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## Foreword: On Building Houses

Steven L. Winter\*

“Where does it lead? . . . When you’re all done arguing, what have you got? Have you built a house? Have you helped somebody? Have you created a better world? Have you fought a battle worth fighting? Or are you banging into shadows on the wall of a cave?”<sup>1</sup>

### I. I Heard It Through the Great Vine

A funny thing happened to legal scholarship: Sometime during the 1980s, it started to turn back on itself like a Möbius strip.<sup>2</sup> For at least sixty years, legal scholars have debated the existence and nature of the constraints, if any, on legal decision making. Particularly in constitutional law, the debate has focused on the character of the politically, morally, or constitutionally proper constraints on judges. Within the jurisprudential mainstream, the contending candidates have included originalism, rule formalism, political theory, and moral philosophy. To this litany, there have been added the more recent strains of law and economics and a variety of hermeneutic approaches such as “law as

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1. Toner, *Senate Star Rides a Wave of Great Expectation*, N.Y. Times, Sept. 3, 1989, § 1, at 22, col. 2 (quoting Senator Bob Kerrey on the proposed flag burning amendment).

2. See Fiss, *The Death of the Law?*, 72 CORNELL L. REV. 1, 15-16 (1986) (bemoaning the practice of “law without inspiration” and observing that “the complexity and magnitude of our dilemma . . . suggests that we are caught in a circle”); Schlag, *Normative and Nowhere to Go*, 43 STAN. L. REV. 167, 177 (1990) (describing normative legal thought as repeatedly asking the same questions and constantly deriving the same solipsistic answers); see also Levinson, *Strolling Down the Path of the Law (and toward Critical Legal Studies?): The Jurisprudence of Richard Posner*, 91 COLUM. L. REV. 1221, 1252 (1991) (“Many of the critiques developed over the past twenty years or so seem to have reached, if not dead ends, then at least a measure of exhaustion.”).

integrity"<sup>3</sup> and "practical reason."<sup>4</sup>

In their turn, the legal realists and members of the critical legal studies movement have mounted sharply skeptical attacks on this mainstream endeavor. The indeterminacy critique, the critique of rights, and the "deconstruction" vogue have become familiar challenges to the very idea of meaningful constraints and, thus, to the most fundamental concept of law. Indeed, many have argued that legal rules are always and inevitably manipulated by powerful social actors in the service of ideological or political ends.<sup>5</sup> This view is aptly summed up by the motto "law is politics."<sup>6</sup>

Notwithstanding the irreconcilable points of view, both sides of this conventional debate share a basic assumption: If there are no constraints, judges and other powerful legal actors will be free to impose their values. That eventuality is vigorously decried by the legal mainstream;<sup>7</sup> it must be avoided at all costs because it would be *Lochnerism* or, worse, nihilism.<sup>8</sup> For the more vocal critics, on the other hand, value

3. See R. DWORKIN, *LAW'S EMPIRE* 225-28 (1986).

The adjudicative principle of integrity instructs judges to identify legal rights and duties, so far as possible, on the assumption that they were all created by a single author—the community personified—expressing a coherent conception of justice and fairness. . . . According to law as integrity, propositions of law are true if they figure in or follow from the principles of justice, fairness, and procedural due process that provide the best constructive interpretation of the community's legal practice.

*Id.* at 225.

4. See Farber, *Legal Pragmatism and the Constitution*, 72 MINN. L. REV. 1331, 1332-33, 1348-49 (1988) (providing a pragmatist solution to the foundationalist project to "show that *Lochner* is illegitimate and then apply the theory to *Roe*" and noting that "[t]he difference between the pragmatist and the foundationalist is not that the pragmatist disavows legal theory, but rather that the pragmatist takes no position in advance about how broad in scope such theory should be"); Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 22-33, 74 (1986) ("One can usefully describe, and significantly criticize, particular judicial performances in terms of their apparent degrees of commitment to mediative practical reason through normative dialogue."); see also Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32, 57-59, 72-73 (1985) (discussing the advantages of and problems with moving away from a pluralist understanding of how government should operate and toward a republican view which "assumes that 'practical reason' can be used to settle social issues").

5. See Kairys, *Introduction*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 3-8 (D. Kairys 2d ed. 1990).

6. See, e.g., Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1518 (1991) ("[I]n general, there does seem to be a sufficient degree of commitment [within CLS] to three propositions about law: that it is in some interesting sense indeterminate; that it can be understood in some interesting way by paying attention to the context in which legal decisions are made; and that in some interesting sense law is politics.").

7. "The question is not idly academic. If no uniquely correct resolution exists to a particular legal dispute, judges must decide as their personal convictions or political preferences dictate rather than as authoritative legal materials prescribe." Rakowski, *Posner's Pragmatism* (Book Review), 104 HARV. L. REV. 1681, 1682 (1991) (reviewing R. POSNER, *THE PROBLEMS OF JURISPRUDENCE* (1990)).

8. See Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 740-41 (1982).

imposition *is* all there is. Some have openly embraced “irrationalism,”<sup>9</sup> while others have professed a willingness to raise nihilism as their banner.<sup>10</sup> To the extent that the critics acknowledge a program at all,<sup>11</sup> they see it as time to give up the quixotic search for constraints and replace it with a more open process of politics, dialogue, or normative persuasion.

Yet, despite its sometimes ferocious quality,<sup>12</sup> the debate is not as momentous as it is deeply complicitous. The opposing positions participate in exactly the same understanding of objectivity and subjectivity as mutually entailed, dichotomous choices. It is true, of course, that the mainstream and the critics differ—often harshly—over their respective assessments of which pole “must be true.” But there remains between them an unspoken, almost symbiotic complicity: “We pass from absolute objectivity to absolute subjectivity, but this second idea is no better than the first and is upheld only against it, which means by it.”<sup>13</sup> Indeed, as Pierre Schlag suggests in his essay, *The Problem of the Subject*,<sup>14</sup> jurisprudential approaches as disparate as Langdellian formalism and critical legal studies are framed by a limited set of permutations on the subject-object dichotomy.

Much the same thing appears to be going on down the hall in the philosophy department. Faced with the depredations of the demon deconstruction, the Anglo-American mainstream reacts with a panic that suggests nothing so much as an analytic anxiety attack.<sup>15</sup> Richard Rorty explains this angst as part of the long-standing dispute between the transcendentalists and the historicists:

[G]ranted that Derrida is the latest and largest flower on the dialectical kudzu vine of which the *Phenomenology of Spirit* was the first tendril, does that not merely show the need to uproot this creeping menace? Can we not now see all the better the need to strip the suckers of this parasitic climber from the still unfinished walls and roofs of this great Kantian edifice which it covers and

9. See, e.g., Dalton, Book Review, 6 HARV. WOMEN'S L.J. 229, 231 (1983) (reviewing THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE (D. Kairys ed. 1982)).

10. See, e.g., Gabel & Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1, 17 (1984) (“Nothingness is the worm at the heart of being. I’m willing to embroider that on the flag.”) (Kennedy).

11. Cf. Tushnet, *An Essay on Rights*, 62 TEXAS L. REV. 1363, 1398-400 (1984) (arguing that by offering a “blueprint,” critics risk falling into the “utopianism,” “lack of program,” and “Stalinism” traps).

12. See, e.g., Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222, 227 (1984) (“A lawyer who succumbs to legal nihilism . . . must contemplate the dreadful reality of government by cunning and a society in which the only right is might.”).

13. M. MERLEAU-PONTY, THE PHENOMENOLOGY OF PERCEPTION 39 (C. Smith trans. 1962).

14. 69 TEXAS L. REV. 1627 (1991).

15. See, e.g., Searle, *The Word Turned Upside Down*, N.Y. REV. OF BOOKS, Oct. 27, 1983, at 74, 77 (reviewing J. CULLER, ON DECONSTRUCTION (1983)) (“Michel Foucault once characterized Derrida’s prose style to me as ‘obscurantisme terroriste.’” (emphasis in original)).

conceals?<sup>16</sup>

Nevertheless, Rorty doesn't think there is really very much at stake: "The issue between Kantian and non-Kantian philosophy is, I think, about as serious as the issue between normal and deviant sexual practices."<sup>17</sup>

Even so, Rorty wryly recommends against tolerance:

We cannot just let the Kantians have their (self-eliminating) kind of writing and the Hegelians their (self-extending, kudzu-like) alternative kind. Being conciliatory in this way would obscure the fact that these traditions live each other's death, die each other's life . . . . The dialectician will always win if he waits long enough, for the Kantian norm will in time become tedious, full of anomie and anomaly. The Kantian, on the other hand, escapes triviality . . . only by the contrast between his mighty deeds and the mere words of the dialectician. *He* is no effete parasite, but one who does his share in the mighty time-binding work of building the edifice of human knowledge . . . . The non-Kantian knows that the edifice will itself one day be deconstructed, and the great deeds reinterpreted, and reinterpreted again, and again. But of course the non-Kantian *is* a parasite—flowers could not sprout from the dialectical vine unless there were an edifice into whose chinks it could insert its tendrils. No constructors, no deconstructors. No norms, no perversions. . . . Without the fun of stamping out parasites, on the other hand, no Kantian would bother to continue building. Normal philosophers need to think, for example, that in forging the powerful tools of modern analytic philosophy, they are developing weapons to ensure victory in the coming final struggle with the decadent dialecticians. Everybody needs everybody else.<sup>18</sup>

In an ironic sense, then, it *is* the edifice of Western thought that is at stake. Only it isn't threatened by deconstruction, but rather by the thought that the "final struggle" might actually take place. Armageddon would leave nothing standing. But, far worse, it would leave nothing left to build, do, or say. From this perspective, the debate represents a fertile symbiosis; it is necessary to everyone's academic survival.<sup>19</sup> Indeed, as Rorty remarks: "This kind of crosstalk can continue indefinitely."<sup>20</sup>

So, with the solipsistic arrogance typical of this kind of cognitive

16. R. RORTY, *Philosophy as a Kind of Writing: An Essay on Derrida*, in CONSEQUENCES OF PRAGMATISM 103-04 (1982).

17. *Id.* at 106.

18. *Id.* at 107-08 (emphasis in original).

19. See S. FISH, *Anti-Professionalism*, in DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 215 (1989) [hereinafter DOING WHAT COMES NATURALLY].

20. R. RORTY, *supra* note 16, at 108.

politics,<sup>21</sup> each side continues to insist that their opponents really want to do what they themselves are doing.

