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IDEOLOGY AS CONSTRAINT

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CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE. BY ANDREW ALTMAN.

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I. INTRODUCTION

***1133** The debate between the Critical Legal Studies movement and its critics has often seemed little more than a collection of arbitrary dismissals from both sides. For this reason, few books can be more welcome than the philosopher Andrew Altman's recent study of the Critical Legal Studies movement. Altman discusses and critiques CLS writings from the standpoint of a scholar deeply committed to liberal political theory. But there is nothing dismissive about Altman's work; if Altman's is a criticism of CLS, it is a very sympathetic criticism. Altman is a liberal who nevertheless recognizes the potential failings of liberal legal theory. He agrees with Morton Horwitz that the Rule of Law is not an "unqualified human good," despite its obvious importance in preserving human liberty.[1] He accepts the claim that social rules and practices affect the justice of the legal system as much as do legal rules, and argues that without a culture of tolerance and respect for freedom, legal guarantees of human rights will not be sufficient to prevent oppression.[2] Thus, Altman has much in common with the CLS thinkers he purports to criticize. Nevertheless, he has an abiding faith in liberalism as a political theory that can adapt to changes in human affairs and reform itself in order better to protect human rights and human values.[3] In his view, the soundest versions of liberalism have nothing to fear from CLS critiques,

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[1] Pp. 200-01 (citing Morton Horwitz, The Rule of Law: An Unqualified Human Good?, 86 YALE L.J. 561, 566 (1977)).

[2] Pp. 197-98.

[3] See, e.g., p. 201.

and much to gain. His book is not an apology for liberalism but rather a call for an invigorated version of it.

To be sure, the book has a few notable weaknesses. It contains no discussion of feminist or critical race theory, both of which have thoroughly transformed ***1134** CLS in the past decade.[4] Altman's failure to recognize these crucial developments is particularly unfortunate given that his arguments in support of liberal legalism echo many of those previously made by critical race theory and feminist scholars in their criticisms of the CLS critique of rights.[5] One cannot understand the history of the Critical Legal Studies movement without taking into account feminist and minority critiques of CLS scholars and their incorporation into and influence on CLS thought. Indeed, it is fair to say that the critiques of critical race theory scholars and feminist scholars have effectively reset the agenda of scholarship within the Critical Legal Studies movement.[6] Altman's portrayal of CLS is thus perhaps truer to the state of the movement in, say, 1983 than it is of CLS work today.

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[4] The complicated history of the relations between the earlier group of mostly white male CLS scholars and Critical Race Theory and feminist scholars is told in Harlon L. Dalton, The Clouded Prism, 22 HARV. C.R.-C.L. L. REV. 435 (1987), and Carrie Menkel-Meadow, Feminist Legal Theory, Critical Legal Studies, and Legal Education or The "Fem-Crits Go to Law School", 38 J. LEGAL EDUC. 61 (1988).

[5] Altman makes a single reference to this body of scholarship in a footnote. See p. 200 n.64 (noting that "many minority legal scholars" have also rejected radical CLS views of rights). He does not mention similar critiques from feminist scholars. For examples of literature attacking the CLS critique of rights, see Kimberele Williams Crenshaw, Race, Reform and Retrenchment: Transformation and Legitimation in Antidiscrimination Law, 101 HARV. L. REV. 1331 (1988); Dalton, supra note 4; Richard Delgado, The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Mari J. Matsuda, Looking to the Bottom: Critical Legal Studies and Reparations, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Deborah L. Rhode, Feminist Critical Theories, 42 STAN. L. REV. 617 (1990); Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U. L. REV. 589 (1986); Patricia J. Williams, Alchemical Notes: Reconstructing Ideals from Deconstructed Rights 22 HARV. C.R-C.L. L. REV. 401 (1987).

[6] For recent examples of this phenomenon, see Duncan Kennedy, A Cultural Pluralist Case for Affirmative Action in Legal Academia, 1990 DUKE L.J. 705; Frank I. Michelman, Conceptions of Democracy in American Constitutional Argument: The Case of Pornography Regulation, 56 TENN. L. REV. 291 (1989); Gary Peller, Race Consciousness, 1990 DUKE L.J. 758.

In Altman's defense, it is clear from the acknowledgements section that he wrote most of this book in 1987 and 1988,[7] when these changes were perhaps not as obvious as they are now. Nevertheless, the feminist and minority critiques of CLS were important precisely because of the substantive political commitments all three groups shared.[8] From Altman's description of the major themes of CLS, one would hardly guess that CLS scholars were interested in issues of race, class, and gender, as opposed to abstract questions of linguistic determinacy and theories of legal precedent. This skewed portrait is due in part to Altman's determination to view CLS theory within the framework of traditional analytical jurisprudence. He assumes that the questions CLS finds interesting must be the same sorts of questions that have fascinated traditional jurisprudes. These questions, however, typically bracket away substantive political issues, and as a result, Altman often tends to miss the point. This problem is clear from the beginning pages of the work, where Altman states:

> I do not provide in this book any detailed exploration of the CLS premise ***1135** that illegitimate relations of power pervade contemporary liberal democratic societies. Any such explanation would take us far afield from the issues in legal philosophy that form the focus of this book and would carry us too deep into the complexities of normative political philosophy.[9]

Of course, the very assumption that "issues in legal philosophy" are really "far afield" from questions of normative political theory or questions about illegitimate relations of power in society is precisely what CLS scholars wish to examine critically. Thus, Altman's attempt to suppress this crucial issue in his own book is question begging; it undermines his project of dispassionate explication and critique of CLS scholarship.

Yet if Altman's tendency to treat CLS as analytic philosophy is in some ways the book's greatest weakness, it is also its greatest strength. No movement has needed sustained and patient analysis of its arguments by a sympathetic outsider more than CLS. And this is where Altman truly shines. Every page demonstrates the author's scrupulousness in unpacking arguments and subjecting them to rigorous examination. One comes away from this book feeling that the debate could have been moved forward much earlier if more persons had taken the time to patiently discuss the arguments that separate CLS from its critics.

Although the book makes many interesting points about jurisprudential issues, I shall focus in this essay on what I believe to be the book's central claim, stated in its final two chapters. This claim is that Critical Legal Studies critiques rest ultimately on a flawed theory of social reality, and in particular, a flawed

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[7] P. ix.

[8] See, e.g., Dalton, supra note 4, at 445-46.

[9] Pp. 15-16.

account of how social structures constrain individual thought, belief and action.[10] This theory of social structuration is only sketchily and imperfectly worked out in much CLS writing. Yet it is this theory of social reality, and not some theory of semantic or linguistic indeterminacy, Altman argues, that really underlies CLS arguments about doctrinal coherence.[11] In his view, CLS doubts about legal doctrine's coherence and its ability to constrain legal decisionmakers are really a special case of a more general skepticism about the possibility of any objective social structures that can constrain individual belief, thought, and action.[12]

To be sure, Altman does not believe that all members of the CLS movement share this view. The other major claim of his book is that there are really two distinct CLS positions, one radical, the other moderate.[13] The radical position, according to Altman, "combines a position on the meanings of legal terms and norms that can loosely be described as deconstructionist with the idea that there is no objective structure tothe law or any social institution."[14] The moderate position "rejects the deconstructionist position ***1136** on meaning" and "holds that our law does have an objective structure."[15] Altman associates the radical strand with most CLS thinkers,[16] and particularly with Duncan Kennedy.[17] The only member of the moderate camp that Altman identifies is Roberto Unger,[18] who, he confidently asserts, "has never even flirted with deconstructionism." [19]

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[10] Pp. 5-6, 131-32, 138-39, 149-86.

[11] Pp. 168-69.

[12] Pp. 5-6, 138-39, 166-70. Altman exempts Roberto Unger from this criticism, because he wishes to view Unger as representing a "moderate" wing of CLS that is consistent with liberal political theory. Pp. 131-32, 164-68; see text accompanying notes 78-84 infra.

[13] Pp. 18-19.

[14] P. 19 (emphasis omitted).

[15] Id.

[16] See, e.g., id. (identifying Mark Tushnet and Clare Dalton with the radical position).

[17] E.g., pp. 131-32, 138-39.

[18] P. 19.

[19] Id. I found this claim particularly interesting, given my own characterization of Unger's technique of deviationist doctrine in Robert

Altman's focus on questions of social structure sets his book apart from previous liberal critiques of CLS and considerably advances the debate. Unfortunately, although Altman is quite correct that CLS arguments implicitly rely upon a theory of social structure, he has largely misunderstood what that theory is. As a result, his asserted distinction between radical and moderate versions of CLS is wholly spurious, at least when it is phrased in terms of belief or disbelief in objective social structures.

Just as Altman tends to read CLS literature as asking traditional questions of analytic jurisprudence when in fact it often asks very different questions, he tends to project his own assumptions about social theory onto the CLS authors he is discussing. Throughout the book Altman poses questions of social and legal theory in the form of a dichotomy: either one believes in more or less objective social and legal structures that constrain individual thought and action, or one believes that such constraints are illusory and people are free to do whatever they like.[20] Thus, he divides CLS theorists ***1137** into those who

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Mangabeira Unger, The Critical Legal Studies Movement, 96 HARV. L. REV. 561 (1983), as exemplary of deconstructionist methods. See J.M. Balkin, Deconstructive Practice and Legal Theory, 96 YALE L.J. 743, 767 n.74 (1987); J.M. Balkin, Nested Oppositions, 99 YALE L.J. 1669, 1688 & n.55, 1689 & n.57 (1990).

Altman's use of "deconstruction" corresponds roughly to a popular conception of deconstruction as linguistic nihilism coupled with assertions of complete individual freedom in the reading of texts. Thus Altman understands deconstruction as the claim that "the words which constitute legal norms and doctrines have no stable or fixed meanings, but are rather 'empty vessels' into which the individual may pour whatever meaning he or she chooses." P. 19 (emphasis added). Nevertheless, this popular conception is quite inconsistent with the decentering of the subject that characterizes deconstruction as well as poststructuralism generally; the idea of autonomous individuals deliberately choosing what texts will mean is quite foreign to the theory of poststructuralism. See generally RICHARD HARLAND, SUPERSTRUCTURALISM: THE PHILOSOPHY OF STRUCTURALISM AND POSTSTRUCTURALISM (1987).

Moreover, the popular conception Altman embraces completely misses deconstruction's characteristic interest in relations between conceptual opposites, or between dominant and suppressed conceptions. This is precisely the way in which Unger's work is most clearly deconstructive. One of the most ironic features of Altman's analysis is his simultaneous condemnation of deconstruction and approval of Unger's theory of deviationist doctrine, see pp. 130-38, 140-45, which demonstrates that Altman both approves of deconstructive methods and does not understand what deconstruction is.

[20] See, e.g., pp. 19-20 (contrasting belief that legal doctrine has an objective structure with belief that legal precedents mean whateverindividuals

believe in objective social structure and legal doctrine and those who believe that social structure or legal doctrine mean whatever individuals choose them to mean.[21] But critical social theory rejects this false dichotomy. What makes the dichotomy false are its assumptions about autonomous choice. The social theory underlying CLS work is premised on the social construction of the subject's thoughts, beliefs, and desires through ideology as well as through social rules. The very structure of individual perception, belief and desire, and thus the terms of individual choice, are already shaped by culture and ideology even before the individual begins to choose.[22] This is hardly a position of nihilistic freedom; indeed, too great an emphasis on the social construction of the subject leads not to nihilism but rather to determinism.

Critical social theory views social reality as a dialectic between social structures and individual thought, belief, desire and action. Individual thought, belief, desire, and action are shaped and constructed by social structures, which in turn are the product of previous individual thought, belief, desire, and action. This dialectical vision is unintelligible within the either-or dichotomy that frames Altman's analysis. His dichotomy severs the link between social structure and individual belief, creating the appearance of individuals who are free to choose any set of beliefs or meanings and who therefore must be hemmed in by separate and objective social rules. What Altman has done, in effect, is project different sides of this dialectic of individual belief and social structure onto different CLS thinkers, thus producing what he calls the "radical" and "moderate" camps.

