Y PUB. TCHRS. L. 20, 21 (1980).

The intellectual legacies of the school extend beyond Legal Realism and include *inter alia*: (1) Marxism, see, e.g., Fraser, *The Legal Theory We Need Now*, 40-41 SOCIALIST REV. 147 (1978); Klare, *Law-Making as Praxis*, TELOS (no. 40) 123 (1979); (2) New Left anarchism, see, e.g., DUNCAN KENNEDY, *LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM* (1983); (3) Sartrean existentialism, see, e.g., Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601 (1977); (4) Structuralism, see *infra* notes 90-143 and accompanying text; (5) Neo-Progressive historiography, see, e.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); (6) liberal sociology, see, e.g., Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974); (7) radical social theory, see, e.g., R. UNGER, *KNOWLEDGE AND POLITICS* (1975); R. UNGER, *LAW IN MODERN SOCIETY* (1976); and (8) empirical social science, see, e.g., Macaulay, *Private Legislation and the Duty to Read — Business Run by IBM Machine, the Law of Contracts and Credit Cards*, 19 VAND. L. REV. 1051 (1966); Trubeck, *The Construction and Deconstruction of a Disputes-Focused Approach: An Afterword*, 15 LAW & SOC'Y REV. 727 (1981). For a more extensive list of the writings of the critical school, see *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984). Much of the scholarship of this group develops a critique of the legal discourse of "rights." See, e.g., Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980); Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining*, 4 INDUST. REV. L.J. 450 (1981); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

This strand of the movement is associated with a critique of legal scholarship which is not

argue that although these complementary disciplines provide useful leverage against liberal legal thought, in many ways their use in legal scholarship has repeated the difficulties which motivated their importation. The final section of the article suggests that the diverse work of "post-structuralists" might prove suggestive and provocative for legal scholars who have heretofore foraged in critical theory and structuralism.

Legal scholars who look to the literatures of critical theory<sup>2</sup> and structuralism<sup>3</sup> share a sense of the difficulties faced by contemporary legal scholarship. Indeed, their perception of the problems faced by post-war legal scholars differs very little from the perception of other scholars who have turned to foreign disciplines. All seem to feel that legal theory and doctrine have become increasingly fragmented since the era of realist scholarship before the Second World War.

Although legal theory and doctrine have become more pervasive over the past decades, they seem paradoxically also to have become weaker and less persuasive. Doctrinal argument seems increasingly complex and ever less able to determine outcomes. The normative moorings of the most basic doctrinal discourse by lawyers, scholars and judges seem infirm. Despite their continued, if muted claims to account for events and behavior either proscriptively or prescriptively, legal principles, rules and policy arguments seem to dissolve far too easily into thin disguises for assertions of interest. The more diverse the sphere of an argument's application, the thinner it seems to become until its manipulability becomes more apparent than its persuasive clout. The result has been ever more polarized arguments, ever more sophisticated doctrinal di-

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directed at breaking down this ideology. See, e.g., Freeman, *Truth and Mystification*, *supra* note 1; Gordon, *Historicism in Legal Scholarship*, 90 YALE L.J. 1017 (1981); Trubek, *Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WIS. L. REV. 1062 [hereinafter Trubek, *Scholars in Self-Estrangement*]; Tushnet, *Legal Scholarship: Its Causes and Cures*, 90 YALE L. J. 1205 (1981). This strand of the movement exists in some tension with more program-related strands. For a fuller discussion of these splits, see Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985); *Critical Legal Studies Symposium*, 36 STAN. L. REV. 1 (1984). The movement has devoted some attention to criticism of law and economics from both directions. See, e.g., Baker, *Starting Points in the Economic Analysis of Law*, 8 HOFSTRA L. REV. 939 (1980); Horwitz, *Law and Economics: Science or Politics?*, 8 HOFSTRA L. REV. 905 (1980); Duncan Kennedy & Michelman, *Are Property and Contract Efficient?*, 8 HOFSTRA L. REV. 711 (1980).

For a description of the critical legal studies movement, see 1 ZEITSCHRIFT FÜR RECHTSOZIOLOGIE (1980), and HELLER, A BRIEF REJOINDER TO THE DISCUSSION OF CCLS 126 (1976). See also Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 561 (1983). For a critique of the effectiveness of the critical scholars' historical and doctrinal work in the furtherance of their political vision, see Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1676-88 (1982). The Conference and The National Lawyers Guild have jointly published an introductory anthology of characteristic work. See *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982). In a concluding essay, Bob Gordon summarizes the various theoretical stands of critical legal scholarship. See Gordon, *New Developments in Legal Theory*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 281 (D. Kairys ed. 1982). See also Dalton, *Book Review*, 6 HARV. WOMEN'S L.J. 229 (1983) (reviewing *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* (D. Kairys ed. 1982)).

2. See *infra* notes 11-89 and accompanying text.

3. See *infra* notes 90-143 and accompanying text.

versity, and ever more narrowly applicable holdings. Interdisciplinary foraging by legal scholars has been a response to this doctrinal diversity.

At the same time, legal theory often seems both bogged down in controversy and irrelevant to the work of legal practice. Traditional descriptions and analyses of doctrinal developments have been unable to explain the unstructured and diverse nature of contemporary law without either abandoning the idea of a law which can embody some sense of "ought" or limiting the ambit of such normative claims to a few fairly narrow cases. Theoreticians working with the traditional tools of legal method have been unable to describe what goes on in legal culture without choosing between a defense of law's normative claims which abandons a great deal of the field occupied by lawyers to politics and a defense of law's scope which abandons claims about its special normative status.

Legal scholars of many political stripes seeking a way out of this dilemma have gone to the bookstore. Scholars have turned to sociology, history, political science and economics, philosophy, moral theory and literary criticism for relief. They have found themselves tempted by two extremes. On the one hand, they have tended to account for legal diversity by claiming that everything "legal people" do constitutes or is structured by the legal process. This very practical, practice oriented approach is very uncritical. Scholars have met this skepticism with the claim that law exists and works when it is good and followed. These extreme strategies seem equally unappealing. Alone, each would merely restate the problem of traditional legal theory: how to account for law's scope without reducing its power in a culture skeptical of both natural law and science. Modern legal scholars, like their practitioner counterparts, have responded with proliferation: more articles, more references, more diverse arguments, drawing simultaneously on as many disciplines as possible.

Legal theorists who have turned to critical theory and structuralism share a common perspective on this difficulty and a common diagnosis of what they perceive to be the failure of more mainstream legal scholarship to resolve the problem. They argue that legal scholars have not adequately overcome the distinction between theory and practice in their work and have not resolved the complementary and contradictory claims of the law to be both descriptive and normative.

In the eyes of these scholars, most contemporary legal scholarship oscillates in one or another fashion between the norm and the deed, the theory and the practice. Traditional scholars, for all their eclecticism, seem to retain faith in the severability of doctrinal and theoretical tasks. They seek to elaborate the system of norms on the one hand, and then to analyze the normative system which they have created. They speak with two voices, imagining themselves as both creator and consumer of the legal fabric. Thus, for example, mainstream critics might use history today to attack law's idealist claims and logic tomorrow to demonstrate that law's purported scope is unsustainable. The result is an interminable discussion in flight from the very closure it seeks.

To the critical theorist or structuralist, legal people who repeat the distinction between the norm and the deed seem to avoid inquiry into both their knowledge and their activity. The interminability of doctrinal discourse seems to result from the attempt to pursue doctrinal analysis separate from both theory and social life. Unmoored from theory, doctrine flies off into uncritical generality and trivial specificity. Similarly, theory cut free from doctrine

rushes to utopian speculation and uncritical description, unable in any other way to account for doctrine without determining doctrine. The failure of theoretical work — and hence the motive for eclecticism — results from the pursuit of a theory which is not itself a doctrinal practice.

To the structuralist or critical theorist, most of the recent interdisciplinary foraging has perpetuated rather than questioned the tendency to oscillate between disconnected theoretical and doctrinal work. Of course, some contemporary scholars who see the problem this way have begun deploying notions gleaned from other literatures (most notably the traditions of hermeneutics and literary criticism) in defense of legal doctrine and legal scholarship.<sup>4</sup> But it has largely been those more disposed to criticize who have turned to literatures which take as their starting point a rejection of the disjuncture between theory and practice.

Both critical theory and structuralism are literatures of this type. There is no natural connection between these two traditions. Nor are they either harmonious or unproblematic enough to have been adopted wholesale by legal scholarship. Nevertheless, one claim they share has attracted frustrated legal critics. Both traditions begin with the late nineteenth century insight that social theory's essential dilemma is the contradiction between the experientially-based conviction that everything seems connected to everything else and the need to resort to reduction to explain or understand social life, a process which diminishes the complexity of reality.<sup>5</sup> Put differently, a social theory which seeks both to explain and to predict must be simultaneously inductive and deductive, creating tension between our experience and our theory.<sup>6</sup>

4. See J. WHITE, *WHEN WORDS LOSE THEIR MEANING* (1984). See also Dworkin, *Law as Interpretation*, 60 TEX. L. REV. 527 (1982); Fish, *Interpretation and the Pluralist Vision*, 60 TEX. L. REV. 495 (1982); Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); Hoy, *Interpreting the Law: Hermeneutical and Poststructuralist Perspectives*, 58 S. CAL. L. REV. 135 (1985); Moore, *A Natural Law Theory of Interpretation*, 58 S. CAL. L. REV. 277 (1985); Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Fish, *Working on the Chain Gang: Interpretation in Law and Literature*, 60 TEX. L. REV. 551 (1982); Fish, *Wrong Again*, 62 TEX. L. REV. 299 (1983).

5. This reductionism in social theory is often generated by an epistemology based upon simple causality. See R. UNGER, *KNOWLEDGE & POLITICS* 14 (1975). Unger refers to such critiques as "partial assaults on a mode of thought they have neither repudiated nor understood in its entirety." *Id.* at 5-6.

6. See, e.g., G. HEGEL, *HEGEL: PHENOMENOLOGY OF SPIRIT* (A. Miller & J. Findlay trans. 1977). Hegel considers an ideal-typology:

[i]s the instrument for seizing hold of absolute essence . . . [it] does not leave the thing as it is for itself, but entails some transformation or change in it. If . . . knowledge is . . . a passive medium . . . we are still unable to attain truth as it is in itself but only as it is through and in this medium.

*Id.* at 46. For Weber's analysis of ideal-types, see M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 328-63 (T. Parsons ed., A. Henderson & T. Parsons trans. 1947). Weber saw the ideal-type as one form of explicating the meaning of social action. See Weber, "Objectivity" in *Social Science and Social Policy*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 50, 101 (E. Shils & H. Finch eds. 1949). For a commentary on Weber's use of ideal-typologies, see Eldridge, *Max Weber: Some Comments, Problems and Continuities*, in *MAX WEBER: THE INTERPRETATION OF SOCIAL REALITY* 9, 28 (J. Eldridge ed. 1980). Weber also warns that the methodology of ideal-types recognizes that to obtain a more coherent and intelligible understanding of a phenomena it is necessary to confront and come to grips with ways of thinking that are foreign to conventionally trained minds. See Weber, *The Meaning of "Ethical Neutrality" in Sociology and*

Structuralism and critical theory have followed quite different trajectories from appreciation of this core dilemma of late nineteenth century social thought. Critical theory proceeds from the relationship between attempts by Hegel and Marx to locate either the source of the dichotomy between object and subject in history or to locate the identical subject/object of history which could transcend both the antinomies of traditional philosophy and the alienation of bourgeois life.<sup>7</sup> As one after another proposed historical subject failed to fulfill this role, critical theory developed a rich literature of explanation, critiquing the social mechanisms which generate alienation. Each of these critiques, however, was supplemented by a relocation of the aspiration for liberation. Brought into law, this theoretical enterprise produced a helpful analytic methodology and a series of accounts of continued injustice.

Structuralism, on the other hand, began by suspending the question of historical origin, separating the fluid present moment from the text of its past and future. This suspension of the search for historical transcendence permitted an elaborate series of explorations into the relational nature of meaning which structuralists take to be the social condition. But these analyses were always supplemented by shadow theories of the origin of the social relations or structures which they analyzed. These supplemental assumptions, when avoided, dessicated structural analysis into a rigid analysis of form.

Despite these difficulties, both traditions sought to dislodge the complacent everyday perception of reality. They share the conviction that the paradigmatic interpretation which underlies the most prosaic of observations has an anesthetising and alienating effect upon those who hold it, which can be overcome only through a traumatic reinterpretation of reality which changes the world for the observer. Paradoxically, each of these traditions suggests that this inertia is easiest to overcome when theories are at their most comprehensive, since such comprehensiveness is gained at the price of flexibility.

Despite these similarities, the traditions of structuralism and critical theory remain distinct. Structuralism has skewed the attention of its adherents away from the social context which is the central concern of critical theory.<sup>8</sup>

*Economics*, in *THE METHODOLOGY OF THE SOCIAL SCIENCES* 1, 41 (E. Shils & H. Finch eds. 1949). See also Trubek, *Max Weber on Law and the Rise of Capitalism*, 1972 WIS. L. REV. 720.

7. The terms "subject" and "object" have acquired a variety of different associations in law and philosophy. The lawyer typically associates "subjective" with "formal" or "express" as opposed to "implied." I use the term "subject" to refer to the essence, mind or agency of history as opposed to the attribute, instrument or context of that subject. In a way, the relationship between subject and object evokes that between theory and practice or norm and deed, since "theory" or "norm" suggest the realm of thought or intention rather than action.

8. Many French Marxists, for example, criticized structuralists for defining themselves out of the political dialogue so important to French intellectual life and avoiding the difficult social dilemmas which gave rise to the events of May and June, 1968. Despite the potential for structuralism to integrate theory and practice, politics and ideology, the French structuralists have remained politically aloof. Levi-Strauss's failure to engage in any of the controversies that divided the French during the Algerian war led the Marxist Henri LeFebvre to denigrate structuralism as politically effete: "a fetishism of knowledge, baptised 'epistemology,' which sacrifices the division of labor on the intellectual level, and which protects the division of knowledge under a mantle of encyclopedism." H. LEFEBVRE, *AU DELA DU STRUCTURALISME* 11 (1971). Levi-Strauss and the structuralists also stayed off the barricades during the events of May and June, 1968, Althusser not because of an apolitical disposition, but rather through support of the French Communist

Structuralism seems more reflective or descriptive and analytical than prescriptive or engaged, involving exploration of the hidden and unconscious determinants of ritual, language or literature.

Certainly it is possible to make too much of these differences.<sup>9</sup> The method of critical theory is also deeply reflective. The Frankfurt School seeks to expose the underlying nature of the belief structure which supports a social system so that it might be discarded by the agents of that system. In doing so, its members, like the structuralists, are careful to subject their own theory to the same exposé.<sup>10</sup> Structuralism's devaluation of the content of cultural artifacts fits well with the mission of critical theory.

Nevertheless these surface differences suggest the difficulty legal scholars face in turning to structuralism and critical theory for help in transcending the theory/practice distinction. In this article, I argue that these two disciplines merely restate the problem legal scholars turn to them to solve: critical theory by valorizing a posited transcendental subject and structuralism by positing an origin for autonomously investigable doctrinal activity. To the extent this analysis is correct, it is not surprising that neither critical theory nor structuralism has provided a "method" which lawyers can "deploy" against their theoretical and doctrinal malaise.

Party's failure to align with the students' and workers' movement. See E. KURZWEIL, *THE AGE OF STRUCTURALISM* 73 (1980). Interestingly, LeFebvre, despite sympathy with the uprising, did not join the 1968 movement. See H. LEFEBVRE, *THE EXPLOSION: MARXISM & THE FRENCH REVOLUTION* (A. Ehrenfeld trans. 1969) for his answer to Marxist students' challenge that he had failed to practice his preachings. He excused his lack of support on the grounds that (1) the contradictions in capitalist society had yet to reach crisis point, and (2) that a "revolution" without strategy and a systematic program was doomed to failure. *Id.* at 12-13, 51, 130, 154. Michael Foucault's post-1968 work on the question of power and knowledge, has clearly been influenced by the events of that social movement, not the least influence was that intellectuals were among the instigators of that political and social upheaval. It is not that his earlier work did not relate to the integration of knowledge and power, see, e.g., M. FOUCAULT, *MADNESS CIVILIZATION* (R. Howard trans. 1965), but that this topic thereafter became the focal point of his writings. See M. FOUCAULT, *Truth and Power*, in *POWER-KNOWLEDGE* 109, 111, 115 (C. Gordon ed. 1980). His analysis has also led him to dispute the polemic that Marxism is synonymous with the revolutionary process. See M. FOUCAULT, *Body/Power*, *id.* at 55, 57. But the events of 1968 appear to have played a significant role in prompting Levi-Strauss to return to his earlier interests in philosophy and kinship studies. See generally C. LEVI-STRAUSS, *L'HOMME NU* (1971). However in the final pages of this text he reaffirms his belief in structuralism being the appropriate methodology for the analysis of all of culture. *Id.* at 583-86. Cf. Levi-Strauss, *Structuralism and Ecology*, in *READING IN ANTHROPOLOGY* 226 (A. Wiess ed. 1976); *Structuralisme et Empirisme*, 16 *L'HOMME* 23 (1976). A fascinating account of the relationship between the development of structuralist psychoanalytic theory and the events of 1968 is S. TURKLE, *PSYCHOANALYTIC POLITICS: FREUD'S FRENCH REVOLUTION* (1978).

9. See *infra* Part IVA, notes 144-154 and accompanying text.

10. Indeed, it has been suggested that structuralism may provide clues about the nature of belief systems which might be expected to collapse when elaborated to those who hold them or about the even more basic inter-subjective or transcendental beliefs about the appropriateness of systems of belief. Althusser indicates a potential integration of the discourses of structuralism and critical theory when he postulates that the social totality, in consequence of its many inherent contradictions, must be subject to a "structure in dominance." See L. ALTHUSSER, *infra* note 144, at 91. For an analysis of this integration focusing on the notion of ideology, see R. COWARD & J. ELLIS, *LANGUAGE AND MATERIALISM* 61-92 (1977).



## II. CRITICAL THEORY

The first thing to understand about "critical theory" is that the word "critical" is not meant to suggest criticizing, in the fashion of either liberal reformism or cantankerous radicalism. Rather, it refers to a particular style of work developed primarily by a group of German intellectuals who saw themselves as the inheritors of a tradition begun by Hegel and Marx.<sup>11</sup> Such theorists as Georg Lukacs,<sup>12</sup> Max Horkheimer,<sup>13</sup> Theodor Adorno,<sup>14</sup> Herbert Mar-

11. The "Frankfurt School" is the name which has come to refer to the tradition of critical theory emanating from the *Institut fuer Sozialforschung* and its journal, the *Zeitschrift fuer Sozialforschung*, which in the 1930's embraced the writings of Max Horkheimer, Theodor Adorno, Herbert Marcuse and Walter Benjamin among others. The most seminal work of the early Frankfurt School is M. HORKHEIMER & T. ADORNO, *THE DIALECTIC OF ENLIGHTENMENT* (J. Cumming trans. 1972) which articulates the revisions of Marx's categorical framework of historical materialism which had been underway since G. LUKACS, *HISTORY AND CLASS CONSCIOUSNESS* (R. Livingstone trans. 1971). For Marx, the overcoming of philosophy as philosophy was the prerequisite for assuring that Marxist theory was critique. See generally K. MARX, *Toward the Critique of Hegel's Philosophy of Law: Introduction*, in *WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY* 249 (L. Easton & R. Guddat eds. 1967) [hereinafter K. MARX, *Critique of Hegel's Philosophy*]. In contrast, Horkheimer and Adorno and the early Frankfurt School are preoccupied with ridding Marxism of its scientific overtones (i.e., defining knowledge and "truth" by the methodologies of the natural sciences) to restore it as critique. This "critique of instrumental reason" sometimes dissolved into pessimistic *Kulturkritik* and sometimes into an over a-rationalism which despaired of finding an Archimedean point on which to base its critique. Having reached its most pessimistic stage with Horkheimer and Adorno in the 1940's, the school distinguished itself by continuing and refining its critique of positivism and, in particular, behavioralism and scientism. This took a variety of forms, the most widely popular being that of H. MARCUSE, *ONE DIMENSIONAL MAN* (1964); H. MARCUSE, *EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY INTO FREUD* (2d ed. 1966). For a history of the early Frankfurt School, see M. JAY, *THE DIALECTICAL IMAGINATION* (1973). But cf. Jaccoby, *Marxism and the Critical School*, 1 *THEORY & SOC'Y* (1974); Kellner, *The Frankfurt School Revisited: A Critique of Martin Jay's "The Dialectical Imagination"*, 4 *NEW GER. CRITIQUE* 131 (1975). For anthologies of the Frankfurt School writings, see *THE ESSENTIAL FRANKFURT SCHOOL READER* (A. Arato & E. Gebhardt eds. 1982); *ON CRITICAL THEORY* (J. O'Neill ed. 1976). For commentaries on the Frankfurt School, see D. HELD, *INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS* (1980); M. THEUNISSEN, *GESELLSCHAFT UND GESCHICHTE: ZUR KRITIK DER KRITISCHEN THEORIE* (1969).

12. See generally G. LUKACS, *supra* note 11. For commentaries on the work of Lukacs, see Arato, *Lukacs' Theory of Reification*, *TELOS* (no. 11) 25 (1972); Schmidt, *The Concrete Totality and Lukacs' Concept of Proletarian Building*, *TELOS* (no. 24) 2 (1975). Despite his critical perspective on Marx's concept of historical materialism, Lukacs remained committed to a number of tenets of orthodox Marxism, in particular those governing the role of the party. See G. LICHTHEIN, *MARXISM* 368-70 (1961); Jaccoby, *Towards a Critique of Automatic Marxism: the Politics of Philosophy from Lukacs to the Frankfurt School*, *TELOS* (no. 10) (1971).

13. See M. HORKHEIMER, *ECLIPSE OF REASON* (1947); M. HORKHEIMER, *CRITICAL THEORY* (M. O'Connell ed. 1972); M. HORKHEIMER, *CRITIQUE OF INSTRUMENTAL REASON* (M. O'Connell ed. 1974); M. HORKHEIMER & T. ADORNO, *supra* note 11. For examples of commentaries on the work of Horkheimer, see J. CARLEBACH, *Marx and the Sociologists: Max Horkheimer*, in *KARL MARX AND THE RADICAL CRITIQUE OF JUDAISM* 234 (1978); Siebert, *Horkheimer's Sociology of Religion*, *TELOS* (no. 30) 127 (1976).

14. See T. ADORNO, *AUFSATZE ZUR GESELLSCHAFTSTHEORIE UND METHODOLOGIE* (1970); T. ADORNO, *NEGATIVE DIALECTICS* (E. Ashton trans. 1973); Adorno, *Sociology and Psychology* (pts. 1 & 2) *NEW LEFT REV.* (no. 46) 67 (1967), *NEW LEFT REV.* (no. 47) 79 (1968). For examples of commentaries on the work of Adorno, see G. ROSE, *THE MELANCHOLY SCIENCE* (1978); H.

cuse,<sup>15</sup> and Jürgen Habermas,<sup>16</sup> often referred to collectively as the Frankfurt School, interpreted both Hegel and Marx to have been concerned with overcoming the split between theory and action. They sought to reinterpret and continue that endeavor.

In the process, they elaborated different notions about the nature and scope of "critical theory," and developed a number of images of the relationship between theory and social life which have been suggestive for legal scholars. In this section, I introduce the work of these German intellectuals by focusing both on their evolving tradition of response to Hegel and Marx and on the set of ideas about the relationship between social life and theory which they make available to legal scholars. The "critical theory" which I describe here is an idiosyncratic account which does not correspond to the work of any particular author, and is held together only by my own conception of what critical theory has suggested for legal scholarship.

### A. Moments of Reinterpretation

Introduced by Lukacs and culminated by Horkheimer and Adorno,<sup>17</sup> the

SCHWEPPEHAUSER, THEODOR W. ADORNO ZUM GEDÄCHTNIS (1971); Benjamin, *The End of Internalization: Adorno's Social Psychology*, TELOS (no. 32) 42 (1977); Buck-Morss, *The Dialectic of T.W. Adorno*, TELOS (no. 14) 137 (1972); Snow, *Introduction to Adorno's "The Actuality of Philosophy,"* TELOS (no. 31) 113 (1977).

15. For examples of the works of H. Marcuse, see H. MARCUSE, *THE AESTHETIC DIMENSION* (H. Marcuse & E. Sherover trans. 1978); H. MARCUSE, *COUNTERREVOLUTION AND REVOLT* (1972); H. MARCUSE, *AN ESSAY ON LIBERATION* (1969); H. MARCUSE, *FIVE LECTURES* (J. Shapiro & S. Weber trans. 1979); H. MARCUSE, *NEGATIONS* (J. Shapiro trans. 1968); Marcuse, *On Science and Phenomenology*, in *POSITIVISM AND SOCIOLOGY* 225 (A. Giddens ed. 1974); H. MARCUSE, *STUDIES IN CRITICAL THEORY* (J. de Bres trans. 1973); Marcuse, *Contributions to a Phenomenology of Historical Materialism* TELOS (no. 4) 3 (1969); For examples of commentaries on the work of Marcuse, see: A. MCINTYRE, *MARCUSE* (1970); *ANTWORTEN AUF HERBERT MARCUSE* (J. Habermas ed. 1968); *CRITICAL INTERRUPTIONS: NEW LEFT PERSPECTIVES ON HERBERT MARCUSE* (P. Breines ed. 1972); Cohen, *Critical Theory: The Philosophy of Marcuse*, *NEW LEFT REV.* (no. 57) 35 (1969); Piccone & Delfini, *Herbert Marcuse's Heideggerian Marxism*, TELOS (No. 6) 36 (1970); Schoolman, *Introduction to Marcuse's "On the Problem of the Dialectic,"* TELOS (no. 27) (1976).

16. The dominant thinker in the contemporary Frankfurt School is Jürgen Habermas whose main works translated in English are *COMMUNICATION AND THE EVOLUTION OF SOCIETY* (T. McCarthy trans. 1976); *KNOWLEDGE AND HUMAN INTERESTS* (J. Shapiro trans. 1971); *LEGITIMATION CRISIS* (T. McCarthy trans. 1975); *THEORY AND PRACTICE* (J. Viertel trans. 1973); *TOWARD A RATIONAL SOCIETY* (J. Shapiro trans. 1971). There is a growing secondary literature on Habermas and Critical Theory. A frequently cited commentary is: R. GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS & THE FRANKFURT SCHOOL* (1981). However, in attempting to assimilate Habermas into "mainstream" analytical philosophy, Geuss distorts most of Habermas's central themes, in particular the emancipatory role of critical theory which flows from it not only being an explanation of the inadequacy of current views, but more importantly a guide for both transforming reality and a methodology for criticizing that reformation. Cf. Taylor & Montefiore, *Introductory Essay: From an Analytical Perspective*, in G. KORTIAN, *METACRITIQUE* 1, 11-13, 16-18 (J. Raffan trans. 1980). Two better guides to Habermas's work are G. Kortian, *supra* and T. MCCARTHY, *THE CRITICAL THEORY OF JUERGEN HABERMAS* (1978). For a collection of essays on Habermas, with a response by Habermas, see *HABERMAS: CRITICAL DEBATES* (J. Thompson & D. Held eds. 1982).

17. See *supra* notes 12-14 and accompanying text. See also G. KORTIAN, *supra* note 16, 42-

Frankfurt School began by developing a reading of Marx which emphasized his distance from positivism.<sup>18</sup> Rather than a "scientific" social analyst who sought to replace one account of history with another, Marx was to be understood as a critic, in a dynamic relationship of response to the claims of the Hegelian philosophy against the background of which he worked. To treat Marx's account of social transformation as if it were a positivist narration of "what is really going on" or a prediction of "what is inevitably going to happen" would, in this view, strip Marx of his most crucial insights. Such a reading would, ironically, impute to Marx the same unproblematic relationship between theory and action that he meant to criticize in Hegel.

To these early Frankfurt School scholars, Marx only *seemed* "scientific" because of his relationship to Hegel. Marx thought that the false separation and privileging of philosophy over social life had strangled meaningful social criticism and understanding. In reaction to what seemed the false claims of naturalist philosophy, Marx developed a theory which could reconfirm itself in social life, in the manner of a positivist science. As a result, his work appeared scientific. Decades later, the Frankfurt School faced the inverse dilemma. Although philosophy and politics had been scientized, exactly as Marx seemed to have demanded, it still seemed impossible to develop a theory which could get a critical grip on social life. In fact, the Frankfurt School wanted to criticize the false claims of positivism: claims about the objectivity and neutrality of social and political discourse. But they did not want to return to the naturalism to which Marx had responded.

Partly to explain their own relationship to naturalism, the Frankfurt School re-examined the work of Hegel and Marx, arguing both that Hegel did more than privilege philosophy over history and that Marx did more than reverse that hierarchy. The Frankfurt School argued that these philosophers were different from traditional philosophy precisely because they did more than reorganize the relationship between theory and practice — they sought to transcend that distinction, transforming philosophy from a continual oscillation between positivism and naturalism into a dynamic progressive force. If Hegel and Marx could do it, so could the Frankfurt School. The key was to identify those elements in Hegel and Marx which permitted that forward movement — permitted, in their terms, a philosophy which was "critical" rather than "traditional." Their own work, if "critical" in this sense, could then succeed in opposing the dominance of positivism without simply returning to naturalism.

Critical theory consequently needs to be understood both as a particular moment in the history of continental philosophy and as a style of intellectual work. As a moment in continental philosophy, it expresses a critique of epistemology and metaphysics which has not been part of the Anglo-American philosophic tradition.<sup>19</sup> Continental "critical theory" has redeveloped and ex-

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47. For a short critical analysis of this shift and of its subsequent development, see Benhabib, *Modernity and the Aporias of Critical Theory*, TELOS (no. 49) 39 (1981).

18. For a fuller description of positivism, see *infra* note 49 and accompanying text.

19. The departure from Kant dominant in Anglo-American philosophy and jurisprudence, has proceeded primarily as a critique of epistemology, developed by grafting some late Wittgenstein onto the work of Quine and others. See Taylor & Montefiore, *supra* note 16. There are some parallel themes in the works of Karl Popper, and the Frankfurt School. Both Critical Theory and

tended the double critique of philosophy offered by Hegel on the one hand and by Marx and then Lukacs on the other. The status which a twentieth century "critical theory" claims for itself developed out of this historical relationship among Hegel, Marx and early Frankfurt School theorists.

The story begins with Hegel.<sup>20</sup> In the *Phenomenology of the Spirit*, Hegel radicalizes inquiry into the relationship of subject and object. For Hegel, traditional philosophy took the distinction between subject and object for granted. It inquired into the relationship and hierarchy between them in a variety of ways and explored the origin of each, but was unable to account for or overcome the division between them. Hegel sought to account for and overcome the distinction between subject and object. His tactic was to develop a philosophical account of the origin and development of the subject. His account suggested that the subject, by slowly educating itself about itself, in fact transcended its oppositional relationship with the object. He reimagines each instance of what was formally thought to be the subject/object relationship as a *phase* in "the education of consciousness itself to the standpoint of Science."<sup>21</sup> Hegel demonstrates the movement of these various moments of consciousness into one another until an absolute standpoint which is neither subject nor object is achieved.

