

3-1999

The Representational Dialectic (with illustrations from Obscenity, Forfeiture, and Accident Law)

Anita Bernstein

Brooklyn Law School, anita.bernstein@brooklaw.edu

Follow this and additional works at: <https://brooklynworks.brooklaw.edu/faculty>



Part of the [Other Law Commons](#)

Recommended Citation

87 Cal. L. Rev. 305 (1999)

This Article is brought to you for free and open access by BrooklynWorks. It has been accepted for inclusion in Faculty Scholarship by an authorized administrator of BrooklynWorks.

California Law Review

VOL. 87

MARCH 1999

NO. 2

Copyright © 1999 by California Law Review, Inc.

The Representational Dialectic (With Illustrations from Obscenity, Forfeiture, and Accident Law)

Anita Bernstein†

Human understanding derives from a “representational dialectic,” whereby abstractions make sensory experiences intelligible. The first element of this dialectic, a human tendency to focus on the concrete, may be called “depictionalism.” The second element, an effort to subsume the concrete within an abstract organizing principle, may be called “rationalism.” A struggle between these two modes, one focused on the tangible or images of the tangible, and the other privileging abstract schemas such as language, has been underway for millennia. Most realms of culture, including philosophy, religion, art, politics, and some of the sciences, provide evidence of this conflict. In attempting to overcome the appeal of depictionalism, advocates and proponents of rationalism frequently equate depictionalism with primitive or magical thinking—in short, error. In this Article, Anita Bernstein argues that lawmakers and law reformers have aligned themselves with rationalism, and that ignoring or slighting depictionalism has hindered both understanding of the law and the creation of optimal legal rules. Using

Copyright © 1999 California Law Review, Inc.

† Professor of Law, Chicago-Kent College of Law; Visiting Professor, University of Michigan Law School, 1998-99. For helpful suggestions and ideas, my thanks to Jeffrey Brill, Jacob Corré, Paul Fanning, Sanford Greenberg, Géraldine Johnson, Kelly Kleiman, Bailey Kuklin, Jim Lindgren, Dean Marks, Kimberly Pace, Phil Regal, Bruce Rogow, Tony Sebok, Aaron Twerski, Richard Warner, Daniela Weiss, Steven Winter, and the faculty attendees at a “work-in-progress” lunch at the University of Minnesota Law School. The Marshall Ewell Fund provided financial support.

obscenity, forfeiture, and accident law as examples, Professor Bernstein shows the representational dialectic at work in the law, and discusses its implications for doctrinal clarity, law reform, and political accountability of the state.

INTRODUCTION

My ten-syllable mouthful is simpler than it sounds: "representational dialectic" refers to a familiar dichotomy in human cognition and understanding.¹ Our intellect tries to make order of its environment by two opposing—and complementary—methods. Bertrand Russell called these two methods "knowledge by acquaintance"² and "knowledge by description."³ Knowledge by acquaintance occurs through sensory perception. In contrast, knowledge by description refers to understanding conveyed through verbal formulations and mental abstractions.

Western philosophers have produced numerous accounts of the operation of a dialectic between these two methods of acquiring understanding.⁴ Representations understood through acquaintance—objects, things, depictions put literally before a perceiving individual—depend on abstractions in order to be understood.⁵ In turn, knowledge by

1. A dialectic, writes Elizabeth Schneider, "stands for the idea of the process, connection, and opposition of dualities, and for subsequent change and transcendence." Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 599 (1986).

2. Knowledge by acquaintance describes the human understanding of things: "we have acquaintance with anything of which we are directly aware, without the intermediary of any process of inference or any knowledge of truths." BERTRAND RUSSELL, *THE PROBLEMS OF PHILOSOPHY* 46 (Oxford Univ. Press reprint 1969) (1912) (emphasis in original). Knowledge by acquaintance corresponds with the verb *connaitre* in French and *kennen* in German. *See id.* at 44.