The Kantian thinks of the non-Kantian as somebody who would like to have a proper, disciplined, philosophical view about, e.g., words and the world, but can't quite manage to get it together into a coherent, rigorous form. The Hegelian likes to think that there is not really a contrast between the vine and the edifice it covers—rather, the so-called edifice is just accumulated dead wood, parts of the Great Vine itself, which once were fresh and flower-laden but now have come to lie in positions which suggest the outlines of a building.<sup>22</sup>

In much the same way, mainstream legal theorists turn to the critics and demand from them a normative program. And the critics, in turn, accuse the mainstream theorists of perpetrating false necessity. Law, they say, is just a reification of the Great Vine passing itself off as a building. With all this cross-disciplinary mimesis going on, it is hardly surprising to find symposia on Kant and Hegel taking place in law reviews at opposite ends of Manhattan Island.<sup>23</sup>

At this point, one might think, we should smile knowingly and, with a nod and a wink, begin the next round. After all, the philosophers have kept up this crosstalk for centuries, and there is every indication that law has become the contemporary successor to this in marvelously self-sustaining language-game.<sup>24</sup> But in another of the ironic twists so typical of this curious, discursive world, some have begun to question the intelligibility of the building-vine distinction. Does it really matter whether our current habitation is “The House that Reason Built” or just a remnant of “The Great Vine of Contingency”? It is ours, isn't it? Surely there is a better, more meaningful way to engage our situation.

In fact, some of us are beginning to suspect not only that the edifice is the Great Vine, but also that we and our predecessors have *ourselves*

21. See Schlag, *Missing Pieces: A Cognitive Approach to Law*, 67 TEXAS L. REV. 1195, 1221-27 (1989) (discussing how rationalism avoids dissonance by assimilating the *formal* insights of modernism into more stable *substantive* claims, “just so much furniture for rationalist consciousness to push around”); Schlag, *Contradiction and Denial* (Book Review), 87 MICH. L. REV. 1216, 1220 (1989) (reviewing M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* (1987)) (“When we project such crude and primitive views of subject-object relations onto the texts of others, we find (not surprisingly) that these texts are weak and flawed. . . . Unfortunately, when we make this discovery, we are often discovering something, not about the targeted theories, but about our own preconscious contributions.”).

22. R. RORTY, *supra* note 16, at 108.

23. See *Symposium on Kantian Legal Theory*, 87 COLUM. L. REV. 421 (1987); *Hegel and Legal Theory Symposium*, 10 CARDOZO L. REV. 847 (1989).

24. See A. MACINTYRE, *WHOSE JUSTICE? WHICH RATIONALITY?* 344 (1988) (“[T]he mark of a liberal order is to refer its conflicts for their resolution, not to those [philosophical] debates, but to the verdicts of its legal system. The lawyers, not the philosophers, are the clergy of liberalism.”).

been planting and tending it all along.<sup>25</sup> Consequently, we find that attention to the terms of the debate may be more revealing of how we construct our world—and, thus, more helpful in our engagement with it—than the more familiar preoccupation with the ideational content of the opposing positions. Take Rorty's "Kantian edifice" metaphor, for example. It is only a particular instantiation of a more general, highly conventional metaphor that conceptualizes theories as buildings—which is why it is syntactically appropriate to say that theories should *stand* or *fall* on their merits or to speak of *building* or *constructing* theories, of empirical *support*, of philosophical *foundations*, even of *deconstruction*.<sup>26</sup> So too, Rorty's "kudzu" and "Great Vine" metaphors are examples of a conventional metaphor that conceptualizes ideas as plants—which is why an idea can *blossom*, *flower*, *bear fruit*, or *die on the vine*.<sup>27</sup> Thus, the Kantian edifice and the Great Vine turn out to be nothing but our constructs after all. No wonder we cannot tell them apart.<sup>28</sup>

There will, of course, always be those who insist upon the integrity of the building and warn against the chaos that will ensue if we abandon "The House of Reason." But it is this very anxiety for some solid foundation that introduces the problem of nihilism.<sup>29</sup> The alternative, how-

25. See, e.g., Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1145 (1988) ("[O]ur individual reality is socially constructed in and through dialogue with others. The me is always constituted in and through the we."); Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. PA. L. REV. 1105, 1152, 1222-23 (1989) (examining the metaphoric structure of our conception of law and arguing that law, therefore, "is not an objective 'thing'" or "brooding omnipresence" but "a purely human creation, an imaginative product of the human cognitive capacity"); see also Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 906-10 (1988) (arguing that "the structure of social and economic life . . . has consequences for the formation of associative relationships which in turn have consequences for the formation of character").

26. G. LAKOFF & M. JOHNSON, *METAPHORS WE LIVE BY* 46, 52-53 (1980). Mainstream legal discourse is no less dependent on this conventional conceptual metaphor. See, e.g., *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) ("This would be to overthrow, in fact, what was *established in theory*. . . . This doctrine would *subvert* the very *foundation* of all written constitutions." (emphasis added)); Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1061 (1990) (stating that "in the world of thought he must *build* his own *foundations* for himself, and indeed *rebuild* them whenever he starts to think again" (emphasis added)).

27. G. LAKOFF & M. JOHNSON, *supra* note 26, at 47; see, e.g., Gabel & Kennedy, *supra* note 10, at 40 (noting that "these concepts [such as rights] are like organic things that live and die") (Kennedy).

28. Cf. W. STEVENS, *An Ordinary Evening in New Haven*, in *THE COLLECTED POEMS OF WALLACE STEVENS* 466 (1965) ("Suppose these houses are composed of ourselves, / . . . So much ourselves, we cannot tell apart / The idea and the bearer-being of the idea.").

29. "Nihilism, I would suggest, is the peculiar product of this rationalist schema. When there is no secure place to stand, no foundation free from dislodgement, no separation of subject-from-object-from-context, then chaos seems obviously to threaten." Winter, *Without Privilege*, 139 U. PA. L. REV. 1063, 1067 (1991). This nihilism-fear coincides with what Richard Bernstein has identified as the "Cartesian Anxiety." See R. BERNSTEIN, *BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS, AND PRAXIS* 16 (1983). "Either there is some support for our being, a fixed foundation for our knowledge, or we cannot escape the forces of darkness that envelop us with madness, with intellectual and moral chaos." *Id.* at 18 (emphasis in original).

ever, is neither disorder nor resignation in the face of blind contingency.<sup>30</sup> It is, rather, a recognition that “truth” is itself a human product: “[T]he phenomenon of truth, which is theoretically impossible, is known only through the praxis that *creates it*.”<sup>31</sup>

An appreciation of the constitutive role of human action in shaping (human) meaning suggests possibilities for a reconstruction of the jurisprudential debate. Employing insights from feminism, phenomenology, cultural anthropology, cognitive theory, and Derridean deconstruction, some of the emerging generation of legal scholars have begun simultaneously to challenge the legal academy’s idea of objectivity and its conventional understanding of subjectivity. For us, these symbiotic assumptions jointly purvey a single, false, and distorted picture of the social and legal world. In their place, we have stressed a more complex and reflexive understanding of the human subject and of the social and legal world that it simultaneously inhabits and constructs.

The fulcrum of this approach is a collapse of the subject-object dichotomy that in turn yields a distinctive appreciation of the role of culture both in constructing and enabling subjectivity.<sup>32</sup> By necessary implication, this understanding renders naive if not peculiar the traditional problematic that has simultaneously animated mainstream legal

30. Cf. M. MERLEAU-PONTY, SIGNS 85 (R. McCleary trans. 1964):

[C]onsider the long history of a language, with all the random factors and all the shifts of meaning that have finally made it what it is today. [Viewed this way, i]t becomes incomprehensible that a language which is the result of so many accidents can signify anything whatsoever unequivocally. Taking language as a *fait accompli* [one] inevitably misses the peculiar clarity of speaking, the fecundity of expression. From the phenomenological point of view (that is, for the speaking subject who makes use of his language as a means of communicating with a living community), a language regains its unity. It is no longer the result of a chaotic past of independent linguistic facts but a system all of whose elements cooperate in a single attempt to express which is turned toward the present or the future and thus governed by a present logic.

31. *Id.* at 96 (emphasis in original); see also G. LAKOFF, WOMEN, FIRE, AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND 296 (1987) (“Because . . . truth cannot be characterized simply as correspondence to a physical reality, we must recognize truth as a human concept, subject to the laws of human thought.”).

32. See Winter, *Indeterminacy and Incommensurability in Constitutional Law*, 78 CALIF. L. REV. 1441, 1485-94 (1990) (asserting that “[t]o locate the subject within a social, cultural, and historical situation is to reestablish that subject as an entity somehow separate from that situation” and that, instead, we need to recognize that “[w]e are unavoidably constituted by the political actions of our predecessors and, at the same time, constituting through our politics the world that our successors will inherit”); Coombe, *Room for Manoeuver: Toward a Theory of Practice in Critical Legal Studies*, 14 LAW & SOC. INQUIRY 69, 74-75 (1989) (urging that we need “to understand the full implications of the recognition that subjective experience is culturally mediated by the structure(s) we socially create”); Cornell, *Toward a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 297 (1985) (describing Hegel’s understanding of “[t]he self . . . as constituted by and at the same time partially constitutive of a process of intersubjective interaction” (emphasis in original)), see also Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie*, 98 YALE L.J. 1321, 1373-83 (1989) (criticizing Derrida for failing to take into account the constitutive role of culture).



theory and stimulated its critique: the danger of unchecked subjectivity and the uncertain existence of meaningful constraints. For once we take into account the role of culture both in constructing and enabling subjectivity, each pole of the conventional debate appears to rest on something like a category mistake. On one hand, the fear that judges will impose their "personal" values seems to confuse social construction with solipsism.<sup>33</sup> On the other, the search for formal constraints seems to confound constraint with determinacy. The emerging alternative, in comparison, recognizes the complex, incomplete nature of constraint and attempts actively to investigate its implications.<sup>34</sup> This symposium is thus an invitation to and an exploration of a different way of thinking about the law.

## II. Law, Culture, and the Politics of Form

If there is some complex middle ground between the polar options of radical freedom and formal constraint that trouble the conventional legal debate, what could it be? What is left after we have deconstructed both formalism and solipsism?

To begin to answer these questions, it is important to understand what is distinctive about the emerging reconceptualization of the subject that animates this vision of the law. What sets it apart from ostensibly similar efforts is the way in which it moves beyond the dichotomies and polarities that so limit more conventional approaches. It is thus able to

33.

[To] conclude that every self must be a "unique" individual whose "content" is entirely contingent upon its peculiar life experiences . . . would mistake social construction for solipsism. The roles and other modes of interaction that constitute the "self" are acquired through interaction with others who themselves, in turn, have acquired those roles in the same way. Thus, the interactions necessarily take place in an already existing social context in which the actions and roles are already endowed with social meaning. In this sense, all social roles are like [Alasdair] MacIntyre's notion of character in that "a knowledge of the [role] provides an interpretation of the actions of those individuals who have assumed the [role]. It does so precisely because those individuals have used the very same knowledge to guide and to structure their behavior."

Winter, *Contingency and Community in Normative Practice*, 139 U. PA. L. REV. 963, 990-91 (1991) (footnote omitted) (brackets in original) (quoting A. MACINTYRE, *AFTER VIRTUE* 27 (2d ed. 1984)); see also S. FISH, *Dennis Martinez and the Uses of Theory*, in *DOING WHAT COMES NATURALLY*, *supra* note 19, at 386 ("[A]n agent so embedded would not need anything external to what he already carried within him as a stimulus or guide to right—that is, responsible—action . . ."); Binder, *supra* note 25, at 910 (stating that people "adhere to roles because of their psychological commitments to fulfill the images that others have of them and in terms of which others recognize them").