This philosophical process of transcendence is illustrated by Hegel's examination of the configurations of consciousness which produce sense certainty. He begins by thinking about a common sense example of the subject/object relationship: the apparently concrete opposition of the "I" facing a "this."<sup>22</sup> He demonstrates that the "I" and the "this" can be revealed to be the opposite of what they claim. In order to stand against and comprehend a "this," the "I" must see itself as an object. For the "this" to oppose the "I" and demand comprehension, it must be constituted as an "other" to the "I," and hence also as subject. Far from being natural, the configuration of "I" and "this" which associates the "I" with "subject" and the "this" with "object"

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Popper's philosophy of science are attempting to "break the grip" of closed systems of thought: to undermine conventional views that claim completeness and encourage an unreflected affirmation of society. See K. POPPER, *THE OPEN SOCIETY AND ITS ENEMIES* (1950); K. POPPER, *CONJECTURES AND REFUTATIONS: THE GROWTH OF SCIENTIFIC KNOWLEDGE* (2d ed. 1965); Popper, *Normal Science and Its Dangers*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 51 (I. Lakatos & A. Musgrave eds. 1970). For a commentary on Popper, see B. MAGEE, *POPPER* (1973). However, despite this similarity, there are enormous differences between Popper and the Frankfurt School. See Popper, *Reason or Revolution?*, in *THE POSITIVIST DISPUTE IN GERMAN SOCIOLOGY* 288 (T. Adorno ed., G. Adey & D. Frisby trans. 1976). Popper criticizes the critical school generally for "simply talking trivialities in high sounding language." *Id.* at 296. He describes Habermas's work as mostly "trivial; the rest seems to me mistaken." *Id.* at 297. But it should be added that Popper fails to analyze any of the major works of Habermas and Adorno (and ignores Horkheimer). In particular, Popper fails to distinguish Habermas's concern for "rational criticism" from either cynical skepticism or "trashing."

20. See, e.g., G. HEGEL, *PHENOMENOLOGY OF SPIRIT* (A. Miller trans. 1977). A useful introduction to Hegel, with annotated bibliography is G. HEGEL, *THE ESSENTIAL WRITINGS* (F. Weiss ed. 1974). For an analysis of the relationship among the projects of Hegel and modern critical legal scholars, in particular Roberto Unger, see D. Cornell, *The Heart's Revenge*, (1983) (unpublished manuscript) (available in the Harvard Law School Library).

21. G. HEGEL, *PHENOMENOLOGY OF THE SPIRIT* 56 (A. Miller trans. 1977).

22. *Id.*

and is responsible for common sense about perception and understanding is a configuration which must be maintained. Hegel argues that a set of ideas (such as the relationship between the universal and the individual or the object and the particular) are used to sustain this configuration. As a result, we might think of the various subject/object distinctions we experience as sustained by or situated within a larger set of ideas which is neither subject nor object. Hegel calls this the "Spirit."

The various notions used to mediate or sustain particular subject/object configurations change historically. Hegel argues that as they become conscious, they give way to one another. We should think of these ideas as a continual movement of consciousness to self-consciousness which reaches completion when all mediations of subject and object have been revealed. At that end point, an Absolute Subject, the subject whose object is its own history, arises. Hegel argues that history is the Spirit's vehicle for movement to this self-consciousness and eventually for the constitution of the Absolute Subject. Far from the triumph of the subject, the achievement of the Absolute Subject is a mutual recognition of subject and object. "They recognize themselves as mutually recognizing one another."<sup>23</sup> Politics, morality and the entire collection of human configurations such as the master-slave dialectic which restate the subject/object relationship are now seen as mediations or phases in the development of the Spirit.<sup>24</sup>

This Hegelian picture is critiqued by Marx. Critical theorists understand Marx's critique as a shift in the focus of historical dialectics from theory to practice. For Hegel, objectification is the self-alienation of Spirit, to be transcended by the realization by consciousness that what it took to be given was its own substance. To Marx, the configurations of history are not the objectification of Spirit's substance, an objectification to be overcome by reincorporation into Spirit's self-knowledge.

Self-consciousness is rather a quality of human nature, of the human eye, etc.; human nature is not a quality of self-consciousness.<sup>25</sup>

Objectivity is neither undesirable nor avoidable.

The fact that man is a *corporeal*, actual, sentient, objective being with natural capacities means that he has *actual, sensuous objects* for his nature as objects of his life-expression, or that he can only *express* his life in actual sensuous objects. *To be* objective, natural, sentient and at the same time have an object, nature, and sense outside oneself or be oneself object, nature, and sense for a third person is one and the same thing.<sup>26</sup>

Consequently, to Marx, the alienation of a subject-object division cannot be overcome in thought alone through progressive realization that the other differs in form only from the Spirit itself. Alienation is not the result of an

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23. *Id.* at 112.

24. *Id.*

25. K. MARX, *Excerpt — Notes of 1844*, in WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 323 (L. Easton & R. Guddat eds. 1967).

26. *Id.* at 325.

untranscended objectivity or of an inabsolute Spirit, but rather of antagonistic social relations. Alienation must be overcome as a precondition of freedom, not truth. That transcendence is not achievable through the development of thought, but through the action of theory in life. "[I]n short, you cannot transcend philosophy without actualizing it."<sup>27</sup> This actualization requires the agency of the proletariat, a class whose absolute alienation will overcome its own objectification.<sup>28</sup> In the proletariat, Marx claimed to find an empirical rather than a speculative historical subject.

Because Marx situated his work against Hegel, critical theorists contended, when he talked about practice or the "proletariat," people, thought he meant some real existing historical entity. Critical theorists argued rather that Marx thought of the proletariat neither spiritually nor empirically but as a potential to be achieved in history. At first it seems that the difference between Hegel and Marx is that between faith in the subject and faith in the object. Hegel seems naturalist and idealist, Marx positivist and empirical. This interpretation is appealing. After all, Hegel writes about a "Spirit" which will achieve an "Absolute Subject" and Marx writes about the scientifically verifiable work of the proletariat to bring about a revolution. But to the critical theorist, this is a serious misunderstanding of Hegel and Marx. Both are concerned with overcoming the subject/object distinction, not privileging one term over the other. The Spirit is not just subject, nor is the proletariat simply object.

More importantly, however, interpreting Marx and Hegel as naturalist or positivist misunderstands their dialectic relationship to one another. Critical theorists argue that Marx's early writings reveal awareness of a dialectic between Hegel's approach to transcendence and his own. Their goal then, was to understand Marx's central claim not to be about the necessity of a shift from naturalist to positivist philosophy, but about the necessary distance between philosophy, trapped in its social context, and critique. If, and to the extent that Marx claimed to have developed an analysis of social life which was objective and predictive in the fashion of a natural science, he was wrong. To the critical theorists, social theory cannot develop a set of true observations or predictions which have the quality of scientific axioms. Critical theorists emphasized the dialectical character of Marx's social inquiry rather than the scientization of theory with which Marx distinguished himself from the philosophy which prevailed in his particular historical context.<sup>29</sup>

27. K. MARX, *Critique of Hegel's Philosophy*, *supra* note 11, at 256.

28. See K. MARX & F. ENGELS, *The Communist Manifesto*, in *ESSENTIAL WORKS OF MARXISM* 13 (Mendel ed. 1961); K. MARX, *Critique of Hegel's Philosophy*, *supra* note 11, at 262-63.

29. Thus the critical school concentrates on Marx's early writings, many first translated in this century. Collections of Marx's early works include: K. MARX, *ECONOMIC AND PHILOSOPHIC MANUSCRIPTS OF 1844* (1959); K. MARX, *WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY* (L. Easton & R. Guddat eds. 1967); K. MARX, *EARLY WRITINGS* (R. Livingstone & G. Benton trans. 1975). See K. MARX, *ON THE JEWISH QUESTION* 212 (1843). For discussions of the distinction between the instrumental scientific perspective on Marx and the critical approach based on Hegelian philosophy, see A. GOULDNER, *FOR SOCIOLOGY* 425-62 (1973); TAYLOR & MONTEFIORE, *supra* note 16, at 15-17. See also A. GOULDNER, *THE TWO MARXISMS, CONTRADICTIONS AND ANOMALIES IN THE DEVELOPMENT OF THEORY* (1980) (part of the trilogy entitled "The Dark Side of the Dialectic"); F. JAMESON, *MARXISM AND FORM: 20TH CENTURY DIALECTIC*

Elaborating upon dialectics made it seem possible to understand how social theory could both analyze and create social life.<sup>30</sup> Although Marx's analysis of social life had developed the technique of dialectics, he had often been read to seem scientific, rational, or reductionist. The Frankfurt School resolved this tension dialectically: by seeing Marx's scientism in relation to his philosophical context as productive of his analytical method which was itself neither scientific nor naturalist in nature.

For this purpose, Hegel, Marx and, for that matter, Lukacs, might be thought to have been involved in a common critical project; to reveal the source of the antinomies of traditional philosophical thought in an uncritical approach to the subject-object relationship.<sup>31</sup> Traditional philosophy was understood to accept as given that which was in the greatest need of philosophical reflection. Hegel, Marx and Lukacs attempted in different ways to locate the source of the antinomy in an entity which united both poles; the identical subject-object of history, which was both the present embodiment and future resolution of the traditional antinomies of thought and life. Yet their resolutions, coming at different moments in social and philosophical history, differed.

Hegel located the subject-object of history in the Spirit, a consciousness educated to self-consciousness at the end of the historical moment of alienation. Marx, on the other hand, viewed man's objectification in the world as a natural human activity, whose transcendence is neither possible nor desirable. To Marx, theory alone cannot achieve transcendence as Hegel seems to have suggested through a series of mutual self-realizations by subject and object. Transcendence can occur in the actualization of theory through the development of an historical agent which unites subject and object: the proletariat. The proletariat is not simply empirical, anymore than Hegel's Spirit was simply subjective. It would be wrong to suggest that Hegel was a Utopian naturalist or Marx a rigid positivist. Marx did not imagine that a natural philosophic method might not bear fruit in some situations. Only an extreme reading of Marx would understand his "scientific" concerns so broadly. Rather, Marx viewed the proletariat to be the transcendence of the dichotomy

CAL THEORIES OF LITERATURE (1974).

30. "Dialectics" is a logic of reasoning the analytic logic of understanding (which, applied to "sensations," yields knowledge of the natural, phenomenal world). Cf. F. ENGELS, *Socialism: Utopian and Scientific* (1880), in *ESSENTIAL WORKS OF MARXISM* 45 (Mendel ed. 1961); G. LUKACS, *The Changing Function of Historical Materialism*, in *HISTORY AND CLASS CONSCIOUSNESS* 223 (R. Livingstone trans. 1971). The dialectics of Marx presupposes that there is some idea, theory and/or movement which is called the "thesis." The critique of this thesis produces an oppositional movement called the "antithesis." The struggle between the thesis and antithesis continues until a "synthesis," is reached. The synthesis transcends both the thesis and antithesis, by attempting to incorporate and preserve the merits, but avoiding the limitations of both the conflicting perspectives. This synthesis in turn becomes a new thesis and the process continues. Marx contended that development of society was dialectical in nature: mankind progressed through the clash of contradictory social systems with their concomitant contradictory ideologies and modes of thought. Thus, this dialectical form of thinking was necessary to transcend the limitations of analytical understanding and obtain a "true" and more integrated knowledge. See, e.g., K. MARX, *Theses on Feuerbach*, in *WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY* 400 (L. Easton & R. Guddat eds. 1967).

31. See N. Berman, *Philosophical Pre-history of Critical Theory* (1983) (unpublished manuscript).

of alienation and subjectivity. The absolute alienation of the working class would generate its subjectivity as the proletariat.

This early moment of critique generated two different roads to liberation from the antinomies of philosophy; the one spiritual, the other empirical. Yet neither Hegel nor Marx embraced either naturalism or positivism. Each "dialectic" is a transcendence of that dichotomy. To critical theorists, the opposition of Hegel and Marx regenerated the antinomy of subject and object as the opposition of theory and practice. Critical theory since Horkheimer has responded to that disjuncture much as Hegel, Marx, and later Lukacs critiqued traditional philosophy. In this sense, the eighteenth century dialectical mechanism embracing and reinventing antinomy seems to continue within the Frankfurt School and might be thought to generate both the main insights of the School and a number of difficult aporias for the critical enterprise as a whole.<sup>32</sup> This progressive development of critique, its own "dialectic of enlightenment," might be characterized as the repeated search for the identical subject-object of history.

### B. *A Process of Development*

As the Frankfurt School developed, it generated insightful critiques of modernity each of which relied upon a particular link between subject and object. One way of thinking about their evolving criticism of modernism is as a repeated relocation of the identical subject-object of history. As one critical theorist transcended another, much as Marx had succeeded Hegel, this very dialectic of enlightenment became the object and engine of theoretical interest.<sup>33</sup> The tradition produced a variety of critical analyses dependent upon a constellation of agents or processes which were thought able to bridge the gap between theory and action.<sup>34</sup>

To sustain these images, the Frankfurt School developed a set of notions about their theoretical work and a set of assumptions about the context within which they theorized which have been suggestive for legal scholarship. In a nutshell, critical theory was to be both a form of cognition and a form of freedom. It could be both if it were self-reflective. Critical theory was to operate in a domain legitimated by a pattern of false consciousness. Through a dialectic of enlightenment, self-reflective theory might liberate or transform its contextual domain by undoing false consciousness.<sup>35</sup> Before taking up these notions about critical theory and its context directly, it is important to under-

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32. See Benhabib, *Modernity and the Aporias of Critical Theory*, TELOS (No. 49) 39 (1981).

33. See T. ADORNO, *NEGATIVE DIALECTICS*, *supra* note 14; M. HORKHEIMER & T. ADORNO, *supra* note 11. Cf. T. MCCARTHY, *supra* note 16, at 232-71, discussing J. HABERMAS, *ZUR REKONSTRUKTION DES HISTORISCHEN MATERIALISMUS* (1976); D. HELD, *supra* note 11, at 148-74, 200-22.

34. Throughout this article, I use the word "agent" to suggest an acting subject, one who knows, decides and acts. Lawyers often think of the agent as the instrument of another's will. Although both are suggested by the Latin in *agere*, the usage adopted here is more common in the literatures of social theory which I consider.

35. See *infra* note 43 and accompanying text. See also J. HABERMAS, *LEGITIMATION CRISIS*, *supra* note 16; F. JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* 281-99 (1981); T. MCCARTHY, *supra* note 16, at 358-86.



stand their generation in the historical unfolding of criticism, through critical theory's continual relocation of the subject-object of history.

The first moment of critical theory, characterized by the work of Horkheimer and Adorno, sought to reinvestigate the relationship between subject and object in a way which could achieve their resolution in a historical moment of frustrated revolutionary hopes and fascism.<sup>36</sup> Neither theory nor practice seemed likely to overcome its objectification through self-reflection or the processes of historical oppression. Many elements of the tradition of Hegel and Marx were accepted and elaborated. Horkheimer, for example, begins his essay "Traditional and Critical Theory" with a Hegelian rejection of the apparent representational nature of sensual knowledge.<sup>37</sup> Although the world *appears* to the individual, he argues, that relationship itself is a social production with a particular history.

[T]he world which is given to the individual and which he must accept and take into account is, in its present and continuing form, a product of the activity of society as a whole.<sup>38</sup>

These insights produce a superb analysis of modern life in which "in the bourgeois economic mode the activity of society is blind and concrete, that of individuals abstract and conscious."<sup>39</sup>

Although Horkheimer thus distances himself from Hegel and Marx, he continues to search for a historical subject which, in light of his analysis of the relationship of individual to social totality, could overcome alienation. In this the structure of his work is similar to that of Marx and Hegel. Yet the engine of oppression and emancipation is different. As a mediated social construct, history is neither completely intelligible nor "moving" from an irrational past to a rational future through the agency of either Spirit or class. The role of the proletariat is greatly diminished:

[E]ven the situation of the proletariat is, in this society, no guarantee of correct knowledge. The proletariat may indeed have experience of meaninglessness in the form of continuing and increasing wretchedness and injustice in its own life. Yet this awareness is prevented from becoming a social force by the differentiation of social structure which is still imposed on the proletariat from above and by the opposition between personal class interests which is transcended only at very special moments. Even to the proletariat the world superficially seems quite different than it is.<sup>40</sup>

To Horkheimer, emancipation must be created by society as a whole, assisted by theory. Given the disjunction between the consciousness of the proletariat and critical awareness, theory plays a new emancipatory role, as does the critical theorist, as midwife for the revolution. The primacy of theory has been dialectically restored, not as Hegel understood it, but as the impetus to prac-

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36. See *supra* notes 13 and 14.

37. M. HORKHEIMER, *Traditional and Critical Theory*, in *CRITICAL THEORY* 188 (M. O'Connell ed. 1972).

38. *Id.* at 197.

39. *Id.* at 200.

40. *Id.* at 212-13.

tice by the proletariat. The critical theorist may come from any class, for "under the totalitarian lordship of evils, men may retain not simply their lives but their very selves only by accident."<sup>41</sup> They maintain the hope of a more human society. "The circle of transmitters of this tradition [of critical consciousness] is neither limited nor renewed by organic or sociological laws. . . . In general historical upheaval the truth may reside with numerically small groups of men."<sup>42</sup>

The first moment of twentieth century critical theory thus retained the search for a historical transcendence of the relations between subject and object. It generated an elaborate conception of the agency of theory which forms part of the Frankfurt School tradition. It also developed in a self-consciously dialectic transcendence of the debate between Hegel and Marx. As a result, the focus on Marx as dialectician seemed persuasive to Frankfurt School Marxists in part for its alluring self-reflective quality: it was itself an illustration of the method it produced. This foreshadowed one of the fundamental aspects of Frankfurt School critical theory: validation through self-reference which produces practical effects.<sup>43</sup> The Frankfurt School meant not to predict social life on the basis of principles derived from objective analysis. They intended to anticipate what will logically result in the world from a body of theoretical work whose logical determinancy is validated by self-reference.

Already at this early point, we see both the specific critiques and general social theory of the Frankfurt School animated by the dynamic search for a link between subject and object — for intellectual work which was positioned between theory and practice. We see the basic mechanism which Frankfurt School intellectuals would deploy to create and sustain work of this sort: a dialectic focus upon the origins of theory and its reenactment in the context of the dialectical motion which gave rise to it. And we see the continual search for an agency to drive this dialectical transformation, a search which plagued the Frankfurt School, constantly reminding its practitioners of their failed aspiration to bridge the gap between theory and practice. This suppressed renewal of the unfound bridge between subject and object became an aporia which unites the various moments of critical theory and generates theories of ideology and legitimation important for legal scholarship.<sup>44</sup>

As the Frankfurt School developed, the identical subject-object of emancipation migrated from the proletariat to the social totality, assisted in turn by the critical theorist, the alternative communities of the sixties and the middle class movements of social solidarity (feminism, environmentalism, pacifism) of the seventies.<sup>45</sup> As the work of the Frankfurt School became increasingly tran-

41. *Id.* at 252.

42. *Id.* at 241.

43. "In self-reflection, knowledge for the sake of knowledge comes to coincide with the interest in autonomy; for the act of reflection knows itself as a movement of emancipation. Reason is simultaneously subject to the interest in reason. Reason, it can be said, pursues an emancipatory cognitive interest which aspires to the act of reflection as such." J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 197-98 (J. Shapiro trans. 1971). Habermas's insistence that his theory can be validated through the practical discourse of those concerned and that this event can be "anticipated" is further emphasized in *THEORY AND PRACTICE* 22-39 (J. Viertel trans. 1975).

44. For a discussion of this process in a non-legal context, see Benhabib, *supra* note 17.

45. Arato, *Aesthetic Theory and Cultural Criticism: Introduction*, in *THE ESSENTIAL FRANK-*

scendental in the work of Habermas, the identification of a particular agent was downplayed in favor of a new general sociology of legitimation and alienation. Emancipation became a lost image of ideal communication.<sup>46</sup>

In each of these moments, the Frankfurt School opposed two tendencies. On the one hand, cognition was established by a form of self-reflective criticism which focused on the resolution of theoretical conflict (i.e., by dialectics). On the other hand, liberation was achieved by a series of assumptions about the consciousness of the agents to whom a critical theory is addressed. These two techniques reinforced each other. The cognitive content was tested by the action of liberated agents. They were to be induced to liberation by the self-reflective nature of the theory.<sup>47</sup> These dialectical rotations shared a great deal with the initial movement from Hegel to Marx as understood by Adorno and Horkheimer. Taken together, they illustrate a continuing set of notions about theory and its context which can be explored in a more static fashion.

### C. *Critical Theory Refuses Positivism and Naturalism*

Like much of modern thought, a critical theory seeks to develop a valid form of knowledge about the world which avoids the dangers of both positivism and naturalism. Indeed, there is nothing startling about the claims which the Frankfurt School makes for a "critical" theory. A critical theory claims to be a form of knowledge about the world (it has cognitive content) which is inherently liberating or emancipating for those who are exposed to it and which can therefore be tested by its effects. Advocates of both positivist and naturalist philosophy may have made similar claims — as do other modern thinkers. The key to a "critical" theory is that these two conditions (to be cognitive and liberating) must be simultaneously satisfied in a way which does not recommit the errors which the Frankfurt School associates with positivist

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FURT SCHOOL READER 185, 207-24 (A. Arato & E. Gebhardt eds. 1982) describes these tendencies. See also H. MARCUSE, *An Essay on Liberation, The End of Utopia, and The Problem of Violence and the Radical Opposition*, in FIVE LECTURES 62-108 (J. Shapiro & S. Webber trans. 1979); H. MARCUSE, *COUNTERREVOLUTION AND REVOLT* (1972). Contemporary critical legal scholarship is similarly enthusiastic about feminism, see Dalton, *Book Review*, 6 HARV. WOMAN'S L. J. 247 (1983); MacKinnon, *Toward Feminist Jurisprudence*, 34 STAN. L. REV. 703 (1982); MacKinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 515 (1982).

46. See *infra* note 70 and accompanying text. Cf. Thompson, *Universal Pragmatics*, in HABERMAS: CRITICAL DEBATES 116-33 (J. Thompson & D. Held eds. 1982).

47. The idea of "reflection" has been used to refer to both aspects of this approach. It has meant self-reference, or the quality of a theory being in part about itself, able to explain its own origin, and subject to its own critique. It has meant mirroring and involvement in social life, or the quality of being active in the world as a liberating force. I tend to use the term in the first of these senses, preferring "emancipatory" or "liberating" for the second element. Because they are related in the fashion I described, however, this association could be reversed. See J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 197-213 (J. Shapiro trans. 1971), for a detailed discussion of the two perspectives on "self-reflection." Compare "[i]n self-reflection, knowledge for the sake of knowledge comes to coincide with the interest in autonomy and responsibility," *id.* at 197-98 with "self-reflection is at once intuition and emancipation, comprehension and liberation from dogmatic dependence," *id.* at 208 (emphasis deleted) and "since at every stage it strikes at the dogmatic character of both a world view and a form of life, the cognitive process coincides with a self-formative process." *Id.* at 210.

and naturalist social theory.

Although the Frankfurt School has inherited the Marxist critique of natural philosophy, its adherents are particularly sensitive to what they regard as the errors of positivism.<sup>48</sup> Positivism, in this use, means the objectifying, rationalistic style of analysis familiar in the natural sciences. It is characterized by an analytic method which imagines itself free from cognitive value, or neutral with respect to epistemological content, but which strives nevertheless to be able to judge the verity of various claims about historical reality.

The difficulties with positivism and naturalism which seem most salient to Frankfurt School theorists might be described in a variety of ways. One might say that positivists achieve a liberating methodology by banishing all cognitive content from it and yet relied on a grounding in a subjective empirical world to define liberation. As a corollary, it might seem that naturalism achieved cognitive content at a cost to the emancipation of a neutral methodology which could confirm itself in social life. The description of the failures of these approaches could be reversed. If one focused on the ability to know truth from falsity, that is, upon the methodology as a form of cognition, it could be said that positivism failed to prove liberating just as naturalism failed to develop an acceptable epistemology. More important than the form of the critique is the insight that neither could simultaneously achieve the goals of epistemological content and liberating effect. This, then, became a test of critical theory.

The trouble is that a sensitivity to the difficulties of positivism makes claims about the cognitive content of theory difficult to sustain. In order that they not repeat the errors of positivism, critical theorists pay special attention

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48. Positivism is the principal "abandoned stage of reflection" which Habermas examines in order to locate his doubly-reflective critique. For these purposes, the term positivism is probably best understood in its Comtean sense, *i.e.*, that all "true" knowledge is scientific and thus limited to describing the coexistence and succession of observable phenomena. Habermas based his critique on a claim that positivism is not reflective and, indeed, aims at immunizing the sciences against philosophy. See *id.* at vii, 67-69. See also D. HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS 296-329 (1980). Cf. Hesse, *Science and Objectivity*, in HABERMAS: CRITICAL DEBATES 98 (J. Thompson & D. Held eds. 1982). There are several critical perspectives on positivism to be found in the works of the Frankfurt School. The "strongest" view is that "scientific experience, as well as prescientific experience are false, incomplete in as much as they experience as objective (material or ideational) what in reality is subject-object, objectification of subjectivity." Marcuse, *On Science and Phenomenology*, in POSITIVISM AND SOCIOLOGY 234 (A. Giddens ed. 1974). Cf. M. HORKHEIMER & T. ADORNO, THE DIALECTIC OF ENLIGHTENMENT 24-25 (J. Cumming trans. 1972); M. HORKHEIMER, *The Latest Attack on Metaphysics*, in CRITICAL THEORY 146 (M. O'Connell ed. 1972). Habermas specifically rejects this position partly on the grounds that positivism gives a correct account of natural science and is a necessary part of any complete theory which could fulfill several specific human interests in knowledge and control. See J. HABERMAS, TOWARD A RATIONAL SOCIETY 82-91 (J. Shapiro trans. 1971). But it is difficult to discern whether Habermas supports the "strong view" that positivism is an inadequate methodology for dealing with the peculiar nature of the subject matter of the social sciences about human society; or the "weak" view that positivism can cope with "empirical-analytical" aspects of social science, but social theory also has a critical component which can only be engaged by normative, metaphysical or theological discourse. See J. HABERMAS, THEORY AND PRACTICE 263-68 (J. Viertel trans. 1973) for a discussion supporting in general the "weak" perspective. See also *id.* at 7-27, for a valuable summary of his theory of the appropriate "interests" served by various forms of knowledge.

to the roots of their theory when making claims about the social world. At the same time, however, a sensitivity to the difficulties of naturalism encourages critical theorists to make claims about their theory's cognitive content while rendering it difficult to sustain claims about the value of self-reflection. As a result, critical theory has developed out of a conflict between these opposed sensitivities in a process which might be called the "dialectic of criticism."

The Frankfurt School elaborates the difference between what they term "critical" theories and "scientific" theories in a number of specific ways.<sup>49</sup> Much of the discussion of critical theory's particular response to the difficulties of positivism and naturalism has occurred in the context of debates with practitioners of other theories. Perhaps because the particular image of critical theory has been shaped by sensitivity to the problems of other theories, it has seemed easier to articulate the self-image of "critical" theory in a negative, exclusionary fashion. Hard as it is to know what it is, we know what it is not, what it wants to achieve and how it proposes to go about it. For our purposes, it may be sufficient to illustrate these distinctions by focusing on three broadly divergent methodological approaches which have been distinguished from critical theory. These are the analytic or explanatory modes of empirical science, such as those familiar in the natural sciences but often attempted also in the social sciences, grand theory in the style of Marx or Freud, and hermeneutic concentration on textual elaboration partly identified by Habermas as "interpretation." The critical theorist acknowledges that each of these methodological strands of contemporary theory can be useful, but only as components of a more total "critical theory."

To the Frankfurt School theorist, enterprises of the first and second type attempt to objectify aspects of social life through theory. Such scholars seek to examine facts carefully until relations between them can be mapped and to examine theoretical maps of social life for imperfections. Theoretical work of this type proceeds primarily inductively — hence the analogy to the objectivity characteristic of natural sciences. But this is no more than a historical accident. For Marx, the "science" to be critiqued was deductive and natural. Of course, practitioners of grand theory distinguish themselves quite forcefully from empirical social scientists: Marxists because their empiricism is driven by and confirms theoretical consciousness and Freudians because they dislodge the subjectivity of the scientist. Nevertheless, to the Frankfurt School, grand theory shares with empiricism an aspiration for control, if not by evidence,

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49. Critical and scientific theories are alike in only a trivial sense: they are both "empirical" in the sense that they are both based on and can only be confirmed by experience. However, the essential difference between a critical theory and a scientific theory is that the former aims at emancipation and is part of the domain which it describes, whilst the latter aims at prediction and control and is not part of its own object-domain. A scientific theory, therefore, cannot be self-reflective. See *supra* note 47 and accompanying text. For a discussion of the difference between a critical and a scientific theory, see R. GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS & THE FRANKFURT SCHOOL* 55-56, 88-95 (1981). See also M. HORKHEIMER, *Traditional and Critical Theory*, in *CRITICAL THEORY* 188 (M. O'Connell ed. 1972). Cf. R. UNGER, *KNOWLEDGE AND POLITICS* 32 (1975). The theories of science are partial languages because they classify things in the world. Their claims to acceptance must, therefore, rest on their ability to contribute to particular ends, like the prediction or control of events rather than on their fidelity to a true world of essences. *Id.*

then by theory or analysis.

The Frankfurt School would not reject these approaches. Indeed, critique requires these analytical techniques. To Habermas they contribute to what he terms an "empirical analytic interest," itself an important component of a critical theory.<sup>50</sup> But the Frankfurt School would distance itself from both elaborative description and analytical scholarship of this type. Both seem to imagine a separation of theory and practice which must be bridged by theoreticians and practitioners working to render social life comprehensible and to redraw theoretical maps. The goal of such theory is to reflect life and to reflect upon life. To the Frankfurt School no form of empirical science can fully achieve this. Attempts at deductive work from theoretical models fare no better, for they misunderstand the complete nature of the relationship between theory and action. Consequently, grand theory which focuses on the elaboration of historical maps of social life is no improvement.

Interpretive, or hermeneutic, theory has a different focus. Rather than perfecting the relationship between theory and social life, it focuses on theory in action — much as critical theory might.<sup>51</sup> The focus is not upon the essence of theory or practice, but upon manifestations in either realm as mere tellings about those essences. A hermeneutic inquiry, then, claims to avoid the infinite regress of an inductive or deductive search for the true shape of social life or theory which plagued both analytic and elaborative forms of scientific theory.

The mission of hermeneutic scholarship is to produce the best possible interpretation of the texts of theory and practice. A good interpretation is produced by a reasoned study and elaboration of the instances of social life which is sympathetic to the mission of the author of those texts. One searches to understand the true meaning of both theory and practice. Understanding is produced by a variety of close reading techniques which might reveal the true source or intention of a text, perhaps in its relationship to the broader content of life or thought. The attempt is to discover the relation of manifestations of both theory and practice to the essence of what is beneath them. One reads "sympathetically" and each text may have a different map.

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50. Habermas considers that the "general orientation" of the natural sciences is rooted in an "anthropologically deep-seated interest" in predicting and controlling events in the natural environment. This he called the "technical" or "empirical-analytical" interest. See J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 302-15 (J. Shapiro trans. 1971). Although a critical theory might, and in general will, contain an empirical interest allowing some prediction, it is not this aspect of the theory which renders it critical in nature.