3. In contrast to knowledge by acquaintance, knowledge by description refers to the understanding of truths, conveyed and understood through verbal formulation. *See id.* at 52. This type of knowledge corresponds to the verbs *savoir* and *wissen*. *See id.* at 44. As Russell elaborates, knowledge by description rests on prior knowledge by acquaintance: "In spite of the fact that we can only know truths which are wholly composed of terms which we have experienced in acquaintance, we can yet have knowledge by description of things we have never experienced." *Id.* at 59.

4. For a philosophical description of the dialectic, see JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING*, bk. II, ch. II, §§ 2-4 (Peter H. Nidditch ed., Oxford Univ. Press 1975) (1690) (drawing a dichotomy between "the objects of sensation" and "the operation of our minds" as the sources of ideas). The philosophers W.V. Quine and Gottlob Frege similarly contrast knowledge *de re*, or "through the thing," with knowledge *de dicto*, or "said." *See* Roger F. Gibson, *In Conversation: W.V. Quine*, 104 MIND 637, 644 (1995) (book review). Psychologists use the term "object relations" to describe the dialectic. *See* PAUL R. MILLER, *SENSE AND SYMBOL* 31 (1967) (describing object relations as the developing individual's experience of tangible objects). *See also* Ernst von Glasersfeld, *Sensory Experience, Abstraction, and Teaching*, in *CONSTRUCTIVISM IN EDUCATION* 369, 374-75 (Leslie P. Steffe & Jerry Gale eds., 1995) (describing acquisition of abstractions through interaction with particulars, as understood in learning theory).

5. Descartes, for instance, wrote that images and sensory experiences are intelligible only in a context of reason and intellectual conception. *See* RENE DESCARTES, *Meditations on First Philosophy*,

description—verbal and mental representations—often relies on illustrations drawn from the physical world to explain or convince.⁶

Consider the sky, for example. Astronomers have helped to order the night sky into concepts: lay persons know the meaning of “planet,” “galaxy,” and “solar system” because of scientific taxonomy oriented toward unification, rather than through their sensory perception of a personal and visual “night sky.” At the same time, “astronomy” urges skygazers to “see” big hurtling orbs instead of, say, light shining through a pinpricked cloth—and perhaps instead of the “heavens” described in the book of Genesis, created divinely on a fourth day as a background above the earth.⁷

With the example of astronomy-and-religion I mean to advert to political (and, inevitably, legal) conflict. Galileo’s famous collision with the dominant scientific and religious systems of his culture demonstrates what happens when perceptions are reordered according to new abstractions.⁸ The study of legal change in the United States reveals a similar strife: knowledge by acquaintance and knowledge by description work together but also separately, and stand at opposite ends of a political struggle. The battle has riven numerous areas of American law, of which I have chosen three—obscenity, forfeiture, and accident law—for particular attention.⁹ Not only legal doctrines but academic reconceptions

Fifth Meditation, in 2 PHILOSOPHICAL WRITINGS OF DESCARTES 1, 44–49 (John Cottingham et al. trans., Cambridge Univ. Press 1984).

6. See DAVID FREEDBERG, *THE POWER OF IMAGES* 191 (1989) (“The mind has no choice: it lapses into visualization in order to grasp all but the purely ecstatic, syllogistic, and arithmetical . . .”); cf. HARRY REDNER, *A NEW SCIENCE OF REPRESENTATION* 39–43 (1994) (describing the function of Hermes, or Mercury, the god of messages and commerce, who uses physical things to express ideas and thus build culture); RICHARD A. WATSON, *REPRESENTATIONAL IDEAS* 2 (1995) (referring to “ideas as effects and things as causes”).