34.

Thus, although there are cultural constraints on judges, those constraints are partial rather than total, local rather than universal. . . . In my view the project of legal theory is to explore these processes, map these patterns, and unearth the underlying cultural models that animate legal doctrine and structure judicial decisionmaking.

Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639, 690 (1990); see also Winter, *supra* note 32, at 1500-02.

avoid the mistakes typical of more familiar versions of the social construction of the subject: neither dissolving the subject into its determining structures,<sup>35</sup> nor reinstating a “relatively autonomous subject” that is—somehow—effectively free of the social construction it otherwise acknowledges.<sup>36</sup>

By way of comparison, consider the recent work of Robert Post.<sup>37</sup> It is emblematic of a certain received view of the social construction of the subject and typical of the way in which postmodernism is deployed within contemporary legal thought. In his introduction to the collection of essays entitled *Law and the Order of Culture*,<sup>38</sup> Post begins by acknowledging the postmodernist insight that meaning is a function of symbolic systems which necessarily precede any individual subject.<sup>39</sup>

35. See Coombe, *supra* note 32, at 83-88, 117-18 (arguing that our understanding of subjectivity must be reformulated to recognize the structurality of experience without resorting to determinism and denying human agency and creativity); Winter, *supra* note 34, at 655-56, 684 (following Merleau-Ponty (see note 51 *infra*) and arguing that freedom should not be understood as independence from social constraint, but rather that freedom arises because “these ‘constraints’ provide the enabling conditions of possibility”); Winter, *supra* note 32, at 1485-92 (urging a view that more fully appreciates the situated yet imaginative—as opposed to wholly autonomous and self-directing—nature of the human subject); Winter, *supra* note 33, at 987-97 (tracing the inseparability of self, social role, and community, while specifying how the social construction of the self yields an adaptive agency rather than a socially determined instrument).

36. Compare Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37, 44 (1987) (describing and critiquing “a relatively autonomous twentieth century self which readily accepts the influence of social context and social convention in the construction and interpretation of daily life” but which nevertheless manages to “survive[] the onslaughts of Freud, Marx, and all the other moderns”) with Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, 11 CARDOZO L. REV. 1613, 1629 (1990) (“The deconstructor of the self is still picking her targets. . . . And this choice . . . is still the grinding of a particular ax, whether its real motivations are conscious or unconscious, whether the self who makes this choice is wholly autonomous or wholly constructed. . . . For only selves can put the self in question—there is quite literally no one else to do it.”).

In his contribution to this symposium, however, Jack Balkin now joins us in “discovering” the social construction of the subject and in recognizing its implications for the way in which we understand human freedom. Balkin, *The Promise of Legal Semiotics*, 69 TEXAS L. REV. 1831, 1848 (1991) (“The modernist project does not fully come to terms with the social construction of the self. It still clings to the notion of a relatively autonomous self who in some way stands apart from culture and the forces of social construction. . . . Our discovery of the terms of our social construction, then, does not entail a loss of freedom or authenticity but rather involves coming to understand what freedom and authenticity really mean.”); see also Balkin, *Ideology as Constraint* (Book Review), 43 STAN. L. REV. 1133, 1137 n. 23 (1991) (reviewing A. ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)) (noting that “[r]ecently, a number of CLS or CLS-influenced thinkers have begun to write extensively about the social construction of the subject and its consequences for legal theory”).

37. See, e.g., Post, *The Social Foundations of Defamation Law: Reputation and the Constitution*, 74 CALIF. L. REV. 691 (1986); Post, *The Social Foundations of Privacy: Community and Self in the Common Law Tort*, 77 CALIF. L. REV. 957 (1989); Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and Hustler Magazine v. Falwell*, 103 HARV. L. REV. 601 (1990).

38. Post, *The Relatively Autonomous Discourse of Law*, in *LAW AND THE ORDER OF CULTURE* vii (R. Post ed.) (forthcoming 1991).

39. *Id.* at viii. Tellingly, however, Post refers to these systems as “faceless and impersonal systems of discourse” and as “empty matrices of cultural systemics.” *Id.* It is as if these cultural

Nevertheless, he assumes "the familiar [image] of law attendant upon a politics that occurs in a realm of exchange among fully constituted subjects."<sup>40</sup> Post is candid about the reason for this assumption: It is the only image that is "logically compatible with the concept of law as a relatively autonomous discourse" and that poses no more than "the problem of politics as usual."<sup>41</sup>

The situation is quite otherwise, however, if cultural discourse is understood to constitute and to undermine the subjectivity of the very citizens who seek to engage in politics. If "power," to use Foucault's words, "makes individual subjects," then . . . [t]he issue is not merely one of historical determinism and consequent political passivity, but, more deeply, of the possible meaning of politics . . . . It would seem that *any* potential political outcome would merely reinscribe initial conditions of deprivation.<sup>42</sup>

Notice the narrow, polarized way in which Post has framed the theoretical alternatives. For Post, politics is the domain "of action and decision [in which] we (at least in some degree) *choose* our legal fate."<sup>43</sup> But, because he (mis)understands postmodernism as having inscribed the self within a totalizing matrix of "culture" or "power," he identifies it with an image of politics in which (to borrow Margaret Jane Radin and Frank Michelman's phraseology) one "could hardly do other than statically ex-

discursive systems were somehow maintained other than through the interactions of real humans, a weakness that I examine below at text accompanying notes 43-56 *infra*. Cf. M. FOUCAULT, POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977, at 98 (C. Gordon ed. 1980) ("The individual is an effect of power, and at the same time, or precisely to the extent to which it is that effect, it is the element of its articulation.").

40. Post, *supra* note 38, at xiv.

41. *Id.*

42. *Id.* (quoting Foucault, *The Subject and Power*, in MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 212 (H.L. Dreyfus & P. Rabinow eds. 1983) and citing M. FOUCAULT, *supra* note 39, at 96) (emphasis in original) (footnotes omitted). One should not, however, mistake this rendition for an accurate account of Foucault. For Foucault, power is never totalizing, but inevitably entails resistance:

[T]here are no relations of power without resistances; the latter are all the more real and effective because they are formed right at the point where relations of power are exercised; resistance to power does not have to come from elsewhere to be real, nor is it inexorably frustrated through being the compatriot of power. It exists all the more by being in the same place as power . . . .

M. FOUCAULT, *supra* note 39, at 142. Foucault, moreover, does not equate power with cultural discourse. Rather, he understands discourse as standing in an ambivalent relation to power:

We must make allowance for the complex and unstable process whereby discourse can be both instrument and effect of power, but also a hindrance, a stumbling-block, a point of resistance and a starting point for an opposing strategy. Discourse transmits and produces power; it reinforces it, but also undermines and exposes it, renders it fragile, and makes it possible to thwart it.

M. FOUCAULT, THE HISTORY OF SEXUALITY, VOLUME I: AN INTRODUCTION 101 (R. Hurley trans. 1978).

43. Post, *supra* note 38, at xii (emphasis added). The echo here of Jack Balkin's affirmation is, I think, not coincidental. See Balkin, *Tradition, Betrayal, and the Politics of Deconstruction*, *supra* note 36, at 1629.

change the products of these . . . culturally codified . . . structures.”<sup>44</sup> Thus, in Post’s rendition of the postmodernist account, the subject is necessarily dead on arrival, and politics is always already aborted. “[W]hen coercive external structures are also and simultaneously seen as constitutive of the very self that seeks autonomy[, p]olitical emancipation . . . necessarily turns Sisyphean, aptly described in images of the ‘permanant’ and the ‘indeterminant.’ ”<sup>45</sup>

Because of his precommitment to law and to politics—at least, as we currently know it<sup>46</sup>—Post must avoid any serious recognition of the social construction of the subject.<sup>47</sup> Only a subject that is (at least) relatively free can engage in politics. “Were it otherwise all our comprehension of the relative autonomy of the law would not much matter.”<sup>48</sup>

Despite his candor, there is reason to suspect that the causal relation runs the other way—i.e., that Post’s position with respect to politics and law is driven by a prior commitment to the relative autonomy of the self.<sup>49</sup> The tipoff is in the way he frames his premise. In Post’s rendition of the social construction of the subject, “cultural discourse is understood to constitute and to undermine . . . subjectivity.”<sup>50</sup> But this cannot be; it is a conceptual sleight of hand, a *dôuble mis-entendre*. A subjectivity that is constituted by cultural discourse is not undermined because of

44. Radin & Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. PA. L. REV. 1019, 1042 (1991) (describing what happens to any cultural-cognitive account of meaning that proceeds in a reductive manner).

45. Post, *supra* note 38, at xv.

46. Cf. Schlag, *Normativity and the Politics of Form*, 139 U. PA. L. REV. 801, 906 (1991) (suggesting that the conventional vision of politics “seems to be a kind of premature politicization in the sense that it leaps from a now relatively widely shared notion that law is politics to a shallow, yet apparently utterly definitive, conceptualization of politics”) [hereinafter *Politics of Form*]; Schlag, “*Le Hors de Texte, C’est Moi*”: *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631, 1671 (1990) (“[T]he ideational content of discussion about political or moral values—so-called ‘value choice talk’—is, as a political matter, virtually epiphenomenal”) [hereinafter “*Le Hors de Texte*”]; Winter, *supra* note 32, at 1472-73 (arguing that the reconstructive project requires that we relinquish our unsophisticated notion of politics).

47. See Post, *supra* note 38, at xvi (“The possibility of [a quintessentially *political*] commitment does not ring falsely, at least to me. In this way the old struggle for particular values, for particular forms of politics and law, continues even in the teeth of the discursive dissolution of the self.”).

48. *Id.* at xvi.

49. As Charles Taylor warns: “Doctrines which are supposedly derived from the sober examination of some domain into which the self doesn’t and shouldn’t obtrude actually reflect much more than we realize the ideals that have helped constitute this identity of ours.” C. TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* ix (1989). Because, however, the notions both of a relatively autonomous self and of law as a relatively autonomous discourse are integral parts of a single conceptual system, it may be inappropriate to speak of one as a “cause” of the other. It may be more meaningful to say that the powerful appeal of the idea of law as a relatively autonomous discourse is that it offers and entails a flattering conception of “self” as self-directing and in control.

50. Post, *supra* note 38, at xiv.

it.<sup>51</sup> To the contrary, the idea that the subject is constituted by cultural discourse undermines nothing except the *conventional* idea of subjectivity as unique and radically free.