51. Hermeneutics is the science of interpretation originally developed for use with Canonical texts whether religious or legal. Wilhelm Dilthey introduced the term to mainstream German philosophy, see 7 *GESAMMELTE SCHRIFTEN* (1927), and it has traditionally been used by those who wish to counter the simplistic sensory impression theory of the world first put forward by the Vienna Circle of positivists. Instead, hermeneutics aims at an understanding of the *meaning* of the situation for the actor concerned. For a discussion of the term hermeneutics, see D. HOY, *THE CRITICAL CIRCLE: LITERATURE, HISTORY AND PHILOSOPHICAL HERMENEUTICS* 1-3 (1978). Probably the most well-known hermeneuticist is Hans-Georg Gadamer. See, e.g., H. GADAMER, *PHILOSOPHIC HERMENEUTICS* (D. Linge ed. & trans. 1976); *Hermeneutik als praktische Philosophie*, in 1 *ZUR REHABILITIERUNG DER PRAKTIISCHE PHILOSOPHIE* 335 (M. Reidel ed. 1972). For a discussion of Gadamer's work, see D. HOY, *supra*, at 41-72. An extremely useful discussion of various approaches to hermeneutic analysis is R. HOWARD, *THREE FACES OF HERMENEUTICS: AN INTRODUCTION TO CURRENT THEORIES OF UNDERSTANDING* (1982).

Although hermeneutics adds something to a complete critical theory, in the eyes of the Frankfurt School, hermeneutics does not go far enough. The focus on theories as instances of theory, on facts as instances of life, is helpful. It recognizes the indeterminacy of the connections between theory and action which scientific theory seeks. Moreover, by seeing both theory and action as artifacts of an understanding of essence in either realm, hermeneutics avoids the error which led to the failure of scientific endeavor. The hermeneuticist does not view the separation of theory and action as fundamental. Unlike scientific thought which split theory and practice to explain its project of unifying them, hermeneutic approaches begin by asserting that both are cut from the same cloth and need be approached similarly.

Nevertheless, for all its diversity, the hermeneutic approach has not abandoned the belief that such understanding can be achieved, or that texts have meanings. Hermeneutics is like science in its belief that accurate maps of social life and thought can be developed. This explains the cozy relationship of hermeneutics and functionalism.<sup>52</sup> The critical theory of the Frankfurt School treats hermeneutics like science, as useful, but partial. It fulfills the need for knowledge just as empiricism or science generally fulfill the social interest in control.<sup>53</sup> Yet both are treated as incomplete and wrong in so far as they purport to be complete because they cannot be self-referential. Although critical theorists carve out a place for these theories which they have elaborately critiqued, critical theory is associated with a deep skepticism about the project of both hermeneutics and science for neither seems able to be fully liberating or fully cognitive, although each strives to achieve both. By distinguishing itself from empiricism, grand theory and hermeneutics, critical theory rejects the aspiration for an externally grounded cognition or control. It commits itself to a totalizing skepticism and self-reflection. At the same time, however, and somewhat paradoxically, critical theory heightens its commitment to liberation and cognition.

#### *D. Critical Theory Aspires to be Liberating and Cognitive*

Critical theorists want their theory to be liberating so that it may be ac-

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52. See N. LUHMANN, *LEGITIMATION DURCH VERFAHREN* (2d ed. 1975).

53. According to Habermas, hermeneutics serves the "anthropologically deep-seated interest" in understanding, see *supra* note 50 and accompanying text, both on the horizontal level (within cultures) and vertical level (between cultures). Habermas sided with Gadamer insofar as the latter's hermeneutics represents a criticism of the unreflective nature of positivism. See J. HABERMAS, *ZUR LOGIK DER SOCIALWISSENSCHAFTEN* 172 (1970) [hereinafter LSW]. However, he doubted whether hermeneutics is an adequate and a complete "paradigm" for philosophical reflection and consequently the basis for a critical theory without being conjoined with the critique of ideology. *Id.* at 188-251. A debate ensued between Habermas and Gadamer. Gadamer replied to LSW, *supra*, in H. GADAMER, *On the Scope and Function of Hermeneutical Reflection*, in *PHILOSOPHICAL HERMENEUTICS*, *supra* note 51, at 18. Habermas answered in *On Systematically Disturbed Communication*, 13 *INQUIRY* 205 (1970). For secondary literature on this debate, see D. HELD, *INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS* 310-17 (1980); D. HOY, *supra* note, 51, at 117-28; T. MCCARTHY, *THE CRITICAL THEORY OF JURGEN HABERMAS* 187-93 (1978); Misgeld, *Critical Theory and Hermeneutics*, in *ON CRITICAL THEORY* 164 (J. O'Neill ed. 1976); Ricoeur, *Ethics and Culture: Habermas and Gadamer in Dialogue*, 17 *PHIL. TODAY* 157 (1973).

tive in the world it analyzes. By "liberating" they mean a theory which both exists in the world of action and acts in that world as theory to bring about some change in social relations. This was also the project of positivists or empiricists: to construct a realm of theory so grounded in practice that it would not suffer the idealistic irrelevance of naturalist philosophy and utopian speculation. This was the project also of Marx: to turn social theory into a science to permit that theory to be an instrument of action. But the reemergence of empiricism and scientism frustrated these hopes. To be grounded in facts was to lose the critical distance necessary to spark reform.

Although one might take the extreme view that empiricism denied human possibilities in all spheres, Habermas urges theorists to capture what is true about empirical insight while refusing its own claims about its status. We are urged to imagine that there is an appropriate domain for empiricism both in the physical sciences and in the internal elaboration of a set of propositions of facts from which critical distance is not necessary.<sup>54</sup> In the social sciences we

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54. A succinct statement of Habermas's views on empiricism and hermeneutics in J. HABERMAS, *Some Difficulties in the Attempt to Link Theory and Praxis*, in *THEORY AND PRACTICE* 1-40 (J. Viertel trans. 1973). See also D. HELD, *supra* note 53, at 296-329; T. MCCARTHY, *supra* note 53, at 42-52 (distinguishing Popper). Cf. D. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism* (1983) (unpublished working paper 1983-10 Disputes Processing Research Program, University of Wisconsin Law School). Compare this with the anarchic position of Paul Feyerabend on the source of progress in the natural sciences. See P. FEYERABEND, *AGAINST METHOD* (1975); Feyerabend, *Explanations, Predictions, Theories*, in *PHILOSOPHY OF SCIENCE* 3 (F. Baumrin ed. 1963); Feyerabend, *Problems of Empiricism, Part II*, in *NATURE AND FUNCTION OF SCIENTIFIC THEORIES* 275 (R. Colodny ed. 1970). Feyerabend's position is that science is "an essentially anarchistic enterprise." Scientific philosophy based on anarchistic ideals is more humanitarian and more likely to encourage progress for "[t]he idea that science can, and should, be run according to fixed and universal rules is both unrealistic and pernicious. It is *unrealistic*, for it takes too simple a view of the talents of man and of the circumstances which encourage, or cause, their development. And it is *pernicious*, for the attempt to enforce the rules is bound to increase out professional qualifications at the expense of our humanity." *Id.* For a critique of Feyerabend, see McMullin, *The History and Philosophy of Science: A Taxonomy*, in *MINNESOTA STUDIES IN THE PHILOSOPHY OF SCIENCE* 12, 34-41 (R. Stuewer ed. 1970). See also I. SCHEFFLER, *SCIENCE AND SUBJECTIVITY* 50-52 (1967); Giedymin, *Consolations for the Irrationalist?*, 22 *BRIT. J. PHIL. SCI.* 28 (1971); Kordig, *Feyerabend and Radical Meaning Variance*, 9 *NOUS* 399 (1970); Suppe, *The Search for Philosophical Understanding of Scientific Theories*, in *THE STRUCTURE OF SCIENTIFIC THEORIES* 170-80 (2d ed. 1977); Suppe, *Afterword-1977*, *id.* at 615, 636-43; Townsend, *Feyerabend's Pragmatic Theory of Observation and the Comparability of Alternative Theories*, in *PSA 1970* 202 (R. Buck & R. Cohen eds. 1971).

Kuhn, in his discussions of "normal" science, would seem to agree. Although Kuhn considers that the "greatest" scientific discoveries are part of the process of paradigmatic revolution, he also believes that the existence of a paradigm guarantees at any given moment that a discipline will devote itself to puzzle-solving along limited but productive lines. This is referred to as the "period of normal science." Furthermore, it is often the gradual accumulation of incremental pieces of contradictory evidence during this period which can lead in the long-term to a "paradigm clash" and "revolution." See T. KUHN, *THE ESSENTIAL TENSION* xvii-xix, 270-92 (1979). But see Feyerabend, *Consolations for the Specialist*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* 197, 207 (I. Lakatos & A. Musgrave eds. 1970) ("'normal' or 'mature' science, as described by Kuhn, is not even a historical fact"); Hull, *Book Review*, 24 *SYSTEMATIC ZOOLOGY* 395, 397 (exemplifies a growing skepticism of Kuhn's views on how science oscillates between "normal" and "revolutionary" science). Cf. Popper, *Normal Science and Its Dangers*, in *CRITICISM AND THE GROWTH OF*



might imagine a field of administration appropriately concerned with control in an established state apparatus where empiricism would be required.

The scientization of politics, however, was subtler and more powerful than the triumph of positivism in the natural sciences. In decisional politics or social theory, both of which are concerned with enabling and liberating rather than with control, the critical theorist is more hesitant about positivism. Because the empiricist takes the very conditions he produces as his objectively present field for analysis or action, the empirical technocrat will be self-validated in a way which precludes emancipation.<sup>55</sup> Consequently, the scientization of politics, or, we might imagine, of law, forecloses social possibility and limits discussion of precisely the nature of that reduction.

It is in response to these limitations that the critical theorist aspires to be liberating.<sup>56</sup> One way to understand how a change in the self-image of theory, absent a change in its content might be thought to relate to a project of liberation, is to think about the Frankfurt School's sense of the inadequate nature of reformism. Beginning with Marx, critical theorists found the reformist critiques of traditional scholarship unsatisfying. This had only very little to do with their sense that these critiques did not go far enough.<sup>57</sup> Often, as Lenin was to demonstrate, reformism could be a crucial part of revolutionary development.<sup>58</sup> Marx's claim was that reformism was wrong because it was insufficiently grounded in social life. Being insufficiently scientific, it could never be effective in liberating men who lived in the world because it was simply mistaken or ignorant about the conditions of life.

KNOWLEDGE 51 (I. Lakatas & A. Musgrave eds. 1970) (outlines negative features of "normal" science).

55. Habermas concedes that interest in prediction and control is best served by the empirical analytical sciences provided this technologically utilizable information is under the control of an enlightened public sphere. See J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 191-98 (J. Shapiro trans. 1971). He states that "[e]mpirical-analytical knowledge is thus possibly predictive knowledge. However, the *meaning* of such predictions, that is their technical exploitability, is established only by the rules according to which we apply theories to reality." *Id.* at 308.

56. Critical theory induces self-reflection in members of society resulting in these people's enlightenment and emancipation, and in turn, the transformation of society. See *supra* notes 43 and 47 and accompanying texts.

57. The "revisionist controversy" which arose in the German Social Democratic Party at the turn of the twentieth century was the first such major debate in Marxism. This controversy centered about E. BERNSTEIN, *EVOLUTIONARY SOCIALISM* (E. Harvey trans. 1961), which was published in German in 1899. Bernstein based his revisions of Marxist doctrine upon the observation that trends of development in Western capitalist societies were diverging from those foreseen by Marx. Thus he questioned the orthodox Marxist view of crisis and the "inevitable economic breakdown of capitalism." *Id.* at 73-94. However, a number of Marxists attacked Bernstein and defended the revolutionary core of Marxism against reformism. See, e.g., R. HILFERDING, *DAS FINANZKAPITAL* (1910) (capitalism has the flexibility to subsume minor economic crises, but would eventually be overthrown not as a consequence of economic collapse, but as a result of the political struggle of the working class); R. LUXEMBURG, *THE ACCUMULATION OF CAPITAL* (A. Schwarzschild trans. 1968) (the capitalist system would inevitably collapse after it had incorporated all the remnants and vestiges of the pre-capitalist system).

58. Lenin argued frequently that Marxists must participate in reform movements and cooperate in coalition governments as a strategic step towards bringing about the revolution. See V. LENIN, "LEFT-WING" COMMUNISM, AN INFANTILE DISORDER 30-59 (1940). For Lenin "theory is not a dogma, but a *guide to action*." *Id.* at 53.

The Frankfurt School makes a similar claim about contemporary reform. They do not claim that liberal reform is not progressive. Rather, the claim that liberal reform tendencies are wrong because, by being grounded in social life, they can never comprehend the overall structure which generates them as it imprisons.<sup>59</sup> As a result, although reform often produces good results, it blinds to the true conditions of social life and is unable to generate imaginative alternatives. In this, reform is insufficient not only because it is too scientific but also because it is too naturalistic.

These criticisms are based in an understanding of the way theory acts in the world. Critical theorists struggle to imagine the interlocking relationship of theory and practice.<sup>60</sup> To their minds, liberal reformist scholarship fails either because it submerges itself in social life and blinds itself to the theoretical aspects of domination which exist even there or because it distances itself from social life and fails to be able to affect those conditions.<sup>61</sup> Built into this analysis of liberal reformism is an assumption about the "real" relation between theory and practice. As a result, the aspiration to be liberating entails a cognitive aspiration to be accurate.

Another way of putting it would be to say that a critical theory's capacity to liberate addresses both the interest in control served by science and that in knowledge which is served by interpretation. Just as these were to be used to elaborate critical theory, so critical theory aims to liberate us from scientific and interpretive inquiry. By "liberating," the Frankfurt School does not mean that critical theory suggests tactics for achieving the ends of freedom already held by social actors. Nor does it simply argue for a specific set of reforms which agents may be persuaded to accept as in their interests. To do either of these would be to provide content in precisely the manner of scientific or interpretive theory. To argue with agents about the meaning of freedom would be to accept a determinative notion of the concrete manifestations appropriate for the idea of freedom in a non-self-reflective fashion. It was by attempting to

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59. Habermas distinguishes between liberal and radical or critical reformism. He considers that liberal reformism fails to transcend the ideology causing the oppression, thereby often "humanizing" and camouflaging the faults of the system rather than leading to positive, rational reforms. See J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 24 (J. Shapiro trans. 1971). For example, Habermas argued that as Popper's "critical rationalism" stopped short of drawing radical implications for the theory of knowledge, its final consequence was only to promote rather than reduce a scientific misunderstanding of science on several important grounds. See Habermas, *Analytische Wissenschaftstheorie und Dialektik, Ein Nachtrag zur Kontroverse Zwischen Popper und Adorno*, in *LOGIK DER SOZIALWISSENSCHAFTEN* 291 (E. Topitsch ed. 1971); Habermas, *Rationalism Divided in Two*, in *POSITIVISM AND SOCIOLOGY* 195 (E. Giddens ed. 1974). In Habermas's critical theory there is little need to distinguish between revolution and reform. The reflective critique of ideologically "frozen" forms of consciousness will lead towards a more rational social order, whether those changes are sudden or gradual. The labeling of such emancipation as "revolutionary" or "reformist" is superfluous and is only a diversion from the more important task of self-reflective critique. Cf. R. UNGER, *LAW IN MODERN SOCIETY* 234 (1976). "One mistaken view confuses the actuality of revolutionary socialism with its future oriented ideal of egalitarian community . . . [This] approach reduces reality to ideology." *Id.*

60. Cf. R. UNGER, *KNOWLEDGE AND POLITICS* 31-36 (1975) (a refutation of the antimony of theory and fact).

61. Cf. J. HABERMAS, *THEORY AND PRACTICE* 268-76 (J. Viertel trans. 1973) (Habermas's analysis of the separation of theory and "commitment" in positivism's critique of ideology).

construct such a form of knowledge and program for action that science limited itself.

Critical theory aims to elaborate the goals which in a certain sense it "must" be in the interests of actors to pursue. This "must" is easy to misunderstand. At first glance it appears that the Frankfurt School has replaced argument about the conditions of freedom with bold assertiveness. Much of the work of the Frankfurt School sounds totalitarian in precisely this sense, for it claims to pre-figure or predict what agents will want and how they will freely act. This charge misses the point in so far as it suggests that critical theorists attempt to force a specific content on the social world. They aim only to be descriptive. Critical theorists propose an elaborate series of assumptions about the conditions of social life which, if true, could be altered, as a matter of logical necessity, by a process of theoretical and practical enlightenment. These assumptions are validated and this claim can be substantiated when that theory produces these effects. In this sense, then, the liberation claim is also a cognitive claim.

This double claim about liberation might also be misunderstood in a way which is connected to earlier claims about prediction and logical compulsion. Once critical theorists have established the initial conditions of social life, they claim that theoretical activity of a certain sort will bring about certain changes in social life. This resembles Marx's theory of historical necessity, which the Frankfurt School claims has been misunderstood in precisely the same way.<sup>62</sup> To critical theorists, Marx could not have meant to cloak his claims with scientific legitimacy by appearing to predict, in the style of a scientific theory, anything about what would actually happen in the world of action. If he had done so, his theory would have been subject to the errors of empiricism, to the extent that it misunderstood the relationship between consciousness and action.

On the contrary, Marx, as read by the Frankfurt School, meant only to describe the logical consequences of his own assertions about the initial conditions of social life. His predictions were more than merely the theoretical

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62. Habermas considers that "vulgar" Marxists have interpreted historical materialism in a predictive empirical fashion rather than as a set of assertions to be tested in a critical theory discourse. See J. HABERMAS, *Geschichte und Evolution*, in *ZUR REKONSTRUKTION DES HISTORISCHEN MATERIALISMUS* 200, 246-50 (1976). He considers that the "vulgar" Marxists have at best a hermeneutic interpretation of the world. He distinguishes his critical approach to Marxism from either a philosophy of history or a universal history, both of which he considers bound to a narrative framework, and consequently a particular hermeneutic standpoint. Rather, he describes his approach as a theory of social evolution, a reconstructive ahistorical enterprise. He can only maintain this position by introducing a division between historical narrative and the reconstruction of social evolution as theory. *Id.* at 244-45, 249. Although his critique of "vulgar" Marxism is appropriate, this sharp separation of theory and history has been criticized, particularly as an artificial separation of theory and practice. See T. MCCARTHY, *THE CRITICAL THEORY OF JURGEN HABERMAS* 268-71 (1978).

[T]he aims of a critical social theory are not exhausted in the construction of a theory of social evolution. Primary among these aims is the analysis of contemporary society; and this analysis requires both a practical and a historical orientation. It requires, that is, a critical, historical account of how we come to be what we are, a reflection on the particulars of our self-formative process.

*Id.* at 269-70.

working out of his own conceptions, precisely because his theory was able to explain its own origins in a self-reflective manner. The Frankfurt School intends to be predictive in this sense. They want more than simply to elaborate their own theoretical premises. They want to make a claim about what will in fact happen, but only in so far as they have elaborated the way in which consciousness mediates the actions of social agents to whom their theory is addressed. Their claims will be validated in open discourse, not by adherence by a vanguard to a scientific prescription. Critical theory then, is a cognitive enterprise.<sup>63</sup> Unlike scientific theories, critical theory claims to do more than simply inform agents about their social condition or suggest methods of achieving goals which they may or may not share. It liberates agents because it demands of them that they liberate themselves.

### *E. The Content and Domain of a Critical Theory*

The Frankfurt School has sought to fulfill its aspiration for a theory which is both liberating and cognitive by developing a series of assumptions about the social domain within which critical theory operates and by constructing a theory which relates to its own origins in a particular way. These assumptions, developed in their work on "legitimation" and "ideology," are expressed by the notion of "self-reference." The notions of legitimation and ideology have been thought to be mutually supporting. Indeed, Frankfurt School theorists seem to feel that these two dimensions of their project are both liberating (in the sense of opening methodological and cognitive possibilities closed by belief in either natural or positive method) and epistemologically valid (there seems some real sense in which they demonstrate the inadequacy of natural and positive methods). Nevertheless, each of these two dimensions of Frankfurt School work raises serious difficulties. Assumptions about the epistemological position of agents seem subject to a critique parallel to that leveled at naturalism. Requiring that critical theory be self-reflective and self-validating threatens to plunge us back into the hermeneutic crisis which engulfed positivist methodology.

Frankfurt School inspired social analysis often seems sustained by an image of social structures being reinforced or "legitimated" by "ideology." Usually, Frankfurt School scholars seem to have in mind a world view or belief system which is held by social actors and which structures their actions and

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63. Scientific theories are "objectifying" in the sense that the theory and the objects to which the theory refers can be clearly distinguished. For example, Newton's theory of mechanics is not itself a body in motion; the theory is not part of the object-domain it describes. In comparison, critical theories are "cognitive" in structure, as the theory itself is always part of the object-domain which it describes. For a discussion of the cognitive nature of critical theory, see R. GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 55-75 (1981). These two different approaches to theory development are distinguished in Habermas's writings on Marx. Habermas comments at length on the tension in Marx's thought between the reductivist/scientific side and the critique of ideology and critical scheme of revolutionary practice. See J. HABERMAS, *THEORY AND PRACTICE* 195-252 (J. Viertel trans. 1973). It is because the latter side of the theory is embedded in an analysis of cultural erudition and the role of symbolic interaction that Habermas's ideal speech situation is so important. His analysis of the universal pragmatics of speech provides in some sense a counterbalance to the scientific tendencies of traditional Marxism.

perhaps also their beliefs about other collateral matters.<sup>64</sup> There are three key elements here. First, ideology is a form of consciousness — a theory, rather than a practice. Second, it is “held” by actors, implying some difference between the actor’s self and the ideology he possesses. Although people sometimes speak of an ideology having possession of an individual’s consciousness, the difference between object and subject is retained. Third, the ideology acts to change and limit the actor’s actions and ideas — imposing itself on the world through the action of the social agent. This active dimension of ideology is often discussed under the rubric of “legitimation” rather than “ideology.” Social forms “legitimate” themselves by inducing or possibly simply by benefiting from an ideological system into which they are integrated. Likewise, ideologies “legitimate” social forms.

Even without refining these ideas, the centrality of this set of assumptions to the project of practicing a liberating theory which avoids the pitfalls of empiricism and naturalism is obvious. If the world is composed of actors whose ideologies affect their social relations in this way, a cognitively true theory could be liberating. The focus on ideology and false consciousness corresponds to an early moment of the Frankfurt School when the critical theorist was to bridge the gap between proletarian stupor and self interest. As the enterprise became more diffusely aimed at society as a whole, the emancipatory potential became more transcendental and the emphasis shifted from false consciousness to legitimation. This earlier moment, however, seemed to compel those who would have pursued the goal of critical theory to imagine social actors, including other, non-critical theorists, to act “willfully” in pursuit of their “interests,” and to be deluded by a set of demonstrably “false” beliefs in such a way as to act to perpetuate wrong or oppressive social relations.<sup>65</sup>

It was crucial, in other words, that ideology be distinguishable from consciousness. Ideology needed to be part of what an actor thought, but not his entire personality and consciousness. Only if ideology could be cordoned off from thinking and feeling generally — only if the subject/object distinction in fact characterized the self — could a correct theory be active against legitimation. As a result, the Frankfurt School devoted a great deal of attention to the idea of “false” consciousness — often used as a virtual synonym for ideology.<sup>66</sup>

The problem was to distinguish true and false consciousness in some sustainable fashion. For example, one might think consciousness false when it produces barriers to free communication or to the free exercise of will. These barriers might be self imposed: an agent might be deluded by his ideology in such a way as to block his own interests or prevent his own participation in open communication. Ideology might also produce actions which blocked the

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64. For a discussion of the different ways in which social theorists, including the Frankfurt School use the term “ideology”, see R. GEUSS, *supra* note 63, at 1-44. A more general list of works on the nature of ideology include: H. BARTH, WAHRHEIT UND IDEOLOGIE: TRUTH AND IDEOLOGY (1975); J. LARRAIN, THE CONCEPT OF IDEOLOGY (1979); K. MANNHEIM, IDEOLOGY AND UTOPIA (L. Wirth & E. Shils trans. 1936); J. PLAMENATZ, IDEOLOGY (1970).

65. Foucault has described the atomized way in which deluded actors fashion oppression for themselves and others in his descriptions of a diffuse social power. See, e.g., M. FOUCAULT, *Two Lectures*, in POWER-KNOWLEDGE 78-108 (C. Gordon ed. 1980).

66. See *supra* note 64.

participation of others; that is, it might sometimes be effective in fulfilling the interests of some actors in domination.<sup>67</sup> So one might picture two forms of surplus repression: self imposed and socially imposed. Both would be legitimated by false consciousness.

While aiming to expose false consciousness and liberate social agents, critical theorists have elaborated various types of belief which might be deluding.<sup>68</sup> Each such elaboration is problematic. An ideology might be constraining and therefore false because of its lack of correspondence to the real interests of the agents who held it. Such a view, however, requires a theory of interests which critical theorists have by and large failed to provide.<sup>69</sup> The search for an approach to interests has become steadily more diffuse, often lodging itself in theories of evolution, social functionalism, or, at its most transcendental, of communication. Habermas, for example, tackles this problem by proposing an "ideal speech situation" of unencumbered communication from which a program of social development might be reverse-engineered.<sup>70</sup> Each of these approaches seem threatened with reduction to the naturalist tautology that an ideology which oppresses is oppressive.

This general approach is often supplemented in Frankfurt School work by its inverse. Instead of testing ideology against some set of actualizable interests or desires, one might imagine epistemological principles deeper than mere ideology or interests by which agents would test ideologies before allowing them to structure their interests. One might imagine, for example, that one had grounds for rejecting beliefs which could only be held so long as their inner contradictory nature, source, or effects remained hidden. A set of beliefs

67. J. HABERMAS, *THEORY AND PRACTICE* 1-41 (J. Viertel trans. 1973).

68. Habermas envisages critical theory as capable of serving the role of liberating people aware of their "suffering" from the oppression of ideology. However, others in the Frankfurt School, such as Marcuse and Adorno, criticize even "deeper" forms of ideological delusion. They consider that the modern industrial state can exercise such an extensive control over the cognitive processes of its members as to prevent them from becoming fully aware of the frustration of their "true" interests. The difficulty facing critical theory in this latter conception is to explode society's "myth of happiness" before it can proceed to reveal the source of suffering in a social framework which falsely lays claim to legitimacy. For a discussion of these differences between members of the Frankfurt School, see R. GEUSS, *THE IDEA OF CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 80-85 (1981).

69. *Id.* at 45-54; OTTMANN, *Cognitive Interests and Self-Reflection*, in HABERMAS: *CRITICAL DEBATES* 79 (J. Thompson & D. Held eds. 1982) (commenting on Habermas's various "cognitive" interests).

70. Habermas uses the term "ideal speech situation" to refer to a situation of absolutely uncoerced and unlimited discussion between completely free and equal human agents. See J. HABERMAS, *What is Universal Pragmatics?*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 1-68 (T. McCarthy trans. 1975). For thorough accounts of Habermas's position, see D. HELD, *INTRODUCTION TO CRITICAL THEORY HORKHEIMER TO HABERMAS* 334-39 (1980); T. MCCARTHY, *THE CRITICAL THEORY OF JURGEN HABERMAS* 272-91 (1978). Habermas suggests a way of eliding this difficulty by reference away from the social condition legitimated by an ideology onto the ideology itself. By suggesting that we prefer theories which expose themselves to validation by correspondence with the interests of those in the ideal speech situation he is able to hook this cognitive branch of his theory, threatened with reduction to naturalist speculation, onto the branch concerned with liberation and testable in action. Still, as we will see, when that branch comes in turn to be threatened with the problems of positivism, he returns to this one.

might be false if it is based on false premises or is internally contradictory. Of course, this approach is as subject to the pitfalls of positivism as was the last to those of naturalism. Just as scientific empiricism had a role as to play in elaborating the conditions of oppression and control, so hermeneutics provides a methodology for uncovering inconsistency of this sort.<sup>71</sup>

Of course these two approaches to the problem of differentiating true and false consciousness do not fit harmoniously together. Indeed, the Frankfurt School has spent a lot of time working on the conundrum posed by the insight that oppression is known only by the falsity of the ideology which supports it while falsity can only be identified by symptoms of oppression. Some search for a context specific approach which begins with the experience of pain and suffering in a given historical context.<sup>72</sup> Others seek more transcendental conditions for defining freedom.<sup>73</sup> These are supplemented by the discoveries of linguistic, anthropological or psychological structuralists about the internal structures of consciousness which might lie beneath ideology.<sup>74</sup>

To develop a "dialectical" route out of this dilemma Frankfurt School theorists have returned to their claim that theoretical work can be both liberating and a form of knowledge if it remains critical. The idea seems to be that by radically denying the validity of truth-finding mechanisms in contemporary theory and by focusing not on the task of making sense of the world but on that of ascertaining how it might not make sense, the Frankfurt School might, in a relentless process of criticism, expose the consciousnesses acting in social life and lead to the rejection of false ones.

Of course, such a relentless process could as easily generate a dialectic of legitimation as of enlightenment and liberation. One might even characterize liberalism in exactly these terms. To the Frankfurt School, the key to avoiding the reformist legitimation of a more traditional approach is to direct the force

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71. Nevertheless, just as Habermas shifted away from the effects of an ideology on interests and conditions to avoid the problems of naturalism, so he also shifts away from inductive investigation of a theory's consistency to avoid the pitfalls of positivism. Instead, he suggests that a critical theory be required only to be self-referential — exposing its own origins so as to permit its open acceptance or rejection. If theories are self-referential in this way, we might imagine that agents will find themselves able to make comparisons with the ideal speech situation.

72. See, e.g., ADORNO, *Introduction to The Positivist Dispute*, in GERMAN SOCIOLOGY 1, 21-22 (T. Adorno ed., G. Adey & D. Frisby trans. 1970).

73. See, e.g., Habermas and his "ideal speech situation." Habermas uses the term "ideal speech situation" to refer to a situation of absolutely uncoerced and unlimited discussion between completely free and equal human agents. See J. HABERMAS, *What is Universal Pragmatics?*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 1-68 (T. McCarthy trans. 1975). For thorough accounts of Habermas's position, see D. HELD, INTRODUCTION TO CRITICAL THEORY: HORKHEIMER TO HABERMAS 334-39 (1980); T. MCCARTHY, THE CRITICAL THEORY OF JURGEN HABERMAS 272-91 (1978).

74. Like Habermas, the structuralists also reject contextualist views in favor of what they often refer to as a "synchronic" approach. They examine particular systems or structures under artificial or ahistorical conditions, simultaneously ignoring and exploring their evolution in order to explain their present functioning. See N. CHOMSKY, ASPECTS OF THE THEORY OF SYNTAX (1965) (linguistics); C. LEVI-STRAUSS, L'HOMME NU (1971) (anthropology); J. PIAGET, *infra* note 110 (psychology). "This is why, in France especially, structuralism has often found itself at odds with Marxism, for which any such denial of history is unthinkable." STRUCTURALISM AND SINCE, *infra* note 91, at 9.

of criticism against critical theory itself. As a result, the critical theorist will develop a relationship to his theory quite different from that which the social agent customarily has with his ideology. This self-reference sustains the cognitive claim of critical theory. Its content is established without succumbing to the pitfalls of positivism or naturalism by inter-subjective reflection and empirical investigation which is self-consciously critical. As a result, while the social agent believes his ideology, the critical theorist *knows* his critical theory.

Just as the liberating and cognitive claims of critical theory were related in a mutually sustaining fashion, so also the images of social belief and action are related to the image of critical theory in a fashion which sustains those double claims through the mechanism of self-reference. As a result, these various components of critical theory are all made to seem related and mutually supportive. The focus on ideology in the development of a "liberating" social theory prevents claims about cognitive content from collapsing into empiricism. The self-referential nature of cognition prevents the liberating drive from descending into utopianism. The Frankfurt School shuttles among these aspects of their approach, alternatively emphasizing one or the other.