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choose them to mean); pp. 90-91 (contrasting belief that words have objective meaning with belief that words mean what individuals choose them to mean); pp. 131-32, 138-39 (contrasting view that dominance of individualist over altruist norms in doctrine is a function of objective structure of doctrine with view that this dominance is merely in the eyes of the beholder and her ethical viewpoints); pp. 149-55 (contrasting belief that social rules act as objective constraints to actors with belief that rules exercise no constraint but are manipulated by actors to achieve their ends); pp. 166-67 (contrasting theory that social frameworks constrain and channel individual behavior and thought and view that no such social frameworks exist); pp. 169-71 (contrasting view that legal doctrine has existence separate from the choice of any individual and thus constrains individuals with view that legal doctrine is wholly dependent on the perceptions of the individual).

[21] P. 19.

[22] For the classic statement of this position, see PETER L. BERGER & THOMAS LUCKMANN, THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE (1966).

The social theory that I claim underlies CLS work is often not overtly articulated.[23] And, as I shall argue in more detail, CLS scholars have not ***1138** applied this approach to social theory consistently throughout their work.[24] Thus, CLS scholars can justly be faulted for occasionally not being clear and consistent enough in their assumptions. If Altman has misunderstood CLS scholars, it may be because CLS scholars have let themselves be misunderstood.

Nevertheless, it is important to carry on the project of clarification and analysis that Altman has so ably begun in his book. In this essay I shall offer an account of how social structure affects the individual's experience of legal norms when one assumes the social construction of the individual subject. This account is both a partial clarification and a partial critique of CLS writings on legal determinacy. The theory can be summed up in three words: "Ideology Is Constraint." I argue that when the social construction of the subject is properly taken into account in jurisprudential theory, it accounts for the determinacy of legal norms rather than their indeterminacy, as is often suggested. In other words, regularities in legal thought and belief, as well as the very genuine subjective experience of constraint by legal materials, are not due merely to the existence of "objective" social rules or legal doctrine, but also to the contributions of shared ideology.[25]

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[23] The most notable exceptions are James Boyle, The Politics of Reason: Critical Legal Theory and Local Social Thought, 133 U. PA. L. REV. 685 (1985), and Gary Peller, The Metaphysics of American Law, 73 CALIF. L. REV. 1152 (1985). Because CLS is commonly identified with the indeterminacy critique, these works are routinely cited for their discussions of linguistic indeterminacy, when in fact their greatest importance in my view lies in their discussions of social theory. See also Thomas C. Heller, Structuralism and Critique, 36 STAN. L. REV. 127 (1984) (arguing that structuralist and post- structuralist theory, which emphasize the constructed nature of the individual subject, are important bases for critical legal theory).

Recently, 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. See, e.g., Drucilla Cornell, Convention and Critique, 7 CARDOZO L. REV. 679 (1986); Pierre Schlag, Fish v. Zapp: The Case of the Relatively Autonomous Self, 76 GEO. L.J. 37 (1987); Pierre Schlag, "Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction, 11 CARDOZO L. REV. 1631 (1990); Pierre Schlag, Normative and Nowhere to Go, 43 STAN. L. REV. 167 (1990); Steven L. Winter, Bull Durham and the Uses of Theory, 42 STAN. L. REV. 639 (1990); Steven L. Winter, Indeterminacy and Incommensurability in Constitutional Law, - CALIF. L. REV. - (1991) (forthcoming).

[24] See texts accompanying notes 86-94 & 125-143 infra.

[25] In this essay, I use the terms "ideology" and "the social construction of the subject's beliefs" more or less interchangeably. I employ the term "ideology"

Legal doctrine and ideology, in my view, cannot be spoken of as fully distinct forms of social constraint; rather, they partially constitute each other and operate together to generate the internal experience of being subject to a system of law. It is a commonplace that legal doctrine reflects our ideology. Nevertheless, I wish to emphasize instead how ideology makes legal doctrine intelligible to the persons who work with it, producing the subjective experience of knowing what the law requires of us, the internal urge to confrom to legal norms as we understand them, and the inescapable sense that some legal arguments are, in fact, better than others. Ideology, in other words, does not merely produce the content of legal doctrine-it makes the content of legal doctrine intelligible to us and binding upon us.[26]

My complaint with both Altman and some previous CLS work is that neither takes sufficiently seriously ideology and the social construction of the subject in their discussions of how social and legal norms constrain individual actors. Altman's theory of social structuration and constraint suffers ***1139** because he brackets away all considerations of ideology, and tends to speak of individuals as if social construction did not matter.[27] In contrast, CLS thinkers often speak of ideology as an important factor in legal thought, and their work ultimately makes sense only as ideology critique. Yet they do not always fully carry through the implications of the social construction of the subject in their discussions of legal coherence and determinacy, or in their advocacy of social transformation.

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with no necessary pejorative connotations of false representation or "false consciousness." My use of the term is closer to Geertz's, see Clifford Geertz, Ideology as a Cultural System, in IDEOLOGY AND DISCONTENT 47 (D. Apter ed. 1964), than to the more traditional Marxist conception. For a history and discussion of theoretical difficulties with the Marxist theory of ideology, see JORGE LARRAIN, MARXISM AND IDEOLOGY (1983). In my view, ideological thinking is largely unavoidable for social beings, and ideologies may differ widely in their degrees of functionality or disfunctionality, or their liberating or oppressive characteristics. Rejection of any necessary connections between ideology and false representation or "false consciousness" seems to me required by any theory that takes as a fundamental postulate the social construction of the subject. See J.M. Balkin, The Rhetoric of Responsibility, 76 VA. L. REV. 197, 199 n.7 (1990).

[26] See Dennis M. Patterson, Law's Pragmatism: Law as Practice & Narrative, 76 VA. L. REV. 937 (1990).

[27] Altman mentions Unger's theories as examples of objective social structures which constrain individual action and thought. See pp. 165, 168. Yet, interestingly, he never applies these insights to his own account of social rules and social constraint.

II. SOCIAL STRUCTURE AND INDIVIDUAL CONSTRAINT

A. Rules as Constraints: The Metaphor of the Prisoner In Chains

Altman wishes to defend two different claims against what he believes to be the CLS position. The first is that social reality is constituted by social rules that constrain individuals, and do not depend for their content upon the perception of any one individual. The second claim is that legal doctrine has an objective structure that constrains individuals, and that legal doctrine is not simply what any particular individual chooses to see in it.

Altman believes that these two claims are related. It is because CLS scholars deny the first claim about the objectivity of social rules, he thinks, that they deny the second claim about legal rules.[28] Thus, Altman's discussion implicitly assumes that social and legal rules constrain in much the same way, or that legal rules constrain because they are a kind of social rule. For example, Altman first argues that social rules are objective and constrain individual action,[29] and he then goes on to apply the same reasoning to legal rules.[30]

The analogy Altman wishes to draw between social and legal rules is by no means clear. One might believe that legal doctrine lacked objectivity, and still believe very strongly in the objectivity of social rules. For example, Professor Peller has argued that this distinction informed some versions of legal realism.[31] Nevertheless, Altman sees debates about social rules as more or less directly relevant to debates about legal rules. He begins his discussion of social reality by contrasting two alternative conceptions of social theory: The first, which he calls a "rule conception" of society, sees " s ocial reality ... as fundamentally constituted by rules," and holds that "social behavior is to be explained with reference to such rules."[32] The second, an "instrumentalist" conception of rules, argues that

> [r]ules exert no power (or little power) of their own over individual thought, desire, and action; they are mere words. Nonetheless, rules can be invoked by those who wield power to rationalize their actions and even to

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[28] Pp. 168-70.

[29] Pp. 179-81.

[30] Pp. 181-84.

[31] Peller, supra note 23, at 1240-59.

[32] Pp. 149-50.

convince ***1140** those over whom they exercise power that their subordination is right and proper.[33]

Altman sees an obvious analogy between these contrasting visions of social reality and debates about the objectivity of legal doctrines. He identifies the instrumentalist conception of social rules with the rule skepticism of legal realism,[34] and, by extension, with the so-called "radical" strain of CLS.[35] Altman, by contrast, wishes to defend something closer to a rule-based conception of society and legal doctrine, in which social and legal rules constrain individual action, while their structure is "independent of the choice or perception of any particular individual."[36]

Putting aside for one moment objections based on the possible differences between legal and other types of social rules, what is most interesting about Altman's project is its implicit model of social reality. Social reality consists of social rules. Social rules (and legal doctrines) are objective phenomena that constrain individual wills. The term "constraint" is metaphorical, suggesting a comparison to physical constraint. And this metaphorical usage is revealing. Like physical constraints, social and legal rules keep us from doing what we want to do. The idea of constraint evokes the image of a prisoner who must be physically prevented from doing what she chooses to do. If the constraint were absent, the prisoner would spring into action according to her own desires and choices.[37]

This model of social structure informs the entire book. Indeed, it is so enmeshed in Altman's thought that he does not even imagine alternative conceptions. Although Altman speaks as if the rule-based and the instrumentalist conceptions exhaust possible visions of social structuration, in fact both conceptions of social reality assume an autonomous individual subject who chooses what to do given the constraints at hand-the same metaphor of the prisoner in chains. In the rule-based conception of society, rules are what keep individuals from doing what they want to do. In the instrumentalist vision, people pursue their chosen values through manipulation of social rules that are

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[33] P. 151.

[34] P. 153.

[35] Pp. 151-54.

[36] P. 170 (describing with approval Unger's alternative version of social theory).

[37] Cf. p. 153 (If radical skeptical position is correct, "[o]ur legal rights could no more stop government officials or private centers of power from wreaking havoc with our lives than a toy gun could destroy a tank.").

indeterminate or illusory. To use themetaphor of the prisoner, in the first conception, rules are chains that keep people from doing what they want to do, while in the second, there are no chains, or the chains are plastic and malleable, so that anyone can do whatever she likes.

This way of thinking about social structuration rests upon a dichotomy between subjects (individual actors) and objective social rules. Social rules constrain (or fail constrain) individual subjects. Moreover, like objects that act as physical restraints (chains, locked doors, etc.), objective social rules are separate from individuals. The objective social rule is perceived as ***1141** alien to the subject's will and desire, to her aspirations and values. In the rule-based conception, the agent's will and desire are posed against social rules which keep that will and desire from being exercised in the way the subject wants. In the instrumentalist conception, the subject manipulates social rules to achieve her desires and aims. These likes, desires, aspirations and values preexist social or legal rules in the same way that the prisoner's likes and dislikes preexist the chains that bind her (or fail to bind her).

Conversely, the agent's will and desire is alien from the object which constrains her (the social rule). The subject's will and desire are constrained, but not constituted, by the social rule. Thus, even when one desires to follow the social rule, one's desires are still separate from the social rule itself, because one could always choose to do otherwise, to disobey, and suffer the consequences. Conformity is obtained by the threat of punishment or social disapproval, which constrains the individual from doing what she would otherwise want to do.[38]

If one separates social rules and individual will in this manner, it becomes obvious that the greatest problem for jurisprudence is what we might call the "rogue judge"-the decisionmaker who wants to follow his or her own political agenda, and who must be hemmed in by an objective doctrinal structure. This situation presents the greatest danger of what Altman terms the instrumentalist conception of rules. Attacks on doctrinal objectivity are threatening because they seem to suggest that there is nothing which restrains the rogue judge from doing whatever he or she wants to do according to the judge's preexisting political agenda. If doctrinal structure existed, but only in the eyes of the beholder, there would be a similar difficulty. It would be like giving a prisoner the key to her own chains. It would not prevent people from doing what they wanted or desired

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[38] Similarly, under Altman's instrumentalist conception of rules, the agent's will and desire are alien to the object (the social or legal rule) which she manipulates. The object is a tool which constrains the use that can be made of it, but does not constitute the desires of the subject who uses it. When one manipulates the social or legal rule, one's desires are separate from the social or legal rule itself, because one could always choose not to exploit it, or decide to exploit it in a different way. In short, the very idea of rules as "instrumental" suggests preexisting desires and values of the agent that the rules will be employed to satisfy.

to do, because social or legal structure might too easily conform to what they wanted it to be.