7. See *Genesis* 1:14–18 (THE SONCINO CHUMASH: THE FIVE BOOKS OF MOSES WITH HAPHTAROTH, A. Cohen ed., The Soncino Press 1947) (referring to *m'orot b'rekeah hashamaim*, lights in the firmament of the heavens); cf. IMMANUEL KANT, *CRITIQUE OF PURE REASON* 273 (Norman Kemp Smith trans., St. Martin's Press 1965) (1781) (using the example of astronomy to distinguish *mundus sensibilis*, the world apprehended through the senses, from *mundus intelligibilis*, the world apprehended through intellect).

8. See JACOB BRONOWSKI, *THE ASCENT OF MAN* 216 (1973); Owen Gingerich, *The Galileo Affair*, *SCI. AM.*, Aug. 1982, at 132.

9. Tangible physical objects play a prominent role elsewhere in American law, which frequently asserts that their presence in a dispute or transaction calls for separate doctrinal treatment. One can scarcely count all the ways. For statutory recognition of physical objects, see, for example, the Clayton Act, 15 U.S.C. § 14 (1994) (making it illegal to form tying arrangements where both the tying and tied goods are tangible); 19 U.S.C. § 482 (1994) (authorizing customs inspectors to examine “any vehicle, beast, or person, on which or whom . . . they shall suspect there is merchandise subject to duty”); U.C.C. art. 2 (1995) (pertaining to sales of goods). See also *United States v. Diaz*, 499 F.2d 113, 114 n.9 (9th Cir. 1974) (relying on expert testimony by an anthropologist to decide statutory claim regarding cultural property). Expressions of concern with physical objects in the common law of torts and property include “bailments,” see *Kitchen v. K-Mart Corp.*, 697 So. 2d 1200, 1208 (Fla. 1997); “conversion,” see *Wallander v. Barnes*, 671 A.2d 962, 971 (Md. 1996); and “personalty,” see *General Motors Corp. v. City of Linden*, 696 A.2d 683, 690 (N.J. 1997). The common law of crimes

of doctrine have been caught in the ancient dialectic. An understanding of this struggle, I will argue, illuminates fundamental debates about the nature and objectives of law.

Though well delineated, the two sides of the dialectic are not quite so well labeled, and thus one is forced to coin phrases. Hence I will use the word "depictionalism" for the stance associated with knowledge by acquaintance, which focuses on the presence or representation of a physical object.¹⁰ The contrary stance, which emphasizes abstract concepts and verbal description, will be "rationalism."¹¹

As I elaborate in Parts I and II, the dialectical conflict has not proceeded evenhandedly. It is in the main a history of the perseverance of depictionalism under attack by rationalism, which seeks to bury once

identifies object-related concepts: "forgery," "smuggling," "theft," and the like. See BLACK'S LAW DICTIONARY 650, 1389, 1477 (6th ed. 1990). Civil procedure recognizes *in rem* (thing-related) jurisdiction, see *infra* text accompanying note 172 (relating *in rem* jurisdiction to civil forfeiture); evidence law considers physical objects in its rules on authentication, spoliation, and "writings, recordings and photographs," see, e.g., FED. R. EVID. 1006. Moving beyond the United States, legal anthropologists have built a literature of the "law of things" situated within culture. See, e.g., Rosemary J. Coombe, *The Cultural Life of Things: Anthropological Approaches to Law and Society in Conditions of Globalization*, 10 AM. U. J. INT'L L. & POL'Y 791, 792-94 (1995) (citing sources); *id.* at 823-25 (relating legal anthropology to trademarks); Andrew Huxley, *Golden Yoke, Silken Tent*, 106 YALE L.J. 1885 (1997) (book review) (providing examples of the law of things in Tibet and ancient China).

The three subjects that receive close attention in this Article are representative of this vast expanse. They cover criminal and civil law; the example of forfeiture covers terrain in between. See *Boyd v. United States*, 116 U.S. 616, 634 n.9 (1886) (calling civil forfeiture "quasi-criminal"). They are expressed in both statutory and common law rules, and they reveal connections to the larger representational dialectic. When appropriate, the Article refers to illustrations outside of obscenity, forfeiture, and accident law.