Taken together, the assumptions which the Frankfurt School makes about the world of social actors and the possibilities for a self-referential theory respond to the twin demands that a critical theory be cognitive and liberating. But it is important to realize that this image of cognition and liberation is a very peculiar one. The assumptions which the Frankfurt School makes about the world tend to retain the gap between subject and object or theory and practice which it seemed at first to reject. Sustaining the relationships among agents, ideologies, social forms and criticism which result has generated a relatively mechanical image of social power and has led to a retreat from the very issues of historical agency which critical theory seemed initially most suited to tackle.

Critical theory is able to claim both to be cognitive and to be a liberating enterprise because of a series of assumptions about the human condition which it contains. But these assumptions appear to restate the difficulties which critical theory aspires to avoid. The Frankfurt School would have one imagine that before the enterprise of critical theory gets going, people suffer from both a lack of freedom and from false consciousness. These two notions are different but related. One must imagine that agents are unfree because of their false consciousness. Social agents share an incorrect world view which causes either self-imposed or legitimated external oppression. Moreover, one must imagine that this consciousness is shared by actors only when and to the extent that these actors do not realize that they share it. One must imagine a world in which people are oppressed because of a consciousness which they would not hold if it were revealed to them.

In such a world a critical theory could be liberating if true and true if liberating. Moreover, one could expect that a theory which was relentlessly self-aware might be both. A critical theory which effectively revealed to agents the self-imposed coercion and the falsity of their world-view would lead them through enlightenment to emancipation. Each of these assumptions, however, is problematic. One way of summarizing the difficulty would be to say that critical theory overcomes the split between theory and practice by projecting it into the heads of social agents as the difference between true and false consciousness, or interests and ideologies. Another way of saying the same thing



would be to suggest that critical theory overcomes the difference between practice and theory by projecting it into the world as the difference between legitimated oppression and the actualization of interests.

The first difficulty is easiest to see. The Frankfurt School seeks to expose the falsity of the consciousness in a way which does not rely on linking it either to an unacceptable social situation or to a particular constellation of interest. The method is to induce self-reflection, on the assumption that false consciousness will only be held because its true nature is hidden. We must imagine, then, that agents are not completely deluded about some deeper epistemological notions than those apparent on the face of the consciousness whose falsity is to be revealed. The critical theorist faces a difficult set of questions. Where within the head of the social agent is the truth to be located? Moreover, once the truth has been placed within the heads of social agents, how is the critical theorist to predict its content? For critical theorists do not see themselves arguing with agents about what is in their interests. Agents will in fact give up beliefs when they should if the criteria of "should" are examined like the consciousnesses themselves.

The Frankfurt School has responded to these difficulties in a variety of ways. All avenues are difficult. One possibility is to reveal belief structures to agents so that they will relinquish beliefs which do not serve their interests or fit with their epistemological first premises. Although such a critical theory might be effective in improving the self-awareness of actors and in bringing about equilibrium among their awareness, activity, and interests, such a theory would not be cognitive. Relying solely on the action of agents confronted with their own beliefs, it could not give an account of when an agent should relinquish a consciousness except to say that they should when they do. We would be left with no way of telling when agents clung perversely to world-views alien to their interests. Such a critical theory, moreover, could give no account of its own justification. Why, we might ask, should we bother to expose false consciousnesses except as it is in our interests? The liberating mission of critical theory would be threatened with the cognitive emptiness which had plagued both positivism and naturalism in different ways.

The critical theory of the Frankfurt School wants no less to rely on agents than to argue with them. The critical theory is to "anticipate" the actions of agents and anticipate their interests, an anticipation which is confirmed by their action, to be sure, but which is not grounded there. It is grounded rather in the cognitive content of critical theory, saved from skepticism by self-reference. The Frankfurt School suggests that the liberating, critical nature of critical theories gives them content: the preference for exposure over concealment. As a result, "anticipation" is neither prediction in the style of the empirical sciences (inexorably descriptive) nor prescription in the style of naturalism (idealistically normative).<sup>75</sup>

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75. When Habermas uses "anticipation" he refers to a demand or requirement of rationality rather than an empirical-analytical prediction. See J. HABERMAS, *Bewusstmachende oder rettende Kritik—Die Aktualitaet Walter Benjamin*, in *KULTUR UND KRITIK* 302, 309, 312 (1973). Thus a critical theory does not predict that members of society will adopt the theory to liberate themselves and re-order society, but rather "demands" that they embrace the theory. In a sense the theory "requires" that they "ought" to act upon the theory. However, this is not the idealist "ought" of a normative system. Although it does not follow that just because members of society

The difficulty, of course, is to account for the continued presence of a cognition within the head of the social agent which can be apprehended by critical theory. The most widespread approach to this difficulty, characteristic of the late Marcuse or of an early Habermas, is associated with the presence in alienated modernity of apparently already liberated agents. The sixties furnished a variety of communal constellations which captured the anticipatory imagination of the Frankfurt School.<sup>76</sup> These groups made it seem possible to give expression to true consciousness in social practice. As a result, critical theory could literally see its cognitive presence in agent's true selves, confirming itself in action.

In another view, characteristic of later critical theorists such as Habermas who abandoned the notion of an historically identifiable counterhegemonic practice, agents are thought to share some deep notions about truth and falsity independent of their ideology to which an external theorist can appeal. The later Habermas develops an elaborate system of choices agents would make in situations of ideal communication based upon some assumptions about rationality and the universal nature of moral and pragmatic interests rather than truth and falseness.<sup>77</sup> For him, these principles transcend historical context. Adorno, although also grounding his claims in a set of deep principles, makes no trans-historical claims about the principles which enable agents, on reflection, to recognize the falsity of their consciousness.<sup>78</sup> His approach has been supplemented by a variety of evolutionary theories reminiscent of contemporary analyses of moral development.<sup>79</sup> These approaches, however, are threatened by the problems of positivism to the extent that they sustain some claim about the objective reality of the cognition which critical theory predicts.

Of course, one way out of this dilemma would be to avoid any claims about the grounding of critical theory in objective beliefs or practices or epistemological principles. Critical theory might be limited to the realm of theory.

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"ought" to adopt the theory they will do so, one can predict that they will do so. Approaching the term "anticipation" from another angle, members of society "anticipate" the "ideal speech situation" whenever they act. See *supra* note 73 and accompanying text. In every action the ideal speech situation must be presupposed, even though it is probably not attained, in order that propositions and norms can be developed and accepted free from unnecessary domination in all forms. For a discussion of "anticipation" in the ideal speech situation, see R. GEUSS, *THE IDEA OF A CRITICAL THEORY: HABERMAS AND THE FRANKFURT SCHOOL* 661 (1981).

76. See *supra* notes 11, 45, 46 and accompanying text.

77. See *supra* note 70 and accompanying text.

78. Adorno believed that members of society's epistemic principles and their standards of reflective acceptability vary historically according to different levels of development and their concomitant pains, frustrations and sufferings. The contextualist view of Adorno conceives of the critical theory as helping a particular group of people explicitly to comprehend their epistemic principles and their idea of the "good," and showing that a particular belief and/or practice is reflectively unacceptable for those who hold those principles and ideals. Thus, this group would have to modify their beliefs and actions in order to attain their ideal of a rational, satisfying existence. Cf. Unger's principle of subjective value: R. UNGER, *KNOWLEDGE AND POLITICS* 76-81 (1976) (values are individual and subjective).

79. For an analysis of U.S. constitutional history influenced by this turn to theories of moral development, see G. FRANKENBERG & U. ROEDEL, *VON DER VOLKSSOUVERÄNITÄT ZUM MINDERHEITENSCHUTZ* (1981).

If one imagined that false consciousness seems appealing to agents because it is rooted in the true interests of the agents who were deluded by it, such a false consciousness would be susceptible to reflective exposure because of the internal inconsistency of being grounded in interests which it does not in fact serve.<sup>80</sup> Such a contradiction in a false consciousness would mean that such a theory would need to hide its tracks in precisely the sense a critical theory could expose. Moreover, if the false consciousness is grounded, not in true interests, but in an invalid epistemology which is then disguised, critical theory could also proceed by internal criticism of the false consciousness.<sup>81</sup> In either of these situations, the mission of a critical theory would be to reveal the delusion of false consciousness by exploiting its incoherence in theoretical terms. The difficulty here, of course, is that the whole point of looking to critical theory is for a way of avoiding this confinement to the realm of ideas.

Nevertheless, critical theorists often seem to be limiting their claims in precisely this way only to extend them again when focusing on what they see as the process of social change. Indeed, one might be content with a theory which operated solely as a purifier of consciousness if one could differentiate social forms which were the product of free choice from those that were generated by ideology-legitimated social mechanisms. But it is difficult to separate the claims which science makes from the claims of critical theory about the nature of social oppression and consciousness. In order to avoid locating cognitive content unreachably within the consciousness of the agents they address, critical theorists sometimes claim that the emancipatory content of their theory, unlike that of scientific theory, can be confirmed by the action of social agents without surrendering its content to their will in the fashion of empiricism or positivism. As a result, critical theorists avoid a separation of theory and practice by relying upon a dialectical image of the relationship between others and their environment.

To the Frankfurt School, institutions of social control are empowered by their objects when they are viewed as legitimate.<sup>82</sup> The link between consciousness and social life is fairly mechanical: agents act out their views about legitimacy.<sup>83</sup> The Frankfurt School consequently spends much of its energy

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80. For Habermas's most detailed discussion of this form of delusion, see *Sozialtechnologie*, *infra* note 83, at 239-67.

81. For an example of false consciousness grounded in an invalid epistemology, see Habermas's critique of Nietzsche's "theory of knowledge" in *Knowledge and Human Interests*, *supra* note 16, at 295-300.

82. Compare this with Foucault's description of fragmented social power. See, e.g., M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (A. Sheridan trans. 1979).

83. Habermas distinguishes several historical stages in the development of forms of social legitimation. See J. HABERMAS, *Toward a Reconstruction of Historical Materialism*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 130, 156-58 (T. McCarthy trans. 1976). In modern society, (1) the capitalist enterprise, the social order, is justified by exclusive reference to its technical efficiency independent of conceptions of the "good life"; (2) other legitimating doctrines, such as rational natural law are also developed along universalistic grounds; and (3) conflicts are resolved from a stand-point of a "strict separation of legality and morality," i.e., public issues are resolved by a "general, formal and rationalized law," while private issues are guided by principles of morality. *Id.* at 158. Habermas further emphasized that the belief in legitimacy can not be reduced to a belief in legality in *Theorie der Gesellschaft oder Sozialtechnologie?: Eine Auseinandersetzung mit Niklas Luhmann*, in *THEORIE DER GESELLSCHAFT ODER SOZIALTECHNOLOGIE*

elaborating the assumptions about legitimacy which might undergird applications of power or systems of oppression.

This effort has by and large not sought to define oppression. Rather it has sought to elaborate the social results of legitimation which are likely to be the products of false consciousness. This avoids the initial difficulties of naturalism. To the Frankfurt School, a society is particularly susceptible to critical theory when oppression covers its tracks by preventing awareness of the theories of legitimacy upon which it depends. Forms of consciousness which cover their tracks by preventing awareness of their first principles are very likely to turn out to be false. The link between false consciousness and oppression, then, is particularly subject to critique when the system of power denies access to views about legitimacy embedded in consciousness and when consciousness operates in such a way as to prevent reflection on this cover-up operation. The lack of self-reflection in a consciousness, then, might at least make us suspicious about its validity. Self-reflective consciousness, by contrast, would be far less likely to obscure those of its premises which legitimized constellations of power.

A critical theory is liberating because by inducing self-reflection by agents it breaks the mutually reinforcing bondage of a social structure that avoids discussion of the world-view which supports it. It avoids substituting another false consciousness because its own cognitive theory of legitimacy, when present, is subject to its own critique. It allows agents to formulate their moral vision freely, in conditions of debate unencumbered by false notions of legitimacy. We can be sure that it will not regenerate oppression, in part because critical theory is itself self-reflective in precisely the sense that it seeks to bring about self-reflection by social actors. It is under these conditions of consciousness and power, then, that critical theory is able to validate itself by self-reflection.

A scientific theory could never validate itself by self-reflection because it cannot criticize its own premises without holding its methodology constant. Indeed the demonstration that a scientific theory "assumes its conclusion" invalidates it in important ways. This is because scientific theory is valid if its content accurately reflects either life or thought outside itself. The project of scientific theory is to deal with a content of which it is not a part either predictively or explanatively. A scientific medical theory is about disease and health, about diagnosis and treatment. A critical theory of medicine is also about the fabric of theory about these things: it is about, among other things, itself. As a result, such a theory not only may be self-reflective, but must be so to be valid.

All of this, however, depends upon a notion of legitimation which is neither empirically compelled by the "forces of production" nor coincidental to a cultural superstition. Efforts to elaborate legitimation have replayed the double effort of theories about ideology to avoid empirical or naturalist moorings. Like ideology, legitimation in the work of Habermas, no less than in

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142, 243-44 (J. Habermas & N. Luhmann eds. 1971) [hereinafter *Sozialtechnologie*], Habermas stressed that "legality is just one part of the total legitimation process related to authority and power in modern society." *Id.* The object of a critical theory is to demonstrate that such a set of beliefs or world-view is not legitimate, but ideological. Once the world-view is seen to be reflectively unacceptable, the repressive social institutions these beliefs legitimate are also not acceptable.

Weber's classic formulation, has become a placeholder for the sought historical subject.<sup>84</sup> It brings into cognition an interminable search for origins and cause. The Frankfurt School resolves this dilemma as they resolved the dilemma of ideology. Instead of relying upon a self-reflective theoretical intervention, they have developed theories of unalienated communication against which to measure mediated, and hence, legitimizing consciousness. These two solutions are then combined to produce a sustainable critical analysis. The oscillation between legitimation and ideology, like those between empiricism and naturalism or theory and practice, is to be overcome dialectically — perhaps by reference to a transcending free communicative experience.

The social analyses produced out of this dialectic are far removed from either the mechanization of more "vulgar" Marxisms or the speculation of policy science. In that, the Frankfurt School provides useful indications of what critical legal analyses might achieve. Critical theory seems best at generating internal critique of structures of belief. The difficulty is that its aspiration is to avoid precisely this limitation — to respond to the realization that such belief systems are enmeshed in social life. The result is a continuing search for a historical agent which can be relocated but never found. Paradoxically, then, an effort begun to understand, predict and locate historical agency has led, most strikingly in the work of Habermas, away from concern with historical agency.

#### *F. Critical Theory and the Law*

Although the traditions of social theory within which the Frankfurt School works would seem to address issues of interest to legal scholars, the Frankfurt School approach has not in fact had much currency in American legal scholarship. The Frankfurt School itself has produced little legal scholarship.<sup>85</sup> Despite occasional appearances in general criticisms of cultural phenomena or analyses of the dialectic of enlightenment by which man's alienation is thought to be reproduced through social progress, the law has not been systematically addressed by the Frankfurt School. Their work typically treats law from the outside — as an object of study, as an instance of congealed ideology or as a mechanism of legitimation.<sup>86</sup> It is seen as the locus of conspir-

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84. See M. WEBER, 1 *ECONOMY AND SOCIETY* 212-26 (G. Roth & C. Witlich eds. 1968). Habermas develops a typology of legitimations, each of which distracts attention from a presumption about origins, in *Legitimation Problems in The Modern State*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 178 (T. McCarthy trans. 1978). Thus, for example, his description of a "reconstructive" concept of legitimation, while purporting to transcend an empirical search for beliefs, closes by suggesting that "cognitive developmental psychology, which is well corroborated and which has reconstructed ontogenic stages of moral consciousness in this way, can be understood at least as a heuristic guide and an encouragement," *Id.* at 205. For a critical review of legitimation theory in legal scholarship, see Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379.

85. See ROTTLEUTHNER, *The Contribution of the Critical Theory of the Frankfurt School to the Sociology of Law*, in *SOCIOLOGICAL APPROACHES TO LAW* 111 (A. Podgorecki & C. Whelan eds. 1981).

86. See, e.g., *DIE HERRSHAFT DES GESETZES, EINE UNTERSUCHUNG ZUM VERHÄLTNIS VON POLITISCHER, THEORIE UND RECHTSSYSTEM IN DER KONKURRENZ GESSELLSCHAFT* (A. Soellner trans. 1980); J. HABERMAS, *STRUKTURWANDEL DER OFFENTLICHKEIT* 131-41 (1962); J. HABERMAS, *THE-*

acy or the reproducer of false consciousness. The law figures in a number of functionalist social analyses produced by Frankfurt School scholars as the force which transforms social necessity into belief and permits domination.<sup>87</sup> These external treatments of law, however, have by and large been disappointing.

Many legal scholars have drawn both inspiration and methodological insight from more conventional Marxist social theory.<sup>88</sup> A number of legal scholars seem to have been particularly influenced by the work of the Frankfurt School.<sup>89</sup> As imported into legal scholarship, critical theory has been associated with a number of approaches to legal materials and with the valorization of a posited transcendental subject. As methodology, critical theory seems to have encouraged a particular skeptical stance towards legal doctrine, a skepticism animated by a dialectical style of analysis in both historical and doctrinal work. These analytical tools — indeed this analytical stance — has been quite successful. The substantive tendency to bridge the gaps uncovered by this method with a reference to some historical agent or client, however, has been more troubling.

Methodologically, the major contribution of critical theory for legal scholarship seems to be its encouragement of a habit of radical distance from the materials of legal culture. Once attuned to the possibility of "false" consciousness and the mechanisms of social "legitimation," it seems difficult to speak about the law in the normalizing rhetoric common to much legal scholarship. Although this habit of distance is present in the work of many who have not had any contact with critical theory, it is one of the Frankfurt School's lessons for those who have immersed themselves in its social theory. A legal scholar who sought to develop such a distance from legal materials might begin by treating a court opinion as more than a description of legal theory or doctrine. Rather, he might regard it as a document which purports to be such a description — which claims to be descriptive of a legal culture which it is simultaneously creating.

Normally, when a legal scholar confronts a court opinion, it appears richly textured. Some elements seem more a part of the story it tells about the application of norms than others. Some parts are deeply normative (the holding), others only peripherally so (the dicta), others merely descriptive (recita-

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ORY AND PRACTICE 156 (J. Viertel trans. 1973); F. NEUMANN, *The Change in the Function of Law in Modern Society*, in DEMOCRATIC AND AUTHORITARIAN STATE (1957); OVERMANN, *Sozialisationstheorie: Ansätze zu Einer Soziologischen Sozialisations Theorie und ihrer Konsequenzen fuer die Aegemeine Soziologische Analyse*, in KOELNER ZEITSCHRIFT FUEER SOZIOLOGIE UND SOZIALPSYCHOLOGIE 143 (1979).

87. See, e.g., F. NEUMANN, *supra* note 86.

88. See, e.g., M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); Balbus, *Commodity Form and Legal Form: An Essay on the 'Relative Autonomy' of the Law*, 11 LAW & SOC'Y REV. 571 (1977); Klare, *Labor Law as Ideology: Toward a New Histrigraphy of Collective Bargaining*, 4 INDUST. REV. L. J. 450 (1981); Tushnet, *A Marxist Analysis of American Law*, 1 MARXIST PERSP. 96 (1978).

89. See, e.g., Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829 (1983); Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 3 RES. L. & SOC. 1503 (1984); Reification in Legal Reasoning, 3 RES. L. & SOC. 25 (1980); Trubeck, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575 (1984).

tion of facts or elaboration of doctrine). Depending upon the purpose with which we read, this landscape will change, thrusting different aspects of the court's story to the forefront. Moreover, we might imagine the opinion to be part of an elaborate historical context, which showed now an economic, now a political, now a psychological facet. Viewed by a critical theorist, however, the text is uniformly flat. It is all a telling at equal distance. Each element of the text would stand in potentially the same relationship to the text's larger cultural claim about itself. This approach would thus focus on situating the legal text as a whole in a cultural project. Once having established this stance, the legal-scholar-as-critical-theorist would search in the text for evidence that the claims which the text made did not cohere. The legal scholar would then struggle to demonstrate that the law is a tale, an ideology about itself. He would seek to exploit the incompleteness of that ideology to expose both its incoherence and its status as a form of consciousness.

Two potential avenues of legal criticism seem to have been encouraged by the Frankfurt School tradition. In the first, elements of the text are brought into relationship with other elements whose presence they seem to exclude. Exceptions are made to devour rules and rules to devour exceptions. Principles are extended until they conflict with one another, undoing the text's attempt to "balance" principled alternatives. Results are shown to be consistent with the principle whose application they purport to be and with the principle excluded by the process of their derivation. And so on. A second avenue of criticism challenges the historical claims which legal doctrine and theory make about themselves by replacing accounts of progress with accounts of dialectical struggles in which one "consciousness" about the law displaced another.

The objective for these critical maneuvers is not to demonstrate that legal materials are or were mistaken in their accounts of doctrine or facts. The critical-theory-inspired-legal-theorist would not point out, for example, that the "better" rule, the real interest or policy, the "relevant" facts, the "most important" holding was not X, but Y. Criticism of this sort is situated inside the claims law makes about itself. Distanced from those claims, the critical theorist examines the claim that the law is a sustainable story about rules, facts, etc. The objective is to dislodge the everyday perception of the participant in legal culture — to challenge the level at which legitimation occurs, if only the legitimation of apparent normalcy.

The critical legal theorist would imagine, then, that examination of the tale law tells might reveal contradictions which call into question legal ideology. One way in which a consciousness can be made to reveal its falsity is by demonstration that its source or nature repudiates it. Therefore, the critical theorist seeks to explain the ways in which the self-reflective claims of legal ideology are unsustainable. The goal would be to explore the extent to which the self-reflective claims law makes do not hold up — an exploration conducted by an internal reading of legal materials which reveals their contradictory nature.

The only way to tell whether critical theory has hit its mark, however, is to see it confirmed in practice, in the activity of liberated agents. This idea has been reflected in legal scholarship influenced by the Frankfurt School in two ways. In the first place, this scholarship puts a great deal of faith in method. The critical theorist hopes that his critical method — the grab bag of techniques by which he brings the claims of a consciousness into contrast with its

content — will shake the grip of legal consciousness on agents' will. The critical theorist does not seek to persuade agents with programmatic alternatives. He seeks to liberate them with a methodological karate chop. As a result, the legal scholar inspired by critical theory spends a great deal of time practicing his karate — and is likely to imagine that success resides in refinement of the chop.

This approach runs into trouble when it confronts the diversity of contemporary legal scholarship which it criticizes. Indeed, it seems that the strength of contemporary legal consciousness resides precisely in its supple eclecticism — a diffusion which makes it invulnerable to any single methodological maneuver. The result for critical legal scholars has been a great deal of theoretical defense of the claim that legal consciousness can be predicted *a priori* to be susceptible to a methodological critique. This claim, which seems by the critical theorist's own account to be impossible to prove, except in the doing, has made the critical legal theorist vulnerable to criticism for methodological formalism as well as radical skepticism or a belief in nihilism, odd as that may sound.

Secondly, the emphasis on confirmation in action has contributed to the uneasy relationship which legal scholars generally have to the world of practice. Just as critical theorists of the Frankfurt School continually reinforced their theoretical work with a location for historical agency, those in legal scholarship who have been influenced by critical theory tend to displace their politics through academic activity into legal culture and the legal profession. They often imagine themselves to be working in alliance with, or on behalf of, some group of progressive practitioners or at least against mainstream legal scholars whose work they think of as legitimating the status quo of legal culture.

As a result, the product of the critical legal scholar often refers out or forward, expiating politics by the invocation of another on whose behalf the legal academic remains in the academy. Like the Frankfurt School, critical scholars of the law have cycled through a number of potential clients. The critic often began by situating himself with the mainstream academic, as a scholar working on behalf of practice. By valorizing the practice of the left bar, the critic could ground his attack on the "apologetic" mainstream colleague. As this relationship gave way to a critique of legal practice and culture generally, the critic came increasingly to invoke either the positions and activities of the political "left" generally or various dispossessed groups. Such invocations often appear in relatively undifferentiated string-cite form in critical articles; minorities, women, Jews, Palestinians, homosexuals, people of color, the third world, and so on. Often, however, a single group has been singled out — most recently women — as the unspeakable voice, the political redeemer of legal work which no longer feels comfortable expressing its commitment directly to a legal client. Alternatively, one finds a more general invocation of authentic human relations, of the private, passionate, intuitive world of phenomenologically comprehended face-to-face human interaction.

These references outside the world of legal theory by the critical theory-inspired theorist of law are troubling. In the first place, they recapitulate the relationship which most legal scholars think of themselves as having to some portion of the bar, and it is difficult to see how the relationship of the critical theorist to the left bar is different from the other relationships of service and



persuasion which a pluralist academy has developed with a pluralist profession. Indeed, this homological relationship suggests the aporia of a search for origins in critical theory.<sup>90</sup> The origin of oppression, the source of alienation, the driveshaft of capitalism, the agent of liberation remains the grail of the Frankfurt School, although it is a hidden and dialectically diffused and transformed grail. The result, when critical theory has unpacked a cultural discourse such as law which is not itself the history of philosophy, has been a cynical critique of "legal ideology" which is unable to locate the absent agent, or of "legal legitimation" which cannot contextualize the oppression. Rather than cognition or liberation we find ourselves tempted by circular cynicism.

### III. STRUCTURALISM

Lawyers use the word "structural" in a wide variety of ways when describing their approach to legal doctrine and institutions. A "structural" approach might be one which relies heavily upon sociological insights about the ways in which rules connect and define institutional functions, or one which focuses on the relationship between particular doctrines and some broad "structure" such as federalism or the separation of powers. The "structuralist" tradition which I describe here has very little to do with such uses of the word "structure." Structuralism refers rather to a distinct body of work developed in a variety of fields during the first two-thirds of this century.<sup>91</sup>

Unlike critical theory which needs to be understood both as a historical-theorizing endeavor and as a set of continuing conditions on, and assumptions about, scholarship, structuralism needs to be understood more statically — as a common problem or approach emerging in different disciplines. As a result, I treat the "structuralisms" of linguistics, anthropology, literature and law distinctly. It will be useful, however, to keep in mind the problematic which

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90. See, e.g., Benhabib, *Modernity and the Aporias of Critical Theory*, TELOS (No. 49) 39 (1981); G. FRANKENBERG & R. ROEDDEL, *supra* note 79 (acknowledging the difficulty of searching for origins through moral development theory).

91. For a straightforward introductory essay on structuralism, see Caws, *What is Structuralism?*, 35 PARTISAN REV. 75 (1968). The oldest text with a claim to being structuralist is GIAMBATTISTA VICO, *THE NEW SCIENCE* (1725) (T. Bergin & M. Fisch trans. 1968). The seminal modern structuralist is Ferdinand de Saussure (1857-1913) whose work in linguistics on the "lexicon of signification" in the early years of this century laid the groundwork for all of modern structuralism. Structuralism has been far more influential in the development of French intellectual thought than in Anglo-Saxon traditions. Unlike the American Critical Legal Studies School, the French Structuralists are not a self-identified school and many, like Roland Barthes, have considered being labeled a "structuralist" both an arbitrary classification and a violation of their freedom of thought. For a brief discussion of their objections to being categorized as structuralists, see INTRODUCTION TO STRUCTURALISM AND SINCE: FROM LEVI-STRAUSS TO DERRIDA 3-4 (J. Sturrock ed. 1979) [hereinafter *STRUCTURALISM AND SINCE*]. However, because of their common ancestry in the works of Saussure, they are still commonly referred to as the French Structuralists. For interesting anthologies of structuralist writings, see *STRUCTURALISM* (J. Ehrmann ed. 1970); *STRUCTURALISM, A READER* (M. Lane ed. 1970); *THE STRUCTURALISTS* (R. de George & F. de George eds. 1972). There is also a growing literature of commentary on structuralist thought. See, e.g., T. HAWKES, *STRUCTURALISM AND SEMIOTICS* (1977); E. KURZWEIL, *THE AGE OF STRUCTURALISM* (1980); P. PETTIT, *THE CONCEPT OF STRUCTURALISM* (1977); *STRUCTURALISM AND SINCE*, *supra*.

unites these efforts. The structuralist seeks to develop accounts which will make more intelligible and coherent the total collection of surface manifestations associated with a phenomenon or field (including those often considered to be contradictory or unrelated or marginal by more conventional analysis) without reference to any causal origin for the phenomenon's coherence external to it. Unlike critical theory, which constantly sought to identify and make responsible the agents of history, structuralism sets aside any question of agency. The structuralist asks how language can explain its puzzling flexibility and coherence without reference to either the object world described by words or the subject world which invents and deploys language. He asks how culture can account for its diversity and meaningfulness without reference to history or function. He explores the "literariness" of literature without linking it to an originating literary genius or a consuming culture.

The structuralist answers these questions by reference to relations among terms within the texts of language or literature, suggesting, for example, that language is generated by a structuralist grammar. The difficulty for structuralists is to sustain their original disinterest in external agency or to avoid simply reconstituting an image of agency internal to the materials with which they do work.

#### A. *Linguistics*

The tradition of structuralism in linguistics was enabled by the theoretical separation of what Ferdinand de Saussure termed the "synchronic" and "diachronic" studies of language.<sup>92</sup> Prior to Saussure's work, linguists had primarily studied the historical development of language, recounting the alteration and reinforcement of meaning over time. Saussure referred to this work as "diachronic." In his own work, Saussure examined the present linguistic moment, in which meaning is produced by the relations among linguistic terms themselves rather than by history. He terms this work "synchronic." This differentiation, which took slightly different forms in various branches of early structuralism, permitted Saussure to study the relational structures of linguistic meaning and set aside questions about the subject of history or of conscious agency. Thus, Saussure not only distinguished these two realms of inquiry, he sought to work only in the synchronic. To his mind, only the synchronic was available to linguistic inquiry. This isolation of the synchronic dimension of language from issues of historical agency led to a series of studies of synchronic systems of meaning which constitute the tradition of structuralism.

If critical theory left the nineteenth century searching for the historical subject, structuralism began the twentieth by refusing such an inquiry.<sup>93</sup> This inattention to questions of history and agency proved problematic. As the

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92. See F. DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* (C. Bally, A. Sechehaye & A. Reidlinger eds., W. Baskin trans. 1959). For a discussion of Saussure's works and their importance for the subsequent expansion of the structuralist method, see J. CULLER, *FERDINAND DE SAUSSURE* (1976).

93. For an elaboration of this comparison, see F. JAMESON, *THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM* (1972). Cf. A. SCHMIDT, *HISTORY AND STRUCTURE, AN ESSAY ON HEGELIAN-MARXIST AND STRUCTURALIST THEORIES OF HISTORY* (J. Herf trans. 1981).

methodological separation of synchronic and diachronic developed into a theory of meaning which excluded the diachronic from consideration, structuralists tended to reintroduce the absent subject into their work. To avoid the tendency toward sterile formalism encouraged by the focus only upon the synchronic, structuralists developed theories of history, rupture or agency which addressed the question of the origins of synchronic structures and might be thought of as placeholders for the absent subject. The key to deciphering structuralists' analysis is to trace the disappearing subject toward its eventual reassertion within the synchronic.