Besides, Post's metaphors are all wrong. For culture to *under-mine* the subject, it would have to subvert the ground upon which the subject rests. But the metaphor of cultural *construction* means nothing if not that culture *is* the ground which makes the subject possible. Conversely, to be *under-mined* by culture, the subject would have to be separate from—if not, indeed, *above*—culture. Thus, in formulating the premise in the way he does, Post reinscribes a subject-culture distinction in his very description of the social construction of the subject. At the same time, Post reinscribes the internal-external distinction by placing culture outside the self: in his version, it is “coercive *external* structures [that] are . . . constitutive of the . . . self.”<sup>52</sup> Hence, for Post, cultural discourse cannot really be constitutive of the subject. Rather, culture remains forever outside and repressive of a subject that might otherwise be free.

This view of the relatively autonomous subject is reconfirmed by Post's depiction of culture. He reduces “cultural systems” to “a medium of political exchange” analogous to language.<sup>53</sup> This, in turn, implies

51. Cf. M. MERLEAU-PONTY, *supra* note 13, at 455 (“I am a psychological and historical structure. . . . All my actions and thought stand in a relationship to this structure. . . . The fact remains that I am free, not in spite of, or on the hither side of, these motivations, but by means of them.”); M. MERLEAU-PONTY, *SENSE AND NON-SENSE* 130 (H. & P. Dreyfus trans. 1964) (“[T]he bond which attaches man to the world is at the same time his way to freedom; . . . man, in contact with nature, projects the instruments of his liberation around himself not by destroying necessity but, on the contrary, by utilizing it . . .”).

52. Post, *supra* note 38, at xv (emphasis added). In spatializing culture and the self in this way, rendering the self an “inside” separate from culture, Post unconsciously invokes the very convention and understanding that constitutes him as a modern subject.

Our modern notion of the self is related to, one might say constituted by, a certain sense (or perhaps a family of senses) of inwardness. . . .

In our languages of self-understanding, the opposition ‘inside-outside’ plays an important role. We think of our thoughts, ideas, or feelings as being “within” us, while the objects in the world which these mental states bear on are “without”. . . .

But strong as this partitioning of the world appears to us, as solid as this localization may seem, and anchored in the very nature of the human agent, it is in large part a feature of our world, the world of the modern, Western people.

C. TAYLOR, *supra* note 49, at 111.

53. Post, *supra* note 38, at xiv. For those to whom the image of a medium and the analogy of language seem about right, consider the alternative understanding suggested by Jeremy Paul in his discussion of matched pairs of proverbs like “absence makes the heart grow fonder” and “out of sight, out of mind.” Paul, *The Politics of Legal Semiotics*, 69 TEXAS L. REV. 1779, 1815-20 (1991). He suggests that these maxims are better understood as “heuristic, emotional devices”—that is, “as evocative capsules that would trigger memories of how I have coped with similar decisions and experiences in the past.” *Id.* at 1817. Paul thus transcends the inside-outside distinction by subtly linking the most banal of discursive formulae with deeply meaningful phenomenological experience. In this way, a highly conventional, cultural proverb can operate not just as an “external” medium with which to communicate meaning, but rather as an “internal” marker of experientially-based, social knowledge.

distinct subjects whom this “medium” connects and between whom the back-and-forth of politics takes place. Thus, if Post thinks that the idea of the cultural construction of the subject undermines subjectivity, it is because—in the final analysis—he understands subjectivity as constituted not by culture but by *will*. It is this will which enables politics—that is, the *choice* of our legal fate—and, accordingly, yields the relatively autonomous discourse of law.

There are lessons to be learned here. If we are to understand the subject as socially situated and socially constructed in any meaningful sense, we must be careful to avoid re-inscribing the distinction between the internal and the external—which is to say, between the subject and its objects.<sup>54</sup> Thus, culture is not to be viewed as some determinate “thing” that exists outside us and connects us or directs our behavior. Rather, we must understand culture and self in non-reductive, non-reified ways. The constitutive action in which the self is already situated is also the field of social interaction in which the self is always implicated.<sup>55</sup> The self is a *process*, and culture *is* us and our behavior: “Society for man is not an accident he suffers but a dimension of his being. He is not in society as an object is in a box; rather, he assumes it by what is innermost in him.”<sup>56</sup>

This conception yields, in turn, an understanding of the social and legal world not as a pre-given, static configuration of power, but rather as an ongoing, socio-cultural construction. In this view, culture is that quintessentially human activity of meaning-creation: humans “somehow secrete culture without even wanting to.”<sup>57</sup> Law is one manifestation of

54. Winter, *supra* note 32, at 1485-86 (“To locate the subject within a social, cultural, and historical situation is to reestablish that subject as an entity somehow separate from that situation. . . . Situatedness is, rather, a way of describing the epistemological ecology in which we are simultaneously constituting and constituted.”); Coombe, *supra* note 32, at 70-71 (arguing that “the tension between subjectivist and structuralist strands is *not* one that all social theory must confront but is, rather, an oppositional structure that must be transcended” and that we need, instead, “to conceptualize the social world in terms which . . . avoid positing these as static dualisms of social life”); see also Schlag, *Contradiction and Denial*, *supra* note 21, at 1218-19 (discussing how the objectification and externalization of law provide legal thinkers with a technique to deny the contradictions that emanate from nowhere but themselves).

55. In this view, the self is not a pre-given reality, but merely a conceptual token for identifying one situs of a complex system. Cf. C. LÉVI-STRAUSS, *THE SAVAGE MIND* 148-49 (1966):

[I]n none of these cases can the animal, the ‘totem’ or its species be grasped as a biological entity: through its double character of organism—that is, of system—and of emanation from a species—which is a term in a system—the animal appears as a conceptual tool with multiple possibilities for detotalizing or retotalizing any domain, synchronic or diachronic, concrete or abstract, natural or cultural.

56. M. MERLEAU-PONTY, *supra* note 51, at 128-29; see also *id.* at 134 (noting that the human subject is “an activity given to itself in a natural and historical situation and as incapable of abstracting itself from that situation as it is of reducing itself to it.”).

57. *Id.* at 118.

the *nomos*-creating process that Robert Cover calls "jurisgenesis."<sup>58</sup>

This recognition of the systemic, processual character of culture, self, and law has quite significant ramifications for the way we think about law and legal theory. Whether we examine the countermajoritarian difficulty or the semiotic structure of legal argumentation, we discover over and over again the "extent to which cultural norms influence legal outcomes."<sup>59</sup> Indeed, at each and every point of entry, one finds the issues different and the stakes higher than we have previously been led to suspect.

Take, for example, the jurisprudential stances that dominate the academy. As Pierre Schlag shows, every approach from liberal legalism (specifically, the "rule of law thinkers") to critical legal studies, neo-pragmatism, and cultural conservatism raises the problem of the subject who is supposed to constitute and transmit its vision; each approach founders on its disinclination or inability to thematize and sustain such a subject.<sup>60</sup>

Consider, then, the subject. It is dependent on culture and cultural forms in its development of an individual identity. Consequently, as Rosemary Coombe argues, doctrines of commercial law concerning copyright and trademark protection are hardly neutral vis-à-vis the subject. Rather, they may impose surprising hardships and restraints on processes of identity-formation and political expression that we also

58. See Cover, *The Supreme Court, 1982 Term—Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 11 (1983) ("[T]he creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium.") [hereinafter *Nomos and Narrative*]. Consistent with his reduction of culture to a "medium of exchange," Post reduces Cover's insight to a mere "realization that social order requires the mediation of social meaning." Post, *supra* note 38, at vii. But this is seriously to misstate Cover. For Cover, "the thrust of *Nomos* [i]s that the creation of legal meaning is an essentially cultural activity which takes place (or best takes place) among smallish groups." Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1602 n.2 (1986) (emphasis changed from original).

Post's reduction also manages to miss the central argument of Cover's famed foreword: that statist law has no greater claim to normative legitimacy than does any other competing *nomos*. Indeed, for Cover, statist law has less legitimacy because of its distinctly imperial pretensions and deliberately jurispathic function. Cover, *Nomos and Narrative, supra*, at 44 ("By exercising its superior brute force, . . . the agency of state law shuts down the creative hermeneutic of principle that is spread throughout our communities."). For Post, in contrast, it is precisely this jurispathic quality which accounts for "the relative autonomy of the law" that he seems committed to defend.

As the uniquely "authorized discourse for the state," accidental law attempts to legitimize its coercive bite through distinctive aspirations toward such values as objectivity, neutrality, and rationality. . . . [L]aw uses the resources of the larger culture precisely in order to establish its own particular kind of cultural discourse. In this respect accidental law may accurately be described as a "relatively autonomous" cultural form.

Post, *supra* note 38, at vii-viii (footnote omitted).

59. Paul, *supra* note 53, at 1810; see also Winter, *An Upside/Down View of the Countermajoritarian Difficulty*, 69 TEXAS L. REV. 1881 (1991).

60. Schlag, *supra* note 14, at 1630.

value and protect.<sup>61</sup> And, as Guyora Binder argues, even the possibility of radicalism turns not on the prospect or promise of revolution—for that founders on the would-be radicals' deconstructive critique challenging the coherence of the idea of a formally realizable legal system—but rather on the potential of reconstructing the culture (and, thus, ourselves) by reconstructing our relationships with one another.<sup>62</sup>

As this last argument suggests, the focus on the complex, systemic nature of affairs need condemn us neither to stasis nor to undecidability. Rather, the insight that cultural forms both constrain and enable subjectivity provides an alternative way of thinking about the problems of law and social structure. If, as some suggest, “[c]ritique is all there is,”<sup>63</sup> then we hazard the kind of political quandary so poignantly illustrated by the legal decisions examined by Richard Delgado and Jean Stefancic: no matter how eloquent the appeal to an alternative vision, there remains the quite substantial risk that decision makers will evaluate those dissenting arguments or counter-narratives unreflectively—that is, through the prism of the dominant cultural assumptions and beliefs that make them who they are—and, thus, will be disabled from appreciating, let alone adopting, the perspective that is being offered.<sup>64</sup>

In contrast, the essays in this symposium offer a way of moving beyond mere critique to explore instead the role of cultural, cognitive, and socio-linguistic form in channelling, structuring, and configning practice. We propose to investigate the concrete ways in which, both in the realm of thought and of action, animating form can and does have a distinctive politics.<sup>65</sup>

This is what is meant by “the politics of form.”<sup>66</sup> The idea is to

61. Coombe, *Objects of Property and Subjects of Politics: Intellectual Property Laws and Democratic Dialogue*, 69 TEXAS L. REV. 1853 (1991).

62. Binder, *What's Left?*, 69 TEXAS L. REV. 1985 (1991).

63. M. TUSHNET, *RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW* 318 (1988).

64. Delgado & Stefancic, *Norms and Narratives: Can Judges Avoid Serious Moral Error*, 69 TEXAS L. REV. 1929 (1991); Winter, *supra* note 32, at 1494-98 (discussing the limitations of dialogue as a transformative methodology).