10. Slightly more graceful terms such as "objectivism" and "representationalism" are already occupied by different philosophical concepts, and are sometimes used to describe knowledge by description, rather than the knowledge by acquaintance that I need a word to connote. See, e.g., LEONARD PEIKOFF, *OBJECTIVISM: THE PHILOSOPHY OF AYN RAND* (1991) (describing Rand's philosophy of objectivism, based on rationality and principles of "enlightened selfishness"); William G. Weaver, Note, *Richard Rorty and the Radical Left*, 78 VA. L. REV. 729, 730 (1992) (calling Plato's philosophy of highly abstract, rationalist ideals "representationalism"); Anthony J. Sebok, Book Review, 93 CAN. J. L. & JURIS. 457, 459-60 (1998) (reviewing *Law and Truth* by Dennis Patterson) (invoking Patterson's use of "representationalism" to refer to philosophy of language). My colleague Richard Warner, a philosopher, has suggested "antipropositionalism," but inasmuch as I believe that knowledge by acquaintance is prior to knowledge by description, see *supra* notes 2-3 and *infra* notes 334-335 and accompanying text, this negative locution, to my mind, does not quite describe what is termed depictionalism here. Russell's "knowledge by acquaintance," see *supra* note 2, describes almost precisely what I mean by depictionalism, but in the interest of brevity I prefer a single word to a prepositional phrase.

11. Like "representationalism," this word has an extensive set of meanings in philosophy and elsewhere. Bernard Williams, after noting the existence of "several different outlooks and movements of ideas" that fall under this rubric, supplies a working definition: "the philosophical outlook or program which stresses the power of a priori reason to grasp substantial truths about the world." Bernard Williams, *Rationalism*, in 7 ENCYCLOPEDIA OF PHILOSOPHY 69, 69 (Paul Edwards ed., 1967). I use rationalism as an umbrella term, covering morality, efficiency, deterrence, corrective justice, incentives, and other such ambitions associated with the law.

and for all the “superstition,”¹² the “fetishism,”¹³ the “idolatry,”¹⁴ the “silly animism,”¹⁵ the “primitive” thinking,¹⁶ and the “bizarre havoc”¹⁷ caused by depictionalism’s focus on the tangible.¹⁸ Although seldom defended as such, depictionalism holds its ground against charges that it obstructs philosophical, theological, economic, political, and social coherence and clarity. Perhaps it endures, I argue, because knowledge by acquaintance is fundamental to any kind of understanding. Depictionalism perseveres also because rationalists say it does: most rationalists share a habit of identifying depictionalism with the backward past, and call abstraction part of current and future enlightenment. In Part I of this Article, I provide a short historical survey of the never-successful rationalist endeavor in Western culture to supersede depictionalism in religion, politics, psychology, and the visual arts.

American law, particularly as it has been shaped by reformers and academic critics, reveals a similar pattern of depictionalist perseverance in the face of rationalist attack. Despite the extraordinary influence of law and economics (the quintessential rationalist ideology) and its tenet that markets can price and exchange almost anything,¹⁹ including legal

12. Mary M. Cheh, *Can Something This Easy, Quick and Profitable Also Be Fair? Runaway Civil Forfeiture Stumbles on the Constitution*, 39 N.Y.L. SCH. L. REV. 1, 6 (1994) (claiming that civil forfeiture rests on an “irrational and superstitious idea” that property can be guilty).

13. See *infra* text accompanying note 77 (discussing Marxist theory).

14. The Judaic ban on idolatry appears in *Exodus* 20:4 (THE SONCINO CHUMASH: THE FIVE BOOKS OF MOSES WITH HAPHTAROTH, A. Cohen ed., The Soncino Press, 1947). The subject receives thorough philosophical treatment in MOSHE HALBERTAL & AVISHAI MARGALIT, *IDOLATRY* (1992).