Saussure's insistence upon the exclusivity of synchronic analysis is expressed by his analysis of the "sign." According to Saussure, "the linguistic sign unites, not a thing and a name, but a concept [the signified] and an acoustic image [the signifier]."<sup>94</sup> Because the bond between the signifier and the signified exists only within the system of language, the sign is also arbitrary. Moreover, Saussure insists that signs, themselves disconnected from names or things, fully constitute language. As a result, Saussure asserts the independence of the linguistic synchronic by asserting the primacy of the sign: "to the degree that something is meaningful, it will be found to be synchronic."<sup>95</sup> This approach asserts that there is no referent other than another sign. Structural linguists do not think of language as cut off from social meaning, but rather as fully constitutive of social meaning at each moment.<sup>96</sup>

The most important insight produced by subsequent structuralist analyses of synchrony is the notion that the relationships between things rather than the things themselves are important. Things do not have true essences which can be studied; their existence is defined by their relationship to other things. One should therefore study the relationships among things. This claim is different from relativism. The assertion is not that things are only important relative to each other or only meaningful in their context. The claim is not that essences are badly connected to meaning and understanding. The claim is that essences are present only in the relationships which lend them meaning.<sup>97</sup>

94. See F. DE SAUSSURE, *supra* note 92, at 98.

95. Quoted in Buyssens, *La Linguistique Synchronique de Saussure*, in XVIII CAHIERS FERDINAND DE SAUSSURE 17 (1961).

96. Saussure's insistence on the comprehensiveness of social meaning at each moment is echoed by other structuralists. Lacan writes, for example, "only the relationship of one signifier to another signifier engenders the relationship of signifier to signified." A. WILDEN, *THE LANGUAGE AND THE SELF* 239 (1968) (quoting Lacan). Similarly, the Russian Formalists began their project of literary criticism by opposing notions of literature as the bearer of a philosophic or natural content which could be uncovered in a search for the origins of literary development. See F. JAMESON, *supra* note 93, at 43-47. This critical stance rejected diachronic study of literature as an evolving essence as well as the study of contemporary literary products as the embodiment of a single, timeless technique or psychological impulse. The elaboration of these refusals in Russian Formalism isolated and privileged the synchronic literary system exactly as de Saussure had isolated the synchronic linguistic moment. "Literariness," for the formalists, became a function of synchronic relations which could be historically isolated.

97. The classic work on structural linguistics is F. DE SAUSSURE, *supra* note 92. A standard introduction to structural linguistics remains J. LYONS, *INTRODUCTION TO THEORETICAL LINGUISTICS* (1968). See also T. HAWKES, *supra* note 91; P. PETTIT, *supra* note 91, at 1-29. Recent developments in structural semiotics are presented in R. COWARD & J. ELLIS, *LANGUAGE AND MATERIALISM* (1977). See also P. de Man, *Semiology and Rhetoric*, in *TEXTUAL STRATEGIES* 121

Within language, this is easy to see. It is a common experience that speakers of a foreign language often are hard pressed to *hear* phonetic differences which change the meaning of English words. L and R for the speaker of Japanese, D and T or T and Th for the German speaker; W, V, F and WH for speakers of many languages, are simply not heard. English speakers are likewise likely to miss tonal changes in some Asian languages or the ü and u or o and ö in German. As a result, words with widely different meanings are in fact not different. The Chinese "san" might be translated as "three" (sān), "umbrella" (sǎn) or "to disperse" (sàn). In other words, there is no natural degree of difference between particular words. Boston pronounced "bawhston" or "baahston" will not sound different, but "lend" and "lent" will. The existence of a given entity or sound unit is defined only by its contrast to things which seem different. The sense of difference comes from notions of relationship, not from the things themselves.

While this is easy enough to see within language, it is much more difficult to imagine how language could be the definer of differences external to itself, between a world of concepts and world of objects. A group of American linguists, foremost among them Edward Sapir and Benjamin Whorf, suggested the process by which language defined or structured both the nature of the reality it described and the speaker's cultural conception of it.

The worlds in which societies live are distinct worlds, not merely the same world with different *labels attached* . . . . We see and hear and otherwise experience very largely as we do because the language habits of our community predispose certain habits of interpretation.<sup>98</sup>

The notion is that we perceive something only in opposition to something else and that there is a cultural mechanism which structures the way those oppositions occur.

Earlier linguists had been able to explain the relative fixity of meaning in language — and consequently its ability to communicate — by reference to agents and social processes external to language. For linguists who focused solely upon the sign, cut loose from its referent, it was more difficult to explain how language generated meaning. If not for a more or less accurate "fit" between words and ideas or things, how is language stabilized? The structuralists responded to this difficulty by dividing the synchronic into two levels.

Language was understood to operate on two distinct levels. There is a surface level of speech, of particular utterances, which has been termed *parole*, and a deeper level of linguistic rules structuring those utterances and giving them meaning, which has been termed *langue*.<sup>99</sup> At the level of *parole*,

(J. Harari ed. 1979). On Saussure, see J. CULLER, FERDINAND DE SAUSSURE (1976).

98. E. SAPIR, SELECTED WRITINGS OF EDWARD SAPIR IN LANGUAGE, CULTURE AND PERSONALITY 162 (D. Mandelbaum ed. 1949). See also E. SAPIR, LANGUAGE (1921); B. WHORF, LANGUAGE, THOUGHT AND REALITY (J. Carroll ed. 1956). For a commentary on the works of Sapir and Whorf in this area, see G. STEINER, AFTER BABEL: ASPECTS OF LANGUAGE & TRANSLATION 87-94 (1975).

99. F. DE SAUSSURE, *supra* note 92, first introduced the terms *langue* and *parole*. Briefly, *langue* is the structure of a language, the body of linguistic rules which must be followed to communicate in that language; *parole* is the actual day-to-day use made of that system by individ-

words are given meaning by their relationship with — degree of difference from other words. We understand a world of objects differentiated according to our naming scheme, and related to each other in accordance with our categorizing scheme. The grammar which structures these relations is the *langue*. Because this underlying *langue* is visible only as it is manifested in *parole* it can be apprehended only through the study of the *parole*.

The development of a distinction between the *langue* and *parole* permits analyses of the synchronic as a system of meaning. At the same time, however, it threatens the enterprise of synchronic study by suggesting a place, the *langue*, in which the origins of meaning might be "found." The assertion of the *langue/parole* distinction has led to attempts to locate the *langue* in social, psychological or genetic existence or to search for the essential pattern of the *langue* as if this would be other than a *parole* relationship.<sup>100</sup>

The independence of the sign thus seemed to require that the synchronic moment be composed of various levels. Meaning, if not diachronically produced, came to seem generated by a deep level of synchrony. As a result, structuralist linguists began to constitute relations within the synchronic analogous to those between the diachronic, which they initially sought to set aside, and the synchronic. The development of two levels of synchronic structure is the first reappearance of the bracketed subject within structuralism. Despite its tendency to subvert the structuralist's initial denial of the subject or of external referents for language, the development of the *langue/parole* distinction opened up a series of synchronic studies in various fields.

### B. Anthropology

Structural anthropologists extended the work of structural linguistics to suggest that the whole of culture also has a *langue* and a *parole*.<sup>101</sup> Man's

ual speakers or writers of the language. According to F. DE SAUSSURE, *supra* note 92, at 10, "what is natural to mankind is not oral speech, but the faculty to construct a language, i.e., a system of distinct signs corresponding to distinct ideas." Thus *langue*, "the linguistic faculty proper [lies] beyond the functioning of the various organs." *Id.* at 11. Furthermore, it is "both a social product of the faculty of speech and a collection of necessary conventions that have been adopted by a social body to permit individuals to exercise that faculty." *Id.* at 9. Thereafter, *langue* is the "larger" structure, while *parole* the smaller, material aspect of language. Cf. N. CHOMSKY, LANGUAGE AND RESPONSIBILITY (M. Ronat interviewer, J. Viertel trans. 1979). Chomsky distinguishes between linguistic "competence" and "performance": the former referring to the speaker's theory of language, the latter to practical application of that theory. *Id.* at 48-50.

100. See *infra* notes 118-20 and accompanying text.

101. See C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY (C. Jacobson & B. Schoepf trans. 1968). It is fruitful to contrast Levi-Strauss's approach with the two views that have dominated anthropology. Originally, non-Western peoples were considered to be psychologically different. Therefore, the study of other cultures was considered to be psychologically relevant from both an evolutionary and a comparative viewpoint. Works such as H. MAINE, ANCIENT LAW (1861); L. MORGAN, ANCIENT SOCIETY (1877); E. TYLOR, PRIMITIVE CULTURE (1971), laid the foundations for the study of cultural evolution. Modern anthropology accepts the psychic unity of mankind, and in fact, uses this argument to distinguish anthropology from psychology: since the human mind is "common" across cultural settings, anthropological study should focus upon the different social structures and institutions of different peoples. See, e.g., E. EVANS-PRITCHARD, THE NUER (1940); J. MIDDLETON, THE LUGBARA OF UGANDA (1965); S. MOORE, POWER AND PROPERTY IN INCA PERU (1958). Like this modern approach, structural anthropology begins with cultural vari-

overall relationship with the world may be thought of as an elaborate linguistic process in which essence is given to things and concepts through a complex coding scheme. As a result, the study of cultural outputs (empiricism) or conceptions (naturalism) needs to be supplanted by a search for the cultural *langue*.

These anthropologists, most important among them Levi-Strauss, approach culture as a complex fabric of synchronic relationships. At one end, a variety of real world things are organized into patterns. At the other end, ideas are given shape and expression. The middle, where all this happens, where the objects and ideas are created *and* comprehended is the realm of explanation, discourse, ritual, myth, argument, thought, action; in short, of culture. Levi-Strauss wants to show that the structures of myths in this cultural realm both create and reflect our minds and our world.<sup>102</sup> To find out how this happens, he searches for underlying structures, accepted patterns of understanding, of behaving or of categorizing, which are typical of a given culture, and analyzes them in relationship to one another. He takes myths apart to discover repeating patterns which transcend and order the content of the individual myth.

In the process, Levi-Strauss describes two levels within each myth which are reminiscent of the *langue* and *parole* of structural linguistics. First, there are the individual statements, or story segments, or events which make up a given telling of the myth. Then there is the grammar by which these units are assembled into a coherent myth. This second level is larger than any given

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ety, but rather than featuring this variety as the level of analysis, it is concerned with the ultimate basis from which this variety is generated. Of course this deep structure is derived from the diverse body of material selected for study, but in the final analysis all surface differences are traceable to basic characteristics of the mind. According to Sperber, *Claude Levi-Strauss*, in *STRUCTURALISM AND SINCE*, *supra* note 91, at 19: "Levi-Strauss's originality . . . is to have combined [contemporary anthropology's] psychic unity of man (actually, he has strengthened it) with new arguments to show that ethnography has a true, indeed unique, psychological relevance." *Id.* See, e.g., C. LEVI-STRAUSS, *THE ELEMENTARY STRUCTURES OF KINSHIP* (J. Bell, J. von Sturmer & R. Needham trans. 1969); C. LEVI-STRAUSS, *THE RAW AND THE COOKED* (J. Weightman & D. Weightman trans. 1969). See also CHARBONNIER, *CONVERSATIONS WITH CLAUDE LEVI-STRAUSS* (J. Weightman & D. Weightman trans. 1969).

102. See C. LEVI-STRAUSS, *supra* note 101. See also the following works of Levi-Strauss: *FROM MONEY TO ASHES* (J. Weightman & D. Weightman trans. 1973); *THE SAVAGE MIND* (1966); *THE SCOPE OF ANTHROPOLOGY* (S. Paul & R. Paul trans. 1967); *TOTENISM* (R. Needham trans. 1963); *TRISTES TROPIQUES* (J. Weightman & D. Weightman trans. 1973); *The Bear and the Barber*, in *READER IN COMPARATIVE RELIGION* 289 (W. Lessa & E. Vogt eds. 1958); *The Story of Asdiwal*, in *THE STRUCTURAL STUDY OF MYTH AND TOTENISM I* (E. Leach ed. 1967). An interesting set of interviews with Levi-Strauss is CHARBONNIER, *CONVERSATIONS WITH LEVI-STRAUSS*, *supra* note 100. For commentaries on the work of Levi-Strauss, see, CLAUDE LEVI-STRAUSS (E. Hayes & T. Hayes eds. 1970); T. HAWKES, *supra* note 91, at 32-58; E. KURZWEIL, *supra* note 91, at 1-34; E. LEACH, CLAUDE LEVI-STRAUSS (1970); O. PAZ, CLAUDE LEVI-STRAUSS (1970); *THE STRUCTURAL STUDY OF MYTH AND TOTENISM* (E. Leach ed. 1967); *THE UNCONSCIOUS IN CULTURE* (I. Rossi ed. 1974); Dyson-Hudson, *Structure and Infrastructure in Primitive Society: Levi-Strauss and Radcliffe-Brown*, in *THE STRUCTURALIST CONTROVERSY* 218 (R. Macksey & E. Donato eds. 1972); Harris, *Levi-Strauss et La Palourde*, 16 *L'HOMME* 5 (1976); Sperber, *supra* note 100; Steiner, *Orpheus with his Myths: Claude Levi-Strauss*, in *LANGUAGE AND SILENCE* 248 (G. Steiner ed. 1969). For a provocative critique of Levi-Strauss, see J. DERRIDA, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 278-93 (A. Bass trans. 1978).

telling of the myth and in this sense he maintains that a myth is properly understood to consist of all its versions.<sup>103</sup> This deeper structure is what permits us to place the myth, recognize it as a myth, understand it. Terrence Hawkes usefully describes this sensation as follows:

Of course, when we hear any myth being told, we only ever encounter the "orchestra" score line by line, diachronically, and we infer (or "hear") the resonances of each 'bundle' as we go along, just as, to take another musical analogy, when we listen to a soloist in a jazz group we (and he) infer from his solo performance the original sequence of chords; the "tune" from which it derives, and on which it contributes a tonal commentary.<sup>104</sup>

This insight leads Levi-Strauss to study a wide variety of myth-tellings, and indeed of diverse myths, in a single framework. In doing so, he builds archetypes, fills in the blanks, reduces and mutates the content of individual myths in a myriad of ways. He seems to open himself thereby to the charge that he has not adequately accounted for various myths in their specificity. Indeed, he seems to claim that it is *only* by rupturing the synchronic from the diachronic that he can discover the myth's place in the *langue*.

The structuralist's distance from more traditional approaches is more visible in anthropology than in linguistics. We are used to thinking of a "grammar" which structures our language — and may have practiced doing violence to sentences in order to uncover the "parts of speech" in elementary school. But we are not used to unraveling our cultural narratives in the same way. Thus, Levi-Strauss's assertion that he is not interested in the *parole* level specificity of culture, except to the extent that it reveals something about the *langue*, which structures it seems bold.

This boldness results from the insight that the mythmaking *langue* exists only as it is used. Just as the grammar of a language is only known by the way it structures concrete sentences, or the "tune" in a piece of music is only known as it structures individual notes, chords or rhythms, so also the cultural *langue* is a pattern of myths which exist only on the *parole* level. Consequently, the building of archetypal *parole* models is the only way to discover the *langue* which lies beneath. The process of doing violence to individual tellings of the myth is necessary to the undertaking.

By ripping culture from its apparent grounding in the diachronic, moreover, Levi-Strauss develops a dynamic dimension within the synchronic. The structuralist anthropologist focuses on the dynamics of myth-making. Levi-Strauss sought to capture the process of myth-making, of structuring, with his concept of "*bricolage*." *Bricolage* is the process by which people (*bricoleurs*) manipulate structures in the *langue* to order and produce outputs at the *parole* level.<sup>105</sup> The *bricoleur* implements or deploys a refined and complex logic to link culture and nature, thereby constructing the world, he seems, at the *parole* level, only to be describing.

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103. C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY, *supra* note 101, at 217.

104. T. HAWKES, *supra* note 91, at 45.

105. See C. LEVI-STRAUSS, THE SAVAGE MIND 16-33 (1966). The term *bricoleur* has no precise equivalent in English. At best, it refers to a kind of professional do-it-yourself man, or jack of all trades.

The system of *bricolage* is important because it answers the difficult question of how culture can be both free of grounding in the things and ideas to which it seems to refer and still be experienced as meaningful and relatively stable. In language, once words were recognized to refer only to other words, the question to be answered by linguistics was how language could permit a perhaps infinite variety of new expressions to be recognized and understood. The separation of *langue* and *parole*, together with the development of sophisticated, and in part, structural grammars provided the answer. *Parole* outputs could be devised ad infinitum in accordance with the grammatical rules which made up the *langue*. These would continue to be understood because they would be accepted, *langue* approved transformations of previous outputs.

In anthropology, the route was somewhat more difficult than in linguistics. The recognition that myths were neither "real" nor "false" but somewhere in between required not just the development of a cultural *langue*, but some conception of how the *langue* structured the *parole*, of how the process of organizing the world operated both to change the organizing scheme and to create the world. This process of *bricolage* remains fuzzy at best, but can be thought of as similar to the way speakers of a language implement grammar to introduce new grammatical construction as well as sentences with new content. The important point is that *bricolage* remains an imagined process unlocated in specific *bricoleurs*. Levi-Strauss suggests that this apparent origin for myth is itself a myth.<sup>106</sup>

Just as the *langue* took the place within the synchronic of the diachronic which had been set aside by structural linguistics, so the *bricoleur* threatens to introduce into structural anthropology the historical agency or subject initially set aside by Levi-Strauss. Internal neither to the synchronic scheme nor to its diachronic origin, the *bricoleur* operates the system of meaning. Just as the creation of the *langue* to undergrid the *parole* echoed the exclusion of the diachronic from study, so also the *bricoleur* echoes the rehabilitation of the *langue* as part of the synchronic; the trace of its diachronic possibility.

Although the *bricoleur* reminds us of the historically situated subject, the *bricoleur's* subjectivity is impaired. *Bricolage*, after all, is a synchronic process. Although it is difficult to get a sense of how a synchronic structure can unite myths about different things or provide the mechanism for production of new myths without actually working through several of Levi-Strauss's classic examples, it might be useful to describe several general aspects of his approach.<sup>107</sup> To Levi-Strauss, "mythical thought always progresses from the awareness of oppositions to their resolution."<sup>108</sup> His vision is that our cosmology, itself the product of prior myth-making, proposes oppositions in our experience: man/woman; raw/cooked; related/not related; native/foreign. A myth

106. *Id.* at 17. Cf. C. LEVI-STRAUSS, THE RAW AND THE COOKED 5-6 (J. Weightman & D. Weightman trans. 1969).

107. C. LEVI-STRAUSS, L'HOMME NU (1971) contains over 800 examples of his analysis of myths. For a more concise description of the methodology with examples, see C. LEVI-STRAUSS, *Four Winebago Myths: A Structural Sketch*, in CULTURE IN HISTORY 351 (S. Diamond ed. 1960). See also Jacobson & Levi-Strauss, *Charles Baudelaire's "Les Chats,"* 2 L'HOMME 5 (1962); Levi-Strauss, *The Structural Study of Myth*, 78 J. AM. FOLKLORE 428 (1955).

108. C. LEVI-STRAUSS, STRUCTURAL ANTHROPOLOGY 224 (C. Jacobson & B. Schoepf trans. 1968).



will typically relate one irresolvable tension to another resolvable one. This "transformation" permits the feeling of opposition to subside while reaffirming the cosmology of differences. That is, we structure social life to validate our "cosmology by its similarity of structure."<sup>109</sup>

As a result, *bricolage* is self-validating and has no origins or consequences beyond the synchronic. The *bricoleur* consequently inhabits a closed social structure. Piaget, more than Levi-Strauss, has directed his attention to this social closure as an experience of actual people. He elaborates most fully the nature of a structure such as that which constitutes the myth-making *bricoleur*.<sup>110</sup> Such a structure, in Piaget's terms, has three principle attributes. First, it is whole, by which Piaget means that a structure is internally coherent and complete. Completeness means that each part is only important for the role it plays in the whole. Second, a cultural structure is transformable, by which he means that it is dynamic and able to process new material through itself, thereby changing itself, without losing its wholeness. Third, such a structure is self-regulating, in the sense that these transformational possibilities are governed by the structure itself and need not be externally validated. If myth-making, and by implication, culture generally, is such a structure, it will be able to develop endlessly without violating itself and without exposing itself or permitting the *bricoleur* an external perspective.

This self-validating aspect of a cultural *langue* permits the structure to hide itself as it performs. The vision is one of a ceaseless reordering of the world to validate an ever-mutating cosmology. In such a world the *bricoleur* could not be an agent *using* or *being used by* the structure. The word "*bricoleur*" would refer only to the intersection of mythic structures. There

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109. *Id.* at 216.

110. J. PIAGET, STRUCTURALISM 5-16 (C. Maschler trans. 1968). Piaget's analysis attempts to capture the deep structure, the real essences of mind rather than transitory ideological structures. *See also* J. PIAGET, BIOLOGY AND KNOWLEDGE (B. Walsh trans. 1971); J. PIAGET, THE ORIGINS OF INTELLIGENCE IN CHILDREN (M. Cook trans. 1966); J. PIAGET, THE PRINCIPLES OF GENETIC EPISTEMOLOGY (W. Mays trans. 1973). For an interesting set of commentaries on Piaget, *see* STUDIES IN COGNITIVE DEVELOPMENT (D. Elkind & J. Flavell eds. 1969). *See also* Flavell, *An Analysis of Cognitive Development Sequences*, in GENETIC PSYCHOLOGY MONOGRAPHS (No. 86) 279 (1972). Piaget's cognitive theory has influenced much contemporary developmental psychology, particularly that concerned with moral development. *See, e.g.*, Kohlberg, *Stage and Sequence: the Cognitive-Developmental Approach to Socialization*, in HANDBOOK OF SOCIALIZATION THEORY AND RESEARCH 353 (D. Goslin ed. 1969); Kohlberg, *From Is to Ought: How to Commit the Naturalistic Fallacy and Get Away with it in the Study of Moral Development*, in COGNITIVE DEVELOPMENT AND EPISTEMOLOGY 163 (T. Mischel ed. 1971). It is interesting to note that Habermas has drawn upon the Piagetian tradition (in particular the work of Kohlberg) in his attempt to develop the psychological dimension of critical theory. *See* J. HABERMAS, *Historical Materialism and the Development of Normative Structures*, in COMMUNICATION AND THE EVOLUTION OF SOCIETY 95 (T. McCarthy trans. 1976). Habermas considers that the Piagetian School provides an important integration of structuralism, action theory and developmental concepts: "[t]he stimulus that encouraged me to investigate normative structures from the point of view of developmental logic also came from Piaget's *genetic* structuralism, that is, from a conception which has overcome the traditional structuralist front against evolutionism and has assimilated motifs of the theory of knowledge from Kant to Pierce." *Id.* at 124-25. *See also* Rotenstreich, *An Analysis of Piaget's Concept of Structure*, 37 PHIL. & PHENOMENOLOGICAL RES. 368 (1977).

would be no ground from which the *bricoleur* could confront the transformational oppositions of culture. The process of explanation, of thought, of culture, would deny him this direct confrontation.

The self-validating nature of cultural structures makes them difficult to study, for the participant in the *parole* can never glimpse the *langue*. It is not surprising that insight into *bricolage* developed in cross-cultural anthropology — in the observation of foreign *bricoleurs*. At the same time, however, this mechanism at the core of structuralism seems to preclude falsification of any account one might generate. To illustrate this problem of self-validation, consider a very stylized philosophic history such as the following.

Imagine that one detected in the history of social theory a tendency towards division and specialization of certain key conflicts, such as that between male and female, reason and desire, or hard and soft.<sup>111</sup> Imagine that the world of ideas progressively fragmented in an attempt to build pure conceptual alternatives. Suppose that upon examining the content of each specialized pole, one found it theoretically incomplete, or impossible to fully isolate from its partner and incapable of standing alone. The division of male and female, for example, might turn out to be theoretically untenable because each had meaning only as the other's antithesis and yet was inadequate alone. Or we might find that either a reason without the motivation, validation and content of desire or a desire without the calculus of reason to define it was unthinkable, yet each was defined by the exclusion of the other.

Two approaches equally possible and self-validating would be available to explain this phenomenon. But each would be unable to exclude the other. We might say, for example, that the real world is characterized by a unity of opposites which we perversely insist on bringing into conflict. In this view, the specialization of theory over the last 500 years was a continual attempt to force our conflicting cosmology on the world. Each time, however, the unity reasserted itself (the man in woman, the woman in man) and we were forced to define further our level of specialization in order to revalidate our cosmology. On the other hand, we might say that the world is in tension, that conflict is the fundamental fact of social life and that our cosmology reflects this tension. Therefore, argument and thought will continually force us to reflect on the conflicting nature of reality in each level in our theory. In this view, specialization recognizes conflict, rendering it analogous, and hence, understandable through theory.

In other words, accounts of the underlying *langue* of culture seem unable to generate any particular concrete insights about culture itself. The *parole* would be compatible with two self-validating and inconsistent analyses of the real world. The structuralist does not attempt to figure out "which way it really is." He has abandoned the effort to ground his exposé outside the *parole* which generates it. Moreover, he has set aside the attempt to ground the *parole* anywhere except in the *langue* which he claims can be understood to lie beneath its maneuvers. Indeed, one could not give content to either realm if

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111. See L. Schiebinger, (1982 untitled and unpublished manuscript) (available on file at the Dept. of History, Harvard University). Cf. R. UNGER, KNOWLEDGE AND POLITICS 51-55 (1975). (Unger's discussion of the antinomy of reason and desire). He argues that "[n]either the morality of desire nor the morality of reason withstand close inspection. Each is inadequate, and needs to be qualified by the other." *Id.* at 51.

the circle of theory and action is itself a self-validating and self-creating structure.

Nevertheless, the structuralist might try to say something about the relationship among transformations of the conflict, however they might come out. In this sense, the structuralist analysis is not self-validating precisely because the structure is. The self-validating nature of the structure leads to a stranglehold of culture and nature. It is impossible for the inhabitant, the *bricoleur*, to see this structure precisely because it is effective in creating the world he sees. Terrence Hawkes has termed this the "anesthetic grip that such a permanent structuring process has on the human mind."<sup>112</sup> To the extent the structuralist aims to rupture that anesthetic grip, he begins to sound like an agent himself—reminiscent of the critical theorists who claimed to be able to tell the true from the false ideology by self-reflection.

Retrospectively, it is easy to understand how linguistic scholarship came to this point. Observing the development of a native language or even casual exposure to a foreign tongue quickly convinces one that the words themselves have no natural quality (a study of etymology can only be so interesting), and that to teach a language one must look for grammatical patterns which will ensure that while the foreigner's speech will be understandable he can choose his own content. This is also true of anthropology. Just as investigation of "primitive" and foreign Indian tongues jogged linguistics into the structuralist age, so it was the study of myths and primitive cultures which permitted the development of structuralism in anthropology. After cultural relativism had been fairly well accepted one could not simply dismiss myths as bad science or as interesting but fictitious stories.<sup>113</sup> Nor, however, were the myths of any one culture "true," in some absolute sense. This relativism made it easy to imagine that the content of the myth was not the main event—they were, after all, myths—but that they played an important cultural role. Cross cultural comparison of a variety of astonishingly similar myths led to the structuralist approach.

In this sense, Levi-Strauss's advances were ironically permitted by precisely the stereotypical view of savage primitivism against which he argued. The notion that these were "other" systems exempted them and him from the anesthetic grip which would hinder a structuralist analysis of the researcher's own cultural *langue*, at least in the first instance. The difficulty with such a liberating mission for structuralism, however naturally it seems to flow from the sense of having understood "what was going on" behind the cultural forms others experience as natural, was that it threatened to reopen the diachronic. Indeed, the notion of a closed system of synchronic references seems to have troubled Piaget. He is continually attracted to questions of origins, of child

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112. T. HAWKES, *supra* note 91, at 14.

113. Cultural relativism became generally accepted after R. BENEDICT, *PATTERNS OF CULTURE* (1934). This position contradicts the views advanced by pioneer figures in psychological anthropology that personality configurations are a stable, enduring aspect of a culture. Benedict, for example, stressed the peaceful, noncompetitive nature of the Pueblo Indians, contrary to the fact that in the sixteenth and seventeenth centuries that race had fought a series of messianic wars during which they had massacred Spanish priests and laid waste their churches and monasteries. For a discussion of the historicity of de-centered analysis, see Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences*, in *WRITING AND DIFFERENCE* 278-80 (Bass trans. 1978).

development, and develops a wide variety of accounts of the structural development of the omitted subject.

### C. Literature

Structuralist literary critics extended the synchronic study of culture in a variety of ways.<sup>114</sup> Among the most significant were the studies of "literariness" and plot structure carried out by the Russian Formalists and their successors and the approach to literary history and readership developed by Roland Barthes. Like the structural linguists, the Russian Formalists changed the focus of their study from diachronic accounts of literary developments to synchronic analyses of literature's structure.<sup>115</sup> Once the synchronic dimension of literature had been isolated, however, they felt it necessary to explain the "literary" quality of literature.

So long as literature was understood to be connected to, indeed expressive of, a diachronic process of cultural development, its literary quality seemed but one dimension of its social meaning. Aspects of art could be thought to exist for an external purpose — they express a historical subject or produce an

114. For some general works on structuralist literary criticism, see J. CULLER, *supra* note 97; S. DOUBROVSKY, *THE NEW CRITICISM IN FRANCE* (D. Colman trans. 1973); T. HAWKES, *supra* note 91; F. JAMESON, references, *supra* note 93; R. SCHOLES, *STRUCTURALISM IN LITERATURE* (1974); *THE STRUCTURALIST CONTROVERSY* (R. Macksey & E. Donato eds. 1972).

The movement in literature from traditional criticism to the "new" criticisms of which structuralism is a part has not followed any single, discernible path. The change has been more eclectic and pluralistic. Very generally, the movement from "old" to "new" criticism might be described in the following ways: (1) In terms of the aesthetics/view of the text: from viewing the text as a created, mystified product of talent, as intellect and sensibility assisting in the "knowing of reality," to seeing it as an artifact of the intersection of a particular psyche, culture, historical era and ideology, to considering it a generative instance of language, a message constructed from a code; (2) In terms of the focus of criticism: from examining the biographical and historical details of the author and era to considering the genre and the context of other texts to concern with only the individual text itself as self-explanatory, to a consideration of language itself and the accidental or arbitrary quality of any text; (3) In terms of methodology: from objectification and rationalization, to (emotional) subjectification, to the attempt to transcend the distinction between the text and reader through a temporal concept of reading the text being the same as writing the text; (4) In terms of theoretical basis: from the aesthetic, to the social and political, to the apolitical concerns of the structuralists and linguists; and (5) In terms of the purpose and function of the critic and criticism: from evaluating and revealing the relationships between text and reality in terms of the degree to which the work accurately expresses and describes it, to less evaluative interpretation of text as "fictive" truth, to the description or delineation of text as experience. For a discussion of traditional approaches to literary criticism, see R. BLACKMUR, *NEW CRITICISM IN THE UNITED STATES* (1951); J. RANSOM, *THE NEW CRITICISM* (1941); I. RICHARDS, *PRINCIPLES OF LITERARY CRITICISM* (1939). For examples of contemporary critical approaches, see J. CULLER, *STRUCTURALIST POETICS* (1975); P. de Man, *supra* note 97; *THE FRONTIERS OF LITERARY CRITICISM* (D. Malone ed. 1974); G. HARTMAN, *CRITICISM IN THE WILDERNESS* (1980); F. JAMESON, *MARXISM AND FORM* (1979); *TEXTUAL STRATEGIES* (J. Harari ed. 1979).