65. See, e.g., Delgado & Stefancic, *Why Do We Tell the Same Stories?: Law Reform, Critical Librarianship, and the Triple Helix Dilemma*, 42 STAN. L. REV. 207 (1989) (examining the convention-reinforcing character of research indexes and classification systems); Winter, *supra* note 59, at 1890-1919 (demonstrating the political valences of cultural conceptions like the concept of a park, the nature of religion, and the idea of land as resource); Winter, *The Metaphor of Standing and the Problem of Self-Governance*, 40 STAN. L. REV. 1371 (1988) (discussing how the conceptual structure of standing law yields in legal decision making a disaggregating individualism that hinders effective self-government).

66. Schlag, “*Le Hors de Texte*,” *supra* note 46, at 1670 (the politics of form “is the political constitution of human beings as particular kinds of selves, with particular kinds of social relations to each other”); Schlag, *Politics of Form*, *supra* note 46, at 893 (“The very form and practice of our thought already establishes us as such competent conversants in an already rational and rationally



examine the prevailing structures of thought “on the bias,” so to speak, in an attempt to reveal the way in which directionality, predilection, and normative precommitment are always already embedded in form.<sup>67</sup> As Jeremy Paul suggests, it is by opening a space for reflection in this way that legal theory can have a progressive political payoff.<sup>68</sup> Through these examinations of form and its practical-political consequences, we attempt to map the possibilities of a different, less empty frame for practice.<sup>69</sup>

Sixty years ago, Karl Llewellyn put the challenge gravely: “Life struggling against form, or through form to its will—‘pity and terror—’ Law means so pitifully little to life. Life is so terrifyingly dependent on law.”<sup>70</sup>

### III. Mere Working Masons

A wag once warned that “[a] lawyer without history or literature is a mechanic, a mere working mason.”<sup>71</sup> Quite so, for to concentrate on the bricks and mortar is to miss the significance and beauty of the architecture. In order to validate the claim that both the legal mainstream and its critique presuppose the subject-object dichotomy, I examine some familiar arguments concerning the public-private distinction in contract and family law. This discussion demonstrates the reflexive way in which apparently antagonistic arguments actually turn back on and collapse into one another. This cannibalistic tendency of conventional legal thought is no accident,<sup>72</sup> but is what inevitably occurs when one focuses on social actors and legal tools—that is, on subjects and objects—without stepping back to consider the role of the larger scene and context that they inhabit.

To drive the point home, I contrast the modern jurisprudential arguments with the evidence of an ancient literary classic—a juxtaposition that suggests the deeper, human underpinnings of what we frequently

legitimated discourse—as such relatively autonomous, coherent, integrated, rational, as originary, individual subjects . . . .”); Winter, *supra* note 32, at 1473-1505 (examining the politics of, and the relationship between, the relatively autonomous subject and legal formalism).

67. See, e.g., Winter, *supra* note 32, at 1450-53 (urging a more complex understanding of human cognition in which legal meaning is only possible within a temporarily stabilized matrix of contextual, non-neutral assumptions).

68. Paul, *supra* note 53, at 1810 (“In this sense, legal semiotics . . . will be anti-conservative if only in its ability to create reflection.”).

69. And for the practice of critique.

70. Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 751 (1931).

71. W. SCOTT, GUY MANNERING 249 (1815).

72. See generally Schlag, *Cannibal Moves: An Essay on the Metamorphoses of the Legal Distinction*, 40 STAN. L. REV. 929, 930 (1988) (describing how the practice of drawing legal distinctions—“the splits”—has evolved in a manner that threatens “to consume our visions of law, of reason, and perhaps of the splits themselves”).

mistake for discretely legal doctrine. In the succeeding sections, I invoke two real-life examples to trace some of the dimensions and implications of the insight that law is merely one manifestation of deeply rooted cultural forms.

Every year, both in Civil Procedure and in Federal Courts, I spend a week or more on Lon Fuller's *The Forms and Limits of Adjudication*.<sup>73</sup> We begin by carefully reconstructing his argument. Fuller contrasts adjudication to other forms of social ordering. He considers a hypothetical barter of potatoes for onions.

The subsistence farmer who has a surfeit of potatoes and only a handful of onions acts reasonably when he trades potatoes for onions. But there is no test of rationality that can be applied to the result of the trade considered in abstraction from the interests of the parties. Indeed, the trade of potatoes for onions, which is a rational act by one trader, might be considered irrational if indulged in by his opposite number, who has a storehouse full of onions and only a bushel of potatoes. If we asked one party to the contract, "Can you defend that contract?" he might answer, "Why, yes. It was good for me and it was good for him." If we then said, "But that is not what we meant. We meant, can you defend it on general grounds?" he might well reply that he did not know what we were talking about.<sup>74</sup>

After considering both elections and other examples of contracting, Fuller concludes that only adjudication is committed to "the peculiarly urgent demand of rationality"<sup>75</sup>—that is, the rigorous application of reason and principle.<sup>76</sup>

From this basic premise, he deduces both the permissible forms and limits of adjudication. "[A]djudication is a form of decision that defines the affected party's participation as that of offering proofs and reasoned arguments."<sup>77</sup> It is unsuitable for any area of human life that cannot or should not be subjected to this mode of rational disputation:

Adjudication is not a proper form of social ordering in those areas where the effectiveness of human association would be destroyed if it were organized about formally defined "rights" and "wrongs." Courts have, for example, rather regularly refused to enforce agreements between husband and wife affecting the internal organization of family life. . . . Wherever successful human association depends upon spontaneous and informal collaboration, . . . there

73. 92 HARV. L. REV. 353 (1978).

74. *Id.* at 367.

75. *Id.* at 370.

76. *See id.* at 366 ("Adjudication . . . gives formal and institutional expression to the influence of reasoned argument in human affairs.")

77. *Id.* at 369.

adjudication is out of place except as it may declare certain ground rules. . . .

. . . [T]he incapacity of a given area of human activity to endure a pervasive delimitation of rights and wrongs is also a measure of its incapacity to respond to a too exigent rationality, a rationality that demands an immediate and explicit reason for every step taken. . . . [T]he fundamental truth [is] that certain kinds of human relations are not appropriate raw material for a process of decision that is institutionally committed to acting on the basis of reasoned argument.<sup>78</sup>

In this category, Fuller includes not only affectional human relations, but also polycentric problems<sup>79</sup> and those that must be resolved by means of "managerial direction" or "intuition."<sup>80</sup>

At this point, I ask the class to reconsider Fuller's example of the potato-onion exchange. Would the farmer really be unable to justify the exchange "on general grounds?" Perhaps. But I suspect that Judge Posner would be surprised. Indeed, a really savvy farmer might say: "Why, of course. It was Pareto optimal." If pressed further, the farmer might explain that it was justified by the more "general ground" of wealth maximization, viewed as a general public good. And, if our farmer had also read Posner's *Economic Analysis of Law*, we would soon receive an explanation of how the principle of wealth maximization really accounts for the rationality of contract law.<sup>81</sup>

If it seems unfair or anachronistic to tax Lon Fuller with the subsequent insights of the law and economics movement, there is nevertheless an important lesson to be learned from this exercise. Frequently, what we take to be irrational is merely undertheorized. Because rationality is paradigm-dependent in just this way, it can be difficult to distinguish between reason and unreason with any assurance.<sup>82</sup>

Let us reconsider, therefore, Fuller's point that affectional human relations cannot and should not be governed by reason. It is a familiar, seemingly incontestable point. The related legal argument, that the state

78. *Id.* at 370-71.

79. A polycentric problem is one in which many interacting points of influence make it difficult to predict the repercussions of a decision. It is, for Fuller, a problem that must be resolved through adjustment rather than reason. See *id.* at 394-97 (discussing M. POLANYI, *THE LOGIC OF LIBERTY: REFLECTIONS AND REJOINDERS* 170-84 (1951)). Ultimately, however, Fuller concedes that "[t]here are polycentric elements in almost all problems submitted to adjudication," *id.* at 397, a point that does not escape deconstruction in my classes.

80. *Id.* at 398.

81. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 79-123 (3d ed. 1986).

82. Indeed, the relentlessly human capacity for meaning-making suggests that almost anything can be theorized—including contingency. As a cautionary note, therefore, it should be kept in mind that humans have read meaning in the stars (astrology) and, during ancient times, even in the entrails of animals.

should not “intervene” in the family, has quite conventional roots in nineteenth century liberal theory. “The classic laissez-faire arguments against state regulation of the free market find a striking parallel in the arguments against state interference with the private family.”<sup>83</sup> In each case, the liberal legal argument assumes a public sphere of objective reason in contrast to a private sphere of subjective preference, emotion, and desire.<sup>84</sup> The public sphere is the precinct of the state, the law, and adjudication. It is the sphere in which determinations are made according to reason and pursuant to neutral, decision-making procedures. The private sphere is the province of the market and the family. In this sphere, autonomous individuals interact on the basis of mutual self-interest, private preference, or emotional attachment.

But note how this distinction introduces the central problem of liberal theory with which we started: the need for constraints on the potentially ungovernable forces of self-interest and desire. Liberalism’s solution is to invoke reason—that is, the law—to set limits on autonomous action. Which is why, for Fuller, it is not only appropriate for the legal system to prescribe the ground rules for private ordering, but it is also a point so self-evident that it does not require justification.<sup>85</sup> Of course, this solution works only if there is a separate sphere of objective reason available to constrain subjective preferences. But it remains plausible as long as one continues to assume the subject-object dichotomy with all its cognate distinctions: objective vs. subjective, public vs. private, law vs. politics, procedure vs. substance, fact vs. value, reason vs. self-interest, reason vs. emotion, and so on.<sup>86</sup> In classic liberalism, it is

83. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1502 (1983).

84. Fran Olsen insists that “[t]here are two different dichotomies involved . . . . It is important to recognize the distinction between the state-civil society dichotomy and the market-family dichotomy.” *Id.* at 1501. Olsen recognizes, however, that the two dichotomies “share a great deal” and that they “are constructed of similar elements.” *Id.* at 1502.

One reason that Olsen insists on distinguishing between the two dichotomies is that, relative to the private family, the market is perceived as public. Thus, she fears that “[c]alling both the marketplace and the state ‘public’ can . . . confuse our thinking about the two dichotomies.” *Id.* at 1501. But one must wonder about the rigidity of a methodology that insists upon the dichotomies it intends to subvert. In contrast, it is perfectly possible to see the public-private distinction as a matter of degree: relative to the subjective preferences of the market, the state is the domain of objective reason. Relative to the subjective, emotional life of the family, however, the hardheaded self-interest of the market is perceived as objective.

85. Thus, in each case, Fuller is quite didactic. See Fuller, *supra* note 73, at 371 (“Wherever successful human association depends upon spontaneous and informal collaboration, . . . there adjudication is out of place except as it may declare certain ground rules.”); *id.* at 404 (“The court gets into difficulty, not when it lays down rules about contracting, but when it attempts to write contracts.”).

86. As Olsen points out, many of these distinctions were traditionally thought to correspond with the male-female dichotomy. Olsen, *supra* note 83, at 1575-77.

this sharp divide that simultaneously marks out the domain of public order and preserves a sphere of personal freedom. It is because so much turns on this divide that, for Fuller, the limits of adjudication "are exceeded only at some distinct moral risk."<sup>87</sup>

But this reliance on law and adjudication to fix the ground rules is what sets up the progressive critique that "deconstructs" the so-called public-private distinction. In the case of both the market and the family, it means that the state—that is, the public realm of reason—has already structured the relevant field of power relations.<sup>88</sup> In the commercial sphere, the previous distribution of legal entitlements will always affect the relative bargaining positions of the parties.<sup>89</sup> So too within the family: "The state is responsible for the background rules that affect people's domestic behaviors."<sup>90</sup> Indeed, one can go even further, acknowledging that "the state undertook to define the marriage relation and to enforce the roles it decided each family member would fill."<sup>91</sup> In each case, then, there is no meaningful separation between the public domain of reason and the private world of preference and desire. The latter is always dependent on and shaped by the former.

This critique seems powerful until one realizes that this was precisely what the liberal order wanted to accomplish in the first place: to engage reason to provide constraints on autonomous action. The critique still has power to the extent that the legal system professes to avoid "interference" with a private sphere that is somehow pre-political and "natural."<sup>92</sup> But once the sophisticated liberal acknowledges that neither the market nor the family exist in a purely "natural" state—that is, once she affirms that the purpose of the legal system is to contain and shape both—liberalism and its critique become one and the same. If there is a dispute that survives, it can only be over the nature of the ground rules that structure the relevant social field of the market or the family.

To avoid this collapse and retain its effectiveness as a critique of liberalism, the progressive analysis can do one of two things. First, it can

87. R. COVER & O. FISS, *THE STRUCTURE OF PROCEDURE* 507 (1979); see also Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REF. 835, 838 (1985) (characterizing the liberal position as believing in only limited state intervention in family matters because "[e]xcessive or unnecessary intervention jeopardizes people's freedom and interferes with family intimacy").

88. See Olsen, *supra* note 83, at 1508-13 (applying to the family the legal realists' critique of the "free" market).

89. Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1748 (1976).

90. Olsen, *supra* note 87, at 837.

91. Olsen, *supra* note 83, at 1522.

92. "The idea that the state can intervene or not intervene in the family . . . would seem to depend upon the belief that a natural family exists separate from legal regulations . . ." Olsen, *supra* note 87, at 846.

assume a target that insists upon the traditional dichotomies, including a radical separation between the objective and subjective spheres.<sup>93</sup> Only against this background can the critique seem to pull the rabbit out of the hat when it demonstrates that the public domain of the state is what really animates the supposedly private realm of the family or the market.

Second, the critique can take the next step and deny the integrity of the public sphere of objective reason, depriving even the sophisticated liberal of her ground. Indeed, this would almost seem to follow from the previous argument. To subvert the dividing line between the objective and the subjective is, in effect, to subvert both sides of the dichotomy. If there is no meaningful separation between the objective domain of public reason and the subjective world of private preference, then it follows that the two will merge and become entangled. If the private sphere of subjective preference is “really” shaped by the public sphere, then it may also be that the public side is “really” constructed by subjective preference. And so, in an ironic reversal, the critique immediately reasserts autonomous subjectivity as the dominant motif of the public sphere. With respect to the family, the critique insists that “the state *undertook* to define the marriage relation and to enforce the roles it decided each family member would fill.”<sup>94</sup> With respect to the market, it inquires: “If the judges had neither derived the common law rules from the concepts nor applied them mechanically to the facts, then what *had* they been doing? The altruist answer was that they had been legislating and then enforcing their economic *biases*.”<sup>95</sup>

The problem with this analysis is that it subjectivizes the public sphere.<sup>96</sup> This would follow, of course, if one presupposed that what is

93. Cf. Kennedy, *supra* note 89, at 1752 (emphasis added):

The premise of the political question gambit is that there is a *radical distinction* between the activity of following rules and that of applying standards. Standards . . . involve “value judgments.” . . . [V]alue judgments are *inherently arbitrary and subjective* . . . . By contrast, formally realizable rules involve the finding of facts. Factfinding poses *objective* questions susceptible to *rational* discussion.

94. Olsen, *supra* note 83, at 1522 (emphasis added); see also Olsen, *supra* note 87, at 842 (“The state defines the family and sets roles within the family; it is meaningless to talk about intervention or nonintervention . . .”).

95. Kennedy, *supra* note 89, at 1749 (emphasis in original) (describing the legal realist critique).

96. This conforms to the first half of what Foucault identifies as the “double ‘subjectivisation’” that results from a purely negative understanding of power.

In the aspect of its exercise, power is conceived as a sort of great absolute Subject which pronounces the interdict (no matter whether this Subject is taken as real, imaginary, or purely juridical): the Sovereignty of the Father, the Monarch or the general will. . . . [T]he problem is always posed in the same terms, . . . an essentially negative power, presupposing on the one hand a sovereign whose role is to forbid and on the other a subject who must somehow effectively say yes to this prohibition.

M. FOUCAULT, *supra* note 39, at 140. It is only this narrow conception of power as imposition that could plausibly explain Coombe’s assertion that I “never explore[] any social negotiations of meaning . . . , relegat[ing] the politics of meaning to a single phrase in a single footnote where [I] tersely

not objective must be subjective. But the critique cannot escape the reflexive power of its own analysis. The critique calls into question the very idea of an autonomous private sphere separate from the domain of public reason. Such a separation is incomprehensible because the so-called private sphere is always already situated in a larger social world. But, if this is correct, it must follow that the same is true of the state, of "power," of "social elites," or any other entity that is supposedly doing the "deciding."<sup>97</sup> In the end, then, there cannot be a public sphere of autonomous choice any more than there can be a private sphere of autonomous subjectivity.

It is at this point that literature might actually help. In class, I contrast Fuller's claim that the private sphere of affectional human relations is unsuited for the rigors of reasoned argument with the following passage from Euripides' *Medea*.<sup>98</sup> I read from the scene in which Medea and Jason have their first confrontation. Jason has abandoned Medea for a politically more advantageous alliance with the daughter of the King of Corinth. Medea reproaches him for his unfaithfulness:

As every hero of Hellas knows  
 Who sailed with you aboard the Argo,  
 When my father sent you  
 To tame the fire-breathing bulls, and yoke them,  
 And sow the deadly field with dragon's teeth  
 I saved your life!  
 Yes! And it was I who slew the serpent  
 Who wreathed his coils about the Golden Fleece,

note[] that 'people in power get to impose their metaphors.' " Coombe, *supra* note 61, at 1880 n.157. In fact, however, the very article of mine that she quotes contains an explicit discussion of the relationships between power, legal meaning, commitment, and social action. Winter, *supra* note 25, at 1226-33. For more detailed explorations of the negotiated social dimensions of power and meaning, see Winter, *The Cognitive Dimension of the Agon Between Legal Power and Narrative Meaning*, 87 MICH. L. REV. 2225, 2256-79 (1989) [hereinafter *The Cognitive Dimension*]; Winter, *The "Power" Thing* (forthcoming 1992).

97. For example, Olsen suggests that it is impossible to "envision[] a concept of family relationship that is not dependent on state law" because "[s]tate-created background rules shape and reinforce these social roles." Olsen, *supra* note 87, at 848. But these social roles did not spring full-grown like Athena from the brow of the legislature. Rather, the legislature itself could only have acted against the background of extensive social practices—as well as prior legal actions.

There is a faint hint of this realization in the parenthetical in Olsen's observation that "more children would be taken from their parents were it not for the legal (as well as social) disapproval of kidnapping." *Id.* at 851-52 n.46. Now, it is certainly the case that the law plays an important definitional role when it determines whether to treat as kidnapping a case in which the child of divorced or separated parents is taken by one of them without the consent of the other. Nevertheless, I rather suspect that, even if there were no law against kidnapping, parents would still react with horror to the taking of their child by a stranger. ("Oh, hon, Junior is missing. I wonder whether he was picked up again by some passing motorist.") Indeed, if there were no law against kidnapping, it is hard to imagine that parents wouldn't demand one.

98. EURIPIDES, *PLAYS: ONE—MEDEA, THE PHOENICIAN WOMEN, THE BACCHAE*, (J. Brooks trans. 1988).

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Guarding it sleeplessly, yes, it was I who raised  
The torch of your success!

My father and my home I left  
To come with you to Iolchos  
Below Mount Pelion, because my love for you  
Was stronger than my prudence. Next, I tricked  
The daughters of King Pelias, your rival,  
Into encompassing his dreadful death.  
All this I did for you.  
For you, you traitor!  
You, who have cast me off,  
Taking a new wife even though  
I have given you two sons!  
Had you been childless still  
I might have sympathised with your desire  
For a new marriage.

My trust in oaths is shattered.

. . .

My case, then, is just this:  
I have become the bitter foe  
Of my own homeland  
For your sake. I have gained the enmity  
Of harmless friends  
For your sake. For my reward I'm seen  
By women everywhere as truly blessed—  
Possessor of an unparalleled loyal lord—  
So loyal, for pity's sake, he'd cast me out,  
Friendless, an exile,  
A woman, with two children, all alone!<sup>99</sup>

There is a conspicuous forensic quality to Medea's rhetoric ("My case, then, is this").<sup>100</sup> But what is most salient about this passage is that

99. *Id.* at 20-21.

100. Jason's reply strikes a similar lawyerly chord:  
As for your reproaches about my marriage,  
I can show, first, that it was prudent,  
Second, that it was not prompted by passion,  
Third, that it should have been to your advantage  
And to the advantage of our sons.

*Id.* at 23. His argument, in short, is that his actions were reasonable and undertaken in good faith. But Medea makes a telling point in rebuttal:

No doubt I differ from others in many ways.  
To me, the man with skill to fence with words  
In an unjust cause should be the more condemned.  
So sure that he can cast a decent veil  
Of pompous righteousness over his foul deeds,  
He pursues them all the more vigorously.  
And yet he's not so clever after all.

No, I can shatter your glib defence  
With a single thought. If you had anything



the moving force of Medea's argument is the idea of contract. Indeed, as I read each of her arguments to the class, I ask my students to name the applicable doctrine that they have learned in Contracts. And the students never fail to identify them all: performance as consideration ("yes, it was I who raised/The torch of your success!"); quantum meruit ("For my reward I'm seen/By women everywhere as truly blessed—/Possessor of an unparalleled loyal lord"); detrimental reliance ("I have become the bitter foe/Of my own homeland/For your sake"); rescission for impossibility of performance ("Had you been childless still/I might have sympathised with your desire/For a new marriage.").

Now, it seems unlikely that Euripides was a student of the Second Restatement of Contracts. In which case, we probably cannot attribute these argument-forms to the hegemonic power of liberal legalism.<sup>101</sup> To the contrary, the unexpected congruence between ancient literary classic and modern contract doctrine puts a new twist on Llewellyn's claim that "[o]ne turns from contemplation of the work of contract as from the experience of Greek tragedy."<sup>102</sup>

Of course, the idea of marriage as a legal contract is quite ancient. What Euripides illustrates through Medea, however, is the *emotional* power of the contractual ideal.<sup>103</sup> Indeed, this conception of emotional contract animates some of the most current work in marital therapy.<sup>104</sup> Thus, we can infer that "reason" is no less characteristic of affectional human relations than of any other sphere of human endeavor. And from this we can surmise that the supposedly separate rationality of the law is continuous with—and largely indistinguishable from—the perfectly ordinary reason of everyday life.<sup>105</sup> If it differs at all, it is primarily in the

But a serpent's heart, you would have come to me  
With your proposals, sought my consent . . . .

*Id.* at 24.

101. I admit, however, a total ignorance of ancient Greek contract law.

102. Llewellyn, *supra* note 70, at 751.

103. In fact, the strength of Medea's sense of having been wronged is so powerful that she murders her own children to punish their father Jason.

104. See C. SAGER, MARRIAGE CONTRACTS AND COUPLE THERAPY: HIDDEN FORCES IN INTIMATE RELATIONSHIPS 3-4 (1976):

What is surprising . . . is that psychiatry and psychology have only recently begun to turn from studying and treating the individual to studying and treating the two mates within the context of their marriage. . . .

In work with marital couples and families, . . . we seek to understand these interactions in terms of the congruence, complementarity, or conflict of the parties' reciprocal expectations and obligations. These "contractual dynamics" are powerful determinants of the individual's behavior within the marriage, as well as of the quality of the marital relationship.

105. For another demonstration of this point, illustrating the unmistakably legal quality of a quite ordinary argument between a child and her babysitter, see Paul, *A Bedtime Story*, 74 VA. L. REV. 915, 928-34 (1988).

degree of self-consciousness with which the lawyer wields her "legal" arguments.<sup>106</sup>

These conclusions should not surprise, however, since the same embodied, socially-situated humans do the ratiocination in each and every case.<sup>107</sup> And from this we can draw a further conclusion: that law is a deeply human product which is inextricably bound up with and unavoidably contingent upon wider cultural forms.<sup>108</sup>

Which raises an important question of vital interest to the law: Just how stable or certain are those cultural forms?

#### IV. Houses in Motion

One would think that "house" is about as close as we could come to a word with a universal meaning. All humans need shelter and, while houses obviously vary from the single family, suburban dwelling that is prototypical for our affluent culture, the basic purpose, role, and function of an igloo or a Bedouin tent is not so very different.

Accordingly, laws designed to protect the security of the home should suffer least from problems of indeterminacy. They should, therefore, be a good testing ground for the viability of some sort of rule for-

106. Cf. Paul, *supra* note 53, at 1826 n.140 ("[W]hat law students gain, which non lawyers may often lack, is the ability to be self-conscious about the kind of rhetoric one is using and how it fits with other competing rhetoric.").

At this point someone will point to the Internal Revenue Code or some other "technical" area of the law as an obvious counterexample that disconfirms the assertion in the text. The problem with this "objection" is twofold. First, the very intelligibility of the Tax Code is parasitic on a vast number of social conceptions like "business," "personal income," "gift," "home," "dependents," etc. that only have meaning with respect to cultural practices and values. Moreover, as I illustrate with respect to constitutional law, it is not just that the law must draw upon social meaning. Rather, the normative-political *content* of these conceptions will actually shape our understanding and application of these legal provisions in ways that affect the outcome of legal decision making. See Winter, *supra* note 59, at 1882-84.

Second, even if one considers some more esoteric, recondite areas of tax law, the fact that they are normally inaccessible to the uninitiated (whether lawyer or ordinary lay person) is not conclusive of its "autonomy" or difference from the ordinary rationality of everyday life. Much the same might be said of carpentry, golf, mathematics, or any other area of human endeavor. All require some degree of training, familiarity, and practice before mastery can be achieved; yet we do not therefore conclude that each embodies some separate, special rationality. Indeed, while higher mathematics, like esoteric tax law, may seem to exemplify a case of special rationality, it can be shown to depend on precisely the same processes of embodied, metaphoric reasoning that is characteristic of conventional linguistic practice. See G. LAKOFF, *supra* note 31, at 354-69.

107. See Winter, *Death Is the Mother of Metaphor*, 105 HARV. L. REV. (forthcoming 1991) ("We do not have separate minds for poetry and for law. Necessarily, we do each with the same mind; indeed, the whole mind."); Winter, *supra* note 25, at 1129-59 (detailing the ways in which meaning is grounded in the experiences, both embodied and social, of the human organism).

108. See Winter, *supra* note 25, at 1186-95 (providing an experientialist account of the development of twentieth century first-amendment doctrine that is grounded in a series of cultural-historical practices and developments); Winter, *supra* note 32, at 1511-13 (illustrating through the right to travel that law is the product of human interactions as they are institutionalized first in social practice and then as cultural and legal forms).

malism. Even so, we will find that law remains culturally contingent in the sense that it is only within a single, stable cultural context that a rule can achieve any substantial determinacy. Legal rules seem to work relatively unproblematically only to the extent that "the context is so established, so deeply assumed, that it is invisible to the observer."<sup>109</sup> Disturb that context in some way, and the rule becomes problematic. Consider the following real-world example.<sup>110</sup>

Early in his career, an English lawyer (now professor) accepted a post as the reporter for the Sudanese law reports. When he arrived in Khartoum, he discovered to his surprise that only homicide cases were reported. As a consequence, there was no working system of precedent for the other offenses in the penal code. Being academically inclined, he investigated the application of the penal offense of "house trespass"—essentially equivalent to burglary. What he found was that there was a different interpretation of the offense in each of the three sections of Khartoum. Nevertheless, within each of the three sections, the magistrates were virtually uniform in their interpretation. In the traditional Moslem section, the offense was understood to include any penetration of the close, including gardens, etc. In the European section, the offense applied only to invasions of an actual dwelling; it was not applied, for example, to someone arrested in the garden. In the commercial-industrial part of town, where there were no actual dwellings, the offense was deemed to apply when someone entered an area covered by a roof. Thus, entering a lumber yard was not covered by the offense, but entering a woodshed was.

There are three particularly interesting things about this pattern of interpretation. The first is that the indeterminacy is a relative one. There is no real divergence with respect to the central thrust of the offense; everyone would interpret it to cover an entry into an actual dwelling. This cross-cultural convergence on a shared central case is an illustration of the cognitive phenomenon of prototype effects.<sup>111</sup> It reflects the fact that a category like "house" is experientially grounded in common human needs. The wide variation in types of shelter, however, is better accommodated by a category with a more-or-less structure consisting of central and noncentral members. (Consider a lean-to or a tent.) It is this category structure, known as a radial category,<sup>112</sup> that gives rise

109. S. FISH, *Consequences*, in *DOING WHAT COMES NATURALLY*, *supra* note 19, at 315, 320-21.

110. The example comes from a personal report made by Professor William Twining at a faculty seminar at the University of Miami School of Law on September 29, 1989.

111. See G. LAKOFF, *supra* note 31, at 40-46, 68-76; Winter, *supra* note 25, at 1138-40, 1151-54.

112. G. LAKOFF, *supra* note 31, at 83-84, 91-114; see also Winter, *supra* note 25, at 1149-57

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to prototype effects. The prototype is a best example or central member of the category. Thus, prototypical dwellings will always be understood to fall within the rule. Differences of interpretation will occur primarily at the peripheries: (1) whether to include the areas peripheral to a prototypical dwelling; and (2) how to apply the offense to non-prototypical cases.

The second, somewhat obvious point is that—at least as applied to the peripheral areas of actual human dwellings—the differences are culturally contingent but stable within subcultures. Thus, different cultural practices and assumptions produce different senses of the “core” and “penumbra” of the category “house.” Within each cultural milieu, the context is assumed and renders clear—that is, without reflection—what is really a house. At the same time, there is nothing fixed or objective about this meaning. Just across town, things can be understood a little differently.

The third interesting point concerns the way in which the magistrates in the commercial section grappled with the problem of extending the category “house” to nondwellings. We can understand the selection of “an area covered by a roof” as an example of reasoning by analogy. But it is important to see that this is not an example of the facile game of analogy-mongering.<sup>113</sup> Rather, the selection of the analogy has a certain logic to it—a logic that, although hardly determinate, is not arbitrary either. It is, rather, an example of how a prototype can function as a cognitive reference point for a further inference. A house would not be prototypical without a roof, which is the minimum necessary to provide shelter. The roof can therefore stand for the house—a case of metonymy—as in the conventional phrase “my job is to see that we have a roof over our heads.” Faced with the need to extend the category “house” to a non-prototypical context, the magistrates reasoned by means of this metonymy; they employed it as a means of extending the category “house” from its central case to a different context.<sup>114</sup>

The standard jurisprudential debate misses the partial nature of

(demonstrating the radial structure of the concept “lie”); *id.* at 1185-95 (describing the radial structure of first amendment doctrine).

113. Cf. R. UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 8 (1986):

[E]very branch of doctrine must rely tacitly if not explicitly upon some picture of the forms of human association that are right and realistic in the areas of social life with which it deals. . . .

Without such a guiding vision, legal reasoning seems condemned to a game of easy analogies. It will always be possible to find, retrospectively, more or less convincing ways to make a set of distinctions, or failures to distinguish, look credible.

114. We can get a somewhat more complete description of this pattern of reasoning from George Lakoff's description of metonymic models. Substituting “house” for “A” and “roof” for “B”:

In general, a metonymic model has the following characteristics:

these kinds of constraints, because it tends to treat the issue in the totalizing framework of objectivity versus subjectivity: either there is something objective, like the literal language of the rule, or law must be animated by subjective considerations like the private opinions or values of the judge. But this two-dimensional approach obscures the more complex dynamic of meaning-making. A legal system must deal with a complex and fluid world. Humans respond to that complexity and contingency by stabilizing contexts in which they can communicate with each other.<sup>115</sup> Rules do work because these contexts and the categories they ground are widely shared. The categories produce prototype effects; this makes rules possible because certain objects or events are more likely to be encompassed by certain language.

But rules remain problematic—and any determinism or pure formalism impossible—because the more-or-less character of linguistic meaning always implicates a periphery of cases that do not correspond fully to the central case or prototype.<sup>116</sup> In addition, the flux of the physical and social world means that the contexts which ground meaning do not remain stable over time. Thus, even within a time frame short enough to pass as “synchronic,” linguistic categories must be sufficiently flexible to be able to extend and adapt to emerging context-changes. The adaptable quality of language is a conspicuous characteristic of what we do unreflectively all the time in order to make sense of the world. (Consider, for example, the shift in meaning of terms like “file” or “hard copy” effected by the advent of the wordprocessor.) It is not realistic or

— There is a “target” concept *A* [*i.e.*, house] to be understood for some purpose in some context.