B. Beyond the Model of Rules: The Dialectic of Subjective Experience and Objective Social Structure

I believe that this way of looking at social reality is incorrect, not because social structuration does not occur through social rules, but because such an account is necessarily incomplete. Altman's conception of social reality omits a great deal that cannot be explained by the division of social life into subjective desire and a separate and objective social structure consisting of social rules. The separation of subjective desire from objective social structure implicit in the idea of "constraint" is the basic tendency- and, I would submit, the basic error-of traditional liberal jurisprudence. Viewed ***1142** through the eyes of this tradition, the rich dialectic of individual will and social structure becomes flattened out and divided into social rules and autonomous agents who choose what to do given those rules. What is lost in this separation is the crucial feedback between social structure and individual belief and desire-the way in which social structure is formed by and simultaneously produces agents with particular beliefs and preferences which create the possibility for choice. In short, social structure cannot be fully explained according to the model of social rules. We must also take into account the social construction of the subject.

The social construction of the individual is so often proclaimed these days that it must by now seem widely accepted. Yet although many people agree in the abstract that individuals are socially constructed, this admission often does not filter very deeply into their theoretical discussions. If instead of giving lip service to this principle, we took it very seriously indeed, it would have drastic consequences for the picture of social constraint offered above. For there would no longer be a clear demarcation between at least some types of social norms on the one hand, and what an individual "wanted to do" on the other. Rather, individual preferences, and indeed, individual perceptions of social reality, would have already and necessarily been constructed by social forces. Thus, the appropriate physical metaphor would not be the chains that bound a prisoner, keeping her from doing what she wanted to do. It would be the structure of the prisoner's brain or retina, shaping her desires and the very way she constructs and perceives the world around her. Indeed, it would be potentially misleading to call some types of social structuring "norms" or "rules," for this would imply canons or precepts that could consciously be articulated, and then adhered to or flouted. Rather, some of what we call social "norms" might be better described as "molds," which "normalize" to be sure, but by making large numbers of individuals think, perceive, and act alike.

In a similar fashion, the problem of the rogue judge would fade into the background of jurisprudential concern. It would be replaced by the problem of the sincere judge, who desires to interpret the law faithfully, but nevertheless is destined to see the law according to her own ideological perceptions and beliefs.

Once the social construction of the subject becomes the basic assumption of jurisprudence, one is less concerned with how constraint is possible than with how undesirable forms of blindness can be avoided.[39] The issue becomes not the dangers of freedom, but those of determinism.

With this different conception of social norms comes a dialectical relationship between individual subjects and objective social structures. Subject and object are both mutually differentiated and mutually dependent. Social structures cannot exist unless they are given form by the thoughts, actions, and beliefs of individuals. Yet the meaning of individual thought, action, and belief can only be understood by reference to a culture and its accompanying ***1143** forms of social structure. Social structures and events are opposed, but interdependent. I call such a conceptual opposition a nested opposition, because the two opposed concepts "contain" or depend upon each other despite their nominal opposition.[40] I shall return to the nested opposition between structures and events, and between social norms and individual behavior, many times during the course of this essay. For the moment, I wish to emphasize how the nestedness of this opposition alters the view that subjective thought and objective social structure exist as independent and self-contained realms. Individual thought, action and belief cannot be something separate from objective social structure, because social structure is the source of their meaning. Culture, language, ideology, and other forms of social structuration cannot exist apart from individual thought, action, and belief because without them there is nothing to structure, nothing to be a structure of.

Following a distinction made by Hegel, I shall refer to individual action, thought, and belief as subjective aspects of social life. I shall refer to culture, language, ideology, and social institutions as objective aspects of social life.[41] It is easy to be confused by the terms "subjective" and "objective," because

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[39] For a critique of Ronald Dworkin's work along these lines, see J.M. Balkin, Taking Ideology Seriously: Ronald Dworkin and the CLS Critique, 55 UMKC L. REV. 392 (1987).

[40] See Balkin, Nested Oppositions, supra note 19, at 1676-77.

[41] Hegel would call these the subjective and objective aspects of Mind or Spirit. G.W.F. HEGEL, PHILOSOPHY OF MIND 20 (W. Wallace & A.V. Miller trans. 1971). I do not pretend that my distinction matches the content of Hegel's terms in all respects. For example, Hegel places religion in a third category, that of Absolute Spirit. See id. at 297. Hegel's central insight, nevertheless, is the dialectical relationship of subjective and objective aspects of Spirit, and the seamless interaction of subjective life and the "ethical substance" of social morality and custom (which Hegel calls Sittlichkeit):

> The consciously free substance, in which the absolute 'ought' is no less than an 'is,' has actuality as the spirit of a nation. The abstract disruption of this spirit singles it out into persons, whose independence it, however, controls and

they have many different meanings. Social life is objective not because it is indisputably true or indisputably real, but because it is shared and structuring. The object is what constitutes the subject. Similarly, by "subjective" I do not mean "false" or "contestable" but rather "individuated" and "experiential." Just as structures and events are mutually interdependent, so too are the objective and subjective elements of social life. Subjective experience is socially constructed, but culture, ideology, and language exist only as instantiated in the experiences of individual subjects.

Once one grasps the interdependence between structures and events, or between the objective and subjective aspects of social life, there are two types of common and symmetrical theoretical errors that one must avoid. Because the objective and subjective elements of social life exist in a relation of mutual differentiation and dependence, one can overemphasize either their differentiation or their dependence. For convenience, we might call these the ***1144** errors of separation and reduction. Because one can overemphasize in both directions (towards the objective or the subjective), each error comes in two different varieties, making four in all:

Errors of Separation:

(1) The attempt to explain too much of social life in terms of objective social structures without recognizing that social structures depend upon individual thought, belief, and action (Reification).

(2) The attempt to explain too much of social life in terms of individual thought, belief, and action, without recognizing that individual thought, belief, and action depend upon objective social structure (Radical subjectivism).

Errors of Reduction:

(3) The attempt to explain too much of objective social structure in terms of individual thought, belief, and action. This reduces the objective to the subjective (Reductionism proper).

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entirely dominates from within. But the person, as an intelligent being, feels that underlying essence to be his own very being- ceases when so minded to be a mereaccident of it-looks upon it as his absolute final aim. In its actuality he sees [it as something] ... he brings about by his own action..... Thus, without any selective reflection, the person performs his duty as his own and as something which is; and in this necessity he has himself and his actual freedom.

Id. at 254 (emphasis in original).

(4) The attempt to explain too much of individual thought, belief, and action in terms of objective social structure. This reduces the subjective to the objective (Anti-humanism).

The error of reification is so named because it makes the objective elements of social life into an independent "thing" over which the subjective elements seem to have no control. People often use the term "reification" to describe making social structures or concepts (for example, "corporation" or "property") into things that resist individual attempts at change and for which individuals bear no responsibility.[42] In fact, social structures can change over time if individual thought and action change sufficiently, just as the meaning of words can change if enough people begin using them in a different way.

Nevertheless, social structures are not completely fluid; they have a shape independent of any individual's view of them. To deny this would be to commit the opposite error of radical subjectivism. Radical subjectivism, which exalts the independence of the subject from the objective elements of social life, can take a number of different forms. One can overemphasize the subject's independence by assuming that objective social structures offer little or no resistance to individual thought, action, and belief. Or one can exaggerate the subject's independence by envisioning individual action, thought, and belief as largely exogenous to social construction.

The error of reductionism proper is so named because it attempts to reduce the objective elements of social life to individual thought, action, and belief, when in fact the latter depend upon social structures for their meaning. One can overcompensate in the opposite direction as well, by denying ***1145** that individual subjects exist as subjects. Under this view, what we call "individuals" are really just the intersection of various forms of social structuration. I call this position "anti-humanism" because it is often associated with Foucault's famous statement of "The Death of Man."[43] Anti-humanism is an incomplete description of social reality because individual subjects must exist in order to be the locus of social structuration and social change. Social meaning requires someone to mean and to be meant.[44]

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[42] See Felix S. Cohen, Transcendental Nonsense and the Functional Approach, 35 COLUM. L. REV. 809 (1935); Peter Gabel, Reification in Legal Reasoning, 3 RES. LAW & SOC. 25 (1980); Peller, supra note 23, at 1157-58, 1274-89. The classic statement appears in Karl Marx, Economic and Philosophic Manuscripts of 1844: Selections, in THE MARX-ENGELS READER 52 (R. Tucker ed. 1972).

[43] MICHEL FOUCAULT, THE ORDER OF THINGS: AN ARCHEOLOGY OF THE HUMAN SCIENCES 385-87 (1970).

[44] I present these overcompensations as independent errors in the interests of clarity. However, each version of overcompensation may involve

I have argued that Altman's major failing is that he does not satisfactorily account for the social construction of the subject. Although Altman clearly believes that social structures in the form of social or legal rules are objective, he does not adequately recognize forms of social structuring, such as ideology, that do not work like rules. Thus he deemphasizes the effects that these types of social structuring have over individual thought, belief, and action. The above analysis suggests that this failure of emphasis will manifest itself in either some form of radical subjectivism or reductionism proper. In fact, this is precisely what occurs both in his interpretation of CLS scholars and in his own theory of individual constraint.

CLS scholars viewed through Altman's eyes look like radical subjectivists. Because Altman does not take into account the social construction of the individual's desire, belief, and perception, he cannot see how individual constraint occurs. Therefore he concludes that CLS scholars must be saying that individuals can believe anything they choose, and they can choose anything. Dissatisfied with what he takes to be the "radical" CLS position, Altman offers his own account of how social rules constraint individual behavior. Predictably, the problem with this theory, as I shall now describe, is its reductionism-it is insufficiently rich to explain why social beliefs converge to constrain individual behavior.

III. ALTMAN'S THEORY OF SOCIAL RULES AND SOCIAL CONSTRAINT

Although Altman offers his theory of social constraint as a response to an imagined "radical" CLS position, he also sees his account as an answer to theorists who believe in the existence of "collective" social entities.[45] These collective entities "exist over and above individuals, their actions, thoughts,

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another form. For example, viewing individual subjects as independent of objective social structures (radical subjectivism) may be accompanied by similar assertions of independent existence for social constructs like property, "the market," and so on (a form of reification). Indeed, liberals are often criticized (whether fairly or unfairly) for engaging in alienating moves in both directions. Other combinations are possible as well. For example, reification may be partly reductive in that it converts some aspects of social relations into things, thus neglecting their human component. This is Marx's critique of the "fetishism of commodities," in which relations between persons are converted into relations between things, i.e., property. KARL MARX, CAPITAL, Vol. I, pt. I, ch. 1, sec. 4 (1886). What I have called anti-humanism may be said to reify ideology, language, and culture by neglecting their dependence on individuals so that they appear to have an independent existence.

[45] P. 179.

***1146** and relations ... and are thought to be the essential elements that constitute social reality and to have a power to control what individuals do, want, and think."[46] Altman gives as an example the work of Emile Durkheim, who believed that there was a conscience collective, or "collective consciousness," in which each individual shared and which shaped each individual's values, perceptions, and aspirations.[47] Altman calls the question of whether there are such collective entities a question of "social ontology."[48]

The moment a theorist speaks of "social ontology," one should be alerted to the possibility that the objective elements of social life are going to be treated as things independent from their instantiations in subjective experience. And indeed, one might criticize Durkheim for reifying some of the objective elements of social life in his idea of a collective consciousness.[49] Yet Altman tends to make the opposite error. He confuses Durkheim's view with the more plausible position that subjective experience is dependent upon the objective elements of social life, even as it is differentiated from them. Thus, in Altman's rush to avoid a "collectivist ontology,"[50] as he calls it, he throws the baby out with the bathwater. His theory attempts to reduce all forms of social structuring to individual thought and action. This overcompensation is the error of reductionism. Inevitably his search for the leanest possible social ontology leads him to underemphasize some of the objective elements of social life, and forms of social structuring that do not work like rules-in other words, ideology. At the

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[46] Id.

[47] Id. (citing EMILE DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD 101 (S. Solovay & J. Mueller trans. 1964)). See EMILE DURKHEIM, THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE 492-93 (J.W. Swain trans. 1965).

[48] P. 179. Different social theorists, with varying degrees of success, have tried to explain how social norms constrain by reference to supra- individual entities. Durkheim's conscience collective, or "collective consciousness," is one such supra-individual entity. The anthropologist Claude Levi-Strauss, wishing to avoid the idea of a collective consciousness, postulated that there were universal unconscious structures in human minds that controlled individual thought. For a discussion of the connections between Levi-Strauss and Durkheim, see C.R. BADCOCK, LEVI-STRAUSS, STRUCTURALISM AND SOCIOLOGICAL THEORY (1975).