15. Deborah Duseau & David Schoenbrod, *Overbroad Civil Forfeiture Laws Are Unconstitutionally Vague*, 39 N.Y.L. SCH. L. REV. 285, 292 (1994).

16. ARTHUR KOESTLER, *THE ACT OF CREATION* 321 (1964).

17. HENRY HYDE, *FORFEITING OUR PROPERTY RIGHTS* 17 (1995).

18. Even the Oprah Winfrey trial of 1998 brought forth this complaint. See Stephen Hymes, Letter to the Editor, N.Y. TIMES, Jan. 29, 1998, at A22 (arguing that food disparagement statutes are dubious because they “implicitly imbue[] inanimate objects with the human element of character”).

19. See Martha C. Nussbaum, *Flawed Foundations: The Philosophical Critique of (a Particular Type of) Economics*, 64 U. CHI. L. REV. 1197, 1199 (1997) (noting “commitment” of law and economics “to the commensurability of all an agent’s ends”). Professor Nussbaum gives as an example of this commitment the practice of measuring a nation’s “quality of life” simply by its GNP per capita. *Id.* at 1202.

An illustration of how law and economics disdains the physical object comes from a talk that Judge Frank Easterbrook, a noted devotee of this approach, once presented. Easterbrook mockingly coined the phrase “the law of the horse.” Case law, Easterbrook explained, is full of horse licenses, horses that kick, sales of horses, and the veterinary standard of care for medical treatment of horses. But the law rightly lacks an equine category: its task is to focus on general rules and principles, including “contract, intellectual property, privacy, free speech and the like.” David Post, *Has Cyberspace Law Come of Age?*, AM. LAWYER, Apr. 1998, at 78 (arguing that cyberspace law is now more than “the law of the horse”).

remedies,²⁰ the physical object occupies an unbudging place in legal doctrine.²¹ Having once addressed the power of objects in products liability,²² here I want to think about depictionalism more generally, and look for the sources of its strength. Part II of this Article conveys some of this power with reference to the law of obscenity, forfeiture, and accidents.

Each of these areas of law has absorbed rationalist criticism, but only to partial avail; law reform proposals that followed or accompanied such criticism failed to eliminate dependence on the tangible, or images of the tangible, from these areas of the law. Obscenity doctrine still criminalizes the essence of a work, such as a videotape or a novel, rather than the behavioral hazards to public order that normally concern the criminal law.²³ Civil asset forfeiture personifies inanimate objects, condemning them for the taint of moral guilt, even where such a determination means that innocent people have to suffer—and at the hands of the state—in consequence.²⁴ Accident law finds tangible things crucial in two of its important doctrines, pure economic loss and products liability.²⁵ Thus, within the world of torts, an area professedly concerned with public policy, corrective justice, deterrence, economic efficiency, and the like,²⁶ the image of a corporeal thing can stand, lumplike, in the path of these goals. Depictionalism thus challenges the very center of civil and criminal law.²⁷

20. See Ronald A. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-8 (1960) (identifying legal remedies as an element of the costs and benefits associated with certain kinds of activity, and arguing that individuals can price and exchange them).

21. See *supra* note 9.

22. See Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1 (1995).

23. See PAUL H. ROBINSON, CRIMINAL LAW 23 (1997) (reciting “the familiar litany of purposes of criminal law sanctions—just punishment, deterrence, incapacitation of the dangerous, and rehabilitation”). Joel Feinberg’s four-volume *The Moral Limits of the Criminal Law* consists of an extended argument that harm or offense is necessary to justify a criminal prohibition: harm must be the principal reason for criminalization, whereas offense has a narrower province and does not simply emanate from objects. Offense, according to Feinberg, requires that someone be offended. Actions “are immoral (better indecent) because they offend; they do not offend because they are judged to be, in their essential nature, iminoral.” 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW 15-16 (1988). See also *infra* Section II.A.