— There is a conceptual structure containing both *A* [house] and another concept *B* [*i.e.*, roof].

— [Roof] is either part of [house] or closely associated with it in that conceptual structure. Typically, a choice of [roof] will uniquely determine [house], within that conceptual structure.

— Compared to [house], [roof] is either easier to understand . . . or more immediately useful for the given purpose in the given context.

— A metonymic model is a model of how [house] and [roof] are related in a conceptual structure; the relationship is specified by a function from [roof] to [house].

When such a conventional metonymic model exists as part of a conceptual system, [roof] may be used to stand, metonymically, for [house]. If [house] is a category, the result is a metonymic model of the category, and prototype effects commonly arise.

G. LAKOFF, *supra* note 31, at 84-85.

115. Cf. Cover, *Nonnos and Narrative*, *supra* note 58, at 8 (“Legal precepts and principles are not only demands made upon us by society, the people, the sovereign, or God. They are also signs by which each of us communicates with others.”).

116. “[T]he authoritative general language in which a rule is expressed may guide only in an uncertain way much as an authoritative example does.” H. HART, *THE CONCEPT OF LAW* 124 (1961). In previous work, I have evaluated Hart’s arguments in light of recent developments in cognitive linguistics and shown that his insights cut against his own positivism. Winter, *supra* note 25, at 1172-80.

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even psychologically possible to expect that legal decision makers will somehow operate differently.

Extension, adaptation, and meaning change are yet more pronounced when viewed as a diachronic phenomenon. At the level of ideas, it is manifested in what Jack Balkin calls “ideological drift,” in which “political and legal ideas . . . change their political valence over time.”<sup>117</sup> But, of course, there is nothing unique here: much the same occurs at the level of linguistic meaning, social practices, and legal form. For example, the meaning of the term “park” changed in subtle but important ways between the mid-nineteenth and early twentieth century as a consequence of conflict over and changes in social practices and attitudes concerning the appropriate uses of urban parks.<sup>118</sup> And these changes, in turn, had significant and demonstrable effects on the meaning and viability of legal precedents that predated those changes in social meaning.<sup>119</sup>

The inevitable process of diachronic shift has important and significant implications for the way in which we think about questions of social justice and constitutional structure. As Alicia Roqué argues, traditional utopian conceptions conceive justice as an ideal or optimal end-state.<sup>120</sup> In this view, a just society is a matter of blind rule-following and all change is evaluated along a single, static dimension: either it carries us closer to the ideal end-state or, more stereotypically, further away from it. In place of this one-dimensional approach, she draws on recent developments in biochemistry and systems theory to explore what it would mean to reconceptualize social justice in dynamic, evolutionary terms. Viewed from this perspective, a just society would be designed for resilience and “meta-stability,” emphasizing processes of openness, flexibility, and change rather than rules that seek deterministic constraint.<sup>121</sup>

All of which suggests that, because of the flux of the physical and social world, the so-called middle ground is itself a dynamic field of action in which the houses *are* always in motion. For us as humans who exist in time, there is no mistaking paradise for that home across the

117. Balkin, *The Promise of Legal Semiotics*, *supra* note 36, at 1833; *see also* Balkin, *Some Realism About Pluralism: Legal Realist Approaches to the First Amendment*, 1990 DUKE L.J. 375, 383-84.

118. *See* Winter, *supra* note 59, at 1895-1901 (discussing the history of the urban park movement in America).

119. *Id.* at 1899-1901 (discussing the changes of social meaning that undermined the holding of *Davis v. Massachusetts*, 167 U.S. 43 (1897), and led to the decision in *Hague v. Committee for Indus. Org.*, 307 U.S. 496 (1939)).

120. Roqué, *Fail-Safe Versus Safe-Fail: Suggestions Toward an Evolutionary Model of Justice*, 69 TEXAS L. REV. 1745 (1991).

121. *Id.* at 1747-49.

road.<sup>122</sup>

## V. Jurisgenesis and the Homeless

One might ask whether, given the inevitability of diachronic shift and indeterminacy of extension,<sup>123</sup> it is plausible or even desirable to strive for the rule of law. I have two responses to this question. The first is that it really doesn't matter because it is unavoidable.

Robert Cover uses the term "jurisgenesis" to refer to the inexorable human impulse to create law and, along with the legal meaning that must accompany law, the normative world which we inhabit.<sup>124</sup> Throughout this Foreword, I have pursued this insight and argued that the juris-generative process is a manifestation of the more general human capacity for meaning-making.<sup>125</sup> I have described this as a process of "stabilizing contexts" in an effort to express the constructed, yet always temporary, nature of the structures that we build for ourselves.<sup>126</sup> To live, grow, and prosper, we ceaselessly stabilize and restabilize these frameworks. No sooner is one washed away, than we are already at work constructing its successor.

Having chosen the concept of the home to test the possibility of law, there is an obvious symmetry in choosing the homeless with which to test the possibility of its absence. No one in our society is more rootless, more marginal, and more context-less than the homeless who increasingly occupy our urban spaces. If there were a situation in which we would most expect the jurisgenerative impulse to have abated, surely this would be it. Yet even in the sidewalks and impromptu shelters of the homeless, the human capacity for culture and for jurisgenesis asserts itself with surprising vigor—as the following story powerfully illustrates.<sup>127</sup>

122. B. DYLAN, *The Ballad of Frankie Lee and Judas Priest*, on JOHN WESLEY HARDING (Columbia Records 1968).

123. See Winter, *supra* note 25, at 1195-96 (describing indeterminacy of extension as one of the three sources of the indeterminacy that we experience in legal doctrine).

124. Cf. Cover, *Noinos and Narrative*, *supra* note 58, at 11 ("[T]he creation of legal meaning—'jurisgenesis'—takes place always through an essentially cultural medium.").

125. See generally Winter, *supra* note 32, at 1511-22 (describing the relentless process of jurisgenesis and demonstrating its role in the development of formal constitutional rights); Winter, *supra* note 25, at 1206-34 (exploring the cognitive relationship between law and rights generally).

126. See Winter, *supra* note 32, at 1450-53 (arguing that legal meaning is only possible within a temporarily stabilized matrix of contextual, non-neutral assumptions); see also *infra* text accompanying notes 128-32.

127. I am grateful to Daniel Abrahamson, N.Y.U. School of Law, Class of 1991, for confirming the details of this account. He deserves credit for his compassion and initiative.

For an account of the capacity of the homeless of another city to organize and govern themselves, see Gross, *For Seattle's Homeless, Home Rule and Self-Pride*, N.Y. Times, Dec. 20, 1990, § 1, at 22, col. 3 ("Ninety-nine homeless men and women here have embarked on a bold experiment in

## Foreword: On Building Houses

A group of law students in New York City decided to do something for the local homeless. They had heard that there was a large camp of homeless living under the Brooklyn Bridge, where the anchoring end of the bridge and its complex of rampways provide partial shelter. One of the students went to talk with the people in the camp to see what kind of assistance would be meaningful. As he asked around, he was quickly referred to "the leader." After locating the leader, the student sat down with him to discuss his plan.

The student observed that, although the bridge provided shelter from the rain, it did nothing to protect the homeless from the cold. He offered to obtain blankets, which he would distribute to the people living under the bridge. The leader objected: "We have some rules around here. The stronger look out for the weaker, so you have to deliver the blankets to us, and we will distribute them. But we cannot accept a single blanket unless there are enough for each and every person." That condition agreed upon, the blankets were obtained and distributed.

From a purely practical point of view, the argument could be made that some blankets would have been better than none. On the other hand, the all-or-nothing rule also yielded some practical benefit in the prevention of disputes over blankets as scarce resources. But how does one weigh the social cost of such disputes against the discomfort of the blanket-less? For the leader, that question was not broached because the camp had developed a rule of equality that governed in such cases.

But where did that rule come from? Certainly it was not modeled on our constitutional jurisprudence which, lacking a principle of substantive equality, is hardly so egalitarian. No, like Medea,<sup>128</sup> the leader and his comrades understood that balance and its cognates—such as symmetry, equality, and reciprocity—are the most elemental stuff of which human relations are made.<sup>129</sup> Indeed, it is hard to imagine a human system of moral reasoning that does not involve and, in fact, depend upon the *balance* schema.<sup>130</sup> Of course, a single schema like the *balance*

self-government, running a shelter in an abandoned bus barn where they set the rules, share the chores and defy the stereotypes that have made pariahs of the people who live on the streets of America.").

128. See *supra* notes 98-103 and accompanying text.

129. See, e.g., Cornell, *supra* note 25, at 1222 ("The ideal of dialogic reciprocity guides us in our effort to be true to the spirit of a democratic conception of law.").

130. See M. JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* 89-96 (1987). As embodied organisms, we achieve upright posture and balance in the world. The imaginative, metaphoric extension of this embodied experience serves as the raw material from which humans construct a sense of justice and fairness. In an important sense, the idea of law is organized around a commitment and fidelity to these concepts of balance and proportionality that derive from these basic embodied experiences. This commitment is symbolized in our iconography by the scales of justice. See *generally* Winter, *supra* note 25, at 1207-24 (describing the



schema can provide the structure for substantially different operations and outcomes.<sup>131</sup> Thus, for example, the balance of formal equality is a relatively desiccated one—an abstract two-pan balance scale that is always empty. But the leader and his comrades understood the concept of balance-as-fairness in a straightforward, relatively concrete way. And from that they constructed a rule enviable in its simplicity, integrity, and humanity: Don't bring any unless there are enough for all.

So, to the question of the plausibility and desirability of law, my second response is that it is a matter of our faithfulness to ourselves: "All several [people] need do is live together and be associated with the same task for some rudimentary rules and a beginning of law to emerge from their life in common. Looking at things in this way, one gets the feeling that [humanity] has immense resources."<sup>132</sup>

*balance* and other metaphors that comprise the cognitive underpinnings of our conceptions of law and legal rights).

131. See Winter, *The Cognitive Dimension*, *supra* note 96, at 2246 (emphasis altered) (footnotes omitted):

[T]he *balance* schema structures conceptions of moral obligation as disparate as the retributive nostrum "an eye for an eye," its rabbinic interpretation as a requirement of monetary compensation for physical damage, and the conceptually more extended injunction of the New Testament to "turn the other cheek." To put it another way, human conceptualizations of morality are not arbitrary in the sense that they can be *just anything*. On the other hand, the imaginative, metaphoric nature of these conceptualizations means that they can be many things *of a specified, related type*.

This phenomenon, which I call "nondeterminacy," follows from the imaginative, metaphoric nature of these cognitive operations. The very idea of a metaphor is that there is no one-to-one correspondence between the source domain and the target domain that it illuminates. Rather, metaphor is a matter of conceptual resemblance and not point-for-point isomorphism. Accordingly, multiple elaborations are possible. And it is precisely this flexibility and adaptability that makes metaphor such a powerful cognitive modality. See Winter, *supra* note 107.

132. M. MERLEAU-PONTY, *supra* note 51, at 118.