[49] See, e.g., E. DURKHEIM, THE RULES OF SOCIOLOGICAL METHOD, supra note 47, at 27 ("[S]ocial phenomena are things and ought to be treated as things."); id. at 105 ("[T]he source of all that is obligatory is outside the individual.").

[50] P. 179.

same time, because he assumes that social ontology includes only individual thought and action, he tends to overemphasize individual autonomy in the choice of values.

Altman argues that he can explain how social rules constrain individual actors without positing the existence of any supra-individual entities. His social ontology includes only "human individuals, their actions, thoughts, and relations to one another, but does not contain any collective entities in the Durkheimian sense."[51] Nevertheless, Altman claims that the experience of constraint by social rules is not the same as constraint by individuals. He argues that to say that a person is constrained by rules is to say that the person is afraid of a certain type of criticism-not the criticism of any specific individual, but that of some unfocused group in society at large:

***1147** [I]nsofar as I do x in order to avoid the criticism of no particular person but just anybody who may find out about it, I have an experience of constraint by rules. To the extent that the feared agent of criticism is a certain individual (or group of identifiable individuals), the experience is one of constraint by specific individual[s].[52]

Thus for Altman all talk of constraint by rules can be translated into talk of constraint by individuals, when "individuals are thought of in a way that abstracts from their particularity."[53] Conversely, " a ny account of constraint by specific individuals can, given the powers of abstraction, easily be turned into an account of constraint by social rules."[54] Altman analogizes his account to George Herbert Mead's concept of a "generalized other,"[55] although, as discussed below, the analogy is somewhat misleading.

Altman's account of social structuration captures some of the mechanisms of social constraint. But because it is too reductionist, it is an incomplete and impoverished vision of social structuration. One problem with Altman's account of constraint by social rules is that sometimes people follow social norms differently than they think other persons in society will. They believe that what they are doing is right even if they believe that the whole world thinks they are wrong. For example, a courageous individual might harbor a political or religious dissident in her home even though the entire community

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[51] Pp. 179-80.

[52] P. 180.

[53] P. 181.

[54] Id.

[55] P. 180. See GEORGE HERBERT MEAD, MIND, SELF AND SOCIETY 154-56 (1962).

wants to have the dissenter lynched. Although this phenomenon is consistent with Mead's notion of a "generalized other," it is not consistent with Altman's statement that all talk of social rules can be translated into talk of disapproval or adverse consequences from "just anybody" in society. For this sense of obligation cannot be reduced to disapproval or constraint by individuals in society, even when considered "in a way that abstracts from their particularity."[56] Rather, this is an example of an individual's own conscience, a conscience which has been shaped by societal norms. Of course, this is the point of Mead's original "generalized other" analysis. In contrast, Altman's reductionist version does not give a convincing account of the internalization of social norms.[57]

A second problem with Altman's account of individual constraint is that it employs a model of constraint by rules when not all forms of social structuring ***1148** operate in this way. The paradigm of social structures as a set of articulable rules meshes well with the picture of the autonomous individual who chooses according to her own values, and thus can choose to obey or disobey a rule, and suffer the consequences. But many types of social structures are not consciously articulated by individuals. They are simply lived. Some social norms manifest themselves in the way that individuals characterize or perceive social events. Sometimes we know that these social norms are in place only because we can observe how people behave, even though such norms are not written down anywhere, and could not in fact be fully articulated in advance. To say that people act according to social norms, then, is not the same thing as saying that they consciously decide to follow these norms to avoid social disapproval.

Ideology is a social structuring process that creates social norms but does not operate in the same way as a legal or social rule. No one asks themselves, "What does the dominant ideology tell me to think about this particular issue?" or "How should I structure my perceptions of this event so as to be consistent with the dominant ideology?" The social norms produced by ideology shape our thought processes rather than present themselves as rules to be obeyed or disobeyed. In fact, when we try to articulate these norms, we may not

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[56] P. 181.

[57] Thus, the analogy to Mead is flawed because Mead did not seek to reduce the objective elements of social life to the subjective, or the social to the individual. Rather, Mead's "generalized other" is simply another way of describing the influence of the objective elements of social life in constituting the subject. See G.H. MEAD, supra note 55, at 178-226. Indeed, Altman's reliance on Mead is particularly ironic given that Mead saw his "social" theory of the development of the mind as rejecting the very sort of reductionist ontology that Altman embraces-an ontology that sees individuals and their experiences "as logically prior to the social process in which they are involved, and explains the existence of that social process in terms of them." Id. at 223. Mead, on the other hand, argued for a social theory of the self, in which the individual's behavior is explained in terms of the social process. Id.

like what we find, and we may even try to deny that these norms are at work in our thought. This is because not all forms of social structuration are worthy of moral approbation, or serve benign social functions.

Racism and sexism are examples of social norms produced by ideology that are not benign or functional.[58] Many legal scholars, both within and without the CLS camp, have argued that racism and sexism are powerful norms in American social consciousness. Indeed, one of the most important contributions of critical race theory and feminist scholarship has been to remind us of the social construction of attitudes about race and gender. Sometimes racist and sexist attitudes are consciously articulated. In that case, they operate more like the social rules of which Altman speaks. However, more often they are unconscious. Indeed, as Charles Lawrence and Catharine MacKinnon have pointed out, these social norms are often vehemently denied when they are brought to the surface and articulated.[59]

The types of constraint produced by the social construction of reality also differ greatly from Altman's version of the "generalized other." Different individuals will see the world in the same way, not because they fear punishment or disapproval by some generalized other, but because they share the same categories of perception.[60] Consider for example, the tendency in our culture to view the male worker-who does not get pregnant ***1149** and has not traditionally been expected to devote large amounts of time to child care- as the norm in shaping attitudes and expectations in the workplace.[61] This tendency is shared by men and women alike, and has been widely criticized by feminist scholars.[62] Yet

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[58] At the very least they are not functional with respect to members of the oppressed group.

[59] See generally CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987); Charles R. Lawrence, The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism, 39 STAN. L. REV. 317 (1987). Although I have given the example of racial and sexual attitudes, I do not mean to suggest that all ideological structuring of thought and perception is in some way malignant.

[60] See Geertz, supra note 25.

[61] See, e.g., C. MACKINNON, supra note 59, at 37; Lucinda M. Finley, Transcending Equality Theory: A Way out of the Maternity and Workplace Debate, 86 COLUM L. REV. 1118, 1126-28 (1986); Mary Joe Frug, Securing Job Equality for Women: Labor Market Hostility to Working Mothers, 59 B.U.L. REV. 55 (1979).

[62] See, e.g., C. MACKINNON, supra note 59, at 32-45; Finley, supra note 61, at 1152-59; Christine A. Littleton, Reconstructing Sexual Equality, 75 CALIF. L. REV. 1279 (1987); Martha Minow, Foreword: Justice Engendered,

people view the male worker as the norm not because they fear moral disapproval from "just anybody in society." Rather, this perception is part of the social construction of reality. There are many other social constructions, perhaps even more profound and pervasive, that we are not even aware of.[63] Altman's theory of social rules cannot account for these forms of social structuration because such rules do not operate by means of a feeling of disapproval of the individual subject's behavior. Instead, they operate prior to this feeling and prior to individual behavior. They shape the categories in which individuals will experience the pull of the "generalized other."

Although these objections seem diverse, they stem from a related set of problems. Altman's theories are trapped within the paradigm of the autonomous individual who responds to phenomena based upon her pre-existing, freely chosen individual preferences. Because of the formative influence of ideology, however, individual choice is never purely individual; it is shaped and structured before the individual begins her conscious deliberation, and before she experiences the pull of conscience. Social constraint has already, always, and also existed, even before the liberal theorist begins her work. [64]

IV. IDEOLOGY AND LEGAL CONVENTIONALISM

Altman's treatment of legal constraint is much more convincing than his general speculations about social rules. His theory of legal constraint is basically a theory of legal conventionalism. In his view, legal rules constrain because of the existence of background conventions: "[T]he content and structure of law are determined by the conventions accepted by legal officials. The structure of law,

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101 HARV. L. REV. 10, 38-45 (1986); Ann C. Scales, The Emergence of Feminist Jurisprudence: An Essay, 95 YALE L.J. 1373, 1376-80 (1986); Ann C. Scales, Towards a New Feminist Jurisprudence, 56 IND. L.J. 375 (1981).

[63] The work of feminist scholars also demonstrates that we can become aware of at least some forms of social structuration, even if many others escape us. Cf. ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS 5 (1979) (individuals are often aware of the forms of social structuration that affect them). Anti-humanist approaches, on the other hand, may tend of downplay the ability of subjects to escape or to understand the ideological roles assigned to them. For an example of anti-humanist skepticism about the possibilities of self-reflection, see STANLEY FISH, DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 436-67 (1989).

[64] S. FISH, supra note 63; Schlag, "Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction, supra note 23, at 1643-44.

then, is not objectively indeterminate but determined ***1150** by norms whose authority is, like that of all legal norms, ultimately rooted in convention."[65]

Altman's embrace of legal conventionalism seems eminently sensible, and it is consistent with the views of diverse legal scholars.[66] My only quarrel with Altman is that he does not take the theory of legal conventionalism far enough. When one strips away the voluntaristic, functionalist, and rule-based associations of convention, one arrives at something very much like the ideological construction of the subject.

The word "convention" is potentially confusing because it implies a voluntary coming together, or willed, conscious agreement, as people would come together to a political convention, or sign conventions in international law. However most theorists who use the term "convention" do not mean to imply that conventions are voluntary in this sense. David Hume, an early theorist of convention, argued that conventions are "not of the nature of a promise: For even promises themselves ... arise from human conventions."[67] Conventions for Hume are "a general sense of common interest" expressed by all the members of society to each other, "which induces them to regulate their conduct by certain rules."[68] Hume offers the example of two persons rowing in a boat, who row together despite never having overtly entered into an agreement.[69] On the other hand, not all conventions need be voluntary even in the limited sense that Hume describes. We are born and socialized into a world already governed by a variety of conventions. We do not always consciously choose to abide by conventions; rather, we see the conventional as natural and beyond the power of choice, and even resist claims that it is otherwise. Thus, many social and legal conventions cannot be equated with conscious or even implicit agreements to behave in certain ways. Rather, they manifest themselves as similarities of perception and social meaning that are shared by and inhere in various individuals.

The word "convention" may also suggest an idea of functionality. Some conventions exist because they help people get about in the world. This is

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[65] Pp. 183-84.

[66] See, e.g., STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING (1985); Owen Fiss, Conventionalism, 58 S. CAL. L. REV. 177 (1985); John Stick, Can Nihilism Be Pragmatic?, 100 HARV L. REV. 332 (1986).

[67] DAVID HUME, A TREATISE OF HUMAN NATURE 490 (L.A. Selby-Bigge ed. 1978).

[68] Id.

[69] Id.

implicit in Hume's example of the two rowers. The philosopher David Lewis argues that conventions are regularities of behavior that arise in order to deal with problems of social coordination.[70] Nevertheless, not all conventions are functional in Hume's and Lewis's sense. Some conventions may be dysfunctional, or oppressive to particular social groups, such as certain conventions of attitude and behavior between men and women. Finally, the idea of functionality suggests that conventions coordinate behavior, when in fact conventions may affect the perception and meaning of the social world around us.

***1151** Because of its voluntaristic and functionalist associations, the term "convention" has a certain normative validity that the terms "ideology" or "social construction of the subject" lack. If a convention exists, then it has moral force because it was agreed to implicitly, or because it solved some problem of social coordination. However, this normative association may be spurious, since many conventions do not fit these categories, and may be preconscious. Racist attitudes may be conventional, but that is not because of conscious or even implicit agreement between blacks and whites. Nor does the conventionality of racist attitudes or behaviors lend them normative force.

Language is a good example of the type of social convention I am concerned with. We often say that language is conventional, and that might seem to suggest merely an implicit "agreement" that we will use certain sounds to stand for different concepts or, following Lewis, a regularity in behavior that solves problems of social coordination.[71] Yet this account of linguistic conventionalism obscures the degree to which language shapes our reality, to which language acts as a series of lenses that affect how we perceive social events and ascribe social meaning to them.[72] The same is true of many other cultural practices that we call "conventional." Such practices do not merely represent an implicit "agreement" about how to behave, but rather are ways of shaping perception, social reality and social meaning. In this sense, conventions operate before we choose, before we behave, before we experience. They structure choice, preference, desire, and perception.