24. See *infra* Section II.B.

25. See *infra* Section II.C.

26. See generally KENNETH S. ABRAHAM, THE FORMS AND FUNCTIONS OF TORT LAW 14-19 (1997) (listing “functions of tort law”: corrective justice, optimal deterrence, loss distribution, compensation, and redress of social grievances).

27. The legal concept of property, however, is an unusual bastion of depictionalism. Property indeed may amount to the greatest triumph of knowledge by acquaintance in American law. Despite scholarly arguments that the subject lacks inherent content and is instead a description of rights among persons, see, e.g., Emily Sherwin, *Two- and Three-Dimensional Property Rights*, 29 ARIZ. ST. L.J. 1075, 1079 (1997) (citing Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 61 (1964)), property law recognizes that its first task “is not to resolve disputes between people over resources, but to establish a relation between a person and an identifiable thing,” Sherwin, *supra* at 1086. Professor Sherwin goes on to note that “physical objects . . . continue to have considerable

This description of depictionalism identifies a barrier to law reform that has not yet been examined: neglect of depictionalism yields both conceptual and strategic errors. At the conceptual level, reformist academics rely on rationalist social science findings to buttress their proposals for legal change, without scrutinizing these sources for descriptive accuracy. Consider, for example, the well-known experimental study that set up a market where cash, tokens, and coffee mugs were to be traded among the undergraduate subjects. The study found that students traded tokens for cash in happy equilibrium, following a smooth pattern of supply and demand curves, but refused to “sell” their coffee mugs for the price in tokens that economic theory would dictate.²⁸ The designers of the study refer to this anomalous outcome as “the endowment effect,” which they define as loss aversion, the idea that people deem losses weightier than gains.²⁹ They never directly confront the possibility that a coffee mug with the Cornell logo might signify something different from its “equivalent” in tokens and money, even though their experiment proved exactly that. The researchers prefer to interpret their subjects’ behavior in terms of gains versus losses—a vocabulary with which professional economists feel comfortable—even though the idea of a market, if it says anything, denies that buyers “gain” at the expense of sellers who “lose.” Academic lawyers consume misperceptions like these and build policy on them: a clearer sense of what constitute losses and gains might yield a better conclusion.³⁰ Such a determination demands that the policymaker abandon the comfortable familiarity of money-language, and look at the object.

At the level of pragmatic strategy, frustrated activists who fail to effect legal change tend to misplace blame; they look for familiar villains. Conservative temperaments, entrenched financial interests, public cowardice, institutional resistance (coming from ideological antagonists on the bench, legislators who cannot defy the predictions of public choice theory, and nonacquiescent administrators), and the problem of

significance” in property law. *Id.* at 1091. Describing this stance of property law in conversation with me, Bailey Kuklin has suggested the helpful metaphor of a telescope: contract, tort, and criminal law regard things as instruments, with people at the end; property law, following depictionalism, will often reverse the telescope to make endpoints of physical objects.

28. See Daniel Kahneman et al., *Experimental Tests of the Endowment Effect and the Coase Theorem*, 98 J. POL. ECON. 1325 (1990).

29. *Id.* at 1327.

30. For instance, one law review article argues that the endowment effect, among other insights of behavioral law and economics, should be used to inform policy. The authors propose that to encourage women to perform breast self-examination, the state should not bother to create regulations or taxes that punish the failure to examine one’s breasts. Instead it should exploit the human tendency to weigh losses more heavily than gains, and print “pamphlets that stress the negative consequences of a refusal to undertake self-examination.” See Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1536-37 (1998).

collective action are among the oft-cited obstacles.³¹ Writers who do not share the law reform goal at issue may say that reform failed because it was ill-conceived.³² All of these post hoc judgments stay within the premises and tenets of rationalism. As explanations for outcomes, they may well be right. I am arguing, however, that they are often incomplete. If depictionalism also stands in the way of law reform, then both advocates of change and their resisters need to reassess law reform as it is now practiced and studied.