115. For commentaries on the Russian Formalists, see V. ERLICH, *RUSSIAN FORMALISM* (2d. ed. 1965); G. HARTMANN, *BEYOND FORMALISM* (1970); F. JAMESON, references, *supra* note 93. Another interesting collection of writings on Russian Formalism is the special double issue of *Twentieth Century Studies*, No. 78 (1972). For a commentary on this school, see T. HAWKES, *supra* note 91, at 59-76.

emotion or pleasure when consumed. The isolation of the synchronic broke these "meanings." Once literature was understood to present only a synchronic moment of meaning for study, unmoored from grounding in authorship or context, it became difficult to understand the distinctiveness of literature. For the Formalists, aspects of the text are meaningful only in relationship to other dimensions of the text and exist to bring the work into being as a work of art. Thus, aspects of a work have its "literariness" as their object and subject. This approach reimagines the historical function and distinctiveness of literature within the synchronic. The "literariness" of a text is the trace of the subject initially set aside by the structuralist literary critic.

This search for the "literary" produced studies of two types. The first, represented by Vladimir I. Propp and A.J. Greimas,<sup>116</sup> developed grammatical structures to "account for" the varieties of literary plots and characters. This approach sought an account for literature's special something by reference to the *langue*-like patterns which generated literary narratives. The second, best represented by Viktor Shklovsky, sought a synchronic device connecting the writing to the reader in a way which signified literariness.<sup>117</sup> Although also seeking to explain literariness as a product of the text's synchronous features, this approach brought the audience into that synchrony. Each of these efforts constituted a moment in the structuralist reimagination of the diachronous subject.

In developing grammatical structures of plot, character and poetic device, the Formalists developed an approach to texts reminiscent of Levi-Strauss's approach to myth. These model structures reveal a method by which other such abstract grammars might be developed. Propp, for example, develops a series of functions and spheres of actions for characters which unite the tellings of a single fairy tale or delimit the genre of fairy tale.<sup>118</sup> Propp develops a literary *langue* which is characterized by the interplay of conflict and resolution. A.J. Greimas proceeds similarly.<sup>119</sup> Where de Saussure was concerned with the *langue* which underlies the *parole* of language, Levi-Strauss with the *bricolage* responsible for myth, Greimas seeks the deep, inner "model" which structures story-telling.<sup>120</sup>

116. See *infra* notes 118 and 119.

117. See *infra* note 123.

118. V. PROPP, *MORPHOLOGY OF THE FOLKTALE* 20-63 (2d ed. L. Wagner ed. 1968). Cf. E. MARANDA & P. MARANDA, *STRUCTURAL MODELS IN FOLKLORE AND TRANSFORMATIONAL ESSAYS* (1971) (maintaining that there are only five possible plot structures in myth and folklore). For an interesting commentary on the relationship between "formalism" and "structuralism", see Levi-Strauss, *Structure and Form: Reflections on a Work by Vladimir Propp*, in 2 *STRUCTURAL ANTHROPOLOGY* 115-45 (1976).

119. A. GREIMAS, *DU SENS* 135-55 (1970); A. GREIMAS, *SEMANTIQUE STRUCTURALE* 18-23, 173-96 (1966); A. GREIMAS, *Pour une Theorie des Discours Poetique*, in *ESSAIS DE SEMIOTIQUE POETIQUE* 6 (A. Greimas ed. 1971). For commentaries on Greimas's work, see T. HAWKES, *supra* note 91, at 87-95; F. JAMESON, *supra* note 93, at 163-65.

120. This work resembles Noam Chomsky's concern with the "competence" that underlies "performance" of speech. See *supra* note 99. For further works by Chomsky see *ASPECTS OF THE THEORY OF SYNTAX* (1965); *CARTESIAN LINGUISTICS* (1966); *CURRENT ISSUES IN LINGUISTIC THEORY* (1965); *REFLECTIONS ON LANGUAGE* (1975); *SYNTACTIC STRUCTURES* (1957); *TOPICS IN THE THEORY OF GENERATIVE GRAMMAR* (1966); Chomsky & Halle, *Some Controversial Questions in Phonological Theory*, 1 *J. LINGUISTICS* 97 (1965). For a commentary on Chomsky's work,

Like Levi-Strauss, Greimas feels the basic structural element is the perception of difference, of contrast. He develops a grammar for narrative which, he maintains, structures all stories. The nuts and bolts of this structure are oppositions which are resolved or changed. He develops a series of roles for narrative actors, who, in their relationship with each other will combine struggle and reconciliation, conflict and compatibility. Narration is the construction of movement and transformation by these actors of these contradictions.

The key to Greimas's contribution lies in the structure of contradiction which he develops. To him, opposition can be reduced to four relationships. Each entity may be confronted with its opposite or its negation. Thus, B is confronted with both A and -B, and A by both B and -A. Thus, -B is the contradiction of both B and -A, -A of both -B and A; A of both -A and B, B of both A and -B. These relationships are:

A vs. B

-A vs. -B

B vs. -B

A vs. -A

According to Greimas, these four relationships can be manipulated to produce either conflict or reconciliation. When A is confronted with its negation (-A) it can be falsely made to seem compatible with its opposite (B). By focusing, for example, on the fact that the opposite and the negation of A are different; contradictory in relationship with A, (B vs. -A) one can commute to discover that both A and -A are in contradiction to B, and therefore, in that respect reconciled. Easier to see is the opposite, namely, that -A and B must be compatible because both are in contradiction with A. A narrative can be reduced to an interplay of two agents who, at any single moment, are either in opposition or not. The narration describes a surface level transaction which stands for some transformation in the underlying relationship. Thus actions produce disjunction and conjunction, separation and union, struggle and reconciliation, etc.<sup>121</sup>

Greimas elaborates a number of basic narrative oppositions which can be combined to generate stories. His goal is not to understand the stories, but to develop a story-generating mechanism which could account for the variety of stories and their recognition as such. The particular arrangement of pairs mat-

see J. LYONS, CHOMSKY (1970).

121. See A. GREIMAS, *SEMANTIQUE STRUCTURALE*, *supra* note 119, at 175-85. A classic example would be the narrative of the quest for the Holy Grail. Using two of Greimas's fundamental "actant oppositions" (subject and object, sender and receiver), we might imagine that the subject is the hero, the object the Holy Grail; the sender God, and the receiver Man. Thus:

Hero (A) vs. Grail (B)

God (-A) vs. Man (-B)

The hero is a man, and the Grail is God, so the A/-B and B/-A relationships are complementary. Yet in their relationship to the grail, or to man, the hero and God stand similarly, thus rendering complementary the tension between A and -A, and, by commutation, between -A and -B. The story is the movement from a view of "A complementary with -B" and "-A complementary with B" to "A complementary with B" and "-A complementary with -B".

ters less than the overall pattern. Like structuralist anthropology, then, literary structuralism develops a *langue* of binary oppositions. These models are interesting for the same reasons that a structural grammar for language or culture is interesting: it seems able to account for the diversity and boundedness of literature without reference to the diachronic.

So long as the fluidity of the synchronic can be accounted for by reference to a structure within the text, the literary structuralists are able to maintain a very strong claim about the disconnection of the synchronic and diachronic. They seem to be saying that the literary *text* should be studied without attention to its historical setting, authorship, or likely readership. The claim that grammatical patterns "account" for a text's literary quality, coherence and fluidity is meant to displace reference beyond the work of literature itself. Yet structuralists who made this very strong claim about the independence of the text seemed to be paying most careful attention to that hidden aspect of the text (the *langue*) which reminds us of the agency which has been set aside. Indeed, in order to bring this structure to our attention, these structuralists are willing to ravage the text to which they first admonished us to pay sole regard.

Consequently, we wonder how, if not who or by whom, the *langue* "structures." To Levi-Strauss this is the handiwork of the *bricoleur*. The Formalists seem to have brought conflict into the literary text itself. Indeed the literary is produced or enabled by patterns of conflict resolution. Yet the resolution worked by the text seems unimportant. By recognizing the role played by literary structures of this sort, one implicitly recognized each particular textual manifestation as just that: one among many, important only as a transformation of the *langue*.<sup>122</sup>

Other structuralist literary critics have modified this strong claim about the independence of the literary text — without abandoning the claim that only the synchronic can be studied. Shklovsky locates the literary quality of a piece of literature in the ability of the text to define the ordinary in such a way as to make it apparent; in other words, through rhyme, metaphor, etc., to make the normal strange.<sup>123</sup> This process, which Shklovsky termed *ostranenie*, seems to reach outside the text — to imply an observer for whom the normal would be rendered strange. But Shklovsky does not abandon the claim that literariness is solely a product of the synchronic. He simply involves the reader in that synchrony. Consequently, *ostranenie* is not a historical phenomenon. Rather, the defamiliarization of literature is a synchronic relationship of difference permitting the story.

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122. See T. TODOROV, *GRAMMAIRE DU DECAMERON* (1969); T. TODOROV, *Language and Literature*, in *THE STRUCTURALIST CONTROVERSY* 125 (Macksey & Donato eds.); T. TODOROV, *SYMBOLISM AND INTERPRETATION* (C. Porter trans. 1982). For a secondary work treating Todorov's analyses, see Schole's, *STRUCTURALISM IN LITERATURE* 111-17 (1974). Todorov argues: "Literary theory provides criticism with instruments; yet criticism does not content itself with applying them in a servile fashion, but transforms them through contact with new material." *GRAMMAIRE DU DECAMERON*, *supra*. To Todorov, each literary output was generated by a pre-existing vision of literature and by contributing to that vision could transform the entire structural system which produced it.

123. For a general overview see the following works by Shklovsky: *ON THE THEORY OF PROSE* (1925 & 1929); *READINGS IN RUSSIAN POETICS* (L. Matejka & K. Pomorska eds. 1971); *RUSSIAN FORMALIST CRITICISM* (L. Lemon & M. Reis trans. & eds. 1965).

*Ostranenie* is thus quite different from Berthold Brecht's notion of *Verfremdung* or alienation whereby the artist forces the audience to be aware of the unnaturalness of the usual by making him aware of the process of playwriting itself.<sup>124</sup> *Verfremdung* is clearly an historical and social estrangement. In the manner of critical theory, it attempts to confront agents with the contradictions in their situation. Nevertheless, *Verfremdung* reminds us of the diachronic potential within *ostranenie*.<sup>125</sup> Although *ostranenie* suggests the possibility of a synchronic social relation which could temper the extreme claims about textual independence made by literary structuralists, it has within it the shadow of the diachronic subject which could generate the estrangement: the social difference of reader and text, or of normal and strange.

Like Piaget's notion of a complete structural system, *ostranenie* sought to explain movement of the synchronic in a way which would not reintroduce the diachronic. Roman Jakobson defended this Formalist approach most eloquently.<sup>126</sup> To Jakobson, the structure is completed in the difference, or rupture, between reader and text, rather than by the reader's colonization as an agent by the text or author. For example, by breaking the flow or perspective of narration (I think I want to stop for coffee now — if you do too you won't notice how I slipped past the self-validation point) the writer sets the reader in opposition to the normalcy apparent on the face of the literary product. The writer aims to engender the same response to the content of culture and the real world as he creates towards his own product. Each of these players is thus involved in the synchronic production of the literary narrative.

If Piaget's complete system sent scholars in search of the system's developmental logic, Jakobson's notion of a synchronic break between text and reader seemed to respond to the difficulty of explaining the movement of a literary structure which was closed. Where Piaget responds to the potential presence of agency within a structuralist account by elaborating the closure of the system — its complete colonization of agency subjectivity, Jakobson responds by emphasizing the breaks between texts, authors and readers — breaks which situated them all within a single synchronic moment of mutual reflection. More interesting than the apparent contradiction between these two responses to the difficulty of explaining a synchronic system's distinctive features is the tendency of each to embrace and submerge the diachronic within a synchronic field of study. Later structural literary critics tended to soften the initial claims about the text's independence from author and reader even further, integrating ever more features of what had been thought of as the diachronic into a single synchronic system. These developments prepared the way for the move to post-structuralism.

124. B. BRECHT, *SCHRIFTEN ZUM THEATER* (1957). See T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* 135-37 (1983); F. JAMESON, *THE PRISON HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM* 58-59 (1972).

125. That reminder was later developed by the post-structuralists who sought to rehabilitate the synchronic trace within *verfremdung* and the diachronic shadow within *ostranenie*.

126. Jakobson, *Closing Statement: Linguistics and Poetics*, in *STYLE IN LANGUAGE* 350, 356 (T. Sebeok ed. 1960). For other works by Roman Jakobson, see R. JAKOBSON & M. HALLE, *FUNDAMENTALS OF LANGUAGE* (1956); R. JAKOBSON, *Language in Relation to Other Communication Systems*, in *II SELECTED WRITINGS* 697 (1971). For a commentary on Jakobson, see T. HAWKES, *STRUCTURALISM AND SEMIOTICS* 76-87 (1977).



Roland Barthes best epitomizes these developments.<sup>127</sup> Barthes asserts the connections between the literary text and its historical and social context, but he does not think of this relationship as one between synchronic and diachronic. Rather, individual elements in a text engage a variety of "codes" which refer to other texts. The multiplicity of referents generated by a single word or portion of a piece of literature allow the text to participate in its readership — or, more accurately, bring that reading within a system of synchronic referrals.

For Barthes, literature presents itself as innocent, normal, reflective of a natural world, and yet it creates that world in an elaborate process of encoded, intertextual, references. As a result, Barthes is able to return a sense of history and of critique to the structuralist without abandoning the attention to the synchronic. Indeed, for Barthes, history has become the mere outcome of synchronic intertextuality: "a purely formal process of the rotation of possibles."<sup>128</sup> The diachronic relationships among synchronic moments can be analyzed as a synchronic instant. "Here *difference* is the motor, not of history, but of diachrony."<sup>129</sup> History reenters structuralist work as the history of models. In this, the rehabilitation of the diachronic itself sets aside the subject.

Barthes's work is directed at decoding literature, exposing it as the manifestation of a cultural *langue* in order to expose literature as the encoder and transmitter of bourgeois values. Ideologically, then, the search for a literary *langue* has become associated with an attempt to shake the foundations of the status quo; to unseal literature's participation in the extension of the anesthetic grip of bourgeois society. Barthes's literary criticism is designed primarily to break the apparent neutrality of literary style in an era dominated by a single style: French *écriture classique*. The attempt to demonstrate and then to destroy the presumption of neutrality in a ruling style extended the essentially cross-cultural work in linguistics and anthropology and brought structuralists closer to the work of critical theorists.

Barthes sought to break the hold of a ruling style by demonstrating that no element of the text had a unitary meaning. Concentrating exclusively on the text, he attempted to *reverse* the meaning of each textual element to show that the connection of binary oppositions which constituted the work were united in single referential series. He isolated oppositions and then demonstrated them to be linked in a series of coded references.<sup>130</sup> Although these

127. See, e.g., R. BARTHES, *CRITICAL ESSAYS* (R. Howard trans. 1972); R. BARTHES, *IMAGE — MUSIC — TEXT* (S. Heath ed. 1978); R. BARTHES, *MYTHOLOGIES* (A. Lavers trans. 1969); R. BARTHES, *ON RACINE* (R. Howard trans. 1964); R. BARTHES, *THE PLEASURE OF THE TEXT* (R. Miller trans. 1976); R. BARTHES, *S—Z* (R. Miller trans. 1974); R. BARTHES, *WRITING DEGREE ZERO* (A. Lavers & C. Smith trans. 1967); R. BARTHES, *To Write: An Intransitive Verb*, in *THE STRUCTURALIST CONTROVERSY*, *supra* note 102, at 134; R. BARTHES, *From Work to Text*, in *TEXTUAL STRATEGIES*, *supra* note 97, at 73; R. BARTHES, *Science versus Literature*, *TIMES LITERARY SUPP.*, Sept. 28, 1967, at 897; For commentaries on Barthes, see J. CULLER, *ROLAND BARTHES* (1983); T. HAWKES, *supra* note 126, at 106-22; E. KURZWEIL, *THE AGE OF STRUCTURALISM* 165-91 (1980); *Roland Barthes*, in *STRUCTURALISM AND SINCE*, *supra* note 91, at 52; Sturrock, *Roland Barthes: A Profile*, 1 *THE NEW REV.* (no. 2) 13 (1974).

128. R. BARTHES, *CRITICAL ESSAYS*, *supra* note 127, at 262.

129. *Id.*

130. A particularly accessible example of Barthes's work of this type is *Textual Analysis of*

codes within the text *seem* to refer outside the text for resolution of the conflict, Barthes demonstrates that their referent remains embroidered within the text or within a wider system of texts.

Turning his attention from literature to contemporary popular culture, Barthes sought to decode a number of bourgeois "myths."<sup>131</sup> He understands or reads advertisements, films, exhibitions or political speeches as he reads literature; searching to reverse the relations among textual elements to release new meanings. Typically, he focuses upon some apparently trivial element in the piece, enjoying an ironic presentation of its normalcy. For example, he wonders why everyone but Caesar in the film version of Julius Caesar is dripping globules of vaseline sweat.<sup>132</sup> Their sweat relates, he suggests, to their knowledge — they know what awaits Caesar, while he remains blissfully ignorant. The sweat/no sweat distinction refers to the cultural referents of knowledge (worry) and ignorance (bliss). By reassociating the lack of sweat with the death awaiting Caesar — by reading the sweat/no sweat distinction in *reverse* — Barthes draws attention to the *unnaturalness* of the association of knowledge/ignorance and worry/bliss.

This approach to bourgeois culture expands the realm of synchronic critique. By transforming history into a rotation of synchronous intertextual references, the authority of causality and intentionality — in short, authorship — is lost. The claim is not that one should ignore the author when thinking about a text. In a sense the claim is much more modest. Barthes claims that the relationship between the author and the text is not different from the relationship among elements of the text itself. Another way of thinking of this is that the author-text relationship presents merely another text to be read.

On reflection, however, this claim is more far-reaching than the assertion that the text be investigated internally — without reference beyond its four corners. Barthes claims to have exploded the boundary of the text itself, bringing within its corners the author and history of its production. As a result, the reader confronts a social text open to a variety of interpretations, free of the authority of origins. When the reader disassociates the author from the text, even if the reader seeks to remain "within" the text's boundaries, there is no escaping the authority of the author — who will define the limits of textual analysis. Normally, then, the reader submits to the text and to the readings which it presents. By replacing authorship with intertextuality, however, Barthes seeks to liberate the reader from the tyranny of hermeneutics.<sup>133</sup> The result is the "pleasure" of readership as the text is recreated by the reader.<sup>134</sup>

Still, one is left wondering about this reader who has been lifted from the intertextuality of social mythology. The "reader," liberated from the "tyranny" of the author reminds us of the historical agency denied the author. As

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Poe's 'Valdemar', in UNTYING THE TEXT 13-161 (R. Young ed. 1981).

131. R. BARTHES, THE EIFFEL TOWER AND OTHER MYTHOLOGIES (R. Howard trans. 1979); R. BARTHES, MYTHOLOGIES, *supra* note 127. For a commentary on these works, see J. CULLER, *supra* note 127, at 33-41.

132. R. BARTHES, *The Romans in Films*, in MYTHOLOGIES, *supra* note 127, at 26-28.

133. A fascinating account of "intertextuality" between critical theory and structuralism is provided by J. FROW, MARXISM AND LITERARY HISTORY 125-26 (1986).

134. See R. BARTHES, THE PLEASURE OF THE TEXT, *supra* note 127; J. CULLER, *supra* note 127, at 91-113.

the *bricoleur* makes myths, so the reader seems to make texts. Here, in readership, we find again the trace of the subject set firmly aside by structuralism. Still, just as the *bricoleur* is not an author — he has been brought into the textual fabric by the closed social system of meaning — so also the “reader” seems a mere exchange of references. “He” participates in the text, or, more appropriately, in the intertextuality set in motion by the text, exchanging its meaning with his identity. Despite this attempt to situate the “reader” intertextually, however, at this high point of structuralism we are again reminded of social agency.<sup>135</sup>

As structuralism has moved from linguistics through anthropology and literary criticism to sociology, ever more spatial and temporal dimensions have become integrated into a theory of textuality which begins by setting historical agency aside. This seems like a maturation for structuralism — able to encompass ever more dimensions of social life, but it is also troubling. Structuralism’s claims that reality and meaning are synonymous and that meaning is relational rather than essential, require the distinguishability of the synchronic and the diachronic. If the diachronic fully colonizes the synchronic, there seems no reason to stand with relational rather than essentialist meaning, or with the openness of social possibility rather than with a sense of historical determination. It is important that the placeholders for agency and context in structuralism remain just that — reminders and placeholders. Consequently, it is important to be able to retain a hierarchical relationship within structuralist theory between the synchronous and diachronous elements of a given approach. Thus, the *langue* structures (and is structured by) the *parole*. The *bricoleur* acts (and is acted upon). The Reader enjoys (and exchanges with) the text, but these hierarchies are difficult to maintain. At each stage the placeholder for agency threatens the comprehensiveness of the theory of a socially constructed system of meaning and reality. The move to post-structuralism is addressed to this difficulty. Before exploring later responses to the difficulties of structuralist analysis which build upon the stance of Barthes, however, we should explore the applicability of what might be thought of as “high structuralism” to legal analysis.

#### D. Law

A structuralist legal theory is difficult to imagine. The structuralists produced almost no legal analysis, except as law played some part in myth or literature.<sup>136</sup> There have been few attempts to think about law in a self-consciously structuralist fashion.<sup>137</sup> Nevertheless, a number of recent works of le-

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135. Indeed, Barthes has been criticized for his tendency toward hedonism should the “reader” break out of synchronic exchange with the text to become a consumer of pleasure. See *id.* at 91.

136. See, e.g., R. BARTHES, *Dominici, Or the Triumph of Literature*, in MYTHOLOGIES, *supra* note 43.

137. See, e.g., Heller, *Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns About Legal Economics and Jurisprudence*, in ESSAYS ON LITTAUER: THE LAWS AND ECONOMICS OF LOCAL GOVERNMENTS 183 (D. Rubinfeld ed. 1979); Goodrich, *Language, Text, and Sign in the History of Legal Doctrine*, LIVERPOOL L. REV. 95 (Ann. 1984); DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (1987); Duncan Kennedy, *The Structure*

gal theory seem to have been influenced by structuralism.<sup>138</sup> These works suggest that elements of the legal fabric might be thought to play a role in legal theory which corresponds to the role played in myth, culture, and literary text, by grammar, opposition, structure, etc., in these other disciplines. This importation effort has encouraged a particular stance towards the problems addressed by legal theory and led to the refinement of a set of techniques for understanding legal doctrine.

Thinking about law like a structuralist changes one's stance toward the materials one analyzes. The legal structuralist sets aside questions of law's origin, consequence and meaning. He focuses on the relationships within legal texts rather than between law and its content. If he imagines that the human conditions encoded in law are like the "real world" described by language or literature, the specific content of legal doctrines will seem less interesting to him because doctrines would be disconnected from the real world relations and

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of *Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Duncan Kennedy, *Form and Substance In Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976); Tushnet, *Truth, Justice and the American Way: An Interpretation of Public Law Scholarship in the '70s*, 57 TEXAS L. REV. 1307 (1979). A good short discussion of the relevance of structuralism for legal scholarship which does not accept the interpretive mission of traditional legal scholarship is Broekman, *A Structuralist Approach to the Philosophy of Law*, 49 PROC. CATH. PHIL. A. 37 (1977). Andre-Jean Arnaud is the best known French jurist to work within the tradition of structuralism. See A. ARNAUD, *ESSAI D'ANALYSE STRUCTURALE DU CODE CIVIL FRANCAIS: LA REGLE DU JEU DANS LA PAIX BOURGEOISE* (1973) (analyzing the French civil code in the fashion of Levi-Strauss, identifying hidden oppositions resolved through the mechanism of "exchange" characteristic of bourgeois culture of a certain epoch); A. ARNAUD, *CRITIQUE DE LA RAISON JURIDIQUE* (1981) (extending the structuralist critique of apparent systems and legal reasoning to criticize the effort to develop a sociology of law); Arnaud, *Structuralisme et Droit*, 1968 ARCHIVE DE PHILOSOPHIE DU DROIT ET DE PHILOSOPHIE SOCIALE 283, 289-91 (developing a program for structuralist legal scholarship which would separate synchronic from diachronic work, studying both structurally). Waldemar Schreckenberger develops a more formal structural analysis of several provisions of the German federal constitution as illustrations of semiotic textual analyses in W. SCHRECKENBERGER, *RHETORISCHE SEMIOTIK: ANALYSE VON TEXTEN DES GRUNDGESETZES UND VON RHETORISCHEN GRUNDSTRUKTUREN DER ARGUMENTATION DES BUNDESVERFASSUNGSGERICHTES* (1978). See also Hermann, *A Structuralist Approach to Legal Reasoning*, 48 SO. CAL. L. REV. 1131 (1975) (criticizing evolutionary and functional analyses for reliance upon conventional theories of legal reasoning and developing a structuralist account of the "transformation of deep structures" in criminal procedure, products liability and antitrust law); Robertshaw, *Unreasonableness and Judicial Control of Administrative Discretion: The Geology of the Chertsey Caravans Case*, 1975 PUB. L. 113-36 (especially developing a Levi-Straussian analysis of categories of land tenure present in a single opinion).

For commentaries on efforts to develop a structuralist legal scholarship, see B. JACKSON, *SEMIOTICS AND LEGAL THEORY* (1985); Hermann, *Phenomenology, Structuralism, Hermeneutics, and Legal Study: Applications of Contemporary Continental Thoughts to Legal Phenomena*, 36 U. OF MIAMI L. REV. 279 (1982); Note, *Towards a Structuralist Theory of Law*, 2 LIVERPOOL L. REV. 5 (1980).

138. See, e.g., Frug, *The City As a Legal Concept*, 93 HARV. L. REV. 1057 (1980); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1276 (1984); Gabel, *Reification in Legal Reasoning*, 3 RESEARCH IN LAW AND SOCIOLOGY 25 (1980); Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

conditions they purport to depict.

The structuralist would think of legal doctrines as signs referring only to other signs. Moreover, the structuralist would set aside interest in the *content* of justificatory arguments (why does or should norm X bind behavior?). The structuralist would seek to disassociate himself from behavioral, policy or historical analysis of doctrine — at least to the extent this analysis purported to track connections between legal discourse and human conditions. The structuralist legal scholar would imagine that legal discourse, and by that I mean all artifacts of legal culture, was *parole* — particular manifestations of an encoding mechanism which created relations in the guise of describing them and which was structured by an underlying legal *langue*, grammar, model or encoding system.

In this way, the structuralist imagination would flatten the realms of norm and behavior into a single synchronic system of meaning. Then the structuralist would search in the structure of the resulting text for the underlying *langue* which could account for law's ability to mutate in order to encompass new situations and still retain its recognizable legal character. Legal thinking would no longer seem primarily a historically situated process of applying techniques like analogy, reason or logic to situations in order to resolve them in accordance with past doctrines. Such a vision of legal activity imagines a difference and a connection between human relations and legal talk. For the structuralist, these realms are not separated and do not need to be connected. As *bricoleur*, the jurist manipulates a legal structure or *langue* of law. The function of a legal concept, then, is like the function of a word. It is not a meaningful symbol of a real essence, but a grammatical operator: e.g. conjunction, differentiator, preposition, object or modifier. The "structure" is nothing more complicated than the diagram of this discursive argumentative "sentence."

Of course a legal theorist so distanced from claims made by legal materials about their relationship to the non-legal world would be skeptical of the naturalness of the *parole* — about the existence of "rights" and "duties" and about the logic of the law. The structuralist would think of "rights" and "duties" as grammatical operatives, referring us to one or another code and text. The legal *bricoleur* produces the relationships which we see as certain permutations of "rights," "duties," "powers" and "liabilities." The *parole* (the rights or duties themselves) does not act; the *bricoleur* or *langue* acts.

The initial goal of a structural legal scholarship might be to uncover the *langue* which produces legal culture. The difficulty, of course, is that the encoding process itself would continually hide the *langue* beneath the *parole*. When most successful, the *bricoleur* would produce not a myth but a reality fully corresponding to our sense of justice and to our experience, precisely because he or she would simultaneously create that experience and that vision of justice. The legal *bricoleur* would grip us anesthetically. Although as scholars we would want to uncover this *langue*, not least of all because one wants to know when one is being anesthetized, doing so seems difficult.

Legal scholars who have sought to deploy the insights of structuralism in their work have begun by freeing themselves from anxiety about doing violence to legal content or doctrine in order to concentrate on argumentative patterns. Such a study is necessarily stylistic, stereotypical, and interpretive. One needs to be able to focus on the grammatical function of a term like

"right" without feeling that one thereby weakens its "meaning." Moreover, they have needed to free themselves of anxiety about setting aside investigation into the questions which cry out for investigation in legal materials — the accuracy of doctrinal purports about connections to "real world" causes and effects.

In other disciplines, the distance necessary to break the anesthetic grip produced by the materials under study has been achieved, or perhaps forced, by comparison of different *langues*. In law this is difficult to achieve, and comparativists, by focusing on content, or on different methods of doctrinal problem solving within a common *langue*, often reinforce rather than expose the anesthetic belief in the naturalness of legal *parole* and its connection to real world human relations. The problem, then, is to break the code of a system which we experience, not as a code at all but as *a*, or as *the* way of thinking.

Structuralist-inspired legal scholars have by and large pursued two paths. First, working historically, legal structuralists have sought to demonstrate the artificial nature of the legal *parole* by elaborating the different *langue* underlying the equally natural seeming former *parole*.<sup>139</sup> Moreover, the development of the *langue* through changing *parole* patterns might itself follow rules. These developments might not be responses to real world pressures as much as transformations of the *langue* itself. This second form of historiography would demonstrate the dynamic character of *bricolage* and the self-regulating nature of the structure.

Second, legal scholars influenced by structuralism have developed a number of techniques for analyzing doctrines which draw on the various narrative models devised by Propp, Greimas, Levi-Strauss, Barthes and others.<sup>140</sup> By identifying and manipulating oppositions and resolutions within legal texts, these scholars have sought to shake the normalcy of legal texts and expose them as a system of shifting internal references generated by an act of abstraction.

For those scholars who have deployed the insights of high structuralism in this way, the enterprise has been a critical one. But it has not always been satisfying. Few legal scholars seem willing to leave issues of law's social context, origins and authority permanently aside. Although critical scholars have deployed structuralist "methodology" in their textual analysis, and invoked the authority of structuralism to free themselves from the normal issues and approaches of legal scholarship, they have generally been unwilling to follow the notion of intertextuality very much farther than that. Typically, after "exposing" a contradiction resolved within the legal text, the structuralist legal scholar will turn to critical theory for assistance in interpreting this "deception." In this, legal scholars, like structuralists in other disciplines, seem unable to resist the temptation to reintroduce diachrony into their analysis.

Other scholars, also influenced by structuralist analytic methods, have

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139. For examples of critical legal scholarship attempting to discern different ideological *langues* governing equally natural seeming former *paroles*, see M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); Duncan Kennedy, *The Structure of Blackstone's Commentaries*, *supra* note 130. Cf. P. ATIYAH, *THE RISE AND FALL OF FREEDOM OF CONTRACT* (1979) for a similar enterprise from a "non-critical legal studies" perspective.

140. For a non-historical search for the *langue* underlying contemporary legal *paroles*, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, *supra* note 138.

been unwilling to set diachronic concerns aside in the first place. As a result, structuralism has by and large been imported into legal scholarship to assist in the hermeneutics of doctrinal interpretation.<sup>141</sup> Linguistic analyses of legal argument have categorized various forms of persuasion as rhetorical devices.<sup>142</sup> Cross-cultural or historical analyses which have drawn upon structuralism have contributed to the study of law and "sociology."<sup>143</sup> The tendency to stop short of the ambition of intertextuality has been enormous in the purportedly antonymous and normative literature of legal scholarship. As a result, structuralist legal scholarship has scarcely been critical. Indeed, structuralism seems to have encouraged many in the tendency towards interpretive formalism.

But if the structuralist asks us to suspend disbelief in anything beyond the text, he also requests that we relinquish a rigid notion of "relationship" as the

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141. See G. GURVITCH, *SOCIOLOGY OF LAW* (1942) (early effort to analyze law as part of a cultural symbolic system). Gurvitch, drawing upon Durkheim, posits various levels of cultural meaning, resting at bottom on a collective consciousness. Although he searches for the historical or cultural basis for symbolic associations in a way alien to structuralism, the legal typologies which he develops resemble in many ways both the functionalism of some work done by critical theorists and the narrative grammars of earlier structuralist literary critics. See also McDonald, *The Legal Sociology of Gurvitch*, 6 *BRIT. J. OF L. & SOC.* 24, 31-38 (1980) (commentary on Gurvitch's structuralist conventions). Some attempts to systematize legal scholarship have been influenced by the structuralist tradition. Most directly, perhaps, analysis of Vico's jurisprudence has dealt with his claim to be an early structuralist. See, e.g., Gianturco, *L'importance de Vico dans l'histoire de la Pensée Juridique*, 24 *ETUDES PHILOSOPHIQUES* 327, 344 (1968).

On the potential value of linguistic analytic techniques for traditional scholarship about legal reasoning, see Mounin, *La Linguistique comme Science Auxiliaire dans les Disciplines Juridiques*, 24 *META* 9 (1979). Jovan Brkic advocates a phenomenological approach to legal scholarship which could incorporate insights from the philosophy of language. In elaborating his proposal, Brkic discusses several themes important for a structural flattening of the object of analysis. He considers, for example, the difficulty of privileging intuitive insights into the text (associates with spontaneity and the unconscious) while simultaneously suspending value judgment about the relative importance of various terms in the legal text (associated with reflection and reason). This tension is avoided by a call for analysis of the systematic establishment of phenomena in consciousness. Brkic's analysis, however, turns out to be directed towards assisting in the interpretation of legal texts and the empirical study of moral norms by awareness of semantic peculiarities, the openness of language, the importance of use and context, etc. See J. BRKIC, *NORM AND ORDER: AN INVESTIGATION INTO LOGIC, SEMANTICS, AND THE THEORY OF LAW AND MORALS* (1970). A more elaborate call for linguistic insights in the hermeneutic process is Moore, *The Semantics of Judging*, 54 *SO. CAL. L. REV.* 151 (1981). Moore analyzes the problems posed for various theories of meaning associated with formalism by linguistic characteristics such as ambiguity and vagueness, and concludes by advocating an alternative, "subjectivist account of meaning" under which the judge would acknowledge his creative role as manipulator of metaphor. A direct discussion of hermeneutics in legal scholarship is McIntosh, *Legal Hermeneutics: A Philosophical Criticism*, 35 *OKLA. L. REV.* 1 (1982) (considering particularly literary theory).

142. See, e.g., J. SVARTICK, *THE EVANS STATEMENTS: A CASE FOR FORENSIC LINGUISTICS* (1968); Haynes, *The Language and Logic of Law: A Case Study*, 35 *U. OF MIAMI L. REV.* 183 (1981).

143. See *supra* note 141. See also Watkins, *Studies in Indo-European Legal Language, Institutions, and Mythology*, in *INDO-EUROPEAN AND INDO-EUROPEANS* 334-45 (G. Cardona, H. Hoenigswald & A. Senn eds. 1979) (developing a structural analysis modeled on the work of Levi-Strauss on the Roman Law of theft); Robertshaw, *Structuralism and Law: Some Comments*, 2 *LIVERPOOL L. REV.* 31 (1980).

unit of induction and deduction. The grammatical relationship between "to jump" and "to hop," after all, is not "one and two legs" but "verb." From "verb" we could not produce "to jump" or "to hop" — nor vice versa — the relationship has nothing to do with content. But this example can be no more than allegorical, for a content-based explanation based on function within a sentence context might be possible. The relationships we are asked to seek are, however, more of this nature. For structuralism to realize its intertextual potential, legal scholars would have to abandon the search for fixed connections of analogy or metaphor. The structuralist alternative at its best offers the search for patterns of tension and resolution; not *ad hoc* connections among events, but a deeper grammatical dialectic.

## V. BEYOND CRITICAL THEORY AND STRUCTURALISM

### A. Some Similarities and Differences

The intellectual traditions of critical theory and structuralism share an ambition to displace the relationship between theory and practice with which legal scholars are familiar. This displacement is accompanied, in both traditions, by a heightened attention to the involvement of intellectual work in the objects and subjects of its study. Still, these two intellectual traditions have developed quite different strategies of displacement. Indeed, the strategies implied by "dialectics" and "synchronicity" seem diametrically opposed. This opposition, however, suggests yet another, broader similarity — a common tendency to stop short — to leave intact or aside exactly that upon which the tradition relies.

The aspiration of both structuralism and critical theory to displace the relationship between theory and practice is apparent, ironically enough, in their common concern with two differentiated levels of existence and of analysis. The first is the shallow level of appearance and behavior. To the critical theorist this is the level of self-awareness and oppression before the advent of critical theory. To the structuralist, this is *parole*. The second is a deeper level which organizes appearance and behavior. This is the ideology or consciousness of the critical theorist and the *langue* of the structuralist. Each of these traditions seems to imagine that the deeper level affects the more manifest level, although they picture this process quite differently. The ideology affects social life through legitimation. The *langue* affects the *parole* far more directly and completely — perhaps as *bricolage*.

Both suggest, moreover, that this deeper level is not what legal scholars customarily picture when we think of legal doctrine or analysis being informed by "theory." We usually mean that the choice among and the understanding of doctrinal interpretations needs to be supplemented by an understanding of some mixture of moral, economic, or political notions, class or individual interest analysis, social or historical vision, coupled with some jurisprudential or methodological idea about the hierarchy and interaction of these various dimensions of doctrine and of the social life to which it responds and which it affects. To both the structuralist and the critical theorist, this entire package belongs to the surface level of *parole* and is structured, like doctrine, by a deeper *langue* or ideology.

These two disciplines seem to suggest that we "look for" the level which "structures" or "reproduces" both doctrines and theory. This deeper level is



always implicated in manifestations of theory and doctrine, but not in the same way in which they implicate each other. It seems true that we cannot imagine a social theory without a doctrinal manifestation or vice versa. But we might distinguish manifestations of one from manifestations of the other and we try to study them separately. This is not possible for the deep and shallow levels suggested by structuralism and critical theory. Unlike, say, economic theory, which can be elaborated independent of any doctrinal manifestation, these deep structures exist only as they manifest themselves, and change or are transformed in each such manifestation.

Both traditions seek to expose and describe the deeper level by focusing on the shallower level. The structuralist imagine a *langue* which only reveals itself in the *parole*. But the *parole* can only be interesting as evidence. To the structuralist the *langue's* hold on the *parole* is complete, but may still be revealed. To the critical theorist the hold of ideology may be revealed because it is incomplete. Both seem to suggest that we turn our attention to legal doctrine and theory in order to uncover this deeper level.

Just as the shallow *parole* level contains both doctrine and theory, the deeper level of *langue* is imagined to "contain" an active and a cognitive aspect. Both structuralism and critical theory suggest that there are some fundamental relationships which are recombined and hidden by the shallow level. These are the basic binary relations, or contradictions, of structuralism and the ideological legitimacy criteria of critical theory. Both traditions suggest that these relationships are combined and covered in certain ways as they enter the shallow level of *parole* or social relations. This might be the work of the rules of transformation of structuralism or the principles for recognizing true and false consciousness of critical theory. Structuralists have both elaborated the structure of this deep level and documented the tricks by which it transforms itself. Critical theory has emphasized both the techniques of legitimation and the dynamic of their manifestation.

In developing these analyses, structuralism and critical theory share what might be termed self-reference, self-validation or self-reflection. Both are concerned with the ways in which their own work is generated by and participates in the *langue* and *parole* or consciousness and culture which it addresses. Critical theory aspires to account for its own existence and to apply to itself. The critical theory could protect itself from the blind falseness it critiques by exposing itself as it criticizes. To the structuralist, an important indicator of elegance is often self-mirroring. The theory should share the structure uncovered in *parole* because it too is *parole*, structured by *langue*. This self-reflective feature permits the structuralist to shatter the anesthetizing effect of the *langue* upon those who exist in the world of *parole*.

Despite these similarities, the styles or strategies of displacement developed by the traditions of structuralism and critical theory differ widely. In both traditions, the deeper level of *langue* or consciousness sometimes seems partial, historically specific and changing and sometimes seems complete, historically transcendent and unchanging. Although both strands are present in both structuralism and critical theory, structuralism seems associated more with the latter and critical theory with the former. Structural anthropologists and psychologists often seem to search for basic cognitive patterns and transformational rules which define human culture and being. Linguists and literary critics have seemed more often to emphasize the ephemeral quality of the

*langue*. Critical theorists, while often elaborating a structure of legitimation as well as of validation which transcends particular historical forms of consciousness, seem more often associated with an approach which treats the forms of oppression as contextually specific. A tension exists moreover between those who emphasize the static content of the deep level and those who emphasize the dynamics of *bricolage* or oppression. Again, both streams are present in both traditions, but structuralism seems, somewhat ironically, to be associated with content and critical theory with dynamics.<sup>144</sup>

One could as well focus on the *form* of dynamism which is emphasized. Both approaches emphasize that the dynamic process by which the underlying level controls the surface level of appearances is a two-way street. The critical theorist suggests that the form of consciousness hides itself as it acts to legitimize forms of oppression just as critical theory reveals itself. The original consciousness, like the critical theory, is itself changed through this feedback process. This is what keeps a self-reflective theory valid. The structuralist maintains that just as the *langue* structures the *parole*, so it is altered by its encoding in *parole*. This is what permits us to uncover it by analysis of the *parole*. But one might emphasize one or another side of this process: either the encoding or the feedback. Although both strands are present in both approaches it is very difficult to do both simultaneously. Structuralism seems concerned with *bricolage*, and critical theory with its inverse, for critical theory is concerned more with undoing the *bricolage* than is structuralism. Both traditions have been criticized for their supposed emphasis on one or the other leg. Indeed, they have criticized one another for these concentrations.<sup>145</sup>

Nevertheless, these differences in emphasis indicate a much more important difference in starting point. Structuralism began by focusing attention upon the "synchronic," setting aside inquiry into the "diachronic." This focus upon the current textual moment is quite different from critical theory's focus upon the historical relationship of thought and action. Indeed, it was by setting aside the particulars of the relationship between Marx and Hegel to focus upon what might be thought of as their diachronic relationship that critical

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144. Indeed, structuralists develop a stance towards the synchronic which avoids the criticism of ideology typical of critical theorists. They develop techniques for unravelling puzzles of social meaning which avoid the question of agency, conspiracy or intention. This stance permits a move from ideology to theory. Louis Althusser, seeking to rehabilitate critical theory and respond to the difficulties created by the bracketing of agency in structuralism describes this distinction between ideology and theory as the move from the real to the ideational. L. ALTHUSSER, *FOR MARX* (B. Brewster trans. 1972); L. ALTHUSSER, *LENIN AND PHILOSOPHY* 155 (1971). See also A. SCHMIDT, *HISTORY AND STRUCTURE, AN ESSAY ON HEGELIAN - MARXIST AND STRUCTURALIST THEORIES OF HISTORY* 82-95 (J. Herf trans. 1981); R. COWARD & J. ELLIS, *LANGUAGE AND MATERIALISM* 74-76 (1977). The stance of critique and the generation of social meaning have been decoupled from social form but not lost. To Althusser, this stance is permitted by a conceptual rupture. "The process which produces a concrete object on the level of knowledge takes place entirely within the realm of theoretical practice." L. ALTHUSSER, *FOR MARX*, *supra* at 189-90. Like the structuralists, however, Althusser presupposes ultimate reality beyond the sign system; in his case a historical process of rupture within the flat plain of a concrete reality and a concrete thought. Nevertheless, it is interesting that the critical stance developed by Althusser, which stands as the last moment of structuralism and the beginning of its replacement, should relate to critical theory in this way.

145. See *supra* note 8.

theory developed its analysis of the "dialectics of enlightenment."<sup>146</sup> The structuralist displaces the relationship of theory and practice through a strategy of synchronicity which sets aside issues of origin and historical relationship. The critical theorist displaces the relationship of theory and practice through a strategy of dialectics which sets aside issues of textual content and purport.

### B. *A Common Problem*

This difference brings a more troubling similarity between the two approaches into view. Each theory works through a systematically pursued blindness. The structuralist turns his eyes from diachrony. The critical theorist turns his eyes from the assertions of Hegel and Marx. This turning aside continues. The structuralist constantly reminds himself of the diachrony he has set aside — in the *langue*, the *bricoleur*, the reader. The critical theorist reminds himself of the historical agent whose meaning could be fixed — in the proletariat, the intellectual, the counter hegemonic enclave or transcendent speech situation.<sup>147</sup> Thus each tradition sets itself against that which it does not consider. Indeed, each tradition seems simply to repeat the setting aside, working by remembrance of that in which it is not interested. This common tendency qualifies the "self-reflection" of both traditions.

It is the "set aside" which differentiates the two traditions. The structuralists have often been criticized for an apolitical navel contemplation and idealism precisely because they seemed to emphasize the unchanging content of the *langue* or the unconscious. Critical theory seems radically indeterminate, on the other hand, if it cannot provide some mooring in a transcendent theory of interest or historical process. This split affects not only the mission of the two traditions, but their validation as well. Structuralism, less concerned with the feedback of action on the *langue*, emphasizes the elegant and the intuitive. Critical theory which begins with self-reflection, is concerned more with its impact than with the particular forms of legitimation. It emphasizes that its approach must be validated in action.

Moreover, it has been impossible for either tradition to fully remember what it has set aside in order to respond to these criticisms, or to join forces with its brother tradition. Better, it seems that each tradition, in searching to respond to these criticisms has *only* been able to remember that which it set aside. Critical theory can do no more than posit an agent. Structuralism can do no more than suggest the dynamics of *bricolage*. To speak for the agent would undermine the distance which the critical theorist must maintain in order to distinguish true and false consciousness. To locate an origin for the

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146. See *supra* note 33.

147. Foucault expresses a similar commonality between the two approaches in the following terms:

Neither the dialectic, as logic of contradictions, nor semiotics, as the structure of communication, can account for the intrinsic intelligibility of conflicts. 'Dialectic' is a way of evading the always open and hazardous reality of conflict by reducing it to a Hegelian skeleton, and 'semiology' is a way of avoiding its violent, bloody and lethal character by reducing it to the calm Platonic form of language and dialogue.

M. FOUCAULT, *Truth and Power*, in *POWER-KNOWLEDGE* 114-15 (1980).

transformation would be to abandon the textuality which generated the structuralist's willingness to violate the *parole* in search of the *langue*.

Finally, it seems impossible for the intellectual simply to combine these traditions — to supplement the historical analysis of critical theory with the textual insights of structuralism — for each of these traditions sets aside the other. It is not enough to argue that each tradition, after all, hinted at the importance of that which the other emphasizes. The hint is important precisely because it remains a hint. Each theory promises access to the social totality.<sup>148</sup> Particularly in an age of totalized alienation or bureaucratic technocracy the promise appeals to the legal analyst as much as the social theorist.<sup>149</sup> Sadly, each fulfillment of the promise threatens it.<sup>150</sup>

Perhaps the most that can be said at this point is that structuralism and critical theory bequeath contemporary legal scholarship a residue of enabling metaphors. Alternating between a bracketed and a flattened subject, we catch glimpses of the legal totality. We can momentarily elude the positivism of pragmatism or the complicity of reasoned elaboration by speaking of a "structure" which "structures," an "ideology" which "legitimizes," "criticism" which "liberates," etc. Each of these notions signals an aspiration to put aside the inevitability of history or a representational approach to true reality without losing the grip of theory on doctrine. By removing or diffusing causality or

148. See J.P. Sartre, *infra* note 154, at 54. For a critique of this promise and the idea of totality, see M. FOUCAULT *Body/Power*, in *POWER-KNOWLEDGE* 81 (C. Gordon ed. 1980). "In each case the attempt to think in terms of totality has in fact proved a hinderance to research." *Id.*

149. The relationship between alienation and the progressive integration of social life, an integration maintained by a reified and categorical division of intellectual and physical labor, has been the focus of much Frankfurt School criticism of modernity. Building upon Weber's somewhat ambivalent analysis of bureaucratic modernism, these accounts of alienation concentrate upon the self's projection of identity into an impoverished role system. See, e.g., M. HORKHEIMER & T. ADORNO, *THE DIALECTIC OF ENLIGHTENMENT* 120-67 (J. Cumming trans. 1972); H. MARCUSE, *ONE DIMENSIONAL MAN* 84-122 (1964) (particularly on the disintegrated nature of "total administration"). The tendency to frame alienation as partiality is described and criticized for encouraging fantasies of totalization by Roberto Unger. See R. UNGER, *KNOWLEDGE AND POLITICS* 57-188 (1975) (connecting the images of totality espoused by the ideas of transcendence and immanence to the modern social-welfare state); Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 648-75 (1983). For background, see T. SCHROYER, *THE CRITIQUE OF DOMINATION: THE ORIGINS AND DEVELOPMENT OF CRITICAL THEORY* (1941).

150. For example, consider an ideology-legitimation critique of an announced "covert" war. The absurdity of the acknowledgment attracts our attention. Connecting the pretention of secrecy to the "ideological imperative" of democratic theory or the "legitimation needs" of a democratic state, which consumes but must deny violence, captures something true and total about the moment of the announcement. Elaborating the conditions of legitimation, the historical pressure of theory or the imperative of ideology in a democracy diverts us into a spin of unsustainable either-ors. Although it seems true that sovereignty *is* patriarchy, or that territoriality *is* homophobia, we cannot unlock the relations among men, women and culture by programmatic unpacking of these insights. Cf. Dalton, *Book Review*, 6 HARV. WOMEN'S L. J. 247 (1983); Mackinnon, *Feminism, Marxism, Method and the State: Toward a Feminist Jurisprudence*, 8 SIGNS 515 (1982). For a distinctly unprogrammatic unpacking, see Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). For fascinating critique of legal racism achieved by exploiting these connections unprogrammatically, see Wriggins, *Rape, Racism and The Law*, 6 HARV. WOMEN'S L. J. 103 (1983).

agency we can find a place for critique which does not plunge us into utopian speculation or historical determinism. In short, we might limit our blind complicity without losing our sanity.

But these enabling notions remain metaphors, dense distracting moments in the text. Pressed, unpacked, defined away from the momentary access they give us to a particular totality; congealed, abstracted, posited and formulated, they disintegrate. Structuralism just can't keep that diachrony down. The agent resurfaces in each dialectic unfolding of a critical theory. We have reimagined historical movement, resituated the text as a flattened relational moment and sought to capture the fluid, mutually constituting relations between them. This creative release is indicated by the constellation of textuality, legitimation, ideology, grammatical structure or historicism in contemporary critical legal scholarship. The point, however, can not be the elaboration or empirical measure of these "phenomena."<sup>151</sup> Legitimation can not be an object of an inquiry.<sup>152</sup> We cannot search for the elusive contradiction.<sup>153</sup> As soon as these notions become objects of inquiry in this sense, they lose their ability to access the totality.<sup>154</sup> The bracketed subject has re-emerged, the refusal has come unstuck. The legacy of critical theory and structuralism, then, seems more like a problem or a caution than a method. Rather than a technology for normal legal science which we can receive we find a vigilance to be maintained.

### C. *Some Departures from Critical Theory and Structuralism*

A number of scholars working in a variety of disciplines have responded to the difficulties encountered by the synchronics of the structuralist tradition and the dialectics of critical theory. Variouslly labeled "post-structuralist" or "post-modern," these authors all seek to refuse to adopt any stable origin, standpoint, agency or totalizer in their work.<sup>155</sup> Rather than setting aside the diachronic, only to reinvent it later as the privileged realm of the "*langue*," "*bricoleur*," or "reader" in the syle of the structuralist, these authors embrace

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151. *But see* Trubek, *Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062.

152. *See* Hyde, *The Concept of Legitimation in The Sociology of Law*, 1983 WISC. L. REV. 379.

153. *But see* Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979). *See also* Duncan Kennedy & Gabel, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984).

154. *See* Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980); Trubek, *Scholars in Self-Estrangement: Reflections on the Crisis in Law and Development Studies in the United States*, 1974 WISC. L. REV. 1062.. *But see* J.P. SARTRE, *CRITIQUE OF DIALECTICAL REASON* 805-18 (A. Smith trans. 1976).

155. A good general description of post-structuralism is T. Eagleton, *infra*, at 127-50. *See also* R. COWARD & J. ELLIS, *LANGUAGE AND MATERIALISM* 61-92 (1977) (focusing on Althusser); J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* (1982); V. LEITCH, *DECONSTRUCTIVE CRITICISM: AN ADVANCED INTRODUCTION & SURVEY* (1983); T. EAGLETON, *AGAINST THE GRAIN* (1986) (a collection of relatively accessible essays); *STRUCTURALISM AND SINCE* (J. Sturrock ed. 1979). A very readable introduction to post-structuralism which places it between critical theory or structuralism and feminism is A. JARDINE, *GYNECIS: CONFIGURATIONS OF WOMAN AND MODERNITY* (1985).

both the diachronic and the synchronic, shifting between them in a variety of ways. Unlike the critical theorist, who would set aside inquiry into history's origin to focus on dialectics only to reinvent the historical subject as the privileged agent of social change, these authors shift among the affirmation, denial and transcendence of prevailing relations between subject and object. Their common project is to reintroduce the diachrony set aside by structuralism without falling into the mechanical determinism or transcendental nostalgia characteristic of late critical theory.

The diverse work produced by post-modern scholars is far more difficult to organize or summarize than that of structuralists and critical theorists. Their work is far more eclectic in style and subject matter and they do not form anything like a self-conscious "school." Organizing their work historically, as I organized critical theory, seems inappropriate if only because, in sharp contrast to the Frankfurt School, they join structuralists in asserting the impossibility of definitive historical ground for their work. Unlike structuralists, however, they reject the stability of ideational patterns such as those supporting the division and characterization of knowledge into "disciplines." Consequently, interpreting their work according to its academic field, as I interpreted structuralism, seems unlikely to capture their totalizing ambition.

Most people encounter post-modern scholarship in the work of individual scholars — associating post-modernism with names like Barthes,<sup>156</sup> Foucault,<sup>157</sup> Lacan,<sup>158</sup> Derrida,<sup>159</sup> Baudrillard,<sup>160</sup> Bourdieu,<sup>161</sup> Kristeva,<sup>162</sup> de Man,<sup>163</sup> Guattari,<sup>164</sup> Deleuze,<sup>165</sup> Bataille,<sup>166</sup> and Blanchot.<sup>167</sup> Yet such a list

156. On Barthes, see *supra* notes 127-36 and accompanying text. See also R. COWARD & J. ELLIS, *supra* note 155, at 33-60; T. Eagleton, *supra* note 155, at 134-50.

157. On Foucault, see *infra* note 181. H. White, *Michel Foucault*, in *STRUCTURALISM AND SINCE*, at 81-115 (J. Sturrock ed. 1979).

158. On Lacan, see *infra* notes 180-81. See also J. LACAN, *ECRITS* (A. Sheridan trans. 1977) (an important and accessible paper in this collection is "The Mirror State as Formative of the Function of the I" at 1-7); J. LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHO-ANALYSIS* (J. Miller ed., A. Sheridan trans. 1977) (a series of introductory lectures). A readable introduction to Lacan is A. LEMAIRE, *JACQUES LACAN* (D. Macey trans. 1977). See also Bowie, *Jacques Lacan*, in *INTRODUCTION TO STRUCTURALISM AND SINCE*, 116 (J. Sturrock ed. 1979); R. COWARD AND ELLIS, *supra* note 155, at 93-121; S. TURKLE, *PSYCHOANALYTIC POLITICS: FREUD'S FRENCH REVOLUTION* (1978); LACAN AND NARRATION: *THE PSYCHOANALYTIC DIFFERENCE IN NARRATIVE THEORY* (R. Davis ed. 1983); Baer, *Understanding Lacan*, in *3 PSYCHOANALYSIS AND CONTEMPORARY SCIENCE* 473-544 (1974).

159. On Derrida, see *infra* note 182. See also J. CULLER, *supra* note 155; C. NORRIS, *DECONSTRUCTION: THEORY AND PRACTICE* 18-85 (1982).

160. See J. BAUDRILLARD, *LE SYSTEME DES OBJECTS* (trans. 1968); J. BAUDRILLARD, *DE LA SEDUCTION* (1979).

161. See P. BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1977).

162. See J. KRISTEVA, *DESIRE IN LANGUAGE* (L. Roudiez ed. 1980).

163. P. DE MAN, *ALLEGORIES OF READING* (1979); P. DE MAN, *BLINDNESS AND INSIGHT* (2d. ed. 1983); P. DE MAN, *THE RHETORIC OF ROMANTICISM* (1984).

164. See F. GUATTARI, *MOLECULAR REVOLUTION: PSYCHIATRY & POLITICS* (Sheed trans. 1984) (with a useful introduction by David Cooper, contains a selection of Guattari's early essays).

165. Deleuze is best known in English for a work co-authored by Guattari, *ANTI-OEDIPUS: CAPITALISM AND SCHIZOPHRENIA* (Hurley, Seem & Lane trans. 1983). He has also written extensively about Kant, Nietzsche and Kafka.

seems the least promising way to capture the post-modern response to critical theory and structuralism. These scholars often disagree bitterly or seem fully unaware of one another's work. Some of these people wrote before structuralism got going — one might as well expand the list to include Breton and more conventional surrealists. Others equally "responsive" to the difficulties of critical theory and structuralism are omitted — perhaps Laing,<sup>168</sup> Althusser,<sup>169</sup> Jameson<sup>170</sup> or Geertz<sup>171</sup> should be added. Finally, nothing seems more foreign to the project of post-modernism than the authority of authorship implied by such a list of names.<sup>172</sup> Consequently, rather than introduce post-modernism historically, by discipline or by author, I will suggest some tendencies common to much of it which might appeal to legal scholars motivated to pursue interdisciplinary reading but frustrated by both critical theory and structuralism.

Much post-structuralist work is about other work. Rather than investigating some issue — like the origin of the historical subject or the meaning of myth — the typical post-structuralist work will read other approaches to such issues in order to comment upon the arrangement and presentation of the issue as well as upon the "answer to the question." In this, these scholars are like both critical theorists and structuralists. The tradition of critical theory began with a re-reading of Marx and Hegel, and structuralism concerned itself with the construction of texts rather than the motives or context of authorship. But the post-structuralist does not respect either the projects of or the claims about themselves made by the texts he reads as faithfully as do these traditions.

Critical theorists saw their work as a continuation of the project begun by Hegel and Marx — to figure out how the subject and object really fit together in history. Similarly, although structuralism changed the method of each discipline radically by setting aside the diachronic, the discipline's interpretive project remained intact. The structuralist tried to figure out what was really going on in myth or literature or language. The post-structuralist is more interested in the construction and reproduction of these projects than in their resolution. To the post-structuralist, it was precisely the determination to "get it right" which led the critical theorist to construct an authoritative historical subject

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166. G. BATAILLE, *VISIONS OF EXCESS: SELECTED WRITINGS 1927-1939* (A. Stoekl trans. 1985). On Bataille, see J. DERRIDA, *From Restricted to General Economy: A Hegelianism without Reserve*, in *WRITING AND DIFFERENCE* 251 (A. Bass trans. 1978); KRAUSS, *No More Play*, in *THE ORIGINALITY OF THE AVANT-GARDE AND OTHER MODERNIST MYTHS* 42 (1984).

167. M. BLANCHOT, *DEATH SENTENCE* (L. Davis trans. 1978); M. BLANCHOT, *THE GAZE OF ORPHEUS AND OTHER LITERARY ESSAYS* (S. Adams ed., L. Davis trans. 1981); M. BLANCHOT, *THE MADNESS OF THE DAY* (L. Davis trans. 1981); M. BLANCHOT, *THE WRITING OF THE DISASTER* (A. Smock trans. 1986).

168. R. D. LAING, *KNOTS* (1970); R. D. LAING, *SELF AND OTHERS* (1961).

169. See *supra* note 10.

170. F. JAMESON, *THE POLITICAL UNCONSCIOUS* (1981); F. JAMESON, *THE PRISON-HOUSE OF LANGUAGE*, (1972).

171. C. GEERTZ, *THE INTERPRETATION OF CULTURES* (1973) (selected essays); C. GEERTZ, *LOCAL KNOWLEDGE* (1983).

172. On the name, see Krauss, *In the Name of Picasso*, in KRAUSS, *THE ORIGINALITY OF THE AVANT GARDE AND OTHER MODERNIZED MYTHS* 23 (1985); Derrida, *Otobiographies, the Teaching of Nietzsche and the Politics of the Proper Name*, in *THE EAR OF THE OTHER. OTOBIOGRAPHY, TRANSFERENCE, TRANSLATION TEXTS & DISCUSSIONS WITH JACQUES DERRIDA* 3 (C. Levesque & C. McDonald eds. 1985).

and the structuralist to invent an authoritative "deeper" level which could account for the diversity of myth or language. To avoid these difficulties, the post-structuralist remains agnostic about these issues.

They do not usually argue that all answers are wrong or that answering these questions is impossible or uninteresting. They simply set these issues aside, much as the structuralist set aside the diachronic or the critical theorist set aside the particulars of Marx or Hegel to focus on the relationship between them. In this sense, the post-structuralist approaches the work which he analyzes much as I have tried to approach the traditions of critical theory and structuralism. By setting aside their concerns about dialectics or synchrony, it became possible to analyze the ways in which the construction of their project implicated a certain set of responses and repetitions, without suggesting that their projects were impossible and undesirable or that their results were flawed.

Much post-structuralist work uses the distance achieved by this agnosticism to uncover marginal indications in the work it analyzes of a reliance upon that which the work self-consciously excludes, just as I sought to uncover a continued reliance upon the diachronic in structuralism or upon historical agency in critical theory.<sup>173</sup> This reading technique — uncovering the positive in the negative and *vice versa*<sup>174</sup> — is similar to the elaboration of contradictory structures within the *parole* and to the identification in Marx of a dialectic more important than the particularities of his rather scientific sounding analysis. Unlike structuralism and critical theory, however, this work treats these relations neither as contradictions which can be resolved at some deeper *langue* level nor as generative of a historical resolution. Because he is agnostic about the projects of both textual interpretation and definitive social theory, the post-structuralist is more likely simply to explicate these hidden dependencies and acknowledge their importance in generating comprehensible narratives within the conventions of modern philosophy.

Moreover, unlike critical theory and structuralism, post-structuralist work tends to locate the dependence outside the frame which the analyzed text presents. The elaborate models of plot or myth developed by the structuralist identified and arranged elements within the myths or narratives they analyzed. Critical theory began by looking at the relationship between Hegel and Marx within the tradition of philosophy. By contrast, the dependence of structuralism upon some diachronic invention which I identified in this article was not located "within" the *parole* as one term in some contradiction, subject to capture by the *langue*. Nor was it located in the "false consciousness" of the structuralist and able to be rejected by the theorist once it had been exposed. Instead, it seemed both indispensable to the structuralist project and located at the very margin of structuralist theory — indeed, in the diachronic which structuralism self-consciously excluded.

This reading technique has been pursued in an enormous variety of ways — applied to philosophic texts,<sup>175</sup> works of art,<sup>176</sup> historical movements,<sup>177</sup>

173. The most explicit elaboration of this idea is J. DERRIDA, *MARGINS OF PHILOSOPHY* (A. Bass trans. 1982). A particularly helpful essay is *The Pit and the Pyramid: Introduction to Hegel's Semiology*. *Id.* at 69.

174. Bataille asserts this relation most aggressively. See *supra* note 166.

175. See, e.g., Derrida, *infra* note 182 (particularly the essays in *OF GRAMMATOLOGY*). See



works of literature and literary criticism.<sup>176</sup> Post-structuralist work of this sort seems extremely empirical, detailed and careful in its argument. Bound tightly to the texts it explicates, these performances develop a habit of extremely close reading which seems almost positivist in its assertions about meaning and origin. At first this assertiveness seems quite paradoxical in works which seem to be going the doubts of structuralism and critical theory one further. No structuralist would assert the stability of textual connections this strongly, nor would any critical theorist make historical arguments as overtly determinist.

And yet, the whole point of this post-structuralist reading technique is to demonstrate that the modesty of the more conventional work is misplaced. Although the structuralist is modest about his interpretations, he thinks he has taken the problem of origin into account by setting the diachronic aside. His modesty covers a more dramatic assertion: that this method can resolve the problem of interpretation. Although the critical theorist is modest about his particular textual interpretations, this modesty masks his assertions about the possibility of philosophy once the problem of textual instability is solved by focusing on the dialectic relations among texts. The post-structuralist argues the vanity of conventional modesty by drawing these assertions into question. Of course one could easily argue that the post-structuralist simply repeats this maneuver — covering his positivist assertions with an even more thorough going agnosticism about the possibility of his endeavor — and indeed post-structuralists often level this critique at one another and at their own work. But the point is simply to acknowledge this pattern, not to escape it.

This post-structuralist ambition to acknowledge what one cannot escape is reminiscent of critical theory's attempts to undo false consciousness or structuralism's aspiration to get to the *langue* beneath the *parole*. But the post-structuralist does not assert that his work will liberate the falsely conscious or expose the real beneath the merely apparent. To do so, he would need to assert some privilege or power for either critical ideas or the grammatical base. By unearthing the marginal and hidden reliance of one textual term upon another, the post-structuralist tries to destabilize the priorities necessary to sustain such claims. In this sense, the reading of critical theory and structuralism which I presented in this article is typically post-structuralist. It identified marginal dependencies in these traditions and then questioned the privilege accorded both the dialectics of critical theory and the synchronic of structuralism. I argued that the critical theorist had to posit the social agent it sought to create, just as the structuralist needed the diachronic it set aside to generate the *parole* it analyzed.

The goal of much post-structuralist work is to renounce textually sustained hierarchies of this sort, and the point of reading closely at the margins of various texts, seeking to expose the negative in the positive and *vice versa*, is

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also de Man's work on Rousseau, collected in *ALLEGORIES OF READING* (1979).

176. See, e.g., KRAUSS, *supra* note 172; *THE ANTI-AESTHETIC: ESSAYS ON POSTMODERN CULTURE* (H. Foster ed. 1983).

177. See Foucault's work on penology *infra* note 181.

178. A most accessible essay is B. JOHNSON, *Melville's Fist*, in *THE CRITICAL DIFFERENCE* 79-109 (1985). See also her essay *The Critical Difference: Barthes/Balzac*, id.; Barthes, *Textual Analysis of Poe's 'Valdemar'*, in *UNTYING THE TEXT: A POST-STRUCTURALIS ANTHOLOGY* 133-61 (R. Young ed. 1981).

precisely to undo hidden assertions of this type. At the same time, however, the post-structuralist generally acknowledges the importance, even necessity, of such textual hierarchies within the traditions of contemporary philosophy or literature. This renunciation of textual hierarchies is thus not a rejection or condemnation. The post-structuralist develops no program or authority which could immunize texts from such privileged exclusions. At best his own texts are content when they are able to mark or acknowledge their reliance upon such rhetorical mechanisms. In this article, for example, my point was not to condemn structuralists for having privileged the synchronic. The point rather is to uncover the equivalence of structuralism and critical theory, destabilizing the definitive purport of each.

This renunciation and acknowledgement — even reacceptance — of textual hierarchies takes a number of forms within post-structuralist work. Sometimes it is achieved by a radical assertion of intertextuality. In his later work, for example, Barthes extended the relationships he encountered among textual elements in his early work to analyze the relationship among authors, texts and readers, developing a literary criticism which refused to privilege any particular origin for meaning.<sup>179</sup> Sometimes, this refusal is presented as a critique

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179. In his early and most structuralist work, Barthes seemed to seek a science of literary criticism, albeit a science of "forms." See R. BARTHES, *MICHELET PAR LUI-MEME* (1954); R. BARTHES, *SYSTEMES DE LA MODE* (1967). For a criticism of the view that Barthes' early works were less open than earlier criticisms, see J. CULLER, *supra* note 155, at 87-90. He removed the author and the historical context from view and focused upon the synchronic arrangement of the literary text, seeking to open texts to diverse readings by analyzing the various ways in which elements in the text activated associations in readers with other texts. This approach was structuralist because it self-consciously directed its attention to intertextual relationships, first by banishing the author as an extratextual origin for the narrative and second by focusing on reading as an intertextual process through which elements of the text were associated with other texts.

This early work seemed incomplete. If the relationship between the reader and the text could be understood intertextually, it seemed difficult to understand why the relationship between author and text, or indeed, author and reader could not be imagined in the same way. Moreover, by privileging the text over the author and then giving the text meaning through a process of intertextual associations by readers, Barthes seemed to be relying upon a reader's subjectivity — albeit a subject which was only present as the plane in which associative intertextual connections were made. This made it difficult to see why the author and historical context should not be imagined to have a similar subjectivity. Releasing the text from the tyranny of origin led to a tyranny of readership. The totalizing claim reversed itself to yield a flexible but reconstituted hierarchy.

Barthes' later works suggest the direction of post-structuralism. In *S/Z*, Barthes' analysis of Balzac's novel *Sarrasine*, the hierarchy of author, text and reader is acknowledged, opened and rearranged. See R. COWARD & V. ELLIS, *supra* note 155, at 45-60; T. HAWKES, *STRUCTURALISM AND SEMIOTICS* 113-22 (1977); V. LEITCH, *supra* note 155, at 102-15, 198-204 for a discussion of *S/Z*. The search for an essentialist grammar of the narrative is absent. The narrative codes through which intertextual associations are thought to be made have been expanded to raise questions about the relations of the text's production and reception. For example, the "referential code" weaves the milieu into the text, positioning the reader in knowledge and the production of knowledge. The "symbolic code" explores the articulation of a series of differences which create the text, establishing identities which are not representations. The critic is no longer only a reader but also a writer, writing his way around and through the text, himself a text, speaking with the author and his creator. The critic as producer reverses the relationship of structure and text, *langue* and *parole*.

of the privileging practice dominant within a single discipline. Lacan, for example, argued that the Freudian psychiatric tradition privileged the unconscious as a dark absence and the analyst as he who could reveal its contents and work. Lacan argued that the unconscious, like the conscious, is a system of signs which is "structured like a language," and that the analyst and analysand exchange meanings and interpretations from one symbolic system to another.<sup>180</sup>

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In this way, Barthes has reorganized the hierarchies of texts and authors, or readers and texts, which seemed so crucial to more classically structuralist literary criticism. It is not that he has abandoned those earlier intertextual insights. Rather, he has extended them to acknowledge and include the process of textual production and the setting aside of that origin. The result is a meandering collection of glimpses among texts — Balzac's, Barthes', ours. The text is no longer structured as much as it begins to structure, to write Barthes or Balzac. The author, text and critic flow into one another in S/Z. The result is a refusal not only of role, or representation, but of the hierarchy of refused roles characteristic of structuralist synchronic criticism. The upset of synchronic and diachronic, rather than ending analyses, opens the way for momentary connections among text and context.

180. Lacan and Foucault, like Barthes, criticize the formal hierarchies of structuralism, introducing notions of fluidity and history without returning to critical theory. For Lacan, the relationship between conscious and unconscious is like the relationship between signifier and signified. J. LACAN, *The Unconscious and Repetition*, in *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS* 17-68 (J. Miller ed., A. Sheridan trans. 1977). The varying claims which are generated by this notion are clearly presented in A. LEMAIRE, *supra* note 158. See J. LACAN, *Function and Field of Speech and Language in Psychoanalysis*, in *ECRITS* 30 (A. Sheridan trans. 1977). As a result, the unconscious itself is structured like a language. See generally J. LACAN, *THE FOUR FUNDAMENTAL CONCEPTS OF PSYCHOANALYSIS* 30 (1977).

Lacan dramatizes the separation and hierarchy of the Saussurian system of "signifier" and "signified" in which the deep and the shallow are distinguished and then related temporally, causally, representationally or, ultimately, structurally. Lacan suggest that the signified is itself a signifier, doubling the sign. The Lacanian redoubled sign is considered in A. LEMAIRE, *supra* note 158, at 96-131 (presenting several clarifying examples of this approach to the psychoanalytic symptom). The infinite reduplication of the sign could find rest in the unconscious if the unconscious were given a privileged status outside the social process by which meanings are generated. This is the contention which Lacan rejects with the statement "the unconscious is structured like a language." See J. LACAN, *ECRITS*, *supra*, at 55-56, § 193.

For Lacan the child's entrance into the symbolic world through the Oedipal struggle, is not the loss of any privileged, true, pre-social consciousness which could ground the sign. See J. LACAN, *The Mirror Stage as Formative of the Function of the I as Revealed in Psychoanalytic Experience*, in *ECRITS*, *supra*, at 1; A. LEMAIRE, *supra* note 158, at 78-92 (considering the Lacanian conception of the "accession to the symbolic"). See also J. LACAN, *ECRITS*, *supra*, at 67, 199 and 217. Rather, the pre-Oedipal child comes to know itself in the "imaginary." See Baer, *Understanding Lacan*, in 3 *PSYCHOANALYSIS AND CONTEMPORARY SCIENCE* 511-17 (1974). See also J. LACAN, *ECRITS*, *supra*, at 1-7, 20-25, 56-77; A. LEMAIRE, *supra* note 158, at 72-77. The child develops the unconscious to be suppressed in movement into the symbolic by knowing the absolute object of its desire (say, being everything with the mother) in nodes of symbolic identity (say, the phallus). The suppression of the phallus by the father, then, is the movement from one socially mediated state to another. As a result, the imaginary, in which one knows oneself, is itself a set of mediated identity pictures. The symbolic "nodes" which constitute it are greater than the self. The unconscious, rather than a dark inner sanctum, is a social fabric in which the individual experiences the breakthrough of the other.

Lacan develops a psychoanalytic practice out of this insight which is instructive for legal analysis. See J. LACAN, *The Direction of the Treatment and the Principles of its Power*, in *ECRITS*,

Some post-structuralists explore the hierarchies and marginalizations of particular historical epochs or situations. Most notable of these are the narratives about penology, insanity and sexuality written by Foucault.<sup>181</sup> His ap-

*supra* at 226; Baer, *supra*, at 483-92, 500-10. As Lacan understands it, both the analyst and the analysand, are situated in the symbolic. Symbolic nodes provide occasions for contact or exchange between one conscious and one unconscious. The analysis proceeds as the two work to follow each other between conscious and unconscious signification, building and disconnecting a map of the difference at work both between them and within each of them. The interaction between the unconscious and the conscious, as well as the communication between analyst and analysand, are produced by similar movements among nodes which have meaning in two symbolic systems with different codes. In such an analysis, the analyst, and analysand are similarly situated, exchanging meanings much as Barthes interacted with Balzac. The analysis, moreover, is neither critical nor constructive, neither theory nor doctrine, but a constituting exchange which permits momentary glimpses of the totality rather than fixed access to some privileged realm. For Lacan, moreover, this process is a playful one, providing fleeting access to our situations most easily when symbolic nodes are followed least earnestly. The image of imaginary and symbolic exchanging meanings in an endless communication suggests a shifting pattern of signification positioned against some absence which is never located. The placeholder for this absence against which signification occurs Lacan labels the "real." See J. LACAN, *ECRITS*, *supra*, at 65, 192-99; A. LEMAIRE, *supra* note 158, at 40-61; Baer, *supra*, at 517-18. Named and known within a linguistic labyrinth, the vocabulary of its naming nevertheless refers outside the social totality which is playfully glimpsed in analysis. Able to be described within the imaginary and symbolic as that outside, the "real" operates like death, which, as Heidegger noted, is "the totally real," able only to be known from life. This absence anchors analysis even as Lacan refuses it in his constitution of both conscious and unconscious. Its constant absence seems to render Lacan's playful refusal anxious. Despite this difficulty, Lacan's approach suggests the possibility for contextual insight within an awareness of ambiguous signs and unknowable origins.

181. See M. FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (Howard trans. 1965). For a critical comment, see J. DERRIDA, *Cognito and the History of Madness*, in *WRITING AND DIFFERENCE* 31 (A. Bass trans. 1978); M. FOUCAULT, *DISCIPLINE AND PUNISH* (A. Sheridan trans. 1979); 1 *THE HISTORY OF SEXUALITY* (R. Hurley trans. 1978).

Despite their appreciation for intertextuality and the problems associated with a referential subject, Foucault's studies seem anchored in a context of authority. His "archeologies" of penology, insanity and sexuality develop connections among exclusions of knowledge and power. At different historical moments Foucault finds what he terms the "*épistème*" of the age in a set of exclusionary relationships, such as the relationship between insanity and reason in the modern era. An interesting commentary on this study is J. DERRIDA, *Cognito and the History of Madness*, in *WRITING AND DIFFERENCE* 31 (A. Bass trans. 1978). By tracing both asylum and philosophic practices to a set of relations rather than to historical forces or agents, Foucault's work seems structuralist. Yet he speaks of these as relations of knowledge and power which operate in a particular historical field. As a result, Foucault's study seems to analyze a social totality at once contextual and abstract. As he relates the historical transformation of penology from punishment to surveillance we glimpse totalitarianism without defining it as a relationship of struggle between the "individual" and the "state." For Foucault, "discourse" expresses the ultimate non-fixing of social relations in which nothing is "real." The exclusionary relations which he uncovers between reason and madness do not precede or "structure" the relations among philosophical texts or the reasonable and the insane nor *vice versa*. More importantly, Foucault claims no priority for his *épistémic* relations over their precursor or their successor. They do not "originate" in some earlier *épistème*, nor do they enable their analysis. In this sense, for all his apparent contextual grounding and concern with power, Foucault's historiography is self-consciously unconcerned with "what really happened." In particular, he is not concerned to write history as the unlocking of power by knowledge or the production of knowledge by power. Because Foucault collapses knowledge and

proach to each of these historical institutions is at once abstract and contextual. For example, he traces the simultaneous marginalization of insanity by reason and internment of the insane in eighteenth century Europe. Other post-structuralists focus on the texts of modern philosophy, producing a highly abstract account of the tendency to privilege one term against another in Western thought. Derrida's work on the texts of Husserl and Rousseau are perhaps the most remarkable of this type.<sup>182</sup>

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power into one another he seems unconcerned with the relationship between his analysis and its apparent object. History becomes a "discourse," neither text nor context nor interactive mutual feedback of text and context. His own work is a discourse about discourses, an archeological investigation of knowledges. On the notion of discourse, see M. FOUCAULT, *POWER-KNOWLEDGE* 123-62 (1980). See M. FOUCAULT, *THE ORDER OF THINGS* (A. Sheridan trans. 1970); M. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE* 21-70 (A. Sheridan trans. 1972). See also Foucault, *War in the Filigree of Peace*, 4 OXFORD LITERARY REV. 15 n.2 (1980).

Foucault constructs his archeologies of exclusion by invoking some historical alternative — some moment in which the excluded and the excluder could have been part of the same referential system. Thus, he articulates the mutual exclusion of reason and madness as intertextual, discursive exercises of power in a historical fashion by invoking some earlier *épistème* in which the exclusion did not operate. Although this historical difference threatens Foucault's ambition to escape from a more traditional historical project, Foucault asserts that the pre-exclusionary *épistème* is not a true, recoverable past. The rupture between *épistèmes* is itself a textual difference which might be reversed. Thus, we might think of the exclusion of insanity by reason as generating for the first time a system in which both were included. Nevertheless, even as this reading is reversed, some grounding Other (here an earlier incompatibility or lack of recognition between reason and insanity) is again invoked. The excluded Other remains essential to constitute the totality, but cannot be recovered. Foucault's archeology thus resembles Lacanian analysis in which the absolute object of desire finds its presence only in symbolic nodes created in the imaginary against some "real". See *supra* note 180. Another way of understanding this resemblance is to focus on Foucault's use of the word "power". See M. FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE*, *supra*, at 95-114.

His archeologies are emphatically not analyses of relations emanating from some authority or cognitive apparatus. Because he weaves historical precursors and analytic successors into his story, his narration seems to do without the priority of either power or knowledge. But the word "power" is not always used in this way in his work. Often it takes on a certain priority and seems to indicate both the object and subject of his inquiry. All of Foucault's analytic work is, like Lacan's, emphatically *not* something. He thinks about the history of ideas without giving them autonomy or effect. He writes about social relations without passing on their authority. This paradoxical lack or absence of authority in his work seems to preoccupy Foucault even as he banishes it. And he calls this preoccupation "power." This second use of the word power — the use which makes Foucault of all post-structuralists seem most attuned to what we think of as history and context — is as a translation into Foucault's work of the Lacanian "real."

182. Jacques Derrida focuses his philosophic criticism upon the enduring "logocentrism" or metaphysical attachment to "presence" in the Western tradition of philosophy. He identifies the enduring attachment of philosophy (even, and often especially, post-structuralist philosophy) to some grounding location — some definable "inside" or "outside" against which a philosopher's system unfolds. Western philosophy for Derrida is the redevelopment of oppositions which purport to be contradictions or exclusions but which are arranged in a preferential hierarchy. Thus, of presence and absence we prefer presence (logocentrism) and so also with speech and writing (phono-centrism) or man and woman (phallogocentrism). See J. DERRIDA, *OF GRAMMATOLOGY* (G. Spivak trans. 1976); J. DERRIDA, *DISSEMINATION* (B. Johnson trans. 1981). This project is pursued in a critique of Husserl in J. DERRIDA, *SPEECH AND PHENOMENA: AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS* (D. Allison trans. 1983). See also Spivak, in *OF GRAMMATOLOGY*, *supra*, at

All of these works, whether grounded in a particular discipline in some general or specifically critical fashion or working more broadly from either history or philosophy, renounce patterns of privilege in the texts, accounts and practices which they analyze. However, one might argue that each post-structuralist

lxvii - lxxviii.

Much of Derrida's work focuses on the preference for speech as it is associated with presence. In a critique of Saussure and Rousseau, Derrida unravels this preference by showing that the special qualities of writing (absence) which make it secondary are qualities of speech as well. More than a simple reversal of this hierarchy, this argument lays the groundwork for an elaborate refusal of the preferencing of logocentric thought. This project is suggestive both for its insight into the philosophic traditions under consideration here and for the analytic or "reading" techniques which Derrida develops. For example, Derrida suggests that philosophic texts characteristically operate by exclusion and preference. Thus, we might think of critical theory preferring the transcendence of an excluded dialectic opposition or as sustaining its analytic power by continued identification of some transcendent subject-object. Similarly, structuralist texts seem to exclude diachrony and prefer synchrony. To Derrida, such exclusions and preferences are not sustainable — even in the work of post-structuralists who seem most comfortable with a synchronized or intertextual approach to the excluded diachronic. Something seems, of necessity, excluded — perhaps the real power or the place where reader, text and author refer to one another.

Derrida's work aims to expose the placeholders for these excluded terms and labels the suppression within philosophic texts of that which they must exclude "supplementarity." The supplement is the hidden addition, the absence, without which presence could not be imagined but which threatens to deny it. The hierarchical repression of the supplement permits the relational contrasts which constitute a logocentric system of meaning. Speech and writing seem different in their relative presence — a relationship which can only be sustained so long as the absence of speech and the presence of writing is suppressed. This suppression can only last as long as speech, the relatively present, is preferred to writing. Consequently, the suppression of the supplement is related to its continuity. See J. DERRIDA, *That Dangerous Supplement*, in *OF GRAMMATOLOGY*, *supra*, at 141-64. Most commentaries on Derrida's work consider the idea of the supplement. Particularly helpful are J. CULLER, *infra*, at 102-10; V. Leitch, *DECONSTRUCTIVE CRITICISM, AN ADVANCED INTRODUCTION* 169-78 (1983). This double relationship within logocentrism Derrida expressed in a variety of ways — evoking the supplement as both enabling and threatening logocentrism. Sometimes he terms this phenomenon *différance*, evoking both the spatial differencing of speech and writing and the deferral of the preference for presence which enables it. See J. DERRIDA, *POSITIONS* 7-14 (A. Bass trans. 1981); *OF GRAMMATOLOGY*, *supra*, at 1-65. For elaboration of the notion of *différance* see J. CULLER, *ON DECONSTRUCTION: THEORY OF CRITICISM AFTER STRUCTURALISM* 95 (1982), *et passim*; C. Norris, *DECONSTRUCTION, THEORY AND PRACTICE* 24-41 (1982). The term "deconstruction" refers to the reading strategy by which these characteristics of Western philosophy are revealed. It elaborates the ways in which a text renders its own premises open to question and uses the constructs of a text to produce a structure that challenges the consistency of those very constructs. In this sense a text is seen to "de-construct" itself or to be "always already" deconstructed. However, this self-contradiction does not invalidate the intellectual enterprise of the text. The deconstruction is not a criticism of the author's mistakes or the text's weakness. Derrida renounces any attempt to identify and judge authors guilty of logocentrism or to replace logocentrism. See, e.g., J. DERRIDA, *POSITIONS*, *supra*, at 52 (referring to Saussure). If anything is destroyed by deconstruction, it is the view that a text has a "correct," "proper," or "natural" meaning intended by the author. For examples of deconstruction see J. DERRIDA, *OF GRAMMATOLOGY*, *supra*, at 97-316 (a critique primarily of Rousseau with reference also to Levi-Strauss); J. DERRIDA, *Structure Sign, and Play in the Discourse of the Human Sciences*, in *OF GRAMMATOLOGY*, *supra*, at 250-65 (a critique of Levi-Strauss); J. DERRIDA, *Freud and the Science of Writing*, in *WRITING AND DIFFERENCE* (A. Bass trans. 1980). For additional commentary on Derrida's deconstruction, see J. CULLER, *supra*, at 171-79; Miller, *Deconstructing the Deconstructors*, in *DIACRITICS* (1975).

turalist style *itself* privileges either the discipline or the history or the theory which it analyzes and uproots. This charge is often made by one post-structuralist about the work of another.<sup>183</sup> Oddly, perhaps, each of these writers names the mechanism which produces this privilege. Barthes unabashedly trumpets the pleasure of "reading," Lacan the playfulness of analysis against the inevitability of the "real," Foucault the analysis of "power," Derrida the inescapability of textual "différance."

And yet, they tend not to argue the priority of their particular privileging scheme. Derrida goes so far as continually to rename the process of marginalization or privileging by which textual argument proceeds.<sup>184</sup> The point is less to argue the priority of a particular analysis than to confront or recover the process by which analysis is generated — to mark the acts of power of exclusion by which thought proceeds. In this article, for example, it remains unclear whether structuralism is best understood to have forgotten the diachronic or to have been compelled simply to repeat it. Similarly, it seems unimportant to me whether critical theory is thought to proceed by positing a historical subject or a terrain for that subject's operation.

The point of the analysis is to renounce the ambition or the purport to have provided a solution for the dilemma of subject and object, rather than to undo some particular textual, disciplinary or historical resolution. Foucault's use of the word "power" to name the exclusion and construction of both philosophy and history reminds us of critical theory's privileging of agency just as Derrida's use of the word *différance* reminds us of structuralism's preoccupation with the synchronic. Unlike the structuralists, however, Derrida renounces any attempt to settle what is going on in the texts he analyzes — to solve the riddle of interpretation — by reference to *différance*. *Différance* does not "work" in the text or "account" for the text like the *langue*. It merely marks the process by which the text itself works.

As a result, the purport of post-structuralist texts seems extremely modest. Rather than resolving the riddles confronted by the texts they analyze or criticizing texts for failing to resolve important issues, the post-structuralist simply recounts the maneuvers presented by a text or discipline which does make such claims. As to their own text, the post-structuralist is often coy and playful — at once asserting a precise reading or series of readings and disowning any intention to closure or program.

Consequently, for all their diversity, post-modern works share a great deal stylistically. Their texts are elaborate imitations and reconstructions of other

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183. See, e.g., Derrida's discussion of Foucault in *Cognito and the History of Madness*, in OF GRAMMATOLOGY 105, *supra* note 182.

184. Sometimes he labels this "*différance*", see MARGINS OF PHILOSOPHY 29 (1982). But Derrida moves among metaphors. Sometimes he uses the word "trace" to indicate the marginal supplement — he then abandons the word when it seems reconnected to "origin." Similarly, he abandons using the words "laugh" and "play" when they come to be merely differences from serious work. Derrida tears these indicators from their place in the logocentric text in order to mark the differencing process by which he moves forward. This self-reflection, or awareness and playful use of his own logocentrism dislodges Derrida's own work from the texts which he analyzes and differentiates him from other structuralists and critical theorists. See J. DERRIDA, POSITIONS, *supra* note 182, at 23-36, 46-48; J. DERRIDA, *The Outside is the Inside*, in GRAMMATOLOGY, *supra* note 182, at xvii-xxi; Leitch, *supra* note 182, at 169-78.

works — often quoting at length as they slowly read the argument being analyzed. As they recount the work of other texts they continually weave and unweave alternatives present and absent in the texts under scrutiny. Moreover, their accounts often seem quite playful. At times their playfulness seems very affirmative, validating one after another inconsistent approach to a given problem and suggesting that others be imagined. At times it seems nasty and sarcastic, as if the post-structuralist refuses to take the works he analyzes seriously even as he works them over with a fine tooth comb. Post-structuralism often juxtaposes an extremely serious and meticulous critical reading with an apparent lack of commitment to outcome or a playful imitation of more traditional work with an iconoclastic sounding critique.

These matters of style raise questions about post-structuralism as a scholarly practice. To those situated in the discipline under scrutiny, however flattering the attention, the playful tone and relentless recovery and rejection of various privileged relations often feels quite unfriendly. When the post-structuralist uses irony to suggest the simultaneous impossibility and necessity of some particular textual move, it is not the familiar irony of unmet expectations or suddenly juxtaposed opposites. It seems rather the irony of one pedagogue winking to another in bemusement as an acolyte struggles with some elemental difficulty. It is an irony which stings, for it suggests the failure of a text both in its own terms and as a result of its own terms. At the same time, however, the playful refusal to take on the projects of contemporary philosophy — to continue the attempt to interpret and solve the dilemmas posed by various disciplines — combines with the abandonment of any programmatic assertions to raise questions about the seriousness of post-structuralistic work. The same playful tone which seems critical and affirmative can seem apolitical, disengaged and nihilistic.

Despite these questions, legal scholars working in the traditions of structuralism or critical theory might find this material worth the formidable barriers to entry posed by difficult vocabularies and presumed familiarity with other texts.<sup>185</sup> Legal scholars often turn to other disciplines out of some frustration with the materials of law. Their diffuse manipulability makes it difficult to take positions or make professional choices with any sense of confidence. Both structuralism and critical theory purport to offer ground on which the lawyer can stand — the ground of social theory or textual structure. In this article, I have argued that both traditions ultimately fail to provide the sort of definitive or totalizing security which legal scholars have sought, for each proceeds by presuming precisely the authority it purports to generate.

The work of post-structuralists, by contrast, makes no such claim. Nevertheless, or perhaps, ironically enough, precisely as a result, the experience of

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185. With few exceptions, post-structuralists have devoted almost no energy to the study of law. Exceptions to this include: Barbara Johnson, *Melville's Fist*, in *THE CRITICAL DIFFERENCE* 79-109 (1985), and de Man's work on Rousseau in *ALLEGORIES OF READING* 135 (1979). For legal work explicitly influenced by the tradition of post-structuralism, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 *YALE L. REV.* 997 (1985); Frug, *The Ideology of Bureaucracy in American Law*, 97 *HARV. L. REV.* 1276 (1984); Hoy, *Interpreting the Law: Hermeneutical and Post-Structuralist Perspectives*, 58 *S. CAL. L. REV.* 136 (1985); Hutchinson, *From Cultural Construction to Historical Deconstruction*, 94 *YALE L. J.* 209 (1984); Kennedy, *Spring Break*, 63 *TEXAS L. REV.* (1985).



reading post-structuralist literature does seem to provide the legal scholar with something to say about the perplexing disintegration of contemporary legal theory and doctrine. Partly post-structuralism works in legal scholarship precisely as structuralism and critical theory worked — providing citable outside authority for a set of interpretations. But more seems to be going on than that.

The habit of reading other work — merging with it and exploring the mechanisms of its own production — and infusing it with authority rather than assuming authority as an interpreter is, of course, familiar from the law. The suggestion that the scholar simply “restates” the law, exploring doctrine in its own terms is a congenial one. At the same time, the post-structuralist materials, by refusing the projects of the texts they so carefully read, suggest a more thorough-going scholarly distance from legal texts than other interdisciplinary alternatives. By modelling distanced work of this sort, post-structuralists do seem to provide an authority of sorts for standing more rigorously external to the law as a scholar — even if they do not provide a particular extra-disciplinary ground to stand upon or an authoritative method to apply.

Moreover, post-structuralism suggests a set of reading habits which might be useful for legal scholars. The close attention to texts is of obvious significance for legal work. The recovery of marginal assertions and exclusions in a text — breaking the analytic frame which a text generates for itself — is also instructive for scholars seeking to understand the mechanism of law's proliferation critically. The habit of refusing to accept particular textual hierarchies while acknowledging their inevitability allows the legal scholar to comprehend the various claims made by legal doctrine and theory without either adopting a particular claim as valid or rejecting the practice of legal interpretation altogether.

Much contemporary interdisciplinary work seems frustrating at least partly because it is often pursued out of a conviction that legal culture is anything but autonomous and yet generates theories about the relationship between law and society which require and reproduce a sense of the distinguishability of legal culture. The elaborate eclecticism of post-structuralism, weaving its analysis across a number of disciplinary boundaries, might reawaken the legal scholar's sense of law's participation in a broader culture without forcing him to produce a particular account of the relationship between law and society, which would reassert law's unsustainable distinctiveness. The post-structuralist text often resembles a collage — picking up various marginal strands from the text and juxtaposing them with other external materials to dislodge the text's own claims. This habit might reawaken the legal scholar's collegiate sensibilities and suggest a sense of law in culture which does not depend upon a simultaneous sense of law's distinctive features more effectively than a straightforward defense of a particular discipline's authority.

The post-structuralist habit of serious attention to text without surrender to the text's thematic claims or structure encourages both a distanced legal scholarship grounded in intellection and a more playful or ironic relationship to legal culture. This stance might appeal to critical legal scholars both because it could free us to understand the conditions of law's operation more fully and because it gives us a place in legal scholarship for the feelings of frustration and cynicism which first motivated our collective interdisciplinary tour. Although the post-structuralist cannon's appeal to legal scholars who

have been influenced by critical theory or structuralism suggests a leftist orientation for post-structuralism in the legal academy, post-structuralism seems poised rather equivocally between an affirmative criticism and a neo-conservative imitation.