If we understand conventions to include not only willed or implicit agreements among social actors, but also pre-conscious forms of behavior, meaning, and perception, legal conventionalism takes on an entirely different cast. It is this interpretation of legal conventionalism that I would like to offer here. Altman is quite correct that we experience law as determinate and coherent

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[70] DAVID K. LEWIS, CONVENTION: A PHILOSOPHICAL STUDY (1969).

[71] See id. at 152-208.

[72] On the power of language to structure our perceptions of reality, see BENJAMIN LEE WHORF, LANGUAGE, THOUGHT, AND REALITY: SELECTED WRITINGS OF BENJAMIN LEE WHORF (J. Carroll ed. 1956).

because of shared conventions. But much of what Altman attributes to "convention" could as easily be called "ideology" or the "social construction of the subject." Ideology, then, is the glue that binds the law together. Ideology is not law itself, but rather, that which makes law intelligible to the subjects who experience it. Ideology is constraint.

To be sure, ideology is not a homogenous phenomenon. It is partially constituted by categories of perception, along with sets of beliefs that are inextricably intertwined with these categories. And belief systems themselves are never simply collections of principles or associations. It is better to think of them as containing systems of principles and associations, held in opposition to other principles and associations, with some dominant and others subordinated or suppressed, but nevertheless present. Thus heterogeneity and tension are always present in the system. The relation of dominant to marginalized ideas may change as we move through different spheres of ***1152** social life, for example from the market to the family. Indeed, the very division of social life into spheres in which different principles enjoy greater or lesser dominance may itself reflect ideological construction. [73]

Just as belief systems do not contain homogeneous sets of principles, but rather systems of principles held in opposition to other principles, individuals in society do not share exactly the same beliefs.[74] Deviations in beliefs are experienced as differences in principle, when in fact they are really more correctly viewed as differences between differences between principles. To say that some persons are more individualist than others, therefore, is not to say that they have completely different principles. It is more likely that they share a great deal in common, but that the relationships between principle and counterprinciple are somewhat different in their respective beliefs. This structure produces two different and opposite effects. First, differences in emphasis produce significant and deeply felt political disagreement. That is because it is differences, and not similarities, that produce meaning within a culture.[75] Thus, liberals and conservatives may argue heatedly about many issues when in fact they have a great deal in common in their assumptions concerning, for example, democracy

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[73] See Frances E. Olsen, The Family and the Market: A Study of Ideology and Legal Reform, 96 HARV. L. REV. 1497 (1983).

[74] For two different versions of this point, see Michael Mann, The Social Cohesion of Liberal Democracy, 35 AM. SOC. REV. 423 (1970), reprinted in CLASSES, POWER AND CONFLICT: CLASSICAL AND CONTEMPORARY DEBATES (A. Giddens and D. Held eds. 1982) at 373-95, and William W. Fisher, Ideology, Religion, and the Constitutional Protection of Private Property: 1760-1860, 39 EMORY L.J. 65 (1990).

[75] This is the fundamental principle of structuralism. See TERENCE HAWKES, STRUCTURALISM AND SEMIOTICS (1977).

and private property. Yet when the ideology of Americans is compared to that of other societies, similarities within American ideology emerge more clearly.

Second, the average assignment of principles and counterprinciples within a culture is not experienced as ideologically charged at all. It is seen as a "moderate" or "reasonable" position, or a "non-ideological" position. In contrast, persons who deviate too much from the political norm are seen as ideologically driven or "radical," or even "unreasonable." Yet there is not much difference in kind between persons who seem ideologically driven in their ethical and political assessments and those who do not. Moderates, in this sense, are "ideologues" whose ideology is shared by a great many people. [76]

***1153** The thesis of ideology as constraint thus reverses many commonly held beliefs about jurisprudence. Ideology is normally thought of as a source of legal indeterminacy. Because of the influence of different ideologies, judges of different political views tend to disagree, and judges with extreme positions must be deterred from inserting their private political agendas into the materials of the law. But I suggest that precisely the opposite is true. Ideology is one (although by no means the only) source of the vast degree of agreement among judges and other legal decisionmakers.[77] Although different individuals do

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[76] Because ideology embraces both dominant and suppressed principles, it contains a possible source of its own critique and alteration. Persons with different views can argue for increased or decreased emphasis on various principles and counterprinciples in moral, political and social life. They can do this because both principle and counterprinciple already exist in present belief structures. When radicals argue with moderates over political, social, and moral issues, they are really arguing that the relative placement of principle and counterprinciple should be altered, emphasizing principles which are marginalized but nevertheless immanent in belief and discourse. Thus, alterations in social thought are often not completely revolutionary-they make use of hidden or marginalized elements already present in existing consciousness. This insight is fundamental to the technique of doctrinal deconstruction. For examples, see J.M. Balkin, Constitutional Interpretation and the Problem of History, 63 N.Y.U. L. REV. 911 (1988) (Rule of Law's benefits as a source of doctrinal metamorphosis emerge in defense of Rule of Law as a source of doctrinal stability); Balkin, Deconstructive Practice and Legal Theory, supra note 19, at 767-72 (reemergence of will theory in defense of the reliance theory of contractual obligation); J.M. Balkin, Some Realism About Pluralism: Legal Realist Approaches to the First Amendment, 1990 DUKE L.J. 375, 414-24 (expansion of captive audience doctrine); Unger, supra note 19, at 576-83 (discussing method of "deviationist doctrine"). Altman's treatment of Unger's doctrinal deconstructions are particularly well done, despite his failure to recognize their deconstructive character. See pp. 132- 38, 140-45.

[77] One might attribute this agreement to an ideology shared by most Americans. On the other hand, one might argue, as Mann does, that there need be

not share precisely the same ideology, in most cases their ideologies do not differ greatly. Rather than seeing non-ideological decisionmaking as the norm and ideological decisionmaking as the exception, I suggest that it is quite the other way around. All decisionmaking makes use of ideological constructions of social reality. What we call "non-ideological" decisions are ideological decisions whose ideology is simply not noticed. It follows that protestations of judicial sincerity and a deliberate attempt to follow the law and not one's own political views are no guarantee that legal decisionmaking will not be ideological. Sincere belief that one is following the law and not one's own personal predilections is the experience of ideological decisionmaking.

V. TWO SCHOOLS OF CLS?

When Altman turns to the CLS theory of social and legal constraint, he finds two different positions. Using terms first coined by Unger, Altman distinguishes between "super-theory," which he associates with Unger himself, and "ultra-theory," which he identifies with CLS "radicals."[78] In Altman's view, the difference between Unger and other CLS theorists is that Unger believes that there are social frameworks "that constrain and channel individual behavior and thought and the routine activities and thoughts that occur within the framework."[79] In contrast, argues Altman, CLS ultra- theorists do not believe that there are any social frameworks, "at least when one conceives of frameworks as having an objective existence and as capable of constraining and channeling individual behavior and thought."[80] Altman argues that for these CLS thinkers, frameworks

> can amount to nothing more than the patterns which a person cognitively ***1154** imposes upon the past flow of actions and thoughts. Such patterns do not exist in the events themselves but are imposed by the subject upon the undifferentiated flow of past events.... Frameworks thus exist only in the eyes of the particular beholder, and lacking any objective existence, they also lack the power to exert any objective control over the thoughts, actions, or desires of a population.[81]

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a significant degree of consensus only among those persons in actual power (police officers, prosecutors, judges, legislators, lawyers, etc.). See Mann, supra note 74, at 388-89.

[78] Pp. 164-68. Unger himself does not describe CLS work as "ultra-theory." This is Altman's innovation. Id.

[79] Pp. 164-65.

[80] P. 166.

[81] Id.

Altman manufactures this elaborate account of CLS "ultra-theory" because he perceives that the CLS critique of indeterminacy cannot rest wholly upon claims of linguistic indeterminacy.[82] Altman is certainly correct that semantic indeterminancy is not the only source of legal uncertainty. Some types of legal indeterminacy are produced by conflicts of value, differences in factual characterization, or the struggle between opposed accounts of the social world. Altman, however, adopts none of these explanations. He argues instead that CLS indeterminacy critique is really grounded upon a deeper critique of social reality: "The CLS ultra-theorist argues that there is no objective structure to law or legal discourse, because there is none to any element of social reality."[83] Thus, Altman believes that the indeterminacy critique follows as a matter of course from what he calls "CLS ultra-theory": Legal norms cannot constrain individual behavior, because no social norms can ever have such an effect.[84]

This account of CLS scholarship is surely incorrect. If what Altman says is true, one would expect CLS thinkers to be relatively uninterested in questions of political and social ideology, for it would follow that ideology could not constrain and channel individual behavior and individual thought. But precisely the opposite is true. CLS thinkers, including Unger, are vitally interested in the ideological construction of the social world, because they believe that ideology produces a framework of thought that makes certain social practices seem natural and normatively superior when in fact they are unjust and oppressive. Their attitude about whether social structures can constrain social behavior and thought is like the old joke about belief in baptism: They not only believe in it, they have seen it done. Indeed, exposing the unnaturalness and injustice of existing frameworks that have in fact shaped our attitudes and actions is the goal of much CLS scholarship.

I believe that Altman has mischaracterized CLS scholarship in this and other passages because he fails to take fully into account the social construction of the subject implied in Critical Legal Theory. He has thus unwittingly attributed his own unstated assumptions about the social construction of individuals to CLS scholars. This is clear in the very rhetoric he uses to describe the CLS argument for legal indeterminacy:

> The rule of law requires that the law provide determinate outcomes for actual and potential cases. But the [CLS] ultra-theorist argues that the absence of any doctrinal structure independent of how an individual chooses to ***1155** view the relations among the various doctrinal rules destroys legal determinacy.... Carve up the mass of legal norms in a different way, and legal outcomes will be drastically different.

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[82] Pp. 168-69.

[83] P. 169.

[84] Pp. 169-70.

But the ultra-theorist argues that the location of any given norm is not something given, it is, rather, created by the way a particular individual chooses to carve up the mass of doctrinal norms. It may be that most legal professionals in our legal culture have thus far chosen to carve up doctrine in very similar ways. This creates the deceptive appearance that there is some objective structure that these choices are merely mapping rather than creating. But there is no such objective structure. There is no aspect of social reality, including the law, that has any structure independent of the choice of any given individual. On that account, there can be no outcomes that the law as such logically requires; it is only the law as someone has chosen to see it structured that can have determinate outcomes for legal cases.[85]

Thus, Altman mistakenly ascribes to all CLS thinkers (except Unger) the proposition that doctrine has an objective structure merely because a large group of individuals choose to look at it in the same way. But the more plausible argument is that persons look at doctrine in the same way because they share a common ideology. Background conventions and shared world views constrain and channel the ways in which people perceive doctrinal structure. Thus, doctrinal structure is not simply produced by the confluence of different individuals' choices to see it that way. It is a constraint produced by the social construction of subjects in a society. This argument clearly rejects the very assumption that Altman ascribes to CLS thinkers-that social structures do not channel individual thought. Moreover, a theory of ideological construction of the subject is perfectly consistent with a claim that Altman believes antithetical to CLS-that doctrine has a structure independent of the way in which any particular person happens to think. An ideological account of legal determinacy would assert simply that it is not an accident or a mere confluence of events that leads many individuals to think the same way about a large number of issues.

In contrast, Altman's description of CLS "ultra-theory" makes CLS scholars sound like naive liberals, and it is no wonder that an incongruity results. Altman first describes the CLS position as one of radical subjectivity; having argued that this position is untenable, Altman imagines CLS proponents as retreating to the position that background conventions give legal norms determinacy, but that these conventions "are class-biased or otherwise unfairly tilted against certain normative conceptions...."[86] Altman claims that "this CLS argument shifts the issue from the question of whether law has an objective structure to the question of whether the distinction between law and politics holds."[87] From my reading of CLS scholars, there has never been any such shift. No substantial group of CLS scholars has ever made the first claim that Altman ascribes to the CLS movement. ***1156** Rather, the claim that the social

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[85] P. 169 (emphasis added).

[86] P. 184.