Accordingly, Parts III and IV analyze depictionalism as a cultural force that intersects with legal doctrine. Part III explores the congruence of depictionalism with theories of human behavior derived from philosophy, psychology, and political theory. In arguing that depictionalism lines up with philosophical traditions, learning theory, and indeed liberal politics, I hope to show that the dumber, less articulate half of the representational dialectic not only is here to stay, but occasionally yields benevolent effects. The last Section of Part III concludes by praising depictionalism as a brake on law reform. Notwithstanding the infamous history of "all deliberate speed,"³³ some reforms do move too fast.

Shifting to favor the other side of the dialectic, Part IV assesses depictionalism from the vantage point of one rationalist objection. It is idle, I think, for rationalist law reformers to thunder against superstition and irrationality in the law. Rationalism has available a more serious avenue of both thought and action, pertaining to freedom. "State interference is an evil, where it cannot be shown to be a good," as Oliver Wendell Holmes famously wrote;³⁴ here I argue that depictionalism tends paradoxically to bolster state interference of a centralized kind, despite its eclecticism and pluralism. If the danger of rationalism is its tendency to reduce physical objects and images of physical objects to abstractions or verbal expressions—the better to centralize control—then the danger of depictionalism is that its focus on physical objects conceals an equivalent control, a statist encroachment into human liberty. The example of forfeiture provides the clearest illustration,

31. See generally RICHARD DELGADO, *THE RODRIGO CHRONICLES* (1995) (attributing law reform failures in part to racism and conservatism); Simon Bronitt & Bernadette McSherry, *The Use and Abuse of Counseling Records in Sexual Assault Trials: Reconstructing the "Rape Shield"?*, 8 CRIM. L.F. 259, 290 (1997) (summarizing explanations for failures of rape reform laws); Michael H. LeRoy, *Can TEAM Work? Implications of an Electromation and DuPont Compliance Analysis for the TEAM Act*, 71 NOTRE DAME L. REV. 215, 225-26 (1996) (detailing political barriers to labor law reform). See generally Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997) (noting explanations for law reform failure).

32. See Bernstein, *supra* note 31, at 1543, 1557-58 (noting criticism of reform policies deemed radical or unmanageable); Gerald W. Boston, *A Mass-Exposure Model of Toxic Causation: The Content of Scientific Proof and the Regulatory Experience*, 18 COLUM. J. ENVTL. L. 181, 351-81 (1993) (defending traditional tort rules of causation in the face of reform proposals).

33. See *Brown v. Board of Educ.*, 349 U.S. 294, 301 (1955).

34. OLIVER WENDELL HOLMES, *THE COMMON LAW* 96 (1881).

although the point has been made also in the context of products liability, another depictionalist bastion.³⁵

In the end I am rooting for rationalism to gain ground in the ongoing struggle that characterizes the dialectic.³⁶ Rationalism enjoys considerable influence in most areas of American law—it pervades the regulation of commerce, for instance, and underlies public law as well as the law of torts—and the rationalist nature of these doctrines contributes to their legitimacy by helping to make them intelligible.³⁷ Any law-based coercion that cannot be rendered intelligible through words, as exists in obscenity and forfeiture and accident law and other fields of doctrine, probably needs to be reformed.³⁸ Only rationalism can meet the glorious demand that liberal political theorists call “public justification”—that is, the requirement that all legal rules ought to withstand a query of how they advance the public good.³⁹ Laws in an enlightened and democratic society ought to be amenable to explanation. When it finally gives depictionalism its due, rationalism will gain power to improve the law.

I

THE DIALECTIC BETWEEN DEPICTIONALISM AND RATIONALISM

The struggle of rationalism to supersede depictionalism is as old as any other Western intellectual or religious tradition. At the beginning of the common era Greek and Judeo-Christian thinkers became the first major participants in the representational dialectic. Other religions began to assert their “aniconism,” or aversion to the veneration of

35. See PETER W. HUBER, *LIABILITY* 161 (1988); Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469, 475-77 (1987). See generally Richard Overton, *An Arrow Against All Tyrants*, in *THE LIBERTARIAN READER* 121-22 (David Boaz ed., Free Press 1997) (1646) (arguing that the sovereign has the power only to act for the common good; because every man is “a king, priest and prophet,” he is entitled to a government of limited powers).

36. Philosophers warn that a dialectic is not a tug-of-war but rather an ongoing, restless relationship among negating, affirming, and transcending moments. See RICHARD I. BERNSTEIN, *PRAXIS AND ACTION* 20-21 (1971); cf. ALLEN W. WOOD, *HEGEL'S ETHICAL THOUGHT* 3 (1990) (attacking vulgarization of Hegelian dialectical method, especially through “grotesque jargon” and “ridiculous expository devices”). In this spirit, I have not taken sides, nor put money on one of two horses, but rather tried to inform a continuing relation that will remain dynamic. Neither side can vanquish the other.

37. On rationalist themes in American law, see, for example, EDWIN W. PATTERSON, *JURISPRUDENCE* 189-94 (1953) (noting social importance of making law intelligible to lay persons); Linda Ross Meyer, *Is Practical Reason Mindless?*, 86 GEO. L.J. 647, 674 (1998) (connecting “thinking” with the traditional legitimacy of law).

38. Cf. *Forfeiting Fairness*, N.Y. TIMES, Mar. 8, 1996, at A30 (“When the nation’s highest court displays indifference to unfair actions by government against people who have done nothing wrong, it invites cynicism about the institution and the justice system generally.”).

39. This demand permeates American law and politics. See STEPHEN MACEDO, *LIBERAL VIRTUES* 39-40 (1990); JOHN RAWLS, *A THEORY OF JUSTICE* 19, 144 (1971).

tangible images. Over the next two thousand years, rationalists moved the dialectic into new domains.

A. *Icons, Aiconism, and Iconoclasm*

Condemnation of idolatry—that is to say, hostility toward a type of depictionalism that endowed tangible objects with religious significance—has remained constant in Western theologies, while agreement about what constitutes idolatry has shifted. Judaism and Christianity have for many centuries asserted the truth of monotheistic abstraction. In antiquity, leaders of these faiths condemned pagan religion for its emphasis on earthly particulars like the wind and the rain, equating this taste for natural images with idolatry.⁴⁰ Debates between the two camps on the subject of depictionalism were recorded in the second and third centuries.⁴¹ These debates revealed that neither monotheism nor paganism could be equated with either depictionalism or rationalism. Moreover the Greeks, who simultaneously were “idolators” and framers of philosophical abstractions including the idea of divinity, claimed some of the ideological territory of monotheism while defending their pagan religion.⁴² For his contributions to the rationalist cause, one Greek philosopher, Xenophanes, has been credited with membership in a “religious Enlightenment” whose modern members include Kant and Feuerbach.⁴³

Later Christian history displayed the representational dialectic in its more famous struggles. In the eighth century, about four hundred years after church buildings began to display paintings of Christ and the saints, iconoclasts—“idol-smashers” opposed to the use of images—prevailed on the Byzantine monarchy to ban the veneration of images.⁴⁴ Christian defenders of icons retorted that since Christ was willing to become a man, images that showed the Logos as a physical, incarnated being were appropriate to the religion; neo-Platonist philosophers joined the fray, defending images as didactically necessary.⁴⁵

40. See generally HALBERTAL & MARGALIT, *supra* note 14 (discussing idolatry as a source of “error” in some ancient religious traditions); 2 ARNOBIUS OF SICCA, *THE CASE AGAINST THE PAGANS* 440, 452-80, 461, 499 (George E. McCracken trans., Newin Press 1949) (noting fourth-century Christian critique of pagan religion for its temples and images, associations of the rain with Jupiter, anthropomorphic conception of the winds, and sex differentiation among gods).

41. See W.H.C. Frend, *Mission Conversion: