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Structuralism and Critique*

Thomas C. Heller**

There are thus two interpretations of interpretation, of structure, of sign, of freeplay. The one seeks to decipher, dreams of deciphering, a truth or an origin which is free from freeplay and from the order of the sign, and lives like an exile the necessity of interpretation. The other, which is no longer turned toward the origin, affirms freeplay and tries to pass beyond man and humanism, the name man being the name of that being who . . . has dreamed of full presence, the reassuring foundation, the origin and the end of the game.

—J. Derrida¹

“Try to formulate a hypothesis. You must have learned how it is done.”

“Actually, I have learned I must formulate at least two, one in opposition to the other, and both incredible.”²

To write about the importance of structuralism for Critical legal theory is an odd task, one I undertake only in a speculative spirit. The task seems odd to me first, because it addresses the significance of a now-dissolved intellectual movement, rarely acknowledged as a “movement” by its best practitioners and never much in vogue in the United States, to a heterodox group of American legal scholars largely unfamiliar with its core texts; second, because the structuralist movement itself cannot be easily defined;³ and third, because it is

* This essay is offered in fond memory of Arthur Allen Leff, from whose absence my work suffers.

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1. Derrida, *Structure, Sign, and Play in the Discourse of Human Sciences*, in *THE STRUCTURALIST CONTROVERSY* 264–65 (R. Macksey & E. Donato eds. 1972).

2. U. ECO, *THE NAME OF THE ROSE* 449 (1983).

3. There are a number of quite professional analytical efforts, both critical and supportive, to define structuralism. See, e.g., R. COWARD & J. ELLIS, *LANGUAGE AND MATERIALISM: DEVELOPMENTS IN SEMIOLOGY AND THE THEORY OF THE SUBJECT* (1977); T. EAGLETON, *LITERARY THEORY: AN INTRODUCTION* (1983); A. GIDDENS, *CENTRAL PROBLEMS IN SOCIAL THEORY* 9–48 (1979); T. HAWKES, *STRUCTURALISM AND SEMIOTICS* (1977); F. JAMESON, *THE PRISON-HOUSE OF LANGUAGE* (1972); P. PETTIT, *THE CONCEPT OF STRUCTURALISM: A CRITICAL ANALYSIS* (1977); R. SCHOLES, *STRUCTURALISM IN LITERATURE: AN INTRODUCTION* (1974); *STRUCTURALISM AND SINCE* (J. Sturrock ed. 1979). There are also a number of intelligently constructed anthologies of structuralist writings. See, e.g.,

difficult to see much internal unity among those who have identified themselves in some way with the search for a Critical legal theory in the United States.⁴ Even if any such unity exists, it would be foolish to attribute it to any conscious attention to the influences of structuralist writers.⁵ Nevertheless, it is precisely because of these difficulties that it seems worthwhile to proceed with the argument.

I will not attempt in this essay to provide a succinct, general definition of structuralism. Rather, at different points of the essay, I will speak of structuralism as both a set of relatively concrete propositions about specific cultural institutions, such as language and law, and as an abstract form of argumentation or explanation. This style is consistent with the differences between important structuralist authors on issues as central to structuralism as the appropriate range of study for structuralist analysis and the epistemological character of the explanatory structure being discussed. Moreover, since those authors who produced structuralism's finest moments now consider the movement *passé*,⁶ to labor toward a unique definition seems pointless.

INTRODUCTION TO STRUCTURALISM (M. Lane ed. 1970); THE STRUCTURALIST CONTROVERSY (R. Macksey & E. Donato ed. 1972); THE STRUCTURALISTS FROM MARX TO LEVI-STRAUSS (R. DeGeorge & F. DeGeorge ed. 1972).

4. Just as "structuralist" authors were not inclined to admit any substantive or stylistic uniformity among themselves, so those who identify themselves with Critical Legal Studies are unlikely to see any doctrinal orthodoxy that affords a substantive basis for their adherence to the group. However, the privilege of ideological coherence is, following Sartre's image of the genesis of personal identity, ironically conferred in the gaze of others. See J.-P. SARTRE, *No Exit*, in *NO EXIT AND THREE OTHER PLAYS* 1 (1961). Not only is an individual's character imposed upon him by the definitions of others, but also the rhetoric of homogeneity—the suppression of diversity—is imposed *by* the individual in his account of the Other. It is in describing those other than ourselves and other than those close to us that we notice and point out the uniformity produced by collective entities such as culture or ideology. In describing ourselves, we grant the special status of heterogeneity and individuality. I suspect this need to distance one's self from a collective group will lead to a tension even in the essays of those who associate themselves with Critical Legal Studies. The linguistic distance which allows the appearance of coherence in the object to be studied (Critical Legal Studies) will usually result in a psychological distance manifested as self-critique. This internal critique, in my work and that of others, should be recognized as an artifact of the structure of argument. Such distancing, unless it overtly signals a repudiation of the collectivity, should be accepted as a necessary event, itself an expression of continuing commitment within an ongoing process of reflexive examination. See note 96 *infra*.

5. Not much American legal work can be said to directly reflect the difficult journey through Saussure, Lévi-Strauss, Lacan, Barthes, the early Foucault, or even more obscure Gallic alleyways. If one were to attribute significance to the self-identification of the Critical Legal Studies movement with the Frankfurt School (the work of which is generally referred to as "Critical Theory"), one could not infer from this that any serious attention had been paid to structuralist Marxists such as Althusser and Poulantzas.

6. This is due not only to the velocity with which intellectual fads turn over in Paris, but

To construct a coherent picture of structuralism, I must first engage in an effort very similar to that undertaken by classical structuralist analysis. I must develop an underlying structure of interrelated concepts that purportedly generate, or provide the meanings of, the multiple particular practices or texts of a diverse collection of authors—a structuralism of structuralisms, as it were. I must also assert that this structure explains (or produces) the particular arguments of various Critical legal theorists even though it operates at an unconscious level. This procedure will illustrate the general form of structuralist analysis at the same time that it articulates a specific argument.

It should be noted that my effort in this respect is self-reflectively critical. My experience in doing structural analysis of law has emphasized to me the contingency, or constructed character, of any wide-ranging explanatory account of legal events that I can offer. It is clear to me that inherent in my claim that concrete Critical practices are produced structurally is a poststructuralist denial of its validity. This article is probably better read as an example of both the necessity for, and the limitations of, structural argument than as an especially appealing account of Critical studies. Indeed, my hope is that through recognition of this paradox more interesting intellectual and political work may emerge.

My argument is divided into four parts. The first offers a definition of structuralism without specific reference to law, in order to provide a general understanding of this intellectual phenomenon. The second part introduces the poststructuralist critique of structuralist texts and suggests that the status of the subject is now the most interesting and pressing issue for all Critical theories. The third part describes the contours of a structuralist account of American law. Finally, the fourth part applies the poststructuralist analysis outlined in Part II to legal theory, in an effort to redirect Critical Legal Studies away from some of the tasks it now pursues.

Because readers of this essay will have different interests and different degrees of prior knowledge about these subjects, a brief reader's guide may be of some help. For those concerned primarily with the relationship between structuralism and law, Part III may be the preferred starting point. If the terminology in that part is too obscure, or an interest in the evolution of the structuralist argument develops, Part I should be consulted. For those with a working inter-

also to methodological contradictions of which the principal structuralist writers were always painfully aware. See note 30 *infra*.

est in Critical legal theory or the general problems of method that have appeared in postliberal, poststructural, and postpositivist theory, Parts II and IV contain the beginnings of my own answers to what are extremely difficult issues.⁷

I. STRUCTURALISM REVISITED

A. *The Value of Structuralism as Critique*

My argument concerning the relationship between structuralism and Critical Legal Studies is overtly historical. Structuralist analysis appears logically and appeared chronologically at a particular moment of Marxist, and probably all other, explanation. Marx, in his “mature” phase (particularly in *Capital*), sought to explain the plurality of cultural, ideological, and political institutions of Western Europe by reference to a specific constellation of economic forces, an economic “structure” he referred to as “capitalism.”⁸ This scientific, or objectivist, aspect of Marx’s thought, which made little reference to subjective consciousness or its role in historical change, had been preceded in Marx’s own work by a humanistic period in which his attention was focused on political and phenomenological issues. In turn, Marx’s own structuralism was superseded in Western European theory by a return to more voluntaristic or existential, and hence less deterministic, accounts of social change reflected in the work of Gramsci and the Frankfurt School. These latter theorists have been especially important to Critical Theory.⁹

7. This paper is for me an opportunity to explore some aspects of a journey I travelled, though not one I had planned. While the logical composition of this essay proceeds from a consideration of structuralism and its critique as a general phenomenon to a reconsideration of these same matters as applied to law, an alternative reading sequence corresponds more closely to the chronology of my personal passage through these areas. The project as a lived experience began in legal problems, proceeded through a Critical reanalysis of legal theory to an involvement with structuralism and its successors as more abstract cultural representations, and arrived at an effort to rework legal thought in a more interesting fashion. I do not expect, or think it would be profitable for, each reader to retrace the path just described. On the other hand, to believe that such a process can be easily summarized as a set of results would demean the seriousness of the labors of too many lives.

8. Marx’s argument was prototypically structural because the base structure—capitalist relations of production—determined, or could be used to give a unified account of, a seemingly disparate set of social phenomena. His structuralism took the particular form of reduction to a material base and generally predictable genetic evolution. The future of capitalist history was objectively unstable due to the internally contradictory nature of the elements that together defined the structure of capitalism itself.

9. I have no wish or competence to enter the worn debate, rekindled by structuralist Marxists following Louis Althusser, over which version constitutes a “truer” Marxism. I see no need to choose, although I believe that the conflict between subjectivist and objectivist variants of Marxism cannot be as easily resolved as the simple logic of dialectic would imply.

Even if Critical legal theory accepts the subjectivist critiques of the more determinist variants of Marxism, the implications of those structuralist forms of analysis remain deeply embedded within its argument. Most importantly, Critical thought incorporates the structuralist theory of the subject as an artifact produced by the cultural subsystem associated with an underlying economic conjuncture, and rejects the liberal image of the autonomy of consciousness. This structuralist position, beyond its Marxist or materialist formulation, is put more generally by Foucault:

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires come to be identified and constituted as individuals. The individual, that is, is not the *vis-à-vis* of power; it is, I believe, one of its prime effects.¹⁰

For structuralism, then, individuality is a surface appearance that manifests the illusion that one existentially creates an identity—an identity actually produced by the encounter between human potentiality and the social constellations represented in, for example, language, myth, ideology, and law.

From this transfiguration of the meaning of subjectivity, political implications may be derived. Structuralism forces a reevaluation of the status of American legal categories. What had been “natural” reemerges as ideology. Because the autonomous subject plays an absolutely central role in American legal thought, the legitimating power of these categories is called into question. Legal theory is compelled to question the relationship between basic sociocultural structures and the derivative structure of legal institutions. A homologous analysis must be directed toward the determination of specific legal practices by underlying legal structures. In the structuralist moment, the orthodox world of legal phenomena is effectively inverted: The individual consciousness which is foundational in the political constitution of liberal society now is itself represented discursively¹¹ as lib-

Rather, I think that the chronological alternation of structuralist and humanistic argument in Marxist and non-Marxist thought ultimately may be of more interest. See text accompanying notes 68–76 *infra*. For an introduction to the complex history of twentieth-century Marxism, see P. ANDERSON, *CONSIDERATIONS ON WESTERN MARXISM* (1976).

10. M. FOUCAULT, *Two Lectures*, in *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS, 1972–1977*, at 98 (C. Gordon ed. 1980).

11. The use of the adjective “discursive” in this essay should not be given its usual dictionary meaning of wandering or shifting from one subject to another. Rather, it follows a

eralism's most carefully crafted product.¹²

In addition, the structuralist theory of the subject suggests an answer to a central problem for Critical theory: why so many individuals apparently do not recognize their own self-interest and throw in their lot with serious political change. Within any structuralism, such false consciousness is to be expected precisely because an individual's phenomenal or experienced sense of "self" is a material product serving the collective reproduction of a social order. If one can overcome the conceptual difficulty of the analyst seeing behind the structure in which he or she lives, the strategy for pursuing political change becomes visible: Delegitimation involves exposing what appears as natural on the surface of a cultural world (e.g., individuality) to be the contingent product of historical forces. The program of critique is to disclose the structure of, and to reconstitute as a determinate, collective ordering, what had been given the discursive privilege of not being analyzed.

The antisubjectivist character of structuralist analyses, considered aside from the historical circumstances of their development, may be interpreted as both antihumanist and antidemocratic. The idea of the artifactuality of individuality presents a frightful challenge, and it is here that Marxism has faltered upon the image of the Gulag. Critical theory itself has at times relied on Freudian images of post-therapeutic (post-revolutionary) freedom to draw back from the implications of the structuralist moment. In this need to reassert, or at least reappraise, the relation of the particular to the collective, humanist socialism has often attempted to reconstitute subjectivity. I

more recent, idiosyncratic practice of explaining events by giving primary attention to alternative linguistic constructions of experience. This notion of discursive practice is analyzed more fully in H. DREYFUS & P. RABINOW, MICHEL FOUCAULT: BEYOND STRUCTURALISM AND HERMENEUTICS 44-78 (1982); see also M. FOUCAULT, THE ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE 31-39 (1972).

12. I will usually, though not exclusively, use the term "liberalism" to refer to the general sociopolitical system which began with Florentine civic humanism and continues as democratic liberalism today. I consciously disregard the many distinctions and contradictions within this tradition in order to emphasize two characteristics. Liberalism is committed, at least on its surface, to a discourse emphasizing the capacity for autonomous choice by mature individuals and to a method that attributes validity to propositions composed of analytically correct, empirically verifiable, or individually confessed elements. For an earlier effort to define this conjuncture in more detail, if less clarity, see Heller, *Is the Charitable Exemption from Property Taxation an Easy Case? General Concerns about Legal Economics and Jurisprudence*, in *ESSAYS ON THE LAW AND ECONOMICS OF LOCAL GOVERNMENTS* 183 (D. Rubinfeld ed. 1979). For reasons to which I allude at the close of part one of this essay, I am no longer entirely at ease with my prior identification of liberalism with subjective discourse alone. For further discussion, see note 15 *infra*.

believe that several important lines of reconstitution—a reliance on an ironic or modernist reinterpretation of subjectivity, a belief in the emergence of a “true” subject through some collective political process analogous to individual psychoanalysis, and the assertion that the ideal of subjectivity must be displaced from the individual to the community—are, in the end, not politically or theoretically satisfactory. Critical theory has implicitly relied on structuralist argument to found its program and now confronts the poststructuralist problem of the regeneration of a postliberal order. The real agenda for critique originates in the dissolution of the moment of structuralism, itself understood as an historical event.

B. *Structuralism and Language*

Keeping in mind the broad claim that structuralism is a contemporary representation of the general form of an objectivist argument, it may be better understood if we begin with a discussion of the issues within the theory of language that structuralism originally set out to resolve. I will first describe a prestructuralist account of language which I shall refer to as subjectivist or phenomenological. In this view, language is an instrument in the hands of conscious subjects who use it, as they do other tools, to carry out their projects. Against this position, I will then describe a structuralist or objectivist theory of language which argues that language precedes and defines the characteristics of consciousness. This theory will be described through an analysis of four elements: the generation of meaning, the production of practice, the theory of the subject, and the nature of time. These elements constitute a generalized grammar of structuralism which may be extended to the analysis of other cultural institutions, including the law.

Despite this generalized grammar, it should be emphasized that there is no single correct account of structuralism. Instead, there are numerous particular structuralisms which respond to specific problems posed within various disciplines. Nevertheless, a general consideration of the historical development of the structuralist theory of language is useful in exposing the unity of these diverse structuralisms. If it is paradoxical to study structuralist language by reference to the historical rebellion against established intellectual orthodoxies, so much the better.

I will begin by creating a somewhat fictional picture of a school of historical linguistics (to which no identifiable linguist ever subscribed) in order to contrast it with an equally caricatured (and

equally empty) account of how an idealized structuralist linguistics might have treated related aspects of experience. In this sense, the section may be seen as an attempt to elaborate a metastructuralism whose structure is defined by the alternation of phenomenological and structuralist accounts of language. If this essay is read as a demonstration of metastructural method, as well as an account of what structuralism is, it can provide a preface to, or the object of, the post-structuralist critique of structuralism introduced in Part II.

1. *Diachronic language.*

Prior to Saussure's synchronic account of language, the dominant tradition in the study of language concentrated upon tracing out the evolution of the elements of languages across time. The etymologies and the histories of usages and stylistic alterations that were the concern of that period exemplify the emphasis on change as the key to understanding what language was and how it functioned. Hidden in this perspective were basic philosophical assumptions about the relations among language, speakers, and the world. Pre-Saussurian accounts of linguistics could be historical, originary, and generational because their underlying theories of meaning accepted the position that meaning preexisted, or was exterior to, language itself. For historical linguistics, meaning was contained in the relationship between the particularized constitutive elements of language—primarily words—and the extralinguistic world of facts, ideas, and human projects. To grasp a meaning was to inquire into the concrete study of the evolution of a word. The word either corresponded to an unchanging aspect of the objective world or represented a self-evident idea or intention. Language was not understood to create meaning, but rather to operate as a tool to uncover and manipulate a concealed, but already known or knowable, order. The content of this order was neither altered by, nor contingent upon, the mediation of the encounter with language itself.

History, in this view, was the appropriate mode of linguistic investigation because the essence of language was believed to be the succession of creative acts of speech, and the agent of linguistic change was thought to be the individual speaker. Linguistic competence depended upon the adequacy of the representation of the relation between the elements of a language and the nonlinguistic world. The contemporary form of a language was no more than the compendium of usages produced by the historical series of adaptive utterances and stylistic re-creations that accompanied the shifting projects

of human action. Since it emphasized both individualist accounts of action and a positivist philosophy of the natural world, this theory of diachronic linguistics was fully compatible with the coexistent politics of classical liberalism.

In the early modern period, this diachronic theory of language was derived from ontological premises that accepted the reality of cognizable extralinguistic phenomena in the realms of both ideas and objects. Emergent liberal philosophies held that the relation of language to world was essentially one of bifurcated correspondence. Linguistic statements were true if they accurately mirrored either facts in the world or distinct ideas in the mind. Language was secondary either to a Cartesian intuition of self-evident ideas or to the empirically verifiable perception of an aspect of material reality.¹³ Indeed, it was the intentionality of the autonomous subject in bringing his or her consciousness to bear on the objective world that led to the evolutionary generation of linguistic terms adequate to historical actions. Whether the philosophical foundations of the diachronic view of language were thought to lie in a materialist, idealist, or an overtly dualist Realism, the speaker enjoyed epistemological primacy over that which was spoken. Both individual identity and the character of that which was apprehended were prelinguistic. Phenomenology preceded language.¹⁴

In the twentieth century, revised modernist expressions of liberal

13. It is important to note that in classical liberal thought there was a strong ontological commitment to individuality mirrored in natural law and built upon the Cartesian view of mental discourse accepted by Hobbes and Locke. In this view, the foundation of individuality lay in the subject's direct intuition of ideas. The subject's existence was known by its connection to this process: *Cogito ergo sum*. See I. HACKING, WHY DOES LANGUAGE MATTER TO PHILOSOPHY? 130–31 (1975); see generally *id.* at 15–53. For a clear and extended philosophical discussion of the central liberal concept that a mental discourse or mental states as nonextended substance may be directly and uncorrectably knowable, see R. RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 17–69 (1979).

14. I will use the term “phenomenological” to refer specifically to discourse that begins by privileging, or accepting as a nonreduced term, the intentionality of subjective consciousness. There are many different phenomenologies, representing both individualist and collectivist passages of spirit through history. I am seeking, in this specific usage, to capture the central conceptual apparatus of Western humanism within which the individual subject becomes the primary referent. My topic more properly should be labeled existential or psychological phenomenology to distinguish it from the transcendental phenomenology described by Husserl. See E. HUSSERL, CARTESIAN MEDITATIONS (1960); E. HUSSERL, IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY (1952); see also Kockelmans, *Husserl's Transcendental Idealism*, in PHENOMENOLOGY 183 (J. Kockelmans ed. 1967). Transcendental phenomenology develops a far more complicated and far less politically accessible account of a denatured and transfigured subjectivity. It is only one of several possible trajectories that philosophies of the subject have taken. A valuable introduction to the modern history of phenomenology may be found in R. BUBNER, MODERN GERMAN PHILOSOPHY 11–68 (1981).

theory have abjured any claim to an objective theory of truth.¹⁵

15. There have been several distinguishable variants of liberal theory. In its classical dualist version, parallel philosophical accounts had to be advanced in order to establish canons of method adequate to empirical-analytical statements as well as a pragmatics of communication adequate to normative-purposive utterances. The analytical philosophy of Frege and Russell explores in detail the problems of liberal method; the speech/act theory of Austin and Searle provides a more extended liberal pragmatics. For a brief discussion of the linguistic theories of Frege and Russell, see I. HACKING, *supra* note 13, at 43–53, 70–81; for an introduction to the pragmatics of ordinary language theorists, see J. AUSTIN, *HOW TO DO THINGS WITH WORDS* (2d ed. 1975).

Liberalism traditionally has been understood as including a bifurcated epistemology that incorporates an objectivist discourse and truth theory (similar to that of more thoroughgoing objectivisms like structuralism) within the restricted sphere of experience that embraces logic and physical science. The second defining feature of liberal theory is its commitment to the centrality of intentionality in its account of the social or normative domain. Liberal intentionality gives meaning to utterance rather than receiving an externally constituted content. It is precisely this notion of the intending consciousness as prior to, or constitutive of, meaning that a wholly objectivist structuralism denies.

However, it may be noted that liberalism, in a modernist variant, can be seen as a system that alternates a complete phenomenological discourse with a complete structuralist discourse. This modernist liberalism is distinguishable from classical liberalism, in which opposed subjectivist and objectivist discourses are each assigned limited cognitive domains in which their use is legitimate. In modernist liberalism, the sequence of the usage of the two discourses is temporal, each successively giving contradictory accounts of events that reduce all experience to either the radically subjective constructions of actors or the product of structural determinants.

The internal history of liberalism and the relationship between modernist liberal thought and the classical form which preceded it may be clarified by a discussion of the relationship between two variants of phenomenology—the individualist and the transcendental. All phenomenologies are journeys of spirit, narratives of consciousness projected developmentally across continuous time. Each is an education, a *Bildungsroman*. In an individualist phenomenology, the dichotomy between self and external objects has tended to produce pure idealism. Objects—the manifestations of that which is other than the self—are instruments used by the self to measure and construct its identity. The material reality of these objects is thus practically irrelevant to the trajectory of the self. The knowledge acquired by the isolated self is a relative knowledge contained within the limits of the self's projects.

The architecture of a transcendental argument is quite different. Transcendental phenomenologies are concerned with the search for a more absolute type of knowledge. The self, seeking to know that which is other than itself in a definitive fashion (i.e., with relation to something other than its own purposes), must understand the purported differentiations between itself and the other. To grasp the reality of the world external to its subjective consciousness, the self must cross the ontological gap which seems to divide it from the other. It must redefine and recognize the place of self as an element of a more comprehensive system. To do this and still remain a phenomenology (rather than be transformed into a structuralism), the subject must postulate its own immersion in a transcendental spirit which comprehends the system within which both the individual self and the differentiated other are elements.

In this sense a transcendental phenomenology is a journey upward to a more encompassing subjectivity. It envisions and thereby unites what appear as subjects and objects at lower levels of the understanding of complex systems. See note 109 *infra*. When the self pursues such a vertical trajectory, its self-realization passes through the totalizing knowledge of the transcendental subject, and there occurs a determinate (absolute) account of the other. At

These revisions were in part built upon emergent existential phenom-

the same time, this passage through a more abstract level of representation of human systems uproots the individual self. It is ripped from its place (i.e., its usual level of self-representation) in a way that produces a transformation of its own understanding; a negation of its existence as an autonomous or unlocated subject; its death. It is only through this death that its realization at a higher level of consciousness can be achieved.

This type of negation is qualitatively different from an alternative form of negation that is not associated with a vertical trajectory of self-realization: the negation of the object alone within radically individualist phenomenologies. During the existential journey of an individual subject, the objects it constructs in action are unstable and constantly in need of reformation. This is caused by the unforeseen consequences of the interaction of human projects and the system in which they are carried out, and by the limitations that derive from the partiality of each construction relative to the possible constructions of experience. This form of object negation is a process without end. It denies the teleology underlying the view that the self's journey can lead to its own negation in a higher expression of knowing.

Following and criticizing Kant's transcendental method, Hegel saw that to overcome the difficulties of materialist empiricism and relativistic idealism, it was necessary to appeal to a third term of argument. This third term (dialectic) had to encompass both individual subject and material object and reduce their differences within a unique, meaning-giving system. For Hegel, the relationship between the individual or ordinary consciousness and the transcendental or divine consciousness in any transcendental phenomenology demanded special explanation, and his solution was the mystification of this relationship through theology. The belief that an individual subject can lift itself to share the perspective of the transcendental subject may betray either a frightening hubris or a commitment to a theory of grace. However, to create a transcendental phenomenology, only the logical form of an appeal to a third term is necessary. It was Hegel's explication of the necessity for a third term to unite and affirm the reality of object and subject which crystallized the difficulties of liberalism in its classical dualist form.

Classical liberal theory following Descartes was committed to the ontological reality of both conscious subjects and an external material world. See note 13 *supra*. Liberalism's bifurcated epistemology reflected these dual commitments, but neither empiricist account was able to give a coherent picture of the reality of the other half of the dualism. Hegel exposed the theological underpinnings of classical liberalism by locating the unifying third term of the liberal argument in the figure of a transcendental and personal God, but this religious underpinning dissolved in the nineteenth century. Subsequent secular movements of thought followed two divergent paths: on one hand, the radical (nontranscendental) subjectivisms of hermeneutics and existentialism which obliterate the object, and on the other, structuralisms beginning with Marx which obliterate the subject. The lack of a secular account of the third term in these subsequent movements has necessitated the rapid alternation of subjective and objective discourses in modernist liberalism.

This secular resolution of the contradictions of classical liberalism must be distinguished from an alternative movement toward organic conservatism prominent in America, where liberalism is taken most seriously. From the explicit affirmation by religious groups of the theological foundation implicit in classical liberal thought has evolved a countertradition of American politics whose origins in liberalism have become obscure.

It may be noted, however, that the logic of the evolution of a religious politics out of liberal theory was demonstrated by Hegel. The philosophical inadequacies of an individualistic liberalism—inadequacies manifested in the alienated condition of subjects who had only a self-contained and relativistic knowledge—provided the basis for Hegel's proposition that the political state required a religious foundation. It was only the mediation of individual desire through Reason or divine consciousness which could overcome the inherent limitations placed by a purely individualist phenomenology upon human knowledge and upon the

enologies that restricted the meaning of words or texts to that imposed by acts of speakers and writers. Even when modernist liberalism began this move in the direction of a radical subjectivism, the dominant referent for diachronic linguistics could still be the immediate existential apperception of intentionality. Language could be described as a rhetorical tool useful in the prosecution of intuitively evident projects of self-realization. In the most romantic moments of individualist thought, when the empirical world was held to be no more than the temporarily reified object of consciousness in motion, adequate language neither shaped nor distorted action; rather, it merely facilitated it.

In the philosophical systems that have been important in recent Western political thought, whether dualist or radically subjectivist, both world and will (consciousness) have been independent of, and prior to, language. Language, and all other cultural institutions as well, has been understood as designed to permit the emergence and exposure of world and will. Language is said to be the tool of action in that it allows our will, cognizant of the consequences of its action, to become effective in the world. Language thus changes with shifts in intentionalist projects and with subjective reconceptualizations that demand a language adequate to their objectives.¹⁶ Inasmuch as its development must originate in its use by a conscious subject, language is said to be voluntarist, expressive, and psychologically moti-

human capacity for self-realization. The irony of this insight is that it leads quickly toward the justification of a nonliberal theory of politics in which individual desire has no historical validity and true freedom is redefined as recognition of the divine project normally institutionalized as the organic state. For Hegel, classical liberalism necessarily degenerated into an antithetical collectivism. See G. HEGEL, *REASON IN HISTORY: A GENERAL INTRODUCTION TO THE PHILOSOPHY OF HISTORY* 29-67 (R. Hartman trans. 1953). A related, but different, version of the linkage between subjectivity and the religious origins of the liberal state is offered by Foucault. See H. DREYFUS & P. RABINOW, *supra* note 11, at 215-19. Treatments of Hegel's criticism of Kant and of Hegel's religious and phenomenological philosophies may be found in H. MARCUSE, *REASON AND REVOLUTION: HEGEL AND THE RISE OF SOCIAL THEORY* 16-29, 30-42, 91-120 (2d ed. 1964). For further discussion of the tensions between modernistic and classical liberalisms, see notes 63, 64 & 67 *infra*.

16. Hacking has described the thesis of nonstructural linguistics as follows:

In theorizing we need the benefit of language not only to communicate with others but also to record our own thoughts. Language is essential to human theorizing, but (says the thesis) it is the tool of the theory. In digging my garden I occasionally break a spade and buy a new one. More gradually the edge of my spade becomes worn and ragged while the wooden shaft becomes smooth. Digging does affect spades, but a spade is a spade for all that, an entity in its own right, whether I dig or let it rust. Such a relationship (it is urged) is the one holding between language and theory. We use our languages to speculate, but they exist in their own right, somewhat low on the chain of being, at the level of spades.

I. HACKING, *supra* note 13, at 116.

vated. Its form can neither be explained nor replicated without reference to the indeterminacy that characterizes autonomous action.

If the relationship of speaker to language to object-world is instrumental, then language is primarily a matter of technique rather than socialization. Not only is language technically adapted over time to fit the projects of its users, but decisions involved in learning and studying language should be made, in this view, by weighing relative costs and benefits. The economics of language will form part of a generalized economics of information, in which investment in linguistic technique is justified when it minimizes the project costs of acting on the world. In contrast, language study will have a noneconomic dimension where it is believed that it alone affords entry into another set of structurally diverse constructions of possible worlds, replete with noncomparable constellations of identities and projects.

Translation, for diachronic linguistics, is also generally a technical matter made possible by the shared extralinguistic referents of speech. To translate, one must locate the object or idea being associated with expressions in different languages. The commonality of the nonlinguistic world of material and ideal forms should permit the persistent translator to make this discovery. Most of us, at one point or another, have shared such an instrumentalist understanding of mutually translatable languages, but the structuralist critic of historical linguistics would point out that this proposition about language is but one portion of our experience. It is the grammar of a particular discourse about the world in which the theory of language ideologically re-presents the dualistic imagery of autonomous subjective action within an objective external world.¹⁷

17. The specific content of any particular phenomenology, or narrative of spirit, depends on the account of the relationship between consciousness and time. Time, like identity, has no metaphysical reality that we may know. Competing images of time are syntactical elements of alternative discourses. All phenomenologies are united by their reference to the subjective experience of time as a continuous, unfolding, single directional flow of being. I will refer to phenomenological time as "narrative" or "entropic" to recall that it recounts, like thermodynamic models in physics, an irreversible chronicle of the gradual but irretrievable dissipation of available energy in life projects that temporarily impose on history symbolic orderings such as language and law. Entropic time may be contrasted with structuralist representations of time, which are more consonant with nonthermodynamic models of science, in that they are nondirectional or repetitive. See note 48 *infra*.

At the same time, with phenomenological discourse, there may be as many narratives of the subject as there are divisions specified within time. Personal identity is defined in existential phenomenologies by the subject's intentionalistic projects. The shorter the contemplated scope of each project and, therefore, the larger the number of possible projects, the larger the number of identities one can take on. Although liberalism has traditionally assumed that

2. *Synchronic language.*

At the core of the diachronic account of language are fundamental commitments to both the particularity of meaning and the agency of the subject. The former specifies the relation between linguistic units and the external mental and physical worlds. The latter defines the character of language as instrumental and renders concrete the history of linguistic evolution. Structural theories of language displace both of these propositions. For prestructuralist linguistics, particular linguistic units corresponded on an elementary basis with particular real external referents and with ideas in the minds of individuals. Structuralism, in contrast, abandoned, or at least bracketed, the inquiry into the correspondential foundations, whether material or ideal, of a Realist theory of language. Initial formulations of structuralist linguistics relocated the production of meaning within the network of relations that was language itself. Structuralism argued that the systematic form of language, rather than the particular linguistic elements of actual spoken words, gave rise to intelligibility. Similarly, since meaning was contained in the intralinguistic system, the role of the speaker as agent was displaced. The speaker was now dependent on language itself to engage in meaningful activities. The meaning available to a subject was that opened up by the conceptual ordering his or her language afforded. The subject was better understood as a product of culture, an identity created in language, a potentiality limited by the language that defined the conventions of a world.

The now familiar characteristics of formal structural analysis were first elaborated in the field of linguistics by Saussure.¹⁸ The most fundamental of Saussure's doctrines for our purposes are the distinction between *langue* and *parole*¹⁹ and the dichotomy of synchronic and diachronic relations. Saussure insisted that the systematic nature of *langue*—the organized network of the rules of language—made it the only appropriate subject for linguistic knowledge and differentiated it from the particularistic character of *pa-*

identity or individuality was coextensive with biological unity or lifetime, recent legal issues such as living wills have exposed the contingency of even this construction of the relation between subjectivity and time. For a brief introduction to the philosophical discussion of the possible variants of subjective identity, see J. PERRY, A DIALOGUE ON PERSONAL IDENTITY AND IMMORTALITY (1978).

18. F. DE SAUSSURE, COURSE IN GENERAL LINGUISTICS (1966).

19. The *langue/parole* dichotomy reappears in other structuralist analyses as structure/event, collective/individual, code/message, text/reading, unconscious/conscious, and competence/performance.

role—individual acts of linguistic expression. This distinction, for Saussure, separated what was social from what was individual and what was systematizable in scientific logic from what was arbitrary or accidental.²⁰ Only when language was understood as a social institution composed of forms that preexist the individual speech acts which prestructuralist linguistics had studied could sense be made of it.

To extend the structuralist method to other disciplines, and to illustrate its conceptual strengths and shortcomings, it is necessary to consider not only (a) linguistic structure, the analysis of which was Saussure's principal contribution; but also (b) the nature of the connection between structure and linguistic practice (*parole*) as mediated by the speaker; (c) the specification of the relationship between structure and speaker; and (d) the description of the mechanism of the reproduction of the structure as a social institution. These four matters correspond to (a) the question of the production of meaning; (b) the account of the production by the collective of particular practices; (c) the theory of the subject; and (d) the question of the constitution of time. The resolutions of these questions constitute what I will call the grammar of a structuralist discourse. It is most easily understood by contrast to the phenomenological or subjectivist discourse I introduced in considering the diachronic position on language. The schematization may also prove useful because at each of these levels particular types of inadequacies appear in the elements of structuralist grammar. The critiques of poststructuralism can then be developed and evaluated with reference to these limitations.

The production of meaning. Saussure's work begins with the assumption that language is a system of forms, of relations between constituent units (signs). There is no "natural meaning" to any particular sign (word); each such constituent unit's relationship with what diachronic linguistics would identify as its external referent is philosophically arbitrary, or, put another way, merely conventional. Further, signs in a system are differentiated from other signs in the same system not by their "essence," or "natural place" within a linguistic order that mirrors the world, but only by certain differences wholly internal to the system of language itself that mark them off from other constituent units. In language, for example, words are marked off from each other both phonetically and semantically.²¹ Meaning, in this view, arises solely from formal relations between signs and not

20. F. DE SAUSSURE, *supra* note 18, at 18–19; see also *id.* at 76–77, 124–25.

21. Each sign in a language is composed of a phonetically differentiated "signifier" and

directly from any substance in the signs themselves. It is “constructed”—not a reflection of individual experience of world or desire, but rather the product of shared systems of signification. Structuralism insists that understanding cannot be located in any tracing of the history of different individual signs (words). Rather, it must originate in the discovery of similarity and difference within a system of discrete linguistic units. Words, in this view, have no independent significance beyond their organic relations. “Language,” as Saussure put it, “is a system of interdependent terms in which the value of each term results solely from the simultaneous presence of the others”²²

Meaning, then, arises precisely because each sign has an identity given to it by its systematic differentiation from related terms in the language. These differentiations are of two types. Syntagmatic differences are those that specify relations between classes of words that can succeed or precede one another in a sentence. Paradigmatic differences relate words that can more or less replace one another in speech. The critical point is that particular words in isolation convey only the illusory appearance of self-contained meaning. Meaning is not tied to extralinguistic existents in a relationship that may be successively refined across diachronic time. Rather, it is uniquely an artifact of the synchronic differentiations of the language in use at any moment.

As in the particular case of linguistics, structuralism in general consistently involves the reduction of apparently multiple and independent *practices*—the analogues of words—to elements within an ordered system. The sense or meaning of each practice derives not from some essence or intrinsic signification, but rather from the transformative relationship by which the practice is derived from the ensemble of practices within which it is enmeshed. An account of the evolution of individual practices in themselves would simply be a narrative history of successive, discrete, arbitrary events—a chaotic jumble of phenomena associated only by temporal contiguity. What creates interest in, gives significance to, and permits knowledge of such a set of events is the reduction of any particular event to its order within the system of differentiations.

This process can be illustrated by the mythology project of Lévi-Strauss. It is of course possible to analyze each myth of a tribe, or the

a conceptually differentiated “signified” juxtaposed to one another in an arbitrary relation. For a more complete discussion, see P. PETTIT, *supra* note 3, at 5–10.

22. F. DE SAUSSURE, *supra* note 18, at 114.

multiple myths of many tribes, as having a particular surface meaning. One can also categorize such myths by their historical evolution, though the successive elaboration of stories would be at most a chronicle of a collective consciousness. Lévi-Strauss proposed that we view myths as transformations of one another or as variations of one deeper structure of meaning. The rationale for his universal structure of myth was that it represented "the unique and most economical coding system to which [structural analysis] can reduce messages of a most disheartening complexity, and which previously appeared to defeat all attempts to decipher them."²³ As with myths or words, one can, with imagination, reduce to order the particularity of disparate, local accounts of phonemes, literary texts, dreams, and legal-political institutions.

If meaning is produced through the differentiation of words within a system of linguistic orderings, then structuralism reverses the diachronic proposition that meaning is external to language. Instead, the only meaning to which we may have access is that produced internally by the structure. Any correspondence between the structure and external referents is called into question or bracketed. As an initial matter, structuralism need only assert that the criterion of meaning is located not in the reference of discrete particulars to some material or ideal reality, but in the interrelation among particulars. It is then philosophically more likely to accord with a conventionalist epistemology which disavows the idea that meaning must be traced to a correspondence to external referents.²⁴

This theory of meaning also has political implications. Struc-

23. C. LÉVI-STRAUSS, *THE RAW AND THE COOKED* 147 (1969). In similar fashion, he states:

"[W]hat I am concerned to clarify is not so much what there is *in* myths . . . as the system of axioms and postulates defining the best possible code, capable of conferring a common significance on unconscious formulations which are the work of minds, societies, and civilizations chosen from among the most remote from each other."

Id. at 12 (emphasis in original).

24. With respect to language in particular, it seems possible to imagine many different modes of differentiating experience. This action leads one toward an epistemology in which the construction of experience has its basis only in the conventions agreed upon by some group of actors. Conventionalism, however, is not necessary. Cultural structures can themselves be embedded within or produced by other deeper, materialist structures, as the works of Lévi-Strauss, Chomsky, and Althusser illustrate. However, even Marxist structuralists grant a certain relative autonomy to the productive operations of cultural or ideological structures. This relative autonomy makes worthwhile the independent study of the organization of structure divorced from its putative ultimate reduction, in the last instance, to external material forces.

turalism insists on the rejection of, or at least the reevaluation of, the individual's capacity to generate meaning independently. Where others see diversity and contrast, the structuralist sees an astonishing uniformity. There is only the illusion of multiplicity, not its glorification. Surface or conscious meanings are but artifacts thrown off by structure. Particulars are not free standing, naturally recognizable, and unmediated elements or essences.²⁵

The production of practice. Diachronic accounts of language gave prominence to the histories of speech practices. Such practices reflect the intentional and material particulars that constitute the extra-linguistic referents of language. Saussure's synchronic linguistics transvalued the particular and rendered illusory its claim to direct connection with meaning, but left the status of concrete practices ambiguous.

The question of how a practice is produced by structure has both a logical and an epistemological dimension. At the formal level, a complete structuralist discourse must contain what Chomsky has termed a "generative syntax,"²⁶ a body of recursive rules by which any sentence of a language, and only a sentence of the language, can be given an abstract structural description. If the sentence represents a transformation permitted by these descriptive rules, the structure formally may be said to have generated the sentence. On another level, the generation of particular practices by structures would seem methodologically necessary. Since the structural order was revealed through the inductive study of practices, it should be logically possi-

25. In some ways structuralism's relocation of meaning in the collective represents a contemporary revival of the scholastic or neo-Aristotelian quest for universals. Medieval theorists discovered meaning only in self-evident (inductive or revealed), undemonstrable principles which in some way manifested themselves in each particular phenomenon. Structuralism is a relativized and secularized method that rejects the theological or teleological foundation of any universals. What may be fruitful in this comparison between medieval theory and structuralism is the manner in which pre- and postliberal discourses converge on a grammar that denies the importance of subjective phenomenology and instead concentrates on the description of the collectivist basis of social order. For a discussion of late medieval and Renaissance thought as a neo-Aristotelian quest for universals, see J. POCOCK, *THE MACHIAVELLIAN MOMENT* 3-9 (1975).

I will make several references to the construction of medieval thought in comparison with structuralism. Although non-Western or ancient thought could, I suppose, provide a basis for comparison, I refer to medieval theory because it directly preceded the humanistic discourse which, in my view, constitutes the orthodox formulation of liberal thought since the Renaissance. Similarities between pre- and postliberal thought were recently brought to my attention by Pocock's work and by unpublished lectures on the concept of civic humanism delivered by Quentin Skinner in Florence, Italy in April 1983.

26. See N. CHOMSKY, *ASPECTS OF THE THEORY OF SYNTAX* 140-41 (1965); see also P. PETTIT, *supra* note 3, at 15-18.

ble to reverse the process to yield predictive accounts of the generation of practices from the structural order.

Structuralists have offered several different accounts of the relation of theory to practice. Chomsky's generative grammar, for instance, yields only a set of possible sentences that are permitted by the system of linguistic differentiations. This set of sentences imposes constraints on speech and defines the limits of the world constructed by a language. The production of particular practices (sentences) at any given moment could be treated as the result of a random process of selection among this set of potentialities. When Lévi-Strauss asserts that the particular is merely phenomenal and therefore uninteresting, it may be that he sees the sequential transformations of myths (practices) as wholly random.

This radical discontinuity between structure and practice has proven difficult to maintain both esthetically and politically. As a result, variants of structuralism more like the classical vision of a pure positivist science have evolved. Such a view insists on its capacity to deduce from general axioms and knowledge of empirical conditions the nature of the particular. Similarly, it is a presumptive matter of interest and inquiry for structuralist theory to explain why an author produced *that* text, a patient dreamed *that* dream, a court wrote *that* opinion.²⁷

If one had a complete description of the rules of structural transformation, one would possess a powerful theoretical instrument with which to predict the generation of particular practices in definable circumstances. Giddens suggests, following Piaget's *Structuralism*,²⁸ that structures ought ideally to "(a) consist of interconnected elements, 'none of which can undergo changes without effecting

27. One model, or metaphor, for a complete positivist structuralism is the biology of the immunological response system. A network of genetic information already present in the lymphoid cells would represent the underlying structure. The introduction of a specific environmental trigger, the antigen, activates a transformational code that synthesizes the proper antibody from among the 10^7 or 10^8 different antibodies that could have been constructed by rearranging the basic genetic information. See F. JACOB, *THE POSSIBLE AND THE ACTUAL* 17-18 (1982).

No longer universally aspired to in biology, determinate models such as this are increasingly restricted to particular domains by representations emphasizing the role of chance in the natural world. See notes 30, 65 *infra*. Still, there seems to be a continuing desire among people to explain human life in a fully general and certain way, without elements of accident or randomness. As Jacques Monod writes: "We would like to think ourselves necessary, inevitable, ordained from all eternity. All religions, nearly all philosophies, and even a part of science testify to the unwearying, heroic effort of mankind desperately denying its own contingency." J. MONOD, *CHANCE AND NECESSITY* 44 (A. Wainhouse trans. 1971).

28. J. PIAGET, *STRUCTURALISM* (1970).

changes in all the other elements' . . . ; (b) involve transformations, whereby equivalences in divergent materials can be explicated; [and] (c) make possible the prediction of how modifications in one element will alter the model as a whole."²⁹ Although structuralist investigations of linguistics have concentrated on developing a description of a generative grammar alone, in structuralist treatments of social science, the issue of the substantive determination of practice has received more attention. Unless one insists that the production of practice from structure is literally random, or alternatively asserts that each practice is internally and uniquely determined by the transformational rules of the structure itself, one seems impelled to postulate either a deeper extrastructural cause or a phenomenological agent mediating between structure and practice.³⁰ This possible

29. A. GIDDENS, *supra* note 3, at 19. It is notable that both variants of the theory/practice relation also appeared in preliberal medieval theology. The radical discontinuity Augustine imposed between fallen human history and eternal knowledge of divine order was frequently displaced by prophetic attempts to display the production of concrete civic events directly determined by God's purposes. J. POCOCK, *supra* note 25, at 41-44.

30. It is important to note that my description of structuralism is itself structuralist. The purest images of structuralist explanation are those most closely tied to representations of positive science. A pure structuralist account would reveal a timeless or unbroken order of grammatical rules that determine the form of each particular practice. Such a structure is best grounded in a materialist base, such as Marxian economics or Chomsky's innate mental configurations, to eliminate any residual dualism in its epistemology. However, most structuralist texts deviate from such an ideal representation in a variety of ways. Because structuralist authors usually were extremely conscious of the methodological limitations of their analyses, they often denied their adherence to a movement whose structural form repressed the incomplete and historically situated nature of all human knowledge.

A principal example of this phenomenon concerns the determinate production of practice by structural causes. Lévi-Strauss and other structuralist writers sensed the open space of indissoluble indeterminacy between structure and event. However, they refused to fill this gap by repostulating a series of epistemologically privileged (unanalyzable) acts of conscious, prestructuralist subjects. Borrowing from probabilist, postpositivist accounts of physics, Lévi-Strauss asserted that individual events were random or unexplainable. Chomsky claimed that meaning lies in syntax rather than the semantics of individual sentences; he was interested in what could be said rather than what is said. The most recent accounts of biology stress the indeterminate nature of the transformation from the information coded in DNA to the reproduction of genetic material. Such deviations from a pure structuralist account are poststructuralist to the extent that they explore the limits of positivism without falling back on a discredited phenomenological epistemology. Poststructuralism must not deny consciousness, but must relocate it as a discourse appropriate to particular situations. At the same time, poststructuralism must not suggest a nihilistic abolition of the possibility of explanation, but must transform our understanding of what adequate theory is. Instead of imagining truth as a timeless equilibrium, a definitive account of the particular, or an innate order such as Chomskian grammar or a Jungian archetype, knowledge must be represented in poststructuralism as an equifinal moment in an evolutionary process involving multiple and competing sets of structural rules. A theory is no less valid when encased within and limited by its own history. For a discussion of these issues in postpositivist science, see J. CAMPBELL, *GRAMMATICAL MAN* 43-124 (1982); *see also* notes 64, 109 *infra*.

role for a mediating agency raises conceptual difficulties with relation to the general treatment of the subject in a structuralist discourse.

The transfiguration of the subject. It has been argued that structuralist analysis cannot properly be generalized from language to social institutions such as kinship arrangements because of the absence in the latter of a constructing subject.³¹ In language, the particularization of the system to individual sentences seems to occur through the mediation of one who “knows” the language and in some sense “chooses” the elements to be employed. A similar argument for impersonally mediated structures in social science would appear to require that a “community” or “institution” “know” the structural code and produce a series of cultural or political practices. Thus, the range of structuralist analyses would ultimately turn on the validity of the analogy between individual speakers and collective “agents” such as communities or institutions.

It seems to me, however, that the case for extending structuralism beyond language³² depends not on some attribution of consciousness to organic unities, but rather on a redefinition of the concept of subjectivity. The mediating institution need not be defined by its assertion of self-consciousness. If the subject is transfigured into the locus in which the structure is instantiated, there is no reason why such a locus must have a natural or biological character. The deconstruction of the natural or existential subject would permit the extension of structuralist analysis beyond linguistics.

The radical nature of the structuralist account of the subject need not be overstated. Subjects speak sentences, make up myths, and give cogent accounts of their own creative experiences in the formation of practical events.³³ In a coherent structuralism, therefore, the experience of self-consciousness is not denied, but rather reinterpreted.³⁴ A structuralist characterization of the subject does not em-

31. See P. PETTIT, *supra* note 3, at 70.

32. Saussure's most ambitious statement of the general power of the method seems to contradict the more limited ambitions in linguistic analysis:

*A science that studies the life of signs within society is conceivable; it would be a part of social psychology and consequently of general psychology. I shall call it semiology (from [the] Greek *semêion* “sign”). Semiology would show what constitutes signs, what laws govern them. . . . Linguistics is only a part of the general science of semiology; the laws discovered by semiology will be applicable to linguistics, and the latter will describe a well-defined area within the mass of anthropological facts.*

F. DE SAUSSURE, *supra* note 18, at 16.

33. See, e.g., C. LÉVI-STRAUSS, *THE NAKED MAN* 625–30 (1981).

34. Note that the accuracy of an individual's reports of his or her own consciousness and

phasize the phenomenological experience of reflection upon the indeterminacy of concrete action, but instead the impersonal and collective sources of behavior. The transvalued subject is conscious that its sense of self is mediated by psychological, economic, and linguistic systems which themselves produce the subject's experience of differentiated identity and of autonomy. The subject is denaturalized because it recognizes its own mediation through structure. It rejects the sense that it has an ontologically given existence, perceiving itself instead as a social artifact with a discursively given constitution. In the structuralist view, the subject does not observe or manipulate social systems; it is simply the incident through which systems becomes concrete.

This sense of impersonality and artifactuality is familiar to us all. It is the experience of seeing our past actions become patterned, an experience Lévi-Strauss has described as follows:

Although I am going to talk about what I have written, my books and papers and so on, unfortunately I forget what I have written practically as soon as it is finished. There is probably going to be some trouble about that. But nevertheless I think there is also something significant about it, in that I don't have the feeling that I write my books. I have the feeling that my books get written through me and that once they have got across me I feel empty and nothing is left.

I never had, and still do not have, the perception of feeling my personal identity. I appear to myself as the place where something is going on, but there is no "I," no "me." Each of us is a kind of crossroads where things happen. The crossroads is purely passive; something happens there. A different thing, equally valid, happens

the importance of intentionality in the development of an idealized pragmatics of communication need not be disputed. Instead, what may be contested is the actual character of a subject's communication, as well as its moral or social significance. Structuralist argument centers on our evaluation of the "self" that generates (or in which arises) particular behavior. A self may be spoken of as either the manifestation of an autonomous consciousness or as a differentiated aspect of a collectively established system for organizing space and time. The "projects" of this latter "self" can be no more than the mediating mechanism for the realization of linguistic and other structures. This critique of the perception of consciousness as autonomous and primary achieves a transvaluation of experience by resituating the conscious subject within an external cultural conjuncture.

An alternative assault on the phenomenological subject can come from an internal deconstruction of the concept of intentionality in utterance, a concept essential to liberal existential and linguistic claims. An example is Derrida's skeptical playing with the possibility of ever grasping one's own or another's intent in his critique of Searle's speech act/theory. Derrida, *Limited, Inc abc* . . . , in 2 GLYPH 162 (S. Weber & H. Sussman ed. 1977); Derrida, *Signature, Event, Context*, in 1 GLYPH 172 (S. Weber & H. Sussman ed. 1977); Searle, *Reiterating the Differences: A Reply to Derrida*, in 1 GLYPH 198 (S. Weber & H. Sussman ed. 1977).

elsewhere. There is no choice, it is just a matter of chance.³⁵

A structuralist theory of the subject may be developed in at least two ways. On the one hand, it may be viewed as a necessary application of the broader structuralist account of meaning. The subsumption of the individual in the social, for the structuralist, is required by the structuralist methodology.³⁶ A nonstructuralist discourse that attributes meaning to subjective intentions is incompatible with the interrelational theory of signification used by structuralists, as the individual is a type of particular (an instantiated unit) in structuralist discourse.

The structuralist transformation of the subject can also be viewed politically, as a critique of the continuing evolution of phenomenological or subjective discourse within liberal society. The modern individual has become increasingly self-centered and solipsistic. The emergent subject in Renaissance and early liberal thought continued to root its identity in some supra-individual order. The history of phenomenological discourse could be caricatured as the gradual liberation of a pure self-founding subjectivity from both the universalist Aristotelian naturalism which marked Florentine civic humanism and the theological context of natural rights theory.³⁷ In turn, European structuralism and American literary formalism (New Criticism) reacted with political and moral revulsion to the decadent liberal image of an uncompromising self-consciousness free of relation to anything except its own desires.³⁸ The internal evolution of liberal discourse from a progressive postfeudal ideology to an anemic apology for egotism thus necessitated the elaboration of an oppositional grammar.³⁹

35. C. LÉVI-STRAUSS, *MYTH AND MEANING* 3-4 (1979).

36. By reducing the multiplicity of individual consciousness to an illusory status, structuralism overcomes the intersubjectivity problem faced by phenomenological analysis. Phenomenological analysis must somehow postulate an empathetic intuition by the individual of the consciousness of others (*verstehen*). The structural theorist, for whom individual consciousness is illusory, is able to ignore this problem of intersubjectivity. See C. LÉVI-STRAUSS, *THE SAVAGE MIND* 250-56 (1966). In this regard it is interesting to compare the structuralist account to Weber's ideal-typical strategy for dealing with *verstehen*. See I. M. WEBER, *ECONOMY AND SOCIETY* 8-9, 20-21 (1978).

37. See J. POCOCK, *supra* note 25, at 3-30.

38. Lévi-Strauss has referred to the phenomenological subject of liberal political and economic theory as an "unbearably spoilt child who has occupied the philosophical scene for too long now." C. LÉVI-STRAUSS, *supra* note 33, at 687; see also G. GRAFF, *LITERATURE AGAINST ITSELF: LITERARY IDEAS IN MODERN SOCIETY* 129-49 (1979).

39. For an imaginative semiotic taxonomy of the manifold, absurd forms of the modern self, as well as an unremitting testament to its disagreeable character, see W. PERCY, *LOST IN THE COSMOS: THE LAST SELF-HELP BOOK* 17-82, 126-98 (1983).

The structuralist account of the subject is fundamentally reductionist. The expressed behavior of the subject, including his or her self-consciousness, is determined by the structural laws of, for example, semiotics, psychoanalysis, or historical materialism. Subjectivity takes on an objective character because the boundaries that differentiate the individual subject from other imaginable systematic orderings of experience are seen to be socially established. The subject reappears as the locus in which the structure is instantiated in the sense that its definition as a subject (or a community or institution) is dependent upon the code that founds it. However, there continues to exist a phenomenal distinction between the subject's conscious experience of self-determination and its reflective admission of a reductive construction.

This disjunction leads in structuralist theory to an assertion of the primacy of structural determination or unconsciousness over surface or false consciousness, which is but the phenomenal product of the structure. Thus, Saussure noted early on that language systems operate on a less than conscious level since users are ignorant of linguistic structure.⁴⁰ Lévi-Strauss felt that native informants' accounts of the meaning of myth or kin relations are to be distrusted because they are superficial and historical phenomena. Marx distinguished latent (unconscious) from manifest (falsely conscious) class interests. Freud reveled in the structural generation of the inevitability of self-delusion.

Finally, note again that the diachronic account of the instrumental relation of agent to language (or other cultural institutions) is wholly reversed by structuralist linguistics. Language is not a tool with which to create one's meanings and values. Rather, one lives within a language which defines identity as it works itself through the individual. To learn a language is to be the object of a process of personality formation. To translate a language (if it is at all possible) is not the technical act postulated by diachronic linguistics, but resocialization.⁴¹ Learning and translating thus represent the wish to enter another cultural system and, even, to pay it respect. Conversely, to deprive an individual of his cultural attributes does more

40. F. DE SAUSSURE, *supra* note 18, at 73.

41. On the problems of translation among alternative conventional accounts of the world, see the discussion of the historically diverse descriptions of even physical science in P. FEYERABEND, *AGAINST METHOD: OUTLINE OF AN ANARCHIST THEORY OF KNOWLEDGE* 69-108 (1975).

than simply divert his attention and actions in a different direction; it strips away his core of identity.

Structuralist analysis invariably yields what has been called a material theory of the subject,⁴² an elocution that is intentionally contradictory. It points ironically to the transformation of the notion of subjectivity that lies at the core of phenomenological discourse. It is also a concept riddled with difficulties. For one thing, it does not seem to solve the problem of the relation of structure to practice. Since the subject is now understood as the locus of structure, the question of the determinate production of practices by structure can no longer be resolved with reference to some independent subjective agency. Second, a number of competing material accounts reduce the classical understanding of self-consciousness differently. After the material overkill of the liberal subject, structural unity seems to remain only a matter of form. Third, the structuralist account would seem to require a theory of socialization or the reproduction of structure as subject. However, such accounts of reproduction range from learning theories stressing gradual education (Althusser and Saussure) or immediate immersion in a linguistic system (Lacan), to theories describing innate mental (Chomsky) or physiological (Lévi-Strauss and Freud) implantation of structures. Again, we can specify the form of structuralist argument but not its content.

The account of time. Lévi-Strauss referred to myths as machines for the suppression of time. This is true both literally and figuratively. Literally, myths are narratives of events that take place in a separate order of sacred time. But he also argues that each myth represents a transformation of the structural rules that unite it with the seemingly disparate myths of other cultures. The continuous production of myth figuratively represents, for Lévi-Strauss, the unchanging reproduction of a fundamental structure of the human mind.⁴³ As manifestations of a single self-reproducing order, myths present only the illusion of change. The history of their successive transformations is misleading, and time marked off with reference to their evolution is only apparent.

In general, structuralism rejects the privileged and central status that diachronic linguistics and romanticist cultural studies gave to history in the nineteenth century. Giddens has properly noted that for structuralism, "[h]istory, understood as the attempt to describe or account for occurrences in time, does not enjoy the epistemological

42. See R. COWARD & J. ELLIS, *supra* note 3, at 92–121.

43. C. LÉVI-STRAUSS, *supra* note 33, at 693.

primacy often accorded it: [H]istorical analysis is only one code among other codes, based on the interpretive mode expressing the contrast of 'before' and 'after', or 'preceding' and 'succeeding'.⁴⁴ In a strategic move homologous to the transformation of the subject, history is not so much banished or bracketed by structuralism as it is reconstructed. It is a particular type of history—history as the narrative of the development of spirit or consciousness—which structuralism abjures.

Diachronic time is the theater of the contingent in which subjectivity pursues its projects and creates a history that recounts the meanings its intentionality confers upon the world. Historicism arose with the introduction in the Renaissance of civic humanism as a discourse of the subject. It flourished with the elaboration of a mature phenomenological discourse in the work of Hegel and the German schools of cultural history.⁴⁵ The direction of time in these earlier phenomenologies of spirit was often explicitly dictated by nonindividual agents such as prototheological subjects (Hegel's Reason), organic cultures (Herder's nations), or even irrational forces (Machiavelli's *fortuna*).⁴⁶ However, as with the evolution of subject from Aristotelian being to solipsistic existentialist, time had lost any sense of supraindividual order by the twentieth century. The diachronic time that contemporary structuralism set out to transform has become anarchic. History, as the narrative of a fragmented, egotistic spirit, is an account of the world as chaos which resists the reemergence of the ordered knowledge structuralism struggles to impose.⁴⁷ Structuralism seeks to alter the understanding of subjectivity that defines phenomenological time as the chronicle of its agency.⁴⁸

44. A. GIDDENS, *supra* note 3, at 21.

45. On German historicism and cultural science, see R. PALMER, *HERMENEUTICS* 75–123 (1969); 2 T. PARSONS, *THE STRUCTURE OF SOCIAL ACTION* 473–87 (1968); Brown, *History and Hermeneutics: Wilhelm Dilthey and the Dialectics of Interpretive Method*, in *STRUCTURE, CONSCIOUSNESS AND HISTORY* 38 (R. Brown & S. Lyman eds. 1978); see generally P. RICOEUR, *HERMENEUTICS AND THE HUMAN SCIENCES* 43–128 (1981).

46. For those unfamiliar with the last of these, it is instructive to examine Pocock's treatment of *fortuna*. See J. POCKOCK, *supra* note 25, at 36–48, 156–82 (discussing Machiavelli's use of the term).

47. I use the word chaos to describe the history of spirit in a quite specific sense. A narrative of consciousness is chaotic, or without order, because voluntary choices of will or spirit are not themselves explained as the effects of some other mechanism. Of course, much historic writing offers motivational analyses of the roots of human action. But these explanations either end in a reduction to some objective order which denies the narrative of spirit, or return to an assertion of phenomenological priority which defies order precisely because an unexplained phenomenology is at the genesis of the chronicle.

48. Narrative time is unidirectional or entropic time in the sense that according to the

The transformation of time is accomplished by structuralism by enclosing narrative time within the reproduction of structure itself. A language or a culture does not alter its structure over time. Rather, it displays different instantiations of the same rules of recursive transformation. The succession of these different forms of a single generative structure, when not recognized to be merely transformations of a static order, constitutes the subject of diachronic history, which denies the permanence of system. Only synchronic analysis can dispel the illusion of time that is created by the teleological flow of a false consciousness and reveal the source of this mystification in the ceaseless reproduction of a unitary structure.⁴⁹

In many structuralist accounts, time is bifurcated into two qualitatively different types: intrastructural and extrastructural. The former is the time that creates the illusion of passage and innovation, but which in fact offers only transformations within the structural order.⁵⁰ Intrastructural time is less static in those variants of structuralism, such as Marxism, in which contradictions exist between structural principles.⁵¹ Because these contradictions produce disequilibria within the structure, an internal history of eventual deconstruction can, with knowledge of the structure's constitution, be

laws of thermodynamics, the actions of living systems that create order (meaning) exhaust the quantity of energy available for use. Time reversal, which entropy insists cannot occur, implies the reprojection of a known past upon an uncertain future. Structuralism postulates precisely that sort of time reversal or negative entropy because the past is indefinitely replayed in the reproduction of structure. Time bound within structure is but a fluctuation of insignificant transformations around an equilibrium position or structural order in which the state of information about the universe is held constant. In truth, the flow of time is not so much reversed as it is recycled. It may also be noted that structuralism's reconception of the laws of thermodynamics is consonant with some recent ideas in natural science. The concept of entropy is a property specific to thermodynamic models. Thermodynamic models may be distinguished from models built upon information theory, which imagines the constant regeneration of order. For discussions of time, information, and entropy in classical and nontraditional views of physical systems, see J. CAMPBELL, *supra* note 30, at 255–56; Prigogine, *Time, Irreversibility, and Structure*, in *THE PHYSICIST'S CONCEPTION OF NATURE* 561 (J. Mehra ed. 1973).

49. Again, this structuralist imagery may be usefully compared to premodern, nonsubjectivist discourses. In particular, there are similar divisions of the qualitatively separate realms of sacred (often escatological) time and profane (historical) time in Christian medieval thought. Structural time is analogous to the eternal or timeless realm of the sacred. Profane time, the analogue of phenomenological time, is epiphenomenal in religious thought, as consciousness is in structuralism. See J. POCOCC, *supra* note 25, at 31–33.

50. The repression of time by continuous reproduction of order is a principal source of the potential for repression in noncritical structuralist politics. This critique of structuralism's capacity to become a totalitarian justification for the elimination of change is at the core of the poststructuralist abandonment of Marxism in any orthodox form. See, e.g., J.P. DUPUY, *ORDRES ET DESORDRES: ENQUETE SUR UN NOUVEAU PARADIGME* 83–107 (1982).

51. See A. GIDDENS, *supra* note 3, at 131–64.

predicted. Thus, while there is change within intrastructural time, it lacks the indeterminacy of the diachronic narrative of spirit. Marx, for example, could speak of the intrastructural time before communism as "prehistory" since human freedom, which would demarcate the true flow of subjective time, had not yet arrived.

Extrastructural time, on the other hand, exists in the abyss of disorder that defines the boundaries of a particular system. If each structure independently constitutes the epistemological rules for valid knowledge with reference to its internal formal differentiations, then each distinguishable structure must logically be understood to be incommensurable with all others. Unless structuralism is given a universal scope such that all structures are themselves transformations of a monolithic originary structure, time must exist in a disordered or irreducible form to demarcate chronologically the analytical discontinuities that mark off the limits of one structure from another.⁵² Given such methodological constraints, structuralist analyses are often silent about the genesis of structure, the construction of alternative futures, and the experience of what it might be like to inhabit another world and speak another language.⁵³ This refiguration of time by structural order does not necessarily deny that we can translate or move cross-culturally. It argues instead that we alter our identities when we enter into alternative systems of differentiations. Similarly, when we describe what life was like in another culture or

52. Although extrastructural time has similarities to narrative or phenomenological time in that it is not merely a mystification produced by structure, it is not at all a phenomenological concept. Extrastructural time is not calibrated by the actions of any conscious agent. It is simply an unknowable emptiness that functions epistemologically within structuralist analysis. The figure of extrastructural time signifies the uncharted distance that lies between discrete and unconnectable historical epochs. Analysis reveals these epochs to be structural unities that create the illusion of change we experience as narrative or continuous time. The qualitative division of time within structuralism is a metaphoric representation of the methodological limits upon the acquisition of a complete and determinate human knowledge. Structuralist analysis that admits discontinuous time abandons the hope for a universal science and acknowledges Goedel's proposition that logic, mathematics, and other complex systems can never be fully described by a closed set of rules. See J. CAMPBELL, *supra* note 30, at 108-11. All postpositivist knowledge is intrasystemic since it is grounded only in the system's internal principles of organization that are themselves ungroundable in consistent terms. The division of time, marking the passage from system to system, symbolizes the radical absence of translatability between theoretical orderings, which is otherwise represented in the figure of the epistemic break. Discussion of Althusser's use of epistemological breaks can be found in A. CALLINICOS, *ALTHUSSER'S MARXISM* 72-88 (1976); see also M. FOUCAULT, *supra* note 11 at 3-17.

53. In this regard, Marx's failure to describe the nature of Communism was not an oversight. It was, rather, the result of the silence imposed by a structuralism peering across an epistemic break.

another period of history, we cannot avoid the reconstitution of that experience in the terms of the language we now speak and the culture we now inhabit. That which lies beyond extrastructural time is forever lost to us. Our images of the Other are no more than reproductions of our own order of synchronic forms.

II. POSTSTRUCTURALIST REFORMATIONS

Poststructuralism begins in the inadequacies of structuralism. The first section of this part describes the inadequacies of each element of the structuralist argument. Any particular structuralist account constructed to explain the unity of diverse phenomena can be *deconstructed* to expose the contingent nature of its claims. All argumentation is indeterminate to the poststructuralist critic. The ambiguous passages from practice to theory and from theory to practice invite the critic to postulate some putative author or reader to choose among alternative constructions of structure or alternative interpretations of theory. Poststructuralist critique thus seems to enable the return of free creativity.

The second section of this part argues, however, that an adequate poststructuralism must incorporate structuralism's deconstruction of the phenomenological account of the subject. The structuralist theory of the subject—its antihumanism—is too firmly established within more recent intellectual currents to permit any easy reintroduction of a romanticized liberal politics. The uncertain role of the subject in poststructural theory can be illustrated by tracing the origins of Critical theory within the history of Marxist studies.⁵⁴ The movement in Marxism from phenomenology to historical materialism to a reconceived Critical politics incorporating a serious account of the ideological production of the subject is homologous to the movement from historicism to structuralism to poststructuralism. The position of Critical studies within Marxism exemplifies, but does not yet resolve, the question of how to proceed with poststructuralism.

There are several possible types of poststructuralism. One, which I reject, would cure the methodological defects of structuralism by reintroducing the liberal image of the subject. As structure criticized subject, so subject then returns to criticize structure. What emerges from this diachronic process is an odd, politically conservative sort of

54. See P. ANDERSON, *supra* note 9, at 75–94; M. JAY, *THE DIALECTICAL IMAGINATION: A HISTORY OF THE FRANKFURT SCHOOL AND THE INSTITUTE OF SOCIAL RESEARCH, 1923–1950*, at 41–85 (1973); *see also* text accompanying notes 67–77.

bimodal stability. The alternation, however rapid, of structural and phenomenological arguments produces a reformed, modernistic version of liberalism. This modernism gives subjectivity a discursive foundation in place of its traditional liberal grounding in a naturalistic ontology. But, in America, where the lessons of structuralism have not been internalized, this type of poststructuralism probably would not be progressive. While a return to a reformulated, post-structuralist subjectivity might produce forward movement in European thought, where liberalism has been seriously criticized, it would likely create retrogressive confusion in American thought, where it has not been.⁵⁵

A. *Deconstructing Structure*

I have suggested that a structuralist discourse will display four components, or grammatical (syntactical) elements: (1) a description of the system of material or conceptual differentiations; (2) an account of the transformative matrix of rules by which these differentiations generate particular practices; (3) an image of the subject as a structural product; and (4) a bifurcated or discontinuous image of time. With regard to each of these elements, it is possible to expose theoretical problems that form the fundamental propositions of post-structuralist criticism.⁵⁶ I do not propose to discuss in detail the nature of such criticism since my emphasis in this article is the relevance of structuralist analyses to Critical legal theory. Nevertheless, a sketch of the origins of the critique may be useful as a reminder that the issues confronted by Critical thought lie essentially within the reconstitution of social theory after the grammar of structuralism has been internalized and deconstructed. What is to be avoided most fervently, it seems to me, is a poststructuralist return to

55. I do not wish to proffer a theory wherein cultural life must pass through some rigid sequence of stages. Instead, my purpose is both to explore the implications of the structural critique of traditional liberalism and to develop a second variant of poststructuralist theory that avoids the political problems engendered by the modern tendency to alternate standard discourses. The implications of structuralism for law are considered in Part III. See text accompanying notes 80-94 *infra*. An alternative type of poststructural strategy—one that abandons the continual alternation of discourses and leaves behind the quest for the type of unambiguous understanding that both self and structure seek to provide—is taken up in Part IV. See text accompanying notes 95-110 *infra*.

56. See, e.g., TEXTUAL STRATEGIES (J. Harari ed. 1974). Note again that these problems were already known and discussed by some structuralists, as evidenced by the theoretically sophisticated, self-Critical essays by structuralist authors in THE STRUCTURALIST CONTROVERSY, *supra* note 3.

a discourse built upon prestructuralist or subjectivist images of experience.

It is in the very richness of structuralist analysis that its limitations become apparent. Consider four relationships that correspond to the elements of a structuralist grammar: (1) that of one postulated system of differentiations to another postulated structure that operates at the same level of abstraction from particular practices; (2) that of any one structure to any one practice; (3) that of any structure to the "agency," personal or impersonal, that mediates its reproduction; and (4) that of any structure to structures or other phenomena that succeed or precede it in extrastructural time.

With respect to the first relationship, study of contemporary structuralist texts reveals an astounding multiplicity of generative accounts. Structures are characterized as having varying material and ideal content, as having narrow or expansive range, as being of stable or genetically contradictory composition, and as yielding examples of practices that are as different as particular sentences and genres of societies. This multiplicity of structuralisms quickly reveals a massive overdetermination (the apparent determination of a single practice by multiple structures, each of which purports to offer a sufficient explanation) of any specific phenomenon and tears apart the presumptive value of each individual structural explanation.⁵⁷ Structures reemerge as narrative accounts with an epistemological character similar to that of fiction:⁵⁸ The recitation of any single structuralist narrative appears to be a construction of the author whose name is attached to it. Each structuralism is reduced to an artifact of volitional or subjective spirit.

The antidote to such a disfiguration of structuralism is a deeper material theory of the production of the illusion of multiple struc-

57. The effect of this overdetermination of practice is to produce an indeterminacy of translation. Each practice may be differently represented in a number of linguistic or conceptual systems. It may thus have multiple meanings or systematic differentiations which appear as endless translatability. This representation of the pervasive ambiguity of life within post-structuralism parallels the problems, developed in the philosophy of Quine, of operating in a world of multiple conventions that define our reality. However, it is also apparent that, once we accent the philosophical consequences of structuralism, we must reject as misguided any theory that holds out the possibility of real translation between the codes that distinguish discrete structural units. When nontranslatability is set off against Quine's description of infinite translatability, it is evident that over- and underdeterminacy are themselves contrasting representations of the same nonpositivist architecture of knowledge. See I. HACKING, *supra* note 13, at 150–56 (discussing W. QUINE, *WORD AND OBJECT* (1960)).

58. For an account of the retranslation of discourse into narrative fiction in the literary theory of the poststructural period, see G. GRAFF, *supra* note 38, at 151–80.

tures, but there are obstacles to this strategy. First, it leads eventually to the positing of a universal structure which obliterates all extrastructural time. Everything must be reduced to a single transformative matrix that is either so abstract that it is uninteresting or so pretentious that it is esthetically offensive. Worse, there seems to be such a multiplicity of universal structures available that only the totalitarian political repression of competitive explanations holds out the possibility of a unification of accounts.

With regard to the second relationship mentioned above, the generation of practice by structure, the underdetermination of practice opens a gap within the logic of structuralist argument that seems to demand the resuscitation of an interpreting subject to fill it. At times, structuralism preserves an unsatisfactory silence about the production of particular practices. At other times, it falls into a positivist genre that seeks to determine uniquely the occurrence of each imaginable practice and to enforce its determination as doctrinal orthodoxy. In fact, the grace of structuralism, in its most exciting moments, such as Lévi-Strauss' account of myths or Freud's interpretation of dreams, is the artifice and bravado of the analyst in asserting a connection between theory and practice in the face of indeterminacy.⁵⁹

The third relationship, that of structure to mediating agency, presents the difficulty that no adequate theory of the production of the material subject by structure exists. This difficulty has pushed intelligent structural analysis toward a reintroduction of a quasiphenomenology. Sophisticated Marxist structuralists, such as Althusser and Godelier, have overtly rejected the viability of a vulgar or universally determinist economic account of societal practice. They resort instead to the notion of the "relative autonomy" of the institutions that produce cultural, political, and ideological phenomena. In the "last instance," this autonomy is illusory since they posit an ultimate reduction to material laws of transformation. However, like the economist's "long run," the structuralist's "last instance" neither arrives nor provides an interesting subject for analysis. Rather, the relatively autonomous institutions function discursively as historical subjects, the accounts of which are curiously reminiscent of traditional diachronic narratives of conscious individuals.

A final set of inquiries should be directed at the fourth relationship, the structuralist reconceptualization of time. There are at least

59. For Critical celebrations of this artistry, see E. LEACH, *CLAUDE LÉVI-STRAUSS* (1970); P. RICOEUR, *FREUD AND PHILOSOPHY* (1970).

three separate orderings of structuralist argument on this point, all of which begin with a discontinuous representation of time. One refolds all extrastructural (chaotic or diachronic) time back into intrastructural time. This arrangement removes the disturbing silence imposed by the introduction of structural breaks, but only at the price of imposing a universal ontology or teleology. Such was essentially the nature of much medieval philosophy of history that, by means of prophecy or the symbolic reading of profane time, brought civic time into the sacred fold.

A second ordering insists on the inability of the structural method to describe any more than historically delimited or intrastructural events. This view accepts with resignation the limits of our ability to know and acknowledges the total relativization of science. Thus, there is a sort of tragic puritanism in, for example, Althusser's correction of Marx's belief that ideology would end with the revolution. Ideology, Althusser insists, is an unavoidable consequence of the human need to order experience with abstract conceptualizations (structures) whose absence would bring only increasing ignorance. Revolution remains desirable, but it is recognized that a new, but currently unknowable, ideology (structure) will necessarily be its consequence.⁶⁰

A final ordering of time may be imagined as a combination of history and nonhistory. Catholic theology posited a secular human epoch of volitional free will to be followed by the theological, timeless antihistory of salvation/damnation. Marx, and at times Freud, reversed the order and posited the era of historic time or subjective action (Communism or cure) after the close of structuralist prehistory.⁶¹ To the extent that this critical ordering rejects both a universal ontology and a quietism born of our inability to know, it harks

60. See L. ALTHUSSER, *LENIN AND PHILOSOPHY* 127–86 (1971). This portrayal may do injustice to Althusser, since he actually describes a double ideology in capitalism composed of epistemologically necessary and politically unnecessary distortions of experience.

61. Marx began his early work by secularizing Hegel's phenomenological discourse and arriving at an idealized condition of pure subjectivity. The subject realized itself through the conscious recognition of its own spirit in objectified products (unalienated labor). However, the dawn of this condition (Communism) took place only after the termination of the prehistory of alienated labor in which man's distorted self image of free action was no more than the artifact of collective forces. The therapeutic possibility of "cure" in Freud contains similar elements of personal freedom following liberation from an objectively determined (neurotic) consciousness which dominates the preceding periods of illness. This discourse of psychological time is always ambiguous in Freud's writings; the structural opposition of civilization and biology, in his view, led as often to a tragic sense of entrapment (one is never through with analysis) as to hope. Nevertheless, the image of successful therapy has played an important role in post-Freudian ego-psychology and in the political adaptations of such

back to the nostalgic desire for the reunification of time as the continuing narrative of the revelation of spirit.

The essence of the problem of poststructuralism is determining how to treat structuralism. One possibility is to regard structuralism as one example of the generalized form of the claim to objective knowledge. If explanation is to be more than the narration of spirit's travels, it should reduce the vagaries of consciousness to cause. A structuralist discourse alters time by creating the extrahistorical standpoint of a stable body of knowledge that confines phenomenology within the bounds of a self-reproducing system. But, even considered apart from its relation to other discourses, the meaning of structural analysis is unclear. It seems at some points to be a totalizing utopia and at others a humble confession of the finitude of our understanding. In its pretense to universal explanation, structuralism recalls both the longing for a nonrelative science and the associated threat of an ideological repression of disparate interpretations of experience. In the frank recognition that order emerges only in a collective representation suspended sequentially in disordered time, the epistemic break between discrete structuralisms underscores the limitations of knowledge locked inside the conceptual system that produces it. To dwell upon the utopian formulation seems insensitive to twentieth century history. To adopt the confessional leads back toward an existential hermeneutics of endless interpretations, which undercuts the logic of structuralist discourse and the lessons about the illusion of the interpreting subject that we should have learned from it.

Another set of difficulties concerns writing about structuralism. Looking at the problem of poststructuralism from a more abstract level of theory, structuralist (objective) and phenomenological (subjective) discourses of language and other events are alternative systems of differentiated terms. But it is possible that the two in combination constitute only a metastructuralism consisting of two discursive elements. Of these elements, the phenomenological has the paradoxical form of being antistructuralist. Such a metastructuralist account of the relationship of structuralist and phenomenological discourses reduces their historic alternation to a movement within an intra- (meta-) structural time and dissolves the subjectivity of even subjectivist discourse. But the evident artificiality of this metastructural analysis could be subjected to a poststructuralist at-

psychological models, including Critical theory. See M. JAY, *supra* note 54, at 86-112; H. MARCUSE, *EROS AND CIVILIZATION* 117-26 (1962).

tack and itself interpreted as testament to my voluntaristic creation of a theory of contradictory grammars. Within a revived poststructural phenomenology, one would describe these discourses as no more than competing narratives, rhetorical tropes by which subjects organize the persuasion of self and others.⁶² Of these tropes, one, structuralism, has the paradoxical form of an antinarrative, whose objective character is subsumed in the subjective project of its speaker/author.

To phrase the problem another way, the relationship of these two discourses is uncertain. Structuralism is taken historically as the contradiction of subjectivist discourse. To speak structurally is to criticize characterizations of experience dependent upon phenomenological constructions. But viewed together from a metalevel, these two discourses can be seen as complements.⁶³ They are mirror or shadow constructions of experience. To grasp the

62. I use the poetic term "trope," following the definition offered in H. WHITE, *METAHISTORY: THE HISTORICAL IMAGINATION IN NINETEENTH-CENTURY EUROPE* 31–34 (1973), to call attention to the authorial role of the subject in a poststructural revival of phenomenology. Tropes are generic stylized presentations of events that "permit the characterization of objects in different kinds of indirect, or figurative, discourse. They are especially useful for understanding the operations by which the contents of experience which resist description in unambiguous prose representations can be prefiguratively grasped and prepared for conscious apprehension." Since poststructuralism does not admit of an unmediated or nonprefigured object language, in a phenomenological representation of language discourses themselves would be tropes available for instrumental use by active subjects. The idea of trope as a rhetorical tool is also related to Aristotle's notion of the function of topics in rhetoric. See ARISTOTLE XXII: THE "ART" OF RHETORIC 295–343 (J.H. Freese trans. 1975).

63. While the problem that I raise—that of the complementarity of apparently opposed discourses—is of great importance to me, it is not necessarily a central element of the relation between structuralism and critique. Consequently, the issue is largely relegated to a brief subtext at note 68 *infra*. More intricate and enjoyable discussions of the meaning of opposed discourses appear in recent works by Percy and Eco. Consider, for example, the "thought experiment" in which Percy asks the reader to compare the relative preposterousness of Judaeo-Christianity and a "modern Cartesian consciousness"—that is, "whether they are two unrelated preposterousnesses or whether one preposterousness is a function of the other." W. PERCY, *supra* note 39, at 252–55. Also consider the following passages from Eco's *The Name of the Rose*:

[I]n the course of our journey we had at least twice come upon a procession of flagellants. Once the local populace was looking at them as if they were saints; the other time there was murmuring that these were heretics. And yet they were the same people.

. . . .

"When I talk with Ubertino I have the impression that hell is heaven seen from the other side."

I did not grasp his meaning. "From what side?" I asked.

"Ah true," William acknowledged the problem. "It is a matter of knowing whether there are sides and whether there is a whole. But pay no attention to me."

U. Eco, *supra* note 2, at 65, 122.

meaning of either, we are forced to refer to the absence of the other. Moreover, as Derrida suggests in the passage quoted at the outset, they are alternative dreams of the presence of knowledge. Structuralism dreams that one can directly and immediately know the Other; phenomenology dreams that one can directly and immediately know oneself.⁶⁴

If these discourses are grammatical complements, must they not also be political complements? Structuralism can be understood as a critique of modern society because liberalism essentially can be understood as a discourse of the subject. But if liberalism is rethought to be the alternation and repetitive mutual deconstruction of twin discourses, then structuralism is not the critique of bourgeois ideology, but rather its representation. This problem must be confronted in the reformulation of practice in a poststructuralist world. However, the immediate question is the importance of structuralism to Critical analyses of legal theory. For this purpose, we can address structuralism purely within that historical narrative in which it appears to itself as an antiliberal or antihumanist phenomenon. It is only within this historical perspective that structuralism attains significance as critique. The more difficult questions of reconstruction are merely prefaced here and left for another time.⁶⁵

64. For another, less cryptic, discussion of philosophical bifurcation and the mistaken quest for Derrida's "presence"—that substance, mental or physical, that can be naturally known without conscious inference—see Rorty's analysis of the dualistic opposition between modern behaviorism and Cartesian subjectivity in R. RORTY, *supra* note 13, at 101–06. More generally, it is valuable to consider Eco's summation on the consequences of the ongoing search for any "truth":

Jorge feared the second book of Aristotle because it perhaps really did teach how to distort the face of every truth, so that we would not become slaves of our ghosts. Perhaps the mission of those who love mankind is to make people laugh at the truth, *to make truth laugh*, because the only truth lies in learning to free ourselves from insane passion for the truth.

. . . .

"Where is all my wisdom, then? I behaved stubbornly, pursuing a semblance of order, when I should have known well that there is no order in the universe."

"But in imagining an erroneous order you still found something"

"What you say is very fine, Adso, and I thank you. The order that our mind imagines is like a net, or like a ladder, built to attain something. But afterward you must throw the ladder away, because you discover that, even if it was useful, it was meaningless.

U. ECO, *supra* note 2, at 491–92 (emphasis in original).

65. The importance of positivist and determinist models of science may be a dated issue within the philosophy of science. Positivist science, however, remains important because it continues to be reflected in the linguistic structures that define what it is to know truthfully or to act legitimately in fields other than natural science. Both structuralism and phenomenology participate in a derivative way in this relationship with positivism. The objectivist and

B. *The Ideology of the Subject and Critique: Political Consciousness and Structure in Critical Thought*

I have argued that structuralism represents a particular form of discourse with systematically interrelated elements. These include a stress on syntax over semantics; on the collective over the individual; on discontinuity over evolution; and on rationalist materialism over phenomenological psychologies. Especially because this is a political essay, I prefer to place the greatest emphasis on what structuralists have avowedly labeled their "antihumanism." Lévi-Strauss, Althusser, Foucault, and Lacan share an antagonism toward conferring a privileged status upon human consciousness.⁶⁶ An objectivist ana-

determinist character of important structuralist explanations directly exemplifies the form of positivist argument. At the same time, phenomenological discourse, which emphasizes the indeterminacy of intentional action, effectively articulates the negation of the propositions of classical positivism. Phenomenology, in a grammatical sense, symbolizes the absence of an objectivist positive method. Neither discourse, therefore, would make sense without reference to the ideal form of positive knowledge. Consequently, if liberalism can be understood as a particular relation of the expression of the presence and absence of a specific type of scientific competence, then only an abandonment of that underlying representation would hold open the hope of moving on.

One vision of a nondualist image of knowledge may be found in information theory, which purports to cast different light on formerly separate disciplines such as cognitive psychology, computational semantics, molecular biology, and physical chemistry. This theory characterizes particular (microscopic) configurations in both inorganic and organic realms as the result of an inherent indeterminacy of elementary behaviors or, in other words, chance. Structural (macroscopic) features are transfigured to become statistical artifacts resulting from the occurrence of multiple chance events within a self-organized system. Existing macroscopic laws, to paraphrase Jacques Monod, do not have to exist, but they may. See J. MONOD, *supra* note 27, at 44.

Existence cannot be constituted without reference to the history of system. System itself has an open future since it may exhibit predominantly stable (equilibrating) or catastrophic operations in the self-reprogramming functions by which it evolves. It is, of course, possible to reformulate this conceptual grammar as a familiar bifurcated account, with a structural or closed determination of the macro-order and a subjectivist or narrative chronicle of particular disorder. I do not think, however, that this translation of systems concepts into a more classical ontology will be productive. To equate structural cause with differentially reproductive systems, and chance with free will, is to deviate sharply from our traditional understandings of these methods of social explanation. For numerous illustrations of the notion of self-organized systems in natural science, see M. EIGEN & R. WINKLER, *THE LAWS OF THE GAME: HOW THE PRINCIPLES OF NATURE GOVERN CHANCE* (1983). For more detailed discussions of self-organizing systems, see I. PRIGOGINE, *FROM BEING TO BECOMING: TIME AND COMPLEXITY IN THE PHYSICAL SCIENCES* (1980); Maturana & Valera, *Autopoiesis: The Organization of the Living*, in H. MATURANA, *AUTOPOIESIS AND COGNITION* 73 (1980); note 109 *infra*.

66. See L. ALTHUSSER, *FOR MARX* (1969); L. ALTHUSSER & E. BALIBAR, *READING CAPITAL* (2d ed. 1977); M. FOUCAULT, *supra* note 11; M. FOUCAULT, *THE ORDER OF THINGS* (1973); J. LACAN, *ÉCRITS* (1966); J. LACAN, *LES QUATRE CONCEPTS FONDAMENTAUX DE LA PSYCHANALYSE* (1973). For relevant works of Lévi-Strauss, see notes 35-36 *supra* and accompanying text.

As one commentator has stated:

lytic substitutes for existential consciousness a material theory of the social production of subjectivity. This analytic appears variously as Lévi-Strauss' mythology, Lacan's unconscious, Foucault's *archive*, or Althusser's adaptation of Marx's ideology. Structuralism is distinguished by its claim of an objective determination of the illusion of autonomy which is contained in contemporary philosophies, psychologies, and politics of self-consciousness.

Having put forward this synchronic proposition, I will not resist the tempting pretension to deepen my account. Recall that structuralist discourse may be understood as linked to its phenomenological opposite. Within this metastructuralism, must I not provide a generative, or at least narrative, explanation of the emergence of this particular, latest moment of structuralist argument? Note again that contemporary structuralism was not directed against all phenomenologies.⁶⁷ Rather, it responded critically to the immediately preceding historical period which was marked by an excessive, decadent, and solipsistic genre of individualism. Objectivism was embraced in the context of a subjectivity that had reduced itself to tired, simplistic, self-serving descriptions of ego motivations. That the difficulties of structuralism are now transparent must not obscure the perception

. . . What these thinkers have in common is a rejection of phenomenology, particularly existentialism. Phenomenology would suggest a distinctive approach in anthropology and history of ideas, one that made of each a discipline of *Verstehen*, an attempt to project oneself through understanding and empathy into another age or culture Similarly phenomenology would suggest a distinctive reinterpretation of Freudian and Marxian analysis: each would become an investigation of external constraints, psychological and sociological, on the individual's capacity to give his own meaning to the world

Althusser, Foucault, Lacan and Lévi-Strauss are "antiphenomenologists" to a man: [T]hey all reject the standpoint of subjective consciousness taken by phenomenology. What a culture or an age, a personal unconscious or a social infrastructure does is not just provide conditions that make subjective consciousness possible. At least they do not do so in such a way that the conditions might be read off as part of the phenomenological description of consciousness—or even in such a way that if read off elsewhere, in scientific investigation, they might be easily integrated within the phenomenological description. According to the antiphenomenologists, the conditions determine subjective consciousness to the extent that its self-understanding, the understanding each man has of what he does and why he does it, is quite discontinuous with the understanding which a scientific study of those conditions yields: [A]t the limit this study presents subjective consciousness as "false consciousness," a consciousness systematically beset by illusion about its own autonomy.

P. PETTIT, *supra* note 3, at 68–69.

67. It is important to recognize that there were progressive political and esthetic effects of the liberal account of the subject during the earlier historical periods when it first came to dominate the ideological representation of experience.

that the self-representations of the modern subject had become excessively tedious and unattractive.

To complement this esthetic account of the transformational syntax that produced contemporary structuralism, I will conclude Part II with a diachronic narrative of the use of structural theory within the Critical political tradition, a narrative concerning the place of the structural theory of ideology within broader discussions of social critique. This is intended to reiterate the point that the intellectual problems of structuralism remain embedded in the core of poststructuralist political thought.

To this end, I will begin by mentioning three different readings of Marx's *Capital*. Two are structuralist, one is diachronic. The first treats his work in a radically discontinuous fashion. This treatment is founded on the image of a break between a younger Marx, who developed a Hegelian discourse of phenomenological categories (such as alienation), and a later structuralist Marx, the Marx of *Capital*, who elaborated a transformational grammar called historical materialism. Structuralist Marxists usually assert that Marx's early humanism should be disregarded as an immature form of utopian subjectivity, repudiated by his own later writings.

The second, less common, reading concentrates on what I have called a metastructural level. In this reading, the early and later work constitute an alternation between subjectivist and objectivist discourses. Read as a whole, Marx provides either a catalogue of linked rhetorical forms or a syntax of human discourse, depending on how the meta-argument is presented.⁶⁸

68. My reliance in this article upon a narrative account of Marx seems to comport better with a simple subjectivist ideology, an ideology that takes the coherence of life projects seriously. But the nostalgic romanticism of the narrative account, as well as its connection to the popular liberal consciousness, seems to me preferable to more intellectual, modernist variants of liberalism which have become increasingly cognizant of, and responsive to, what was originally structuralist imagery. In particular, I would like to avoid the interpretation in which an author is seen as making a fundamental shift in his or her understanding of the world. It is fashionable to treat recent theorists, including Marx, Freud, Wittgenstein, and Heidegger, as having experienced a seminal disruption in their thought. The picture is one of serious analysts who run up against the limits of their discourse, and in play, confusion, or despair take up a new and contradictory track.

Liberalism, in this modernist version, becomes an expression of the failure to discover any firm ground on which theory (or critique) can stand. The sophistication of such a position offers a good defense against the evident weaknesses of the naturalistically conceived subjectivity of popular liberalism. Liberalism as a modernism represents an initial moment of self-reflection which, by internalizing structural critique, struggles to dehabilitate it. The fundamental problem of such a modernist liberalism is its explicit retranslation of discourses into rhetorics and its implicit reintroduction of a speaker who can choose among these competing rhetorics. Given the internal weaknesses of structuralism, it is tempting to see structure as

The third, narrative reading views the later structuralist arguments as pragmatic responses to intellectual problems raised by the phenomenological discourse of the early work. Both sets of writings are assimilated into a continuous biography of Marx's political project. Any ultimate contradiction between them, either conceptual or discursive, is denied.

The story line of this third, diachronic reading could be the following: Under the influence of Hegel, the early Marx took seriously the possibility of the autonomy of the subject. He used standard Hegelian terminology to describe an idealized condition in which man would recognize the objectified or reified projection of his spirit in the product of his labor. In the recognition and appropriation of his labor, man could achieve a consciousness of self in that which seemed other. He thus dialectically could overcome the alienation inherent in the gulf between the phenomenology of spirit and an external world. In exposing the possibility of an alternative to alienated social relations, Marx opened the path to a critique of social institutions.

Having put forward this simplified and secularized account of Hegel,⁶⁹ Marx encountered a curious circumstance: Why did laborers not take political action to achieve subjective freedom? In fact, why did they not even seem conscious of the existence of this choice? If human beings were to be characterized as having the capacity for existential choice, was it possible that they had chosen the alienated historical form of their social ordering? In attempting to deal with the deepening divergence between man's latent capacity for autonomy and the manifest illusion of liberal freedom, Marx increasingly turned to the description of a deeper structure of economic systems and its associated theory of the material subject. For Marx, these elements of a structuralist grammar came to explain the failure of men to pursue their teleological interest in self-representation and to obviate the need to resolve directly the difficulties that attended the effort to reform political consciousness.

text, discourse as rhetoric, and to call again upon the subject as author, speaker, or actor. But who is there to use rhetorics, compose texts, or create structures in history? There remains only that which structure has defined, unless we repress what we have just learned. The modernist liberal subject returns only as a parasite upon its earlier ontological incarnation. For all the subtlety of the recreation, nothing important changes. What is needed is a new vocabulary in which voice or language does not represent any other thing, real or conventional. It must be no more than that which has evolved in the local processes of its own history to create us as we have become. In the meantime, I prefer the esthetics and politics of simple narrative liberalism to modernism in accounting for biography.

69. See note 15 *supra*.

The Marxist theory of ideology may be seen as a particularization of the general structuralist theory of the subject. Within the capitalist ordering of experience, the system of syntactical differentiations between subject and object (represented by the commodity form) and between individuals (represented by social relations based upon the form of freedom of contract) loses its contingent origins in history and reappears as an ontologically given condition. The linguistic definitions that constitute the boundaries of subjectivity within the structure of economic interactions are falsely conceived to be necessary features of a natural, Realist account of being. Marxist analysis reduces the illusory, presocial autonomy of the self, set off against both things and others, to a collective product generated within an historically limited, material conjuncture.

In adopting a structuralist theory that treated subjectivity as ideology, Marx exposed the problems inherent in Critical subjectivist politics. The deconstruction of the liberal actor leaves political theory without a revolutionary subject to overthrow capitalism and volitionally reconstruct an alternative social convention. This seems to create the need for either a new collectivist politics or for a transfigured politics of individuality built upon some notion of identity reformation. For Marx, this need was obviated by the evolving character of the economic structure itself. The disequilibrating, objective internal logic of the capitalist system prevented the development in early structural Marxism of a theory of political education, therapy, or conversion that attended seriously to the cognitive problem of displacing reified ideologies.

The absence of a subjectivist account of politics in Marx stems from his objectivist description of the material structure of productive relations. The determinate, intrastructural evolution of capitalism derived for Marx from inherent contradictions between fundamental components of the economic order. Marx spent much of his mature period detailing how immiseration and degenerative crises within capitalism were logically entailed by intrastructural "laws" such as the falling rate of profit. The false consciousness that posited a natural order would be shattered, he reasoned, by the inevitable self-dissolution of the economic structure. Objective determinants independent of states of consciousness would render transparent the contingent status of the liberal discourse of subjectivity. The phenomenological subject would recommence its narrative only after the "prehistory" of the structural production of alienated subjectivity had run its course.

Within orthodox Marxism, the theoretical difficulties of combining a subjectivist discourse of human choice with a structural critique of existing institutional arrangements never were resolved. Rather, through a bifurcation of time into successive structuralist and post-structuralist periods, the possibility of self-realization and the actuality of objectively determined consciousness separately were considered and accommodated. Because Marx banished motivational psychology to an indescribable historical future, he never elaborated a voluntarist politics of the individual subject.

The multiplication of Marxisms during the twentieth century can be attributed to the failure of the contradictions within the capitalist economic structure to produce the dissolution of capitalism. One response to this failure remained wholly within the objectivist discourse. The core project of this tradition was to redefine the structure of capitalism so as to explain the mechanisms by which dissolution has been delayed. Such explanations have included the maintenance of profit levels through imperialism or monopolization,⁷⁰ the support of declining mass purchasing power through economic transfers in the welfare state,⁷¹ and the rationalization and legitimation of production through the emergence of a relatively autonomous administrative state.⁷² These developments, however, have produced institutions themselves laced with contradiction. In this reading, time, rather than political consciousness, is still the key to the liberation of the subject. The legal-political system merits discussion principally as the locus of ideological representation that reproduces the illusion of subjectivity. As the emendations of the structural laws have begun to resemble in their complexity Ptolemaic epicycles, contemporary structural Marxism offers a more respectable analysis, if a less convincing politics, than its more simplistic progenitor. The narrative of relatively autonomous institutions has dispelled much of the oppressive vulgarity of economic orthodoxy.⁷³ Nevertheless, the structuralist discourse within Marxism

70. *See generally* P. BARAN & P. SWEETZ, *MONOPOLY CAPITAL: AN ESSAY ON THE AMERICAN ECONOMIC AND SOCIAL ORDER* (1966).

71. J. O'CONNOR, *THE FISCAL CRISIS OF THE STATE* 161-62 (1973).

72. J. HABERMAS, *LEGITIMATION CRISIS* (1975).

73. Contemporary structural Marxism—as represented in the work of Althusser, Poulantzas, and Godelier—differs from earlier accounts in two important ways. First, the relative autonomy of institutions that these writers posit permits the introduction of a narrative-like internal history of these institutions, which contrasts pleasantly with the brute economism of many of Marx's epigones in the early part of this century. The internal architecture of the Marxist structure thus becomes less harsh and is complemented by the decorativeness of subsystems that are autonomous until the arrival of the moment of "last instance." Second, later

never has relied upon the possibility of the reformation of subjective consciousness to effect social change.

An alternative to the redefinition of material structure was a reconsideration of the paradoxes of political psychology. Again, different answers to the problem of politics emerged. Bernstein and the evolutionary socialists abandoned the notion of cultural revolution and the humanistic utopia of early Marxism. They took seriously neither structural determinism nor the reification of a liberal concept of self-identity. Instead, they simply sought electoral power within parliamentary institutions and treated workers as fully responsible subjects capable of seeing and acting upon their perceived, albeit somewhat less radically defined, interests.⁷⁴ Sorel and the protofascists who grew out of Marxist origins also took politics seriously when the anticipated economic crisis did not come. However, they fully accepted the structuralist tenet that the bourgeois subject was unable to discern its true human potential. Consequently, the political strategies they developed were irrationalist, based on elite manipulations of cultural images, and usually reactionary in their search for motivationally effective mass symbols.⁷⁵

The Critical tradition developed by Gramsci, Lukacs, and the Frankfurt School shared many of these same characteristics. Unlike the structuralists, Critical analysts accepted the need for a voluntarist, psychologically founded theory of politics.⁷⁶ Like the reformists, they refused to reject the possibility of a rational politics and were repulsed by the ironic inversion of Marxist images of the subject which emerged as fascism. But like the irrationalists, Critical theorists did not repudiate the structuralist theory of the ideological production of the subject. They held to the proposition that political

structuralists were much less sanguine than Marx seems to have been about the emergence, after the disappearance of capitalism, of an undeceived or nonideologically formed subject. Whether this resignation to a radically pure structuralist account is the reflection of the defeatism of Western Marxism after long years of waiting is open to question. See A. CALLINICOS, *supra* note 52, at 72–101; V. DESCOMBES, *MODERN FRENCH PHILOSOPHY* 117–26 (1980); M. GODELIER, *PERSPECTIVES IN MARXIST ANTHROPOLOGY* 15–62 (1973); see also N. POULANTZAS, *POLITICAL POWER AND SOCIAL CLASSES* 37–56 (1973).

74. For discussion of Bernstein's Marxism, see P. GAY, *THE DILEMMA OF DEMOCRATIC SOCIALISM* (1962); see also A. GREGOR, *THE FASCIST PERSUASION IN RADICAL POLITICS* 96–121 (1974).

75. Sorel's principal theses are found in G. SOREL, *REFLECTIONS ON VIOLENCE* (1961). For a discussion of the emergence of fascism from leftist roots, see A. GREGOR, *supra* note 74, at 139–88.

76. See P. ANDERSON, *supra* note 9, at 24–48; M. JAY, *supra* note 54, at 41–85; M. POSTER, *EXISTENTIAL MARXISM IN POSTWAR FRANCE: FROM SARTRE TO ALTHUSSER* 3–105 (1975).

action founded upon no more than currently held conceptions of the egoistic self could yield no release from the cultural problem of alienation.

Critical theory resembles poststructuralist thought in that it insists both upon the inadequacies of the nonpolitical, structuralist account of cultural transformation and also upon the retention of Marxist and Freudian deconstructions of the subjectivist liberal subject. Rather than reinterpret the material theory of the subject as a political rhetoric created by Marx for its motivating effects, Critical theory asserted the objective reality of a reified, collective production of the image of autonomous consciousness. In adopting the theory of ideology as a problem that precedes any reconstruction of a phenomenological program of politics, Critical theory took within its core the conceptual commitments of the structuralism that it would not abandon.

The politics of Critical theory has centered on the analytic of delegitimation. An essential aspect of delegitimation has been exposing the constructed, artifactual status of the discursive categories of the dominant social order that were generally taken as natural and universal. Critical theory has sought to reveal the historically contingent roots of propositions that were privileged, or not reduced to prior material causes, by the orthodox discourse being criticized. For these purposes, the material theory of the subject is useful in transfiguring either the ontology of the natural subject or the privileged philosophical position accorded by existential philosophies to the immediate perception of phenomena. But the material theory of the subject is but one element of structuralist discourse. If Critical theory is to accept the existence of an underlying structure in order to establish its political program, then it must face the consequences of structuralism's deconstruction and the possibility of contradiction within its own presentation.

One methodological problem within the logic of delegitimation concerns the position of the analyst: How does the analyst step outside his or her own conceptual categories to evaluate determining structures, if one's categories themselves were formed by these structures? Another problem concerns the audience: Delegitimation as a political strategy assumes people not only listen to critique, but also are sufficiently "rational" to be moved to action by the exposure of incoherence between practical reality and structural ideology. But if subjectivity is no more than the artifact of structure, where does this potential for recognition, appraisal, and choice arise? Delegitimation

seems to assume at once the validity of structural discourse and the reality of the phenomenological subject which structuralism denies.

The question of the standpoint of the analyst is often resolved by limiting the scope of the structure's reach in time or space. Structures presumably may become visible when they are in dissolution. External analysis may take place in the spaces from which structure has receded: Reason may see only that which is in the process of ending.⁷⁷ Alternatively, the question may be resolved by noting the marginal social (structural) position of intellectual critics. The stranger may be able to generate a representation of the whole that more active participants in a system cannot imagine.⁷⁸

Such accounts of the reduced scope of structuralism are supported by poststructuralist critiques built upon the overdetermination of explanation and underdetermination of practice. I have argued that the poststructuralist dissatisfaction with objective discourse reopens areas of theoretical uncertainty where the subject as author and reader may once more appear. However, the return of the phenomenological subject to compose the audience needed for delegitimation to operate effectively undercuts the materialist grammar of the subject. If structure is denied reality in order that delegitimation may have an audience, what is left to expose?

A coherent presentation of Critical theory threatens a return to a pure voluntaristic politics of rational subjects rhetorically persuaded

77. The possibility of the recession of the structure in time is illustrated by Hegel's epigram that the Owl of Minerva spreads her wings only at dusk. G. HEGEL, *PHILOSOPHY OF RIGHT* 13 (T. Knox trans. 1942). The recession of the structure in space is at the heart of Mannheim's theory that marginality is the topographical prerequisite of social critique. See K. MANNHEIM, *IDEOLOGY AND UTOPIA* 153-64 (1936). It is of course the internal logic of structuralism that creates the necessity for its own deconstruction and permits an analysis of structure. Only by postulating narrative or irreversible time (Hegel's solution) or parallel universes marginal to one another (Mannheim's solution) can we see reversible or structural time and the equilibrium state of structural space. If we were inside that space/time system of a structural order, these configurations of structure would be beyond our capacity to know. To speak of structure is to postulate its negation.

78. The point that we can know only what our symbolic representations allow also can be expressed in physical terms:

. . . If irreversibility ceased to exist, we would never know it, for the very asymmetry of unachieved equilibrium is one of the essential premises of all life. The disappearance of this symmetry would mean "heat death" for the entire universe and therefore the end of all life.

What would follow?

Timelessness?

Or time reversal concomitant with a contraction of the universe?

With these questions we have far overstepped the limits of present knowledge.

M. EIGEN & R. WINKLER, *supra* note 65, at 157.

to alter their self images. Structuralism then would be treated as illusory, and its deconstruction of subjectivity would be abandoned. Much of the history of Critical theory has concerned the bases on which the discourse of the subject might be reconstructed. While I accept this as logically necessary to make delegitimation a meaningful political strategy, I am quite skeptical that any proposed reformulations of subjective experience, either by postulating an authentic subject cured by therapy or by reconstituting the subject as merely a necessary artifact of discourse, will prove politically effective or culturally interesting. Indeed, I suspect that the defenders of orthodox liberal theory will discover in the indeterminacy of objective discourse, now exposed by the critique of structuralism itself, the reasons why they mistakenly assert that the subject and its associated liberal institutions must be relegitimated.⁷⁹

Critical theory, as a poststructural practice, must work out an account of social order that ignores neither what structuralism has done nor the fact that structuralism determines nothing. It must derive an account of political process founded elsewhere than in the authority of the subject. If Critical theory expresses its poststructural character by a return to some form of a phenomenological grammar, it will remain bound within the complementary discourses of subject and object. Alternation between those discourses provides only the temporary illusion of advancement.

III. STRUCTURALIST FORM AND STRUCTURALIST PRACTICE: CRITIQUE AND AMERICAN LEGAL STRUCTURE

The structural critique of phenomenological grammar constitutes an historically necessary moment within the development of an adequate poststructuralist account of any cultural institution, including law. The relevance of this point for legal theory becomes apparent upon recognition of the centrality of subjectivist categories within the dominant American legal discourse. Critical theory argues that the structurally defined elements of legal discourse have produced an implicit constitution—a legitimating and legitimated set of principles of social order. In turn, this constitution of legal rights and legal-polit-

79. These twin lines of the reformation of subjectivity are best explored by Habermas. On politics as therapy, see J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 214–300 (1971). On the necessity of a discourse of subjectivity to establish the possibility of a reconstructive communication, see J. HABERMAS, *What is Universal Pragmatics?*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 1 (1979). For a discussion of my pessimism about these strategies, see note 103 *infra*.

ical institutions has, through a transformative syntax, generated an interestingly coherent collection of more concrete legal practices. If the structuralist critique is to be generally effective, the apparent diversity of existing legislative, administrative, and judicial practices must be reducible to the limited components of the structural grammar.

The fundamental contradiction at the core of liberal theory, according to structural critique, is the phenomenological claim that institutional order originates in the action of speakers or subjects whose being is presocially or asocially given. Subjective discourse denies its own structural character by tracing its genesis to the instrumental projects of its naturally existent constituents. To speak of a phenomenological structure is to deconstruct either the logic of structuralism or the antilogic (narrative) of spirit. In this sense a structural critique of phenomenological discourse must be theoretically unpromising.

To analyze American legal categories as a structural discourse is to describe objectively a phenomenon that claims it ultimately has no order other than the chronicle of the aggregated wills of its members. Structural analysis calls forth the imagery of a culture whose system of differentiations (including legal rights) creates the specific concept of individuality. This concept of individuality is transposed by a ruling subjectivist ideology into the putative asocial source of institutional principle. To name an object is to take power over it.⁸⁰ Structuralism as critique names that structure which denies it has a name of its own. In showing that which hides itself in its own illusions, structural critique places the power of American legal discourse in issue.

I will not attempt to work out a detailed account of the determinative relations among structure, institution, and practice⁸¹ for American legal discourse, though I have argued above that there are

80. See M. FOUCAULT, *supra* note 66, at 96–120.

81. While advocates of law and economics are busily trying to elaborate a relatively vulgar structuralism in which the determinate results of cases can be derived from structural principles, the standard legal response to the problem of structure and practice is more interesting. The world of possible cases usually is divided into two qualitatively distinct classes. Easy cases are those in which concrete outcomes clearly can be derived by applying the legitimating principles of the legal structure. Hard cases are those exceptional or aberrational situations in which results are not so easily derived. Law students encounter only hard cases since, presumably, they are more challenging. But the ideological value or meaning of the legal order is contained in the structure and its derivative easy case.

In practice the legal system depends on the existence of easy cases of a different type. A case is easy when particular settled practices are reproduced across time without theoretical

various possibilities.⁸² This elaboration is properly the agenda of those who wish to propagate the existing liberal legal structure. Certainly, the great bulk of legal scholarship is aimed, though not self-consciously, at the specification of practices representing the competent use of the dominant transformational syntax. If Critical work becomes obsessed with working out the details of a systematically rationalized legal practice in order to demonstrate that the liberal legal structure exists, it will be deflected from its own reconstitutive task. It is sufficient for Critical theory to locate the categories of traditional legal analysis within the dominant phenomenological discourse, as long as it avoids representing the legal system in too vulgar a fashion. The legal order is laced with contradictions and complexities, and these should become a focus of inquiry. In an analysis seeking a path beyond structuralist determinism, as well as a displacement of the prestructuralist subject, it may be that less emphasis on the need for coherence in theory, and more attention to the incoherence of the production of practice, would be instructive.

Structural critique understands American legal theory and practice as an account of legal institutions that expresses the orthodox liberal commitments to subjective autonomy and objective method. The standard narrative of American law begins with presocial or naturally given individuals. These individuals voluntarily associate in civil society and contractually create the state to further their individual life projects. In the standard narrative, reference to an underlying deep legal structure permits the correction of any discordant legal practices that remain as vestiges of the preliberal legal order or that result from technical failures in the process of institutionally reproducing liberal theory. While there is no need to show that each legal practice represents an appropriate institutionalization of legal structure, there exists the general sense that American legal history is characterized by a gradual evolution toward a perfected liberal order.

The working out of a legal theory adequate to liberal structure has involved the progressive reformulation of structurally appropriate principles of jurisprudence. Earlier conceptualizations of such principles suggested that legal discourse was largely autonomous from the discourse of other social subsystems.⁸³ More recently, under

reexamination. But the heart of legal critique is to show that there are no easy cases in the sense that practice flows directly from legitimating principles. See Heller, *supra* note 12.

82. See text accompanying notes 26–30 *supra*.

83. There are also strong professional interests in the preservation of the autonomy of

pressure from Realist attacks on pure legal conceptualism, the most sophisticated and exemplary reconceptualization of liberal jurisprudence has emerged in law and economics. The virtue and attraction of law and economics is its clear and persistent reiteration of the structural grammar of subjective intent and objective technique, its integrated and continuous history of the American legal order, and its consistency with the evolutionary and functionalist (purposive) tone of American social theory.

The principal symbolic significance of American law is its reproduction of the categories of phenomenological discourse and its ideological centerpiece, the existentially free subject. This figure is imagined as a being conscious of its autonomously selected normative principles and adept at the employ of instrumental reason in carrying out projects oriented to these norms. The autonomous self-definition of the subject by means of its projects is the source both of the moral respect accorded to, and the legal responsibility attendant upon, choice.⁸⁴ The phenomenological subject appears as a set of differentiations (legal rights) that define the space in which, and the instruments with which, the subject may freely act. The theory of property rights is essentially a structural code that defines the physical and intellectual arena, as well as the material resources, available to a legal actor in pursuit of his or her normative ends. To trespass this differentiated ground is, in a serious sense, to invade the personality of another. For modern legal economics, property is more than a matter of material rights—its categories construct a world by marking off the boundaries between self, others, and environment.

To complete a phenomenological account of law, it is necessary to derive the content of this system from a presocial origin. The subject must precede chronologically, as it does discursively, the social order which it constitutes to facilitate its intentionalistic projects. The legal order, like language and other aspects of this social order, must be derived from the will of its constituents. The metaphorical form of

the legal subsystem. The capacity of any set of institutions to preserve and exercise power will depend in part on the clarity of the boundaries between subsystems organized around separate domains of expertise or local knowledge. To admit the relevance to a problem of a form of knowledge dominated by another group is to surrender hard-won professional ground. See note 100 *infra*.

84. "To know all is to forgive all" is the proverbial expression of the argument made here. If one is aware of the structure and of the operations of the structure that determine the subject's behavior, moral blame is not an appropriate response to an externally determined product. Conversely, if one has no science that can predict the behavior of the free subject in an *ex ante* fashion, then must not that subject be held accountable for behavior which need not have been?

this precedence of subject over society is, of course, the social contract. Grammatically, the phenomenal subject cannot itself be an artifact of the legal (cultural) system without losing its discursive character.

Especially in the United States, accounts of the genesis of property rights display a somewhat ill-defined conjunct of ontological and theological propositions bunched under the concept of natural rights. In early liberal thought, the adjective "natural" expressed the extrasocial character of subjectivity. It referred variously to a Christian image of the divine infusion of spirit or to the philosophically generalized preconditions of knowledge and action that emerged as Kant's transcendental subject. In the subsequent intellectual retreat from theology and ontology, liberalism has experimented with both analytic and empirical alternatives to establish a theory of rights.⁸⁵ One analytic example is the utilitarian attempt to derive property rights from presumptively technical principles such as the maximization of wealth.⁸⁶ In a similar, more sophisticated effort, Rawls, like Kant and Rousseau, locates the origin of social order in the hypothetical, rational choice of the pure expression of subjectivity denuded of all attributes that constitute the historic individual.⁸⁷

85. Rights theory is the historic, though not logically necessary, form of Western liberal individualism. While many reformist approaches to legal change concentrate on the elaboration of new rights with transformed substantive content, the retention of a rights-based legal theory remains a structurally conservative strategy of limited cultural meaning. A fuller postliberal legal theory would have to look beyond the organizing categories historically associated with the liberal social order. The most important of these are "man" as an existentially unique being who can know with certainty the conditions of his own existence, "rights" as the legal expression of this special ontological status, and "nation" as the collective aggregation of political identity.

86. See, e.g., Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Posner, *A Reply to Some Recent Criticisms of the Efficiency Theory of the Common Law*, 9 HOFSTRA L. REV. 775 (1981). But see Markovits, *Legal Analysis and the Economic Analysis of Allocative Efficiency: A Response to Professor Posner's Reply*, 11 HOFSTRA L. REV. 667 (1983).

87. In Kant, this dehistoricized experience of pure subjectivity, from which analytical reason can begin to derive the principles of social order, locates identity in a transcendental capacity for apperception. See T. WILKERSON, KANT'S CRITIQUE OF PURE REASON 45-69 (1976). In Rousseau it is the general will. See J. TALMON, THE ORIGINS OF TOTALITARIAN DEMOCRACY 38-49 (1965). In Rawls it is that which remains behind the veil of ignorance, which screens out all knowledge of concrete historical attributes. J. RAWLS, A THEORY OF JUSTICE (1971).

A recent account of the nonparticularized subject, represented at the core of liberal legal theory, is given by Luhmann. Luhmann suggests that the legal subject is the potential for action freed of all its social roles. The subject defines itself through its engagement with functionally differentiated subsystems such as the legal or the economic. But since liberal societies are at a stage of social evolution in which functional differentiation has produced too many subsystems for a single subject to engage, the subject must be conceived as that which

Other theoreticians have given up the effort to ground rights theory in reason and have sought a noncollective foundation in empirical propositions. Three recent suggestions are: (1) that of sociobiology, which asserts that property systems develop naturally to facilitate the reproductive success of species;⁸⁸ (2) that of economists influenced by Hobbes, who consider the distribution of entitlements an historical remnant of preexisting anarchistic struggles abandoned when the costs of further acts of predation exceeded the marginal gains;⁸⁹ and (3) that of legal commentators who have attempted to place the genesis of basic rights in an historical agreement among individual subjects to respect some order of established endowments.

I do not believe that any of these accounts can dispel the structural counterclaim that a cultural or linguistic system of differentiations constitutes the concrete theory of the subject. However, a *liberal* social order must reflect the bifurcated grammar that is expressed in classical Western philosophical commitments. The dominant legal discourse must originate in the twin representations of a knowable, objective (natural and logical) world and direct subjective (phenomenological) apperceptions of norms originating only in individual volition. Liberal method denies the epistemological value and the political legitimacy of any *collectively* imposed ordering of propositions that are normative in the sense that they are not exclusively derived from analytical or empirical statements. Any such imposition would imply the existence of a substantive hierarchy of normative claims or a social ranking of the experiential apperceptions of some subjects over those of others. Liberal theory must therefore demonstrate that legal and political institutions can be built up solely from some combination of true nonnormative propositions and the aggregated expressions of the wills of its constituting subjects. Nevertheless, each such liberal argument can be deconstructed by showing that it does not meet its own methodological criteria for validity.

Empirical theories justifying rights lack legitimating power precisely because they do not incorporate a Kantian norm which founds social arrangements in freely exercised subjectivity. Instead, Hobbesian and sociobiological accounts begin *in medias res*. Discovering the

has the potential to choose among them. N. LUHMANN, *The Autonomy of the Legal System*, in *THE DIFFERENTIATION OF SOCIETY* 122 (1982).

88. See Demsetz, *Toward a Theory of Property Rights*, AM. ECON. REV., May 1967, at 347.

89. See J. BUCHANAN, *THE LIMITS OF LIBERTY* 53-73 (1974).

content of the entitlement system in a prior history of natural conflict, they incorporate in legal institutions the moral character of a history that displayed no respect for the subjective capacity of others. Beginning *in medias res* may be a virtue in Homer, but it is the negation of a theory of liberal justice.

The resolution offered by theories that refer to some historic convention of subjects is equally unsatisfying. Even if such a convention were valid, it would be necessary to hypothesize a continuing series of ratifications by successive generations. Such an ongoing consensus quickly assumes attributes of fictional construction unacceptably remote from any reasonable empirical or analytical propositions.

If empirical accounts of liberal rights fail largely because they remain trapped in the unfairness of preliberal history, accounts based on ahistorical reason fail because they incorporate normative propositions not derivable from individual expressions of will. Utilitarian argument falls back on intersubjective comparisons of well-being to set up its rights theories. These comparisons usually presume a psychological equality among individuals not traceable to logic, empirical fact, or historically agreed-upon convention. Yet, without such a basis, the system is technically indeterminate.⁹⁰

Rawls uses a criterion similar to Paretian optimality to mitigate the problem of intersubjectivity. But in order to specify even a minimal substantive content for the original distribution of entitlements, he is forced to rely on contestable empirical propositions including a universal sense of risk aversion among the hypothetical subjects.⁹¹ In contrast to empirical theories of liberal order, such an analytically founded theory has the virtue of being normatively consistent with the subjectivist categories of phenomenological discourse. What it loses in dehistoricizing the subject, and thereby removing the taint of exploitative history, is the capacity to particularize the formal theory of rights it evolves. Such particularization is achieved only through the importation of collective norms that provide the character of subjectivity with content. But such imported norms are precisely the social orderings that a structuralist critique would identify as the materialist system that constitutes the phenomenological subject.

Despite this shortcoming, there remains great value in the clarity with which the analytical genre of liberal theorizing displays the

90. See Heller, *The Importance of Normative Decision Making: The Limitations of Legal Economics as a Basis for a Liberal Jurisprudence—As Illustrated by the Regulation of Vacation Home Development*, 1976 WIS. L. REV. 385, 438–68.

91. See J. RAWLS, *supra* note 87, at 65–83.

pure subject as the abstract moment of the immediate consciousness of self. The unmitigated expression of phenomenological experience in a political discourse founded upon a transcendental or nonparticularized subject provides the core cultural representation of this system of order. The ideological power of liberalism lies in the syntactical significance given to choice and responsibility as interpretive canons in constituting meaning from chaos, and in the potential application of these elements to the resolution of any disputed concrete legal or political practice. I will return to this point at the end of the article to consider its consequences for the enterprise of delegitimation.

If, as I have asserted, the phenomenological representation of the constituting subject in law is the theory of property rights, then the institutional rules governing all departures from the original legal position must reflect and ratify the legitimacy of those rights to freely constitute the self. Illegitimate change thus would be defined by the collective imposition, upon protected individual space, of the normative desires of other constituting individuals. Since any collective ranking of norms would conflict with the proposition that individual action is the sole source of value, liberal theory necessarily recognizes methodological limitations on public or governmental behavior.

Within these limitations, voluntary contract, represented in classical private law doctrine as the meeting of subjective wills, is the paradigmatic example of a social change that does not exceed the expressed intentions of the individuals affected by the change. The contractual exchange of legitimately held property requires the consensus of all those whose projects will be disturbed or aided by the transaction. Such private reorderings of property can be extended into generalized markets which, when operating ideally, retain unanimity or Paretian optimality as their legitimating principle. Perfect markets are institutions whose method of operation accords with liberal principles because they rely only upon the empirically verifiable display of volitional choice. The function of markets is to aggregate intentions (revealed preferences) by analytical processes, best represented mathematically, so as to maximize the ability of autonomous subjects to create their preferred worlds within the space allotted to them. In orthodox liberal American law, normative legitimation is firmly rooted in subjective desire. The normative power of the market is derived from the grammatical commitment to independent will.

It should now be evident how economic theory could emerge as

an exemplary representation of liberal legal categories. Microeconomics, the core image of which expresses the cultural meaning of neoclassical theory, is itself a straightforward expression of phenomenological discourse. Since economics treats individual preferences as exogenous to its analysis, consciously held intentions are not reduced within economics to any structural order. Preferences appear instead as the products of autonomous choice, the narrative starting point of a phenomenological account. The operations of the market, on the other hand, reflect only analytical and empirical propositions legitimated by reference to their truth in an objective world. And normative statements are validated by reference to the fact that they are confessions of intent expressed directly by subjects through the price system. Property and contract—preferences and market—represent the integrated legal order of phenomenological discourse.

What remains to be described in the elaboration of the subjectivist legal order is the theory of the state or the public sector. As economic inquiry evolved, it became evident that private activity did not lead to an optimal level of protection for legitimated property rights because of negative externalities and lack of market competition. Moreover, unregulated markets did not maximize individual welfare because certain classes of goods and services possessed the technical characteristic of nonexclusive consumption and thereby produced free rider problems. In the liberal subjectivist order, legal institutions can, in theory, correct these difficulties. An activist public sector implies no discontinuity or structural break with the liberal tradition. The object of the modern state remains that use of resources, within the legitimated distribution of property rights, which would have resulted from the consummation of all consensual transactions in the absence of market failure.⁹² The role of the state is residual because it acts only when private arrangements are insufficient to achieve this unchanging ideal of social order.⁹³

92. The apparently coercive action of the state is, in this view, illusory. Individuals *are* forced to do things such as pay taxes, but if the tax/expenditure system is properly conceived, this coercion is only necessary to overcome the free rider tactics of self-interested citizens. Absent such tactical behavior, taxed citizens should, in theory, consensually choose the collective goods they thereby purchase.

93. A semiotic analysis of law school curricula illustrates the point. In spite of the emergence of the interventionist state as a market corrector, the first year of law study remains, with the exception of constitutional and criminal law, almost exclusively dedicated to the classical private law fields. This arrangement conveys the structural message of the legitimacy of the subject as rights bearer within the liberal order. Courses concerned with culturally less significant matters such as market organization (antitrust), information failure

The consistency of this description with liberal principles may be noted as well in the methodological prerequisites for proper governmental action. Public institutions act legitimately when they (1) force the internalization of external costs that, in unregulated private markets, would otherwise lead to the expropriation of recognized property rights; (2) aggregate the preferences of consumers for social goods, revealed through political rather than market mechanisms, to increase the value of available resources; and (3) restructure market institutions to allow private activities to proceed in an undistorted fashion. In each case, the state must legitimate its behavior through the correctness of its analytical operations, the accuracy of its perceptions of individual intentions, and its respect for original entitlements.

While normative justification remains exclusively in the conscious acts of those subjects who constitute the state, the transformational syntax of the liberal structure has over time become remarkably more intricate. As phenomenological discourse has developed, the increasingly complex operations by which structural principles must be reduced to legal practices have produced an expansion of the public sector (regulatory or welfare state) and generated the illusion of qualitatively disparate forms of modern liberalism. In fact, however, the essential categorical differentiations and epistemological commitments that define the liberal structure have remained stable.⁹⁴

(securities; consumer protection), externalities control (environmental law) or redistribution (tax; labor) are relegated to later years when socialization has been completed and attention has waned.

94. I will not discuss in this article particular structuralist critiques of the phenomenological account of legal practices. For purposes of illustration, however, I will describe two general types of delegitimizing argument. First, delegitimation may concentrate on internal structural contradictions in order to demonstrate that the production of practices within a structure cannot proceed in accordance with its self-defined principles of justification. Such delegitimation advances the logical argument that, when examined sufficiently closely, a structure collapses of its own weight. For example, in the nineteenth century, the relative inactivity of the state allowed social change to go forward principally through markets. Consequently, as a matter of methodology, liberal institutions aggregated the empirically verifiable desires of economic actors that were represented in market prices. At the same time, because of market failures, this system did not permit the realization of many legitimate individual projects. In the twentieth century, the state has assumed a more active role in order to improve property protection and maximize welfare. But because an adequate mechanism for ascertaining consumer preferences through nonmarket institutions has not been developed, all government action has become of ambiguous character. That is, modern public action is based upon highly imperfect empirical indications of volition. Thus, collective controls may as easily be interpreted to be the illegitimate output of an exploitative government as to be the legitimate perfection of the liberal order. Due to the contradiction between the discursive referent (subjective intent) and the objectivist methodological principles (analytical/empirical) on which legitimated action can rest, there is a pervasive indeterminacy

IV. POSTSTRUCTURALIST DIRECTIONS FOR REWORKING LEGAL (AND OTHER) THEORY

There exists within the liberal legal structure a multiplicity of theoretically inconsistent legal practices, peculiar to particular regions of legal doctrine. These practices ought not to be explained as persistent mistaken transformations of structure or as exceptional (if temporary) aberrations within a legal system that is relatively autonomous of, but ultimately unified with, a deeper social structure. Instead, as this part will argue, irreconcilable practices are better described as the normal condition of a poststructuralist order, reflecting an underlying system of mutually deconstructive discursive representations of experience. Contrary to structuralist theory, each such symbolic representation is incapable of producing an objectively correct determination of legal practice. But, contrary to liberal theory, poststructuralism must incorporate the structuralist critique of subjective autonomy, and must not refer to personalized, autonomous decisionmaking (interpretation), in order to specify how legal

within contemporary liberalism about the propriety of public intervention. Liberalism is left to choose between, on the one hand, the nineteenth-century figure of the methodological coherence of economic markets and an acknowledged economic inefficiency and, on the other hand, the twentieth-century figure of the methodological incoherence of political markets and the uncertainty as to whether efficient regulation is possible. (In the nineteenth century, some commentators perceived the serious problem in liberal theory due to the methodological necessity for objective legal observation of subjective states of mind. For example, Holmes, at times, wished to ban all subjective discourse and reconstitute law in collective, pragmatic terms. See Note, *Holmes, Pierce and Legal Pragmatism*, 84 YALE L.J. 1123 (1975). Other, more orthodox, constitutional analysts have tried to banish the contradiction between discourse and method by dividing the theory of the state into political and legal branches. Arbitrary actions (i.e., nonobjective, collective, coercive judgments) would be permitted in the legislature. Liberal purity of method (neutral principles) would be limited to the courts. This bifurcated approach led to a restriction of judicial review of legislative action but was essentially unsatisfactory, since an adequate subjectivist theory of the state requires a unified legal politics or constitution. Removing arbitrary action to the realm of politics seems only to defend the restricted turf of jurists.)

Second, delegitimation can follow a strategy external to structure. By attacking the central distinctions within what claims to be a naturally existent or externally referential language, Critical analysis demonstrates the contingent historical production, and the constructed character, of a set of ordering categories. For example, subjectivist theory represents the subject preceding diachronically the social institutions which are its tools. In pre-twentieth-century legal theory, it was understood that entitlements were not assigned by the state but rather were the natural ontological attributes of individuality. With the contemporary development of new categories of social conflicts, such "natural" boundaries of individuality are no longer discernible. Complex environmental, distributional, and informational "rights" have come to be viewed as dependent upon political decisions by the state. Modern individuality is thus increasingly exposed as the artifact of public action, rather than being that which creates government and defines the range of the state.

practice emerges from the more abstract rules of alternative legal discourses.

In order to avoid restating exhausted formulations of the problem of legal method, a poststructuralist, Critical account of the law must rework the orthodox conception of the relationship between theory and practice. Within a legal system producing and reproducing theories and practices, the role of legal structure should be reconsidered in a nonhierarchical fashion. Structure is neither irrelevant to, nor determinative of, the production of practice. The specific nature of the relationship will differ in local subsystems.

In a sense, we may speak of a need to dislocate both self and structure. Poststructuralism remains antihumanist to the extent that it sees consciousness as one of many possible states of representation, deserving no special priority. On the other hand, it is nonstructuralist in that explanatory theory is but another practice, valid in itself, but no more privileged than other representations within such a system. The production of theoretical practice is, like the production of more concrete practices, an act of systematic play not to be taken too seriously. Neither self nor structure, subject nor object, will disappear in poststructuralism. These discourses are simply the perceptions that result from looking at a complex system of experience from differing viewpoints within that system.⁹⁵

The precedence of theory over practice comes from the utopian wish in both structuralism and phenomenology for unmediated and certain knowledge. To deprive theory is to give up this image of a positive truth, whether of subject or structure, and to lash out at all centralized political systems that base their claims to generalized power on the privileging of one representational form as universally valid. Poststructuralist thought refocuses concern on the unceasing production and reproduction of practices in multiple local systems neither free of their own histories nor determined in their courses. It suggests that the specific content of our personal identities and of the categories of collective organization are not established realities which we bring to politics. Rather, in redescribing consciousness and structure as projections back upon our own histories of the products of ongoing systems differentiating themselves through political competition, we may leave behind the modernistic alternation of discourse that I criticized in Part II.

95. See note 109 *infra* for a preliminary program to develop a poststructuralist discourse centered on the evolution of complex systems.

A. Theory and Practice in Complex Legal Systems

To reproduce a structural critique of standard subjectivist legal categories is no longer enough. Structuralism itself has been subjected to the criticism that it simultaneously under- and overdetermines practice. Any purely structuralist account of a uniform production of legal practices would miss the complexity of the legal landscape, and paint so false a picture of the reproduction of theory in practice that it would strain the credibility of the entire account. Such thoroughgoing objectivism invites the reintroduction of an existential subject to compensate for its tedious simplicity in denying the indeterminacy of theory, an indeterminacy that characterizes our experiences of the production of legal practice. To avoid such a retrogressive step, it would be preferable for Critical theory to experiment with different representations of the relationship between legal theory and legal practice.

The positive science notion that theory and practice form a unified and integrated system should be reconsidered. The actual practice of the law is complex, local, and filled with contradictions when examined relative to any comprehensive theory. For example, although the dominant American legal discourse centers upon subjectivist categories that speak of undetermined action, there are numerous instances therein of determinist or objectivist discourse. Children, the insane, primitives, women, and blacks have been treated as less than autonomous subjects. They have been at times absolved of responsibility for their behavior and made the objects of public interventions that overrode their interests such as they had defined them.⁹⁶ The legal development of an objectivist discourse

96. One political explanation of this phenomenon is that structural discourse is no more than a rhetorical device used for taking power over the "Other." The privilege of responsible action is reserved for those like us. The Other is a homogeneous classification produced by social collectivities such as race, culture, or genetic underdevelopment. As suggested vividly by Edward Said, to apply a discourse of the Other is to subjugate by repressing the diversity of the particular. See E. SAID, *ORIENTALISM* (1978). This argument, though attractive, can itself be represented as a romanticization or subjectification of the relationship between language and power. In phenomenological terms, Power is a primary expression of desire realized through acts of political choice. Actors use discourse as an instrument in the project of taking power. In a structuralist account, however, this concept of power is no more than a necessary element produced within the grammatical system of phenomenological discourse. In other words, only where a subjectivist discourse is spoken is such a hierarchical understanding of the relationship between self and others imagined.

In a phenomenological grammar, the self is the speaker which creates meaning through its internal projects. It is thus at the origin or center of the semiotic system, and precedes discourse in a logical and chronological sense. The self is a being possessed of pure freedom or potential which assigns signifiers to others. Percy writes:

examines reductively the sources of human action and acknowledges the likelihood of the unintended consequences of choice, both of which are generally ignored by a phenomenological account of law. Structuralist legal discourse that deconstructs the subject is not invariably repressed within a liberal legal order. Contradictory linguistic practices do coexist within a single legal system without delegitimizing the legal order itself.

The essence of daily legal activity is the reproduction of legal practices within the localities where they actually function. The simultaneous presence of contradictory legal discourses is not the heart

For me, certain signifiers fit you, and not others. For me, all signifiers fit me, one as well as another. I am rascal, hero, craven, brave, treacherous, loyal, at once the secret hero and asshole of the Cosmos.

You are not a sign in your world. Unlike the other signifiers in your world which form more or less stable units with the perceived world-things they signify, the signifier of yourself is mobile, freed up, and operating on a sliding semiotic scale

...

W. PERCY, *supra* note 39, at 107.

This discursive depiction of the self as the origin of the semiotic system creates the liberal "self without qualities" described by Robert Musil. *See generally* R. MUSIL, *THE MAN WITHOUT QUALITIES* (1965). The privilege of selfhood arises in the linguistic positioning of self. The Other is then defined by its assigned qualities, a set of reified signifiers made concrete by a limited and limiting set of artifactual products. In order to proceed, the self must construct an objective world, even though the signification given to the Other imposes a form of enslavement upon it. At the same time, the psychological emptiness of the phenomenological self generates the urge to take others and appropriate their semiotic content. As a cannibal takes the exemplary qualities of those he consumes, so does too the subject give itself substance by exercising power over those upon whom it has conferred significance that must be returned. In this way, to take power is neither a choice nor an act. It is a consequence of the structure that is phenomenological speech.

If power can both produce language and be produced by it, understanding power may depend on differentiating the established configuration of linguistic practices in which phenomenological and structural constructions are found. In a world of multiple discursive practices, how can the discourse of the Other be limited to the description of certain sectors of humanity? In what principled way can the Other be distinguished from the self? What allows us to categorize with stability the line between us and them? Why doesn't objective discourse absorb our account of ourselves in law as it does in orthodox psychoanalysis? It must be that some other set of categorical distinctions allows each understanding of the exercise of power to focus on a limited set of objects. Here, we are led toward an exploration of analogical or metaphorical categorization to account for nonlogical differentiations. The status of subjectivity and narrative time may be reserved for those with whom we are more familiar and those who are relatively closer to us in species, in space, and in time. It is the stranger who lacks (or to whom we deny) the attributes of individualized identity. The metaphorical bounds of proximity to the center or likeness to the self coincide with the bounds of the use of a discourse and replace within a metastructure the concept of discourse itself. But if this treatment of discourse alternatively as rhetoric and as a practice within a figurative structure does no more than restate the dichotomy of subjects and objects at a more abstract level, must there not be some more fertile representation of this issue? For reference to a third representation of power, see note 109 *infra*.

of the problem for the liberal legal system. Instead, the difficulty lies with keeping these contradictions from spilling over their boundaries and destabilizing established legal practices. In this sense, there is no global or unifying legal structure that can determine legal practice. Law is essentially a cognitive and professional, rather than a normative, discipline, referring to theory only in the liminal case where the content of settled practice comes into crisis.⁹⁷ In other words, the

97. The idea of theory as "liminal" to the routine reproduction of practice is borrowed from Turner's account of symbolic systems in primitive societies. See V. TURNER, *Between and Between: The Liminal Period in Rites de Passage*, in *THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL* 93 (1967). Turner analyzes rites of passage in which young men would withdraw from daily life at prescribed periods of their lives, be secluded in sacred places, and consider the meaning of their traditional forms of social organization. While there is a priestly class for whom the production of liminal content is routine, there is nevertheless a marginality, though not less importance, ascribed to the realm of the sacred that distinguishes its practice from the unanalyzed world of the profane.

The metaphor of "liminality" may also be useful in dealing with the place in contemporary society of institutions that produce symbolic structures of organization. There is, for example, a certain spatial and temporal marginality of the university system, where much contemporary theorizing is concentrated. The law also has liminal characteristics. In our secular society, in which meaning is depicted without reference to a true sacred object, the legal system has become a principal institution for the representation and reproduction of ideology. This imposes a curious duality on the nature of law schools and law courts: Both incessantly confuse functions related to the normative, theoretical representation of the legal system with those related to the reproduction of settled legal practice. The systematic reproduction of legal practice has an abnormal (compared to, say, linguistic practice) internal organization which produces a too frequent confrontation with theory. Litigation, when not simply a form of debt collection, is designed to upset settled practice, invoke the search for meaning in legal reason, and present deconstructive rhetorics to adjudicators. This radical feature of the law has led to a certain ostracism of litigators within the profession and produced a series of procedural doctrines designed to keep litigation from undercutting any pretense of legal logic.

The concept of liminality has recently been explored in R. DA MATTA, *CARNAVALS, BANDITS ET HEROS: AMBIGUITES DE LA SOCIETE BRESILIENNE* 66-85 (1983). When he discusses the Brazilian Independence Day celebration, which is dominated by military imagery, Da Matta emphasizes the ordering function of liminal reconsiderations of daily life which reinterpret the collection of existing practices as structurally unified. Another Brazilian holiday celebration, Carnival, appears to be a recognition of chaos or of the dissolution of all normal practice in the celebration. It is possible to argue about the significance of either of these two festivals, but the important point is the politically and socially open nature of liminal systems, including the law. In this sense a law school's reconsideration of the normally unexamined practices that constitute the law's daily life may either express a theoretical ordering of such practices into structure or expose a deconstructionist denial of any possibility of meaningful order. I believe that much of the psychological discomfort experienced by many law students results from their lack of desire for any type of nonpractical approach to law. To the extent that education must be liminal, it seems clear that the style and spirit of law schools is more conducive to celebrations of hierarchy than to the staging of carnivals.

The disjunction of liminal experience into Independence Day and Carnival mirrors Nietzsche's opposition of the Apollonian and Dionysian. But note that Nietzsche suggests that the post-Socratic impoverishment of Western culture stems from the loss of the Dionys-

practice of law primarily consists of the hermetic reproduction of that which already exists. Though the boundaries of settled legal practice do shift at the margin as mutually deconstructive accounts of events are juxtaposed in the form of contending legal rhetorics, there is no structural logic to the occasions of this change. Each practice is theoretically overdetermined, and each theory is indeterminate of practice. To preserve the concept of a legal order as more than a haphazard collection of local exercises of power, a legal system must keep the contradictions of mutually deconstructive discourses from disturbing the reproduction in legal *theory* of its dominant symbolic representations of social organization.

I would suggest that a poststructuralist account of the law treat any existing set of legal practices as a succession of theoretically arbitrary signs. Like language games or forms of life for Wittgenstein,⁹⁸ such practices are reproduced across time as unanalyzed ways of being in the world.⁹⁹ The core of the training and work of lawyers is to learn these practices and how to manipulate them. In situations where legal practices are disturbed, the resettlement of an altered practice is not determined positively by the logical application of theoretically coherent rules, but rather proceeds analogically, or analogically, and may involve some mode of reference to contemporaneous competing theoretical practices.¹⁰⁰ At any given time, we should ex-

ian. See F. NIETZSCHE, *The Birth of Tragedy*, in *THE BIRTH OF TRAGEDY AND THE GENEALOGY OF MORALS* 1, 3–11, 76–96 (F. Golffing trans. 1956).

98. See H. PITKIN, WITTGENSTEIN AND JUSTICE 132–39 (1972).

99. I suspect that this concept of practice, which I take from Heidegger's notion of practices being "at hand" for use, see M. HEIDEGGER, *BEING AND TIME* 102–07 (1962), is the most important aspect of what Weber was getting at with his category of traditional legitimation. See 1 M. WEBER, *supra* note 36, at 215–16. However, to the extent that legitimation implies a consideration of the nature and source of a proposition prior to the acceptance of its authority, most human activity does not involve legitimation at all. The reproduction of practice is quite apart from the traditionalist rationality of Edmund Burke and the English common law. Traditionalist rationality explicitly questions and reaffirms tried solutions either out of mannerist fears of disorder or the sense that what lasts must by definition be superior. My notion of daily legal and political practice as unanalyzed or unexamined pushes, rather, toward the idea that legitimation itself is an exceptional or liminal event and of limited use in understanding social behavior. See note 106 *infra*.

100. Resettlement of disturbed practice within a given system of practices is always system-specific. In other words, the rhetorical figures that have persuasive value in pushing back the threat of disorganization will differ in coexisting institutional orders, and the point at which a system's resettlement processes will appeal to practices drawn from other systems is a historically contingent event. In the American legal system, controversy is commonly closed off through reliance on the common law trope of analogizing the disputed practice to an uncontroversial practice. This unprincipled appeal for quiet succeeds only in the sense that it denies that a problem ever existed. At a middle level, legal institutions struggle to maintain their systemic autonomy and still resettle cases by invoking a set of substantively empty max-

pect to discover contradictory (though arguably linked) discourses coexisting within the systems of both legal theory and legal practice. These render the nature of systematic reproduction complex.

This image of law leads away from the idea that the legal theory of the subject—the subject of structuralism's delegitimative analysis—unequivocally determines legal practice. It suggests instead that structuralism be seen as an assault of theory upon theory within the institutions where theory is produced. To argue that the scope of delegitimation in a poststructural analysis is limited is not to deny the deconstructive power of structural analysis. However, the impact of delegitimation will depend on the relationship between the separate institutional systems in which the practice of legal theory and the practice of law occur.

A similar integrated view of the relationship of theory to practice characterizes both structural and phenomenological discourse. Practice is connected to theory in the former by the logic of the structure, and in the latter by the instrumental action of the subject. Once we disrupt these relationships, the legal theory of the subject can no

ims such as "reliance," "legislative intent," "proximate cause," "balancing interests," and the like. Such ritualized recitations may incorporate generalized references to fundamental liberal categories, such as subjective intent, aggregation of volition, and efficiency, with a vagueness sufficient to create the appearance of doctrinal autonomy. Only in periods of severe reevaluation of the system will fully articulated references to extrasystemic and ideologically dominant theoretical/structural practices of reorganization be made.

The reexpression of law as economics in the postrealist period has many of these more extreme characteristics. Arguably, much of the ferment caused by this reconstruction, when understood from a systematic perspective, derives from its ambiguous implications. On the one hand, law and economics is radical precisely because it breaches the bounds that traditionally have separated the legal system from coexisting and competing networks of institutions. To turn to an external system in order to resettle disrupted internal theoretical practices is to signal an essential breakdown in the reproduction of the practices that defined that system's exercise of power. Consequently, numerous recalcitrant traditionalists continue to urge the relatively exclusive study of doctrine to defend a closed or wholly internal realm of legal discourse and deny that a reconstruction of jurisprudence was required by Legal Realism's assault on orthodox theory.

On the other hand, law and economics is conservative because it seeks to resettle disturbed legal practice by reference to an ideologically dominant, politically established system of liberal theoretical practices. As a consequence, the movement has attracted an amalgam of enthusiasts that includes both political critics attracted by its exposure of the structural unity of the legal system and political apologists attracted by the overt re-embedding of legal theory within the core set of representations offered by economics. However, such an extrasystemic response is professionally embarrassing and necessarily short-lived. Like ideology, which is most effective when not consciously worked through and when buried beneath layers of (usually incoherent) subideologies, the true nature of an integrating, structural legal theory is best not exposed. The emptiness of indeterminate and overdeterminate theories simply leads back to, at best or worst, an ungrounded prayer for the restoration of order. See Jacobson, *Absence, Authority, and the Text*, in 3 GLYPH 137 (S. Weber & H. Sussman ed. 1978).

longer be held to produce any unified set of legal practices. Instead, our attention is drawn to the reproduction of the theory of the subject as a practice of theory, so to speak, in which the world is given a particular representation or meaning. What is necessary for the reproduction of theoretical practice is not control of the full run of legal outcomes, but rather continuing domination over paradigmatic or semiotically central events. For example, the legitimacy of contractual bargain in labor transactions is founded on the attributes of autonomous subjectivity, but these attributes were progressively withdrawn from children, women, and lower class immigrant workers by social legislation early in this century. What remained untouched was the core wage bargain of white native males which held out the utopian image of free subjectivity to which others, after maturation, could aspire. Thus, legal practice reflected an objective discourse appropriate to the historical condition of ideologically marginal groups, while legal theory centered on the representation of the pure subject, a representation that continued to confer meaning upon the social order.

The legal form of the subject drawn from a phenomenological grammar is consistent with other dominant representations within systems of theoretical and symbolic production in this country. It is the ego of existential psychology, which has risen above its structural antagonists, the id and superego. It is the achievement-oriented figure, escaped from premodern social systems which formerly ascribed an identity to it, at the core of American social science in Parsonian action theories.¹⁰¹ In literature, it is the singular misanthropic (Western) hero who overturns bureaucratic (social or Eastern) barriers to discover truth. It reappears in the genre of a simple narrative recitation of events performed repeatedly on television and in other popular media.

A discourse of pure subjectivity characterizes, then, the symbolic ordering appropriate for a society that claims to have outgrown culture (determination) and to have reached the end of ideology.¹⁰² But daily life, like daily law, is too difficult a jumble of contradictions for ideology or discourse to dominate. Only in the limited number of liminal, exceptional instances when the question of meaning or the ordering of society is examined must ideology control. And it is only in these situations, in which orthodox theory represents meaning as a

101. See TOWARD A GENERAL THEORY OF ACTION 53-88 (T. Parsons & E. Shuls eds. 1951).

102. See, e.g., D. BELL, THE END OF IDEOLOGY 393-407 (2d rev. ed. 1962).

utopia of existential subjectivity, that structural criticism may have force.

Structuralism provides an appropriate basis for critique in the United States because it contradicts the underlying liberal pretensions of autonomy, which are taken far more seriously in America than elsewhere in the West.¹⁰³ In a poststructuralist understanding, however, it is not yet evident what such an apt form of delegitimation would accomplish. It could be said that the domination of certain symbolic representations of order leads to a general acceptance of current institutional arrangements of power. This is the classic Weberian notion of legitimation,¹⁰⁴ which may explain some political behavior on those odd occasions when political life is thought through in places other than the institutions in which political theorizing occurs. But more typically, structuralist deconstruction, if it truly contradicts rather than complements phenomenology, would play an important role only within institutions specialized in theory production. Delegitimation, thus, would represent an assault on the self-characterization of members of a theory elite that could create internal confusion and yield some measure of satisfaction to their more irreverent colleagues.

This result, however, falls far short of the original project of a delegitimative politics of law. On the assumption that practice followed directly from theory, the delegitimation of legal theory was intended to alter daily legal practice. Phenomenological and struc-

103. The very strength with which these ideological pretensions persist in American theory is worrisome. It appears that a mere restatement of some altered discourse of the subject, designed to escape the limitations of structuralism, would render critique politically ineffective in the United States. In Europe, where the ungrounded subject has always been received with skepticism, a Nietzschean recreation of the subject as romantic hero, or the image of the posttherapeutic subject as free communicator (Habermas), may have political utility. Against the European intellectual backdrop that speaks easily of estate, class, national culture, and structure, and distrusts liberalism as ideology, perhaps critique may fruitfully refer to speech/act theory or to some ironic reinterpretation of the classical ontology of individuality. In America, such reference has begun to produce, I fear, only a manneristic and dangerous recommitment to the same institutional practices we have always known. It is manneristic because the spirit of natural individuality is gone and only the fear of anarchy remains to support continuing adherence to the form of the subject. It is dangerous because it is so easy to confuse the transvalued, postmodernist subject with the traditional subject that continues to dominate popular consciousness, the subject as natural being. To maintain a firm separation between the classical liberal subject and the transfigured subject that fills the space opened within structural critique requires a degree of subtlety that politics does not achieve. Such subtlety may delight the intellectual left, but its effects will likely be conservative.

104. *See* M. WEBER, ON LAW IN ECONOMY AND SOCIETY 1-10 (M. Rheinstein ed. 1967).

tural discourses assert that when practice needs to be reformed, reference is necessarily made to theory. Conversely, when theory comes into crisis, so do its positively derivative practices. This logic rests on the existence of a hierarchical relationship between the system that produces theory and the institutions that produce practice. In a poststructural order this hierarchical arrangement becomes wholly problematic.¹⁰⁵

To summarize, then, my description of some elements that may figure in a refounded Critical account of law and politics, I would stress the following points. The legal system should be understood as a self-reproducing set of theoretically unintegrated practices which refers to legal theory only when some local practice becomes unsettled. The continuing presence of contradictory practices is not a consequence of mistaken judgments to be corrected by a more competent application of structural principles but a normal and stable condition of the system. Theory, only exceptionally involved in the legal system, is represented by a complex system of seemingly competing symbols that have only an analogical and indeterminate bearing on the resettlement of disturbed practices.

Structuralist delegitimation is a critique aimed at an ideologically dominant representation of theory. But symbolic systems are marginal to daily life. The resettlement of disturbed theoretical practices is an esoteric activity concerned with metaquestions about the symbolic reorganization of symbols. A crisis in theory may be disruptive within the particular institutions where theoretical practice is shaped, but its wider effect on the reproduction of political and legal practice is indirect and unclear. What seems more clear is that neither orthodox nor Critical accounts of the hierarchical relation-

105. I am concerned that the limitations I express about the role of theory may be confused with traditional anti-intellectual distinctions between thought and the "real world." I am not arguing that theoretical practices are somehow divorced from reality or that they particularly distort the actual nature of experience. Theoretical practices have the same relation to the chaos of unordered "reality" as does any other set of practices. I personally find the practices concerned with the production of meaning or the symbolic ordering of experience to be esthetically pleasing. But theoretical practices exist and are reproduced within systems that have no natural hierarchical precedence over other institutionalized orders. The special relationship of the practice of theory to other practices is associated with the exceptional (liminal) occasions on which reference is made to theory because the routine of established practice is somewhat upset. It does not derive from the positive capacity of theory to determine practice. The claim to a metastatus for theory may be seen as a claim to institutional power for the practitioners of theory or as a desire for a utopia of closed knowledge. To admit this does not delegitimize theory; it decenters it. On these last points, see S. CAVELL, *THE CLAIM OF REASON: WITTGENSTEIN, SKEPTICISM, MORALITY, AND TRAGEDY* 191-243 (1979); R. RORTY, *supra* note 64, at 3-13.

ship of theory to practice now adequately describe the impact of the delegitimation of theory on political and legal practice.

B. *Relocating Knowledge*

The origin of the Critical theory of ideology lay in the search for an answer to the question posed by Marx of why workers do not perceive their species interests and overturn established social order. Weber generalized the inquiry to ask why men accorded authority to social orderings that he assumed could not exist by means of the exercise of repression alone. Repression occurs at the level of specific practices, and if legitimating ideologies acted for Weber as a substitute for repression, then those ideologies would seem to operate at that level too. Delegitimation analysis, based on reversing the mechanisms of authority, presumes it will alter political or legal practice by tearing away the theoretical justification that Weber suggested shielded practice from the consequences of Marx's teleological argument that human nature would lead to revolt. Yet, in fact, the delegitimation of theory, though well and often advanced, seems too peripheral to political life.¹⁰⁶

It could be that structuralist critics do not effectively delegitimize liberal society. It could be said they only express an objectivist discourse which alternates with subjectivism to form the real constitution of liberalism. It could also be argued that it is the debilitation of structuralism by its own methodological limitations that has led to a readoption of phenomenological discourse in the poststructuralist period. I believe that in deconstructing a universalist subjectivism with a global structural theory, delegitimation restricts its impact to

106. One must avoid confusing the distinct levels of political practice to which the concept of legitimation may be pertinent. I disagree with the assumption that legitimation acts directly in the sustenance of ordinary political life. This perspective ignores the unthought nature of normal practice, and assumes such practice needs, or can be given, justification. Weber properly discerned the problematic nature of authority that can resettle practices that have been brought into crisis. But here, ideal categorizations of authority types constructed upon analytical reason may be misleading. Substantive and formal rationality always refer to theoretical structures of under- and overdeterminate character. Consequently, resolutions of disturbed practice, or *ex post* correct interpretation, must emerge either through a recognition of the authority of the fathers (which Weber called traditional legitimacy) or through the acceptance of the arbitrary pronouncements of some other voice that speaks aptly in particular historical circumstances (Weber's charismatic legitimation). See M. WEBER, *THE THEORY OF SOCIAL AND ECONOMIC ORGANIZATION* 324-63 (1964). A hypothetical account of the psychological and dramatic elements of the reconstruction of sacred or theoretical practices out of the crises of disorder—a reconstruction that matches the collective embrace of one arbitrary order and the sacrificial repression of the symbols of linked (twin) alternative orders—is presented in R. GIRARD, *VIOLENCE AND THE SACRED* (1979).

a realm beyond political action, if not political theory. Delegitimation derives its Critical force from its structuralist logic. This logic contrasts the contradictions within the existing social order with some perfected image of a unitary knowledge able consistently to relate a single theory of society to a rationalized practice. Yet, like postmodernist esthetics, a viable Critical politics as its natural condition must tolerate, if not seek, contradiction between practices and between theories.

When Aristotle referred to man as a political being, his referent was the *polis*. Plato's prescription for the *polis*' optimal size was 5400. The evident lesson is that political life is local and not global. Modern global theories operate within local centers of power, explain and justify the domination of those centers, and create the appearance of mass involvement. Political practice, like legal practice, remains local and theoretically indeterminate. Delegitimation, like the universalizing claims of liberal subjectivist equality which it assaults, contributes to the myth of the structurally unified or extended political organization. Ultimately, it risks deflecting analysis and attention to institutions of theory only marginal to the institutions of legal and political practice where power is actually produced and reproduced.

The unified image of man projected by structuralist theory must dissolve and carry with it the reverie of a unified science of human affairs.¹⁰⁷ But there must be no falling back upon a discourse of the unremitting fragmentation of the civic order. Refashioning a cultural representation that imagines that meaning can be gleaned from individual projects, and that immediate consciousness of the presence of self can be more than an empty echo of our own speech, is reactionary. Given the decentralized and ongoing production of communities, it is *local*, *depersonalized*, and *public* history that should appear as the centerpiece of theory. Such history should reject both the power of global theory and the validity of concentrated power. Mass politics, like the dream of a timeless or personal knowledge, should be seen as oxymoronic. Power is always local in its exercise. To indulge the illusion that it can be legitimately delegated or administratively banished is to give up politics for manipulation.

107. It has often been suggested that the quest to discover or impose coherent meaning is the essence of the special claims of Western civilization. It is also asserted that the suppression of contradiction is a necessary consequence of our struggle with our potential schizophrenic dissolution. However attractive this defense of consistency may be, it is threatened by the converse propensity to indulge in delusive wish fulfillment. Perhaps, for us, as for the ancient Greeks, some moderation in our mixing of psychoses is now advisable.

One possible step toward a Critical theoretical practice might be the development of a poststructuralist "architecture" of complex systems, which would accept the inevitability of inconsistency and contradiction in the everyday life of legal and political theory and practice.¹⁰⁸ At the level of nontheoretical practice, it is necessary to describe in detail the network of established practices within functioning legal institutions and to understand the reproduction of unanalyzed ways of going about the world. The logic (or analogic) of reproduction must take into account that existing practices may be continually reformed because they are constructed in systematic processes that may refer to multiple discursive representations of experience.¹⁰⁹ In terms borrowed from biology and cybernetics, the in-

108. The metaphor of a complex, contradictory, poststructuralist architecture is borrowed from the antimodernist criticism made by architects such as Venturi and Portoghesi. This architecture, with its insistent stress on the importance of global history, typifies the poststructuralist problem through its embodiment of the promise inherent in the development of a variety of communities and the threat inherent in a sterile reproduction of an exhausted past.

109. The program I wish to see developed would deny neither the reality of the experience of consciousness nor the validity of explanatory structures. Rather, it would presume to clarify the boundaries between discourses and properly resituate these contradictory representations within a more general system of information. The purpose of such a reconstruction would be threefold. First, it would lessen the confusion that currently exists due to the conflation of concepts and procedures appropriate to one type of discourse in discussions of some alternative grammar. Second, in emphasizing that the particular symbolic orderings within any single discourse are historically produced, a reconstruction of theory would invite reconsideration of terms and relationships often accepted as natural and necessary. For example, to view phenomenology as one among many possible discursive practices, ought, at the same time, to call attention to the myriad possible accounts of subjectivity within phenomenological discourse.

Most importantly, to relocate contending discourses within a more comprehensive topography of possible expressions would transform how we understand the politics of knowledge. My thesis is that contending discourses never touch one another. Instead, they are images drawn from distinct vantage points within complex information systems. Neither the unique experience of indeterminacy which we label self-consciousness nor the symbolic orderings that we use as determinative explanatory structures has a privileged claim to constitute any particular discursive event. Both the specific transformation of the grammatical rules within any spoken discourse and the more general discourse (e.g., structural or phenomenological) that is actually used to constitute any particular event are themselves the outcomes of an ongoing process that Foucault has called, for lack of a better term in our present speech practices, the exercise of power. See Foucault, *Afterword*, to H. DREYFUS & P. RABINOW, *supra* note 11, at 208-26. Power is neither individual nor collective; it is the historical emergence of voice that founds both consciousness and structure. The constellation of discursive practices at any given time is literally a *regime du savoir* since any particular claim to knowledge is installed through the exercise of power. The object of understanding is to trace the trajectory of the system that at once generates the possibility of discourse and constrains the evolution of its practice.

We can speculate about some results of the application of this reformed perspective to the discourse with which we have become familiar. The claim of hermeneutics—the em-

ternal life of the system must be autopoietic, or capable of self-

pathetic apprehension of the intentions of self or others—to present the sole method appropriate to phenomenological knowledge must be resituated. Consciousness is not a unique attribute of mankind. It is rather the representation of one level of a complex system to itself. We appear to ourselves to be special because we have access only with respect to our own position to the odd viewpoint afforded by reflexivity. Reflections through which the higher and lower levels of the complex system in which we participate are represented to themselves are simply unavailable to us. There is, however, a coherent discourse appropriate to every such reflexive phenomenology. It is the discourse whose method is confession or *verstehen*, whose politics speaks of rhetoric or persuasion, whose revision lies in therapy, whose genre is narrative, and whose authority is charismatic.

Alternatively, we must resituate structuralism's claim to produce a scientific knowledge that affords a complete, determinate, causal, and timeless account of the particular. Such discourse is appropriate either to a system's representation of the more complex system of which it is an element or to its representation of the lower levels of system which, in turn, compose it. Structuralism is the expression of our attempts to step outside our own position, ranging up and down through the multiple levels of the complexity in which we are enmeshed. This effort to escape the confines of reflexivity yields symbolic or collective orderings that fashion messages out of randomness and restrict the ultimate freedom from order that is entropy. These structural orders are theoretical practices that describe the coherence or internal logic of alternative representations of system. Such symbolic practices frame and shape the production of nontheoretical practices. The method of structural discourse is positivist; its explanatory form privileges the un- (or super-) conscious; its authority is rationality.

To resituate discourse within the wider topography of a complex system is to dwell on its self-contained character or epistemological limits. From the standpoint of structure, all nontheoretical or individual practice is inexplicable and, in a way, uninteresting. In the epistemology of a discourse of systems, we can have knowledge of experience only at the collective level of representation. All symbolic ordering or theory is probabilistic generalization from the aggregation of the particular. There is no science of the individual, nor should we treat as meaningful each particular event, behavior, or practice. Rather, the particular is randomly distributed in relation to the symbolic order that affords meaning. Only from the standpoint of reflexive consciousness does such randomization appear as intentionality.

Theory and practice, meaning and individual action, are terms drawn from different discourses. The dream of their unification is empty. Individuals may be persuaded or coerced; we cannot know one another as conscious actors. But symbolic orders are never the static, idealized forms to which our Platonic longings aspire. Viewed from a systemic perspective, culture itself is an institutionally produced aggregation of local practices. The symbolic practices that I have called knowledge, theory, identity, level of representation (i.e., what is termed collective or particular), and discourse (i.e., viewpoint on the system) are themselves constantly contestable and indeterminate in the process of their reproduction. In developing a broader discourse of system, we must see theory and practice, structure and consciousness, as equifinal states within an evolving network of possible messages. All these messages are local and represent permutations of the information sets that preceded their generation. The historical production of new information is the exercise of power, and it is all that we have to share.

In this latter sense, to explain and elaborate a discourse appropriate to the description of autopoietic systems is to resituate politics at the center of our being. The essential attribute of a self-referential system is its evolutionary history of continual internal differentiation of newly organized patterns of information out of its preexisting states. Variations in the construction of these differentiations are functions of a self-programming system's operating instructions, and are therefore unrelated through predictable rules to alterations in the extrasystemic world. The genesis and maintenance of codes of symbolic order arise in the

programmed reproduction. At the same time, the evolution of practice can be responsive to interactions with other subsystems of practice, including those which produce theoretical practices. How these relations will be best represented is difficult to predict.

At the level of theory, global theory is to be replaced by a local set of theoretical practices. Theory must be analyzed as nothing more than one system of practices among others, with dynamics of reproduction and environmental interaction similar to those of non-symbolic practices. In displacing the hierarchical superiority over other levels of practice that is claimed by the pretense of theory to a determinate knowledge of self and others, there is at least a symbolic expression of the desire to decenter the political power that has, in our era, been linked to that pretense.

I am aware that a discourse that speaks of the architecture of unpredictable systems could be recast in the terms of either a phenomenological or a structuralist grammar. The disordered evolution of system could be read as the narrative of some transfigured, collective spirit. The categories that distinguish one system from another

course of organizing the process of systemic reproduction. Typical differentiations within contemporary systems include the attributes of personal identity, such as economic preferences and legal rights, and the categories of collective organization, such as race, nation, class, culture, and structure. Objective and subjective discourses are equally artifacts of system differentiation that represent indeterminate outcomes of its evolutionary process. However, from the reflexive perspective of conscious actors within the more complex system, the outcome of system is not random. The process of differentiation is perceived as political struggle over the establishment of practice. At the same time, the set of alternative differentiated outcomes (practices) made possible within the trajectory of the system is reified by participants in politics and mistakenly understood to be the inputs of political conflict.

My argument is that we have neither fixed subjective identities nor determined ascribed memberships in particular corporate groups prior to the generation of those attributes in the local histories of systems. These differentiated categories of identity that we take on randomly in the process of political competition afford organization to our lives only when they are reified and reprojected back over our personal histories prior to the conflict. Each particular account of identity produced is framed by the local evolution of systems as they move among the many potential levels of system representation to rework the architecture of established claims to knowledge. Legal rights, legal identities, and legal theories arise in ongoing, indeterminate production of legal practices specific to systems in existing Western social orders. Describing the boundaries of those systems, the nature and ontogenesis of the categories of their internal organization, and the practices that exist at any moment is the task of poststructural legal theory. Active participation in accessible political competitions (local public life) is the only way to gain whatever identity or knowledge we may have in a poststructural order. For discussion of developments in physical science and artificial intelligence, where autopoietic systems have become prominent, see generally H. VON FOERSTER, *OBSERVING SYSTEMS* 2-24 (1981); J.P. DUPUY, *supra* note 50; N. LUHMANN, *supra* note 87. For speculation about the resituation of consciousness within more complex systems, see Hofstadter, *Prelude . . . Ant fugue*, in *THE MIND'S I: FANTASIES AND REFLECTIONS ON SELF AND SOUL* 149-91 (D. Hofstadter & D. Dennett eds. 1981).

could be read as the differentiations of a metastructure. But why retrace this now barren ground?¹¹⁰

SUMMARY QUESTIONS

Whatever value this account of structuralism may have, it surely raises more questions than it lays to rest. There remain the political tremors that we properly experience when confronting the noncritical application of global objectivizing structures. To the extent that structuralism is too flawed an analysis of consciousness, must not its derivative accounts, including that of delegitimation, be flawed also? Nevertheless, the problem of what to do after the structuralist argument has been understood and internalized interests me most.

If there exist a multitude of structuralisms and a multitude of possible practices consistent with each, how does one "choose" among them to produce explanation or prediction? Are we compelled to reintroduce the notion of the autonomous subject, at least in the guise of author, analyst, or reader? How can such a rein-

110. A related point:

. . . All arguments between the traditional scientific view of man as organism, a locus of needs and drives, and a Christian view of man as a spiritual being not only are unresolvable at the present level of discourse but are also profoundly boring—no small contributor indeed to the dreariness of Western society in general. The so-called *détentes* and reconciliations between "Science" and "Religion" are even more boring. What is more boring than hearing Heisenberg's uncertainty relations enlisted in support of the freedom of the will? The traditional scientific model of man is clearly inadequate, for a man can go to heroic lengths to identify and satisfy his needs and end by being more miserable than a Calcuttan. As for the present religious view of man, it begs its own question, the question of God's existence, which means that it is not only useless to the unbeliever but dispiriting. The latter is more depressed than ever at hearing the good news of Christianity. From the scientific view at least, a new model of man is needed, something other than man conceived as a locus of bio-psycho-sociological needs and drives.

Such an anthropological model might be provided by semiotics, that is, the study of man as the sign-using creature and, specifically, the study of the self and consciousness as derivatives of the sign-function.

W. PERCY, *supra* note 39, at 81–82.

There are, of course, obvious reasons to object to the persistent use of the imagery of the autonomous self if it is, as structuralism asserts, false or illusory. There would also be political reasons to become depressed if the existence of a liberal self were proved true. My sense is that, at this point, the relevant question is no longer whether the predominant narrative of autonomous selfhood is true or false. Rather, autonomous selfhood is increasingly seen as one of a related series of possible accounts that describe and organize experience in the world. It is the unceasing recitation of this discourse and its complements, recognized as discursive phenomena and transformed by this recognition, that is esthetically unsupportable. On one hand, ennui may not seem to offer a standard on which to base political or social critique. On the other, one computer theorist has suggested that boredom is the principal quality that still distinguishes human from artificial intelligence.

roduction be possible, given the telling assaults of historical materialism, psychoanalysis, and linguistics on the "natural" conception of individuality? And is not my account of the movement between structuralist and phenomenological discourses in language and other fields simply a prelude to (another) universal metastructure of discursive differentiations? If so, must not my implicit structuralism itself be subject to a poststructuralist attack on its indeterminacy and overdetermination? If we now rediscover the subject, do we not expose ourselves to a potentially infinite alternation of discourses, going nowhere ever more rapidly?

I believe the answer to all these questions is a confused and disturbing assent. I also suspect that the path beyond the limits of these discourses lies neither in retreat from, nor in embracing with the perverse pleasure of resignation, the paradoxes they establish. As with all games built upon true paradox, in spite of the wondrous levels of complexity at which they can be played, in the end the game grows tiring and we must simply put it to one side.