[87] Id.

construction of the subject produces the experience of legal determinacy appears to have been the dominant position among CLS scholars all along.[88]

Nevertheless, one of the reasons why Altman views CLS scholars as he does is that the CLS literature is full of phrases suggesting that individuals can change social structures through acts of individual will and individual commitment. Altman quotes Peter Gabel, Mark Tushnet, and Robert Gordon for this proposition,[89] although he could as easily have cited Gary Peller and Joseph

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[88] For example, Duncan Kennedy's work often contends that legal arguments are circular, but Kennedy never asserts that actors in the system do not experience doctrinal structure, or that all legal positions are equally plausible to them. See, e.g., Duncan Kennedy, Form and Substance in Private Law Adjudication, 89 HARV. L. REV. 1685, 1723-24 (1976) [hereinafter Kennedy, Form and Substance] ("Although each argument has an absolutist, imperialist ring to it, we find that we are able to distinguish particular fact situations in which one side is much more plausible than the other."). Indeed, it would be difficult to square a position of radical indeterminacy with Kennedy's elaborate descriptions of the legal doctrines and legal consciousness of the 19th and 20th centuries. See generally id. (characterizing legal doctrine as comprised of a recurring struggle between two opposed rhetorical modes); Duncan Kennedy, Toward an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940, 3 RES. L. & SOC. 3 (1980) (analyzing the emergence of a distinct form of American legal thought which flourished in the late nineteenth and early twentieth centuries). Moreover, the argument in Form and Substance rests upon the assumption that rule-based doctrines are normally more determinative of legal outcomes than standard-based doctrines. Nor could the radical indeterminacy thesis be squared with Kennedy's own arguments in Duncan Kennedy, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEG. EDUC. 518 (1986), in which he routinely describes certain arguments as more plausible than others, and characterizes doctrinal structures that one must deal with as a judge.

Similarly, Joseph William Singer, The Player and the Cards: Nihilism and Legal Theory, 94 YALE L.J. 1 (1984), is the work most often associated with the position of radical indeterminacy. Yet Singer does not deny that we know most of the time how most people will react to legal arguments, such as the argument that the Constitution enacts socialism. Id. at 22-23. Singer claims that socialization produces the uniformity of legal practice and the experience of doctrinal order. Id. at 19-25. His dispute with Professor Stick seems largely to revolve around whether these processes of socialization merely shape and inform law or, as Stick argues, are law themselves. Cf. Stick, supra note 66, at 354-55. For a similar assessment of the CLS indeterminacy argument, see Richard Michael Fischl, Some Realism About Critical Legal Studies, 41 U. MIAMI L. REV. 505, 528-29 (1987).

[89] Pp. 167-68 (citing Peter Gabel, The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves, 62 TEX. L. REV. 1563,

Singer.[90] Altman views these arguments as denials that social structures have any power to control and constrain human experience. I regard them instead as exhortations to alter existing structures which are conceded to control the way people presently do think about social issues. In other words, they are a form of cheerleading.

Altman's argument thus rests upon a conflation of three different statements that CLS scholars might be making:

(1) Existing social structures constrain the thought of individual subjects.

(2) Existing social structures should constrain the thought of individual subjects in the way that they presently do.

***1157** (3) Existing social structures must continue to constrain the thought of individual subjects in the way that they presently do.

One could easily deny (2) and (3) without denying (1). Indeed, given ideology critique, acceptance of (1) by CLS scholars is virtually guaranteed. In other words, one could acknowledge, as Robert Gordon claims, that we build social structures and then come to believe that these structures are natural or necessary ways of looking at the world.[91] Yet at the same time one might hold that individuals could eventually learn to look at the world in different ways. Evidence for this proposition might be gleaned from a study of the thought of other times and other civilizations. If we have come to think as we do, we could come to think otherwise.[92]

There are two important caveats to this argument. The first is that we must not overestimate the impact of our recognition of historical contingency in existing social frameworks. Just because we say that a form of thought is contingent, it does not follow that it may be transformed into or produce any other form of thought. Historical events may be contingent, but the occurrence of such events forecloses as many possibilities as it creates. This fact is connected to a more general point about historical possibility: The fact that an historical event

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1570 (1984); Robert W. Gordon, New Developments in Legal Theory, in THE POLITICS OF LAW 281, 288-90 (D. Kairys ed. 1982); Mark Tushnet, An Essay on Rights, 62 TEX. L. REV. 1363, 1402 (1984)).

[90] Gary Peller, Reason and the Mob: The Politics of Representation, TIKKUN, July/Aug. 1989, at 28, 95; Singer, supra note 88, at 64-70.

[91] Gordon, supra note 89, at 288-89.

[92] Id. at 289-90.

was causally possible at some time in the past does not guarantee that it is causally possible today. So the CLS argument must not be that we could move from our present belief structures to any possible set of social norms. Rather, it must be that, given sufficient time and effort, we could move to a morally preferable set of norms.

The second caveat is that such a change in social attitudes and beliefs would not come overnight. Altman points out, as have many others, that social beliefs and practices are resistant to change.[93] To the extent that CLS scholars can be read as saying that we could snap our fingers and social customs, institutions, and attitudes would change instantly, they are surely wrong. But it is unlikely, despite their eager rhetoric, that any of them seriously believes this to be the case. That is why I tend to see such passages as exhortation, rather than as description. Exhortation is the appropriate rhetorical mood when one recognizes that there remains a long way to go before achieving one's goals.[94]

VI. STRUCTURALISM AND THE STRUCTURE OF LEGAL DOCTRINE

Altman's misconception of the philosophical traditions underlying CLS writing carries over to his discussion of CLS theories of legal doctrine, and in ***1158** particular, to his discussion of Duncan Kennedy's work. Just as Altman does not appreciate that CLS arguments assume socially constructed subjects, he likewise fails to recognize the specific methodology that Kennedy uses to describe and analyze this social construction-structuralism. Because Altman does not recognize the structuralist methodology behind Kennedy's arguments, he attributes to Kennedy positions that Kennedy does not hold.

The fourth chapter of Altman's book discusses and criticizes CLS arguments about legal doctrine, focusing in particular on Kennedy's argument in Form and Substance in Private Law Adjudication.[95] In this article Kennedy argued that legal doctrine is characterized by a recurring struggle between two opposed rhetorical modes, which he called individualism and altruism.

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[93] Steve Winter, for example, has argued that the social construction of reality may have a certain homeostasis that offers resistance to alteration. Winter, Indeterminacy and Incommensurability in Constitutional Law, supra note 23.

[94] Of course, this suggests that CLS scholars would be best advised to exhort in the streets rather than in the pages of law reviews.

For a playful attack on the usefulness of normative legal discourse to effect social transformation, see Schlag, Normative and Nowhere to Go, supra note 23.

[95] Kennedy, Form and Substance, supra note 88.

Individualist arguments emphasize personal freedom and the right to engage in self-interested behavior, while deemphasizing responsibility towards others; altruist arguments emphasize self-sacrifice and duties and responsibilities owed to others.[96]

Altman views Kennedy's argument in Form and Substance as typical of CLS arguments about doctrine. Unfortunately, his critique of Kennedy's article is flawed by a misunderstanding that undermines much of his analysis. Altman views Kennedy's individualism and altruism as if they were a set of coherent political positions like a party platform. Instead, they are merely directions or orientations of policy argument.[97] Altman believes that Kennedy's position is that certain legal doctrines, for example the negligence standard in unintentional tort law, are individualist or altruist in and of themselves. In fact, no legal doctrine is individualist or altruist per se. It is only relatively individualist or altruist in comparison to some other doctrine or position. Thus negligence is relatively individualist in contrast to strict liability, but relatively altruist in comparison to no duty.[98]

Kennedy's discussion in Form and Substance exemplifies a structuralist analysis.[99] A basic tenet of structuralism is that cultural artifacts and events ***1159**

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[96] Id. at 1713-22. These are not the only ways one could divide up legal doctrine. See, e.g., J.M. Balkin, The Hohfeldian Approach to Law and Semiotics, 44 U. MIAMI L. REV. 1119, 1133-35 (1990). For the purposes of this essay, however, I shall adopt Kennedy's original distinction between individualism and altruism, which has been highly influential in Critical Legal Theory.

[97] See Kennedy, Form and Substance, supra note 88, at 1720-21.

[98] This point is easy to see in terms of the Learned Hand Test of negligence. The Learned Hand Test states that persons are liable if they fail to take cost-benefit justified measures necessary to prevent harm to others. In other words, the test requires persons to invest an amount equal to the expected loss to strangers discounted by the probability of such loss. Instead of using income or property for one's self, one is required to divert its use to creating safety precautions for the benefit of others, or else one will be required to compensate in damages. An argument for no duty would be individualist-it would argue that one should not be required to aid strangers by investing in their safety. The Learned Hand Test looks altruistic in comparison because it is premised on the idea that living in society requires us to take into account the costs and benefits to others caused by our conduct as much as we consider the costs and benefits to ourselves. By requiring us to internalize the costs of activities to society as a whole, the Learned Hand Test begins to look like a utilitarian calculus which makes no distinctions between persons in assessing total social harm and benefit.

[99] Kennedy, Form and Substance, supra note 88, at 1712 & n.3; See Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law,

do not have meaning in and of themselves. Rather, they only have meaning within a system or structure of relationships to other cultural artifacts and events.[100] Cultural meaning is an effect produced by differences and contrasts between elements of culture. Thus, for the structuralist, the proper subject of study is not things in a culture, but relationships between things in a culture.[101] These relationships form a structure, hence the term "structuralist."

Consistent with structuralist method, Kennedy's concepts of individualism and altruism are products of contrast and differentiation. The individualist meaning of negligence emerges when it is compared to relatively altruist doctrines like strict liability. That is because in a structuralist analysis differences, and not similarities, create cultural meaning. In many cases, negligence and strict liability produce the same result, as for example when the defendant has failed to exercise due care. Thus, it is only in the cases in which they differ (i.e., where the defendant has exercised due care but the plaintiff is harmed anyway) that we must choose between them. And with respect to this class of cases, negligence appears more consistent with individualist rhetoric than does strict liability.

Similarly, the altruistic meaning of negligence emerges when it is compared to relatively individualist doctrines such as no duty. In many cases negligence and no duty produce the same result, as for example when the defendant has exercised due care but the plaintiff is harmed anyway. Again, only when these two rules differ (i.e., where the defendant has failed to take due care and the plaintiff is harmed as a result) must we choose between them. And with

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with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 MD. L. REV. 563, 564 & n.3 (1982) [hereinafter Kennedy, Distributive and Paternalist Motives]; Duncan Kennedy, The Structure of Blackstone's Commentaries, 28 BUFFALO L. REV. 205, 210 & n.2 (1979). Structuralism, of course, was not the only influence on Kennedy and other CLS scholars. They were also influenced, in varying degrees, by Marx, Hegel, Mannheim, members of the Frankfurt School, and French Existentialism. Id. However, all of these influences on Kennedy were filtered through a generally structuralist approach which emphasized, in Kennedy's own words, "the permanence of contradictions in consciousness." Kennedy, Form and Substance, supra, note 88, at 1712 n.73.

[100] The classic statement of this thesis is FERDINAND DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (W. Baskin trans. 1959). For discussions of structuralism, see JONATHAN CULLER, FERDINAND DE SAUSSURE (1977); JONATHAN CULLER, STRUCTURALIST POETICS (1975); R. HARLAND, supra note 19; T. HAWKES, supra note 75.

[101] See T. HAWKES, supra note 75, at 17-18.

respect to this class of cases, negligence appears more consistent with altruist rhetoric than does the position of no duty.[102]

Kennedy's individualism and altruism, then, are not doctrinal positions. Rather, they are the differences between doctrinal positions. There are no individualist positions per se. There are only relatively individualist positions. The position supported by individualist arguments and rhetoric is whatever position is relatively more individualist than the other position currently under consideration. We can thus say that legal doctrine is Janus- faced: Its differing cultural meanings emerge as it is compared and contrasted to other legal rules which differ from it in different ways.

***1160** Understanding the structuralist basis of Kennedy's arguments permits a much more plausible account of the argument in Form and Substance than Altman offers. Yet here again, I must come partly to Altman's defense. Kennedy did not make clear to the uninitiated his reliance on structuralist methodology and its full implications for legal doctrine in Form and Substance. After making the key points that individualism and altruism exist on a continuum, and that they are defined in terms of contrast and relation between positions,[103] he then spends most of the article talking about "the" individualist position or the "individualism" of late 19th century doctrine, assuming that the reader will simply provide the requisite caveats for herself. Nevertheless, if one is unaware of the structuralist underpinnings of the analysis, one will be tempted to think that Kennedy believes that doctrines, historical events, and beliefs are individualist per se, rather than merely individualist in relation to some other doctrines, historical events, or beliefs, or to some hypothetical standard of comparison.

Because Altman is unaware of the structuralist basis of Kennedy's arguments, he believes that Kennedy takes two inconsistent positions on legal doctrine:

> At times in Form and Substance, [Kennedy] suggests that certain legal norms can be characterized as individualist and others as altruist, and that overall doctrine is an unprincipled patchwork quilt of the two sorts of norms....
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> But in other places, Kennedy paints a quite different picture of the law. He suggests that virtually any of our legal doctrines is compatible with either individualism or altruism.... In this picture, the law can be organized according to two radically incompatible ethical positions....
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> If this picture of the law is accurate, it would be more appropriate to speak of doctrine as a kind of Wittgensteinian duck-rabbit [picture] than as a patchwork quilt.[104]

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[102] See Balkin, supra note 39, at 419-21.

[103] See Kennedy, Form and Substance, supra note 88, at 1720-21.

[104] P. 120.

Altman thus views Kennedy as arguing inconsistently that law is full of individualist per se doctrines resting cheek by jowl next to altruist per se doctrines in hopeless contradiction (a view Altman calls the "patchwork quilt" thesis),[105] and that law can be either individualist or altruist depending upon how any individual chooses to look at it (the "duck-rabbit" thesis).[106]

The two conflicting positions Altman ascribes to Kennedy are a misreading of a single coherent position based on a structuralist analysis. The individualist or altruist character of doctrines is neither a property of the doctrines themselves nor a property of how a particular individual chooses to look at them. First, the individualist or altruist character of doctrine is not an inherent property of doctrine but emerges from its differentiation from other actual or hypothetical doctrines in the legal system. Negligence ***1161** can be supported by altruist arguments because it can be opposed to no duty; it can be supported by individualist arguments because it can be opposed to strict liability.[107] Second, a structuralist analysis always assumes that cultural elements have meaning independent of any particular observer; this meaning depends upon contrast with and differentiation from other elements in the system.[108] The basic structure of differences that gives meaning to cultural artifacts is held in common by different individuals; another name for this structure is ideology. In other words, structuralist analysis attempts to unearth the "deep structure" of individuals' shared ideology.[109]

Altman argues that Kennedy does not believe in an objective structure to legal doctrine because for Kennedy "every legal case and every piece of legal territory is disputed ground between the warring armies of individualism and altruism."[110] Ironically, Altman does not see that this is an argument in favor of an overarching structure to legal doctrine independent of any particular individual mind-that the structure of differences exists whether any particular person wishes them to exist or not. Every choice between legal rules, argues Kennedy, produces a struggle between individualism and altruism to the extent that in each case one

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[105] P. 105.

[106] Pp. 105, 130-31, 138-39.

[107] See J.M. Balkin, The Crystalline Structure of Legal Thought, 39 RUTGERS L. REV. 1, 59-60 (1986).

[108] See J. CULLER, FERDINAND DE SAUSSURE, supra note 100, at 13-17, 118-21.

[109] C.R. BADCOCK, supra note 48, at 11.

[110] P. 138 (citing Kennedy, Form and Substance, supra note 88, at 1766).

alternative is relatively individualist and the other relatively altruist. Individualist arguments will support the relatively individualist position, and altruist arguments will support the relatively altruist position. The preexisting structure of cultural meanings, and not any individual's particular desire to see the world that way, guarantees this result.

A similar misconception underlies Altman's discussion of the so-called "duck- rabbit" thesis. The duck-rabbit thesis, according to Altman, holds that the interpretation and application of doctrine is "largely a function of which norms are taken to be part of the core of doctrine and which norms are taken to be part of the periphery."[111] The appearance of a core/periphery structure produces the dominance of individualism in our legal and political culture. The individualist view is seen as dominant, and altruistic doctrines are explained as exceptions to a more general rule. What makes individualism and altruism opposed is not the incompatibility of particular doctrines associated with them but rather their depiction of particular doctrines as relatively central or relatively peripheral to the area of law in question.[112] In Altman's view, the CLS position (or rather, the position of Kennedy and Unger) is that most people see individualism as the core and altruism as the periphery. Altman, however, notes that both Kennedy and Unger recognize that the structure can be flipped: doctrines seen as peripheral or exceptional can be viewed as central, and doctrines previously viewed ***1162** as central or basic can be explained as exceptions.[113]

Altman argues that there are two versions of the duck-rabbit thesis, one moderate and one radical. He associates the first with Unger, and the second with Kennedy.[114] The moderate version holds that the dominance of individualism in doctrine is real; it is "not simply the way that most legal professionals have chosen to look at doctrine."[115] The radical version, according to Altman, holds that "doctrinal structure is not in itself one way or another; it is merely relative to the set of ethical lenses through which a given individual happens to look at doctrine."[116] In fact, no member of CLS holds either view, at least as Altman states the choice between them. The dichotomy that Altman proposes is one of his own imagination.

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[111] P. 130.

[112] Id.

[113] Pp. 130-31.

[114] P. 131.

[115] P. 132.

[116] Id.

Altman believes that the objectivity of doctrinal structure turns on whether we can say that doctrine is really individualist or altruist. But once again, under a structuralist analysis, individualism and altruism are not properties of doctrines per se-they are properties of doctrines in relation to other doctrines. Thus, the question whether doctrine has a structure independent of any individual's perception of it is not the same question as whether doctrine is "really" individualist or altruist. Not only is the latter inquiry irrelevant to the former inquiry, it is nonsensical. It is as if Altman thought that the question whether the integers were ordered in size turned on the question whether one could say definitively whether 512 was a large number per se.

We can see the negligence standard as supporting individualist policies (when contrasted to strict liability) or as supporting altruist ones (when contrasted to no duty). That is another way of saying that doctrine is Janusfaced. But this does not deny that doctrinal structure is objective. It does not mean that there is no doctrine of negligence, or that negligence and strict liability are the same doctrine. It merely means that we can see different values emanating from the same doctrine.

To say that individualist positions are dominant and altruist positions are exceptional is nothing more than a judgment derived from comparison and contrast. Consider, for example, this plausible description of unintentional tort doctrine:

> The basic rule in unintentional tort is that liability depends upon a showing of individual negligence, or fault. Absent fault, there is no justification for the state to force some persons to bear losses that occur to others. To be sure, there are pockets of traditional strict liability (ultrahazardous activity, for example) and a few new areas where strict liability has been applied (products liability). Some of these doctrines stem from the difficulty of proving fault in certain classes of cases. Both products liability and the doctrine of res ipsa loquitur can be explained in this way. Thus, these exceptions are really consistent with a requirement of individual fault before ***1163** shifting of loss will occur. Others are relics of history, or simply exceptions or anomalies.

Under this description of tort law, the dominant structure is relatively individualist with a few altruist exceptions. We have constructed this portrait by emphasizing the difference between existing tort doctrine and absolute liability. It thus looks as if the principles "emanating" from our embrace of the negligence standard are individualist ones. Nevertheless, negligence is only an individualist doctrine when compared to strict liability; it is altruist in other contexts, for example, when compared to no duty. Thus we might provide another plausible account of the basic structure of tort doctrine, by showing how far existing doctrine differs from a position of no duty:

> The basic rule in unintentional tort is that loss will be shifted from injurers to victims where this would maximize social benefit over social cost. All persons are thus required to sacrifice for the greater social good. The Learned Hand Test of negligence is an articulation of this basic altruistic concept: It induces potential injurers to internalize the expected social cost of failing to invest

in safety. In some cases, problems of proof require shifting costs even where this cost-benefit balance cannot be demonstrated effectively (for example, in cases involving products liability or ultrahazardous activity). Finally, there are many cases where the law shifts losses because it believes that some parties can more easily spread or absorb losses.

To be sure, there are exceptional situations where we do not require individuals to internalize social costs to others. For example, one has no duty to rescue a stranger even though this could be done at little expense to one's self and would avoid great harm to another. However, these rules deal with exceptional cases, or, like the fellow servant rule, are discredited anomalies within a generally altruist conception of duty.

Which of these descriptions is correct? Both are. If we compare our system of tort law with a system of no duty, it is easy to see how altruistic it is. In most comparisons with such a system, the existing rule choices will reflect altruist values and can be defended by altruist argument forms. On the other hand, compared with a general system of strict liability, it is clear that individualist premises still predominate, and that we can defend existing choices by reference to individualist values and individualist forms of argument. None of this, however, disproves the existence of an "objective" doctrinal structure. Indeed, this type of exercise is possible only because doctrinal structure is objective in the sense that structuralist analysis proposes-because it is intelligible in terms of contrast and relation. This is the fundamental insight of structuralism-things possess cultural meaning because they are imbedded in a system of contrast and differentiation. Remove this system, and their meaning collapses.[117]

***1164** The error in Altman's analysis, once again, is assuming that cultural meaning inheres in things (here doctrines and principles) and not in relationships between things. This does not mean that the statement "19th century tort doctrine was highly individualist" is incoherent, any more than the statement "people living in the twelfth century were short" is incoherent. These claims make perfect sense once we recognize that they, too, implicitly rely upon standards of

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[117] Post-structuralist critiques of structuralism have pointed out that the categories of cultural meaning described in structuralist analyses will prove unstable in that they will change over time or be subject to reconceptualization and deconstruction. See, e.g., JACQUES DERRIDA, Structure, Sign, and Play in the Discourse of the Human Sciences, reprinted in WRITING AND DIFFERENCE 278-93 (A. Bass trans. 1978). Nevertheless, deconstructive arguments about the instability of structuralist categories are parasitic on the existence of these categories themselves. The deconstructionist needs the oppositional categories of cultural meaning in order to show their mutual dependence and differentiation. And she needs to assume that cultural categories have a particular meaning different from their later meaning in order to historicize them. Cf. Balkin, Nested Oppositions, supra note 19, at 1703-04 (indeterminacy critique is parasitic on assumptions of determinacy).

comparison and contrast. In order to avoid confusion, we must make precisely clear what relationships are implicit in what we are saying.

When we postulate an ideal type, like individualism, we may ask whether certain concrete institutions, principles, or things are individualist. We speak as if individualism were a property of a particular as opposed to an effect of differences between particulars. Yet as soon as we fix upon a concrete entity, we discover that it "contains" both individualism and altruism, its opposite.[118] It can be seen as consistent with either because it produces different effects of meaning when it is contrasted to other particulars.[119]

The relationship of ideas like individualism to their concrete instantiations is a complex one of mutual differentiation and dependence. It is a relationship much like that between structures and events. We use conceptual oppositions like individualism and altruism to describe the cultural significance of more concrete ideas like private property or negligence. Of course, no concrete instantiation of individualism is purely individualist, because each concrete instantiation, whether it be negligence, freedom of contract, or private property, can exemplify either individualism or its opposite, altruism, depending upon the context in which it is considered. But this does not mean that these conceptual oppositions have an existence separate and apart from their concrete instantiations. There are no forms of individualism or altruism in the sky, just as structures of meaning in general do not exist without individual events which have meaning. In order to give content to the ideal of individualism, we can only explain it in terms of concrete instantiations. In this way, individualism is both dependent upon and differentiated ***1165** from each concrete example of individualism. Each concrete example, in turn, is both partly consistent with and partly in opposition to the individualist ideal.

This analysis may seem puzzling in that it does not seem to give us anything to "push against," so to speak, in our judgments of individualism and

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[118] Balkin, Nested Oppositions, supra note 19, at 1681-82.

[119] As an example, consider the institution of private property. It seems at first glance to be a concrete instantiation of individualism. A system of private property allows persons to exclude others from certain resources. It is a state-supported right to be selfish in the use and distribution of certain goods. Yet once we compare the institution of private property to a state of nature in which the state offers no security from theft and destruction, its altruist elements begin to emerge. A system of private property prevents individuals from confiscating or destroying resources for their private advantage. It requires us to subordinate our short term ambitions for conquest to the interests of others, and for the long term interest of all. It produces a system of exchange which facilitates forms of social cooperation. Similarly, in existing doctrine, restraints on unfair competition and predatory pricing can be seen as imposing altruist duties akin to the protection of property rights.

altruism. Nevertheless, doctrinal structure does have a certain gestalt. It is a gestalt we experience because we live and think within a system of cultural meanings. We share common understandings of what our basis of comparison should be, even if these common understandings are not consciously agreed upon.

Altman does not fully appreciate the ideological construction of cultural meaning. He believes that the only choices available are that doctrine has an "objective" structure, or that "doctrine has no structure independent of an individual's view of it; Doctrinal structure is in the eyes of the beholder."[120] Hence, he argues that " t he dominance of individualism is part of existing doctrine, not simply the way most legal professionals have chosen to look at doctrine."[121] Altman thus present us with a dichotomy between a structure that is independent of individual minds and one which "exists only relative to the person and his choice of ethical viewpoints."[122]

We have seen this dichotomy before. It is the same one that Altman drew in his discussion of social rules and individual behavior. Either social rules had an objective existence that constrained individual behavior, or there were no objective social constraints and individuals were free to choose and behave anyway they liked.[123]

Both sides of Altman's dichotomy assume an individual in control of her values and the way in which she perceives the world. This assumption is implicit in Altman's characterization of legal doctrine as merely what an individual chooses to see. The "illusory appearance of an objective structure" is due to the contingent fact that "most legal professionals accept a view dominated by individualism."[124] In other words, the happy confluence of individual acts of ethical choice produces the illusion of structure.

Yet Altman's conception of the alternative-an objective doctrinal structure (as he understands the meaning of objectivity)-shares the same assumptions about individual autonomy. For in that case the objective structure of

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[120] P. 131.

[121] P. 132 (emphasis added).

[122] Id.

[123] This dichotomy also mimics Altman's distinction between rule-based and instrumentalist conceptions of social reality. See pp. 150-54. Note that this dichotomy once again omits any possibility that social structuration can take place outside of the model of rules-that individuals can be socially constructed through ideology.

[124] P. 132.

doctrine constrains the ways an actor can choose to look at doctrine. The objective structure prevents a person from looking at doctrine anyway she wants. This is the familiar metaphor of the prisoner in chains, ***1166** based on a model of social reality that ignores the forces of ideology and social construction.

It should by now be clear that Altman's division of CLS scholars into two groups-those who believe in objective doctrinal structure (led by Unger), and those who believe that doctrine is in the eyes of the beholder (led by Kennedy)-is also a false dichotomy. There are many disagreements that separate the CLS camp, and Unger and Kennedy in particular, but Altman's manufactured distinction about belief in objective doctrinal structures is not one of them. Moreover, the greatest irony in Altman's book is his choice of Kennedy as representative of the "nihilistic" camp. Indeed, Kennedy is, in an important sense, more committed to objective doctrinal structure than other members of the CLS movement because his commitments to structuralist method are the most overt and sustained.

Because structuralism postulates that meaning is produced by a system of differences, it locates the source of meaning not in the individual human mind, but in the system itself, which is shared in some way by all of the members of a culture. Thus, the error of structuralist social theorists is rarely radical subjectivism-the belief that things mean whatever specific individuals decide them to mean. Rather, structuralists are much more likely to err in the direction of reification of anti-humanism-to believe that social structures exist independently of the individual mind and that the individual mind is largely constructed and controlled by these structures. For this reason, one of the most ironic parts of Altman's book is his attempt to portray Kennedy as a radical subjectivist who believes that legal doctrine is simply in the eye of the beholder. Perhaps there are CLS scholars who are radical subjectivists, but Duncan Kennedy does not fall into the camp. Rather, the recurring problem in his work is explaining how individuals can transcend the universal structures that seem inexorably to shape their political imaginations.[125] This is the source of Kennedy's famous renunciation of the "fundamental contradiction" of social life in 1984.[126] The entire tenor of his work up to that point had been so heavily structuralist, so imbued with tendencies towards anti-humanist determinism, that he felt compelled to reject the stability of his earlier structuralist projects and embrace a more destabilizing post-structuralist critique.

Yet the post-structuralist critique of structuralism does not really solve Kennedy's problem. For post-structuralism shares with structuralism the

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[125] See Kennedy, Form and Substance, supra note 88, at 1712-13, 1766-67; Kennedy, The Structure of Blackstone's Commentaries, supra note 99, at 212-13.

[126] See Duncan Kennedy & Peter Gabel, Roll Over Beethoven, 36 STAN. L. REV. 1, 15-18 (1984).

decentering and effacement of the individual subject. Indeed, it merely carries these tendencies through more systematically, so that the individual is, if possible, even more obliterated in the post-structuralist universe. The freedom of the deconstructionist is not the freedom of the individual subject to choose free of ideology or social structuration. It is rather the freedom of the social forces that replace the individual to signify in many different ***1167** directions.[127]

Interestingly, Altman finally does recognize in a footnote that there do seem to be a disturbing number of passages in which Kennedy takes a distinctly structuralist line.[128] Altman cites The Structure of Blackstone's Commentaries as an example; one could add Kennedy's work on contract and tort doctrine[129] in addition to most of Form and Substance.[130] In order to portray Kennedy as predominantly a radical subjectivist, Altman must ignore substantial passages (and indeed entire works) or consign them to footnotes. Rather than seeing these as marginal or exceptional elements of Kennedy's work, it would be more appropriate to recognize that these passages and writings define the central elements of his thought. Kennedy is, for better or worse, a predominantly structuralist thinker. And structuralists rarely believe that individuals decide for themselves what culture means. Rather, their greatest problem is explaining how individuals ever mean anything at all as individuals.

VII. CONCLUSION

I suspect that the popular portrait of CLS scholars as free-wheeling 1960s radicals has led to the assumption that their theoretical work must rest upon an unabashed embrace of radical subjectivism. But this overlooks the theoretical tendencies towards determinism or anti-humanism in structuralist and post-structuralist perspectives. Nevertheless, there is a curious inconsistency between ideology critique and the rhetoric that often appears in CLS writings. Altman's analysis of CLS scholarship comes closest to the mark when he argues

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[127] Kennedy's article, Freedom and Constraint in Adjudication: A Critical Phenomenology, 36 J. LEGAL. EDUC. 518 (1986), approaches questions of legal determinacy through self-reflection about the author's internal experience of legal norms. Kennedy makes quite clear that legal doctrine constrains his thoughts and behavior in his description of how he would decide a hypothetical case. Id. at 520-21, 525-30. Altman does not discuss this work.

[128] See p. 132 n.38.

[129] See, e.g., Kennedy, Distributive and Paternalist Motives, supra note 99.

[130] See also Duncan Kennedy, A Semiotics of Legal Argument, 3 L. & SEMIOTICS 167 (1990) (structuralist account of legal argument).

that "CLS ultra-theory rests on a radical existentialist vision."[131] This is not an original insight, but it is an important one. In one of the most perceptive studies of the CLS movement, Professor James Boyle pointed out that CLS scholarship, like other critical theories, has both a structuralist and a subjectivist strand.[132] The structuralist strand emphasizes ideology and the forces of social construction.[133] The subjectivist strand, in contrast, focuses on the experience of individuals within a legal system, examining the alienation and oppression produced by the system.[134] This element of CLS writing is phenomenological or existentialist. It is also connected to the utopian element in CLS work, which expresses faith in the ***1168** possibility of radical social change. An example of the structuralist strand of CLS theory is Kennedy's depiction of legal doctrine as animated by opposed social norms of individualism and altruism.[135] An example of the subjectivist strand is Peter Gabel's discussion of how the legal system produces alienation.[136]

Boyle's analysis, however, went much deeper than this. He quite correctly noted that no CLS scholar wholly subscribed to either a structuralist or a subjectivist analysis. Rather, Boyle argued, the structuralist and subjectivist approaches were really interdependent; predominantly structuralist CLS authors had to smuggle in subjectivist assumptions, and vice versa: The structuralist argues that structures produce the experience of necessity or constraint; while the subjectivist/existentialist "rel[ies] on the vision of transcending or breaking through a repressive structure."[137] At the same time, the subjectivist and structuralist approaches were clearly opposed: The structuralist approach tries to explain social life largely independent of the subject, while the subjectivist approach "seems to devalue structural theories by the primacy it gives to immediate personal experience and the associated existentialist idea that, given the contingency of all philosophical and social arrangements, personal choice is

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[131] P. 167.

[132] Boyle, supra note 23, at 740-45.

[133] By "structuralist," Boyle meant to include other forms of ideology critique besides Levi-Straussian structuralism. Id. at 742.

[134] Id. at 741.

[135] Kennedy, Form and Substance, supra note 88, at 1766-76.

[136] Gabel, supra note 89.

[137] Boyle, supra note 23, at 744 (emphasis in original).

the only lodestone."[138] Thus, Boyle concluded, "each strand of CLS writing both contradicts and relies on the other."[139]

Boyle's diagnosis of CLS, and, by extension, all attempts at critical theory, is consistent with the taxonomy of social theoretic approaches and errors outlined at the beginning of this article.[140] Structuralism emphasizes the objective elements of social life, even as phenomenology and existentialism emphasize the subjective ones. Ultimately, however, the subjective and objective elements of social life must be interdependent as well as differentiated. Social theorists who fail to recognize this will tend to engage in one of four forms of overcompensation: reification, radical subjectivism, reductionism proper, or anti-humanism. The danger of structuralist and post-structuralist approaches, for example, is anti-humanist effacement of the subject, while the danger of phenomenological and existentialist approaches is the naivete of radical subjectivism. As noted above, different social theories may overcompensate in several directions at once. Thus, liberals may be accused of reifying social structures and simultaneously employing radical subjectivist rhetoric which assumes that individual values are exogenous to social forces, and discounts the effects of ideology. Indeed, one might say at the risk of oversimplification that a combination of reification and radical subjectivism is the characteristic error of liberal political theorists. This is not to say that all liberal theorists make such errors or overcompensations, but ***1169** rather that this is the most likely direction in which errors and overcompensations will occur. In contrast, CLS scholars tend towards a different combination of errors and overcompensations. They tend to embrace anti-humanist theories of the subject while simultaneously engaging in phenomenological and existentialist rhetoric, which, although different from liberal views of the self, also raises echoes of radical subjectivism.[141]

The oscillation between structuralist and subjectivist approaches in CLS work is likely to be confusing to readers, and, more importantly, confusing to Critical Legal scholars themselves. That is because CLS scholars have not sufficiently come to terms with the connections between ideology critique and the

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[138] Id.

[139] Id.

[140] See text accompanying notes 41-45 supra.

[141] Here, at last, we do come to something that might be characterized as a dichotomy in CLS thought. But this conceptual opposition is organized along quite different lines than Altman imagines, and, equally important, this opposition does not separate CLS scholars into warring camps. Rather, it reflects a tension within each critical scholar's thought, a tension which is resolved by each in different ways. See Boyle, supra note 23, at 745, 757-62, 763-65 (discussing works of Unger, Kennedy, Peter Gabel, Robert Gordon and Gary Peller).

social construction of the subject which it entails. They have not carried through to its logical conclusions the interdependence of the subjective and objective forms of social life.

Thus, the most serious problems for CLS scholarship stem from its simultaneous commitments to structuralist and existentialist rhetoric. Because Altman systematically suppresses the importance of ideology critique to CLS scholarship, these problems evade him. CLS scholars have yet to explain how an existentialist commitment to political reform can be squared with the more deterministic elements of ideology critique. This difficulty has been raised most forcefully in the work of Stanley Fish.[142] Unlike more traditional liberal critics of CLS, Fish well understands that CLS arguments rest upon the social construction of the subject. Indeed, Fish is notable for his own tendencies towards anti-humanism, and his criticisms involve taking the anti-humanist tendencies of CLS to their extreme. Thus, Fish suggests that the social construction of the subject ultimately undermines any possibility of self-reflective social reform, for the social critic is already trapped in a pattern of thought from which she cannot escape. Although Fish's critique is potentially devastating to CLS, few scholars have met it head on.[143] Ironically, then, Altman's critique of CLS scholarship focuses on difficulties that are completely the reverse of the most serious problems that CLS theory faces. Altman believes that the central defect of Critical Legal Theory is its failure to explain how individual constraint is possible; in fact the greatest problem for CLS scholars is explaining how individual self-determination and collective social reform can ever be achieved.

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[142] See generally S. FISH, supra note 63.

[143] For one recent response, see Winter, Bull Durham and the Uses of Theory, supra note 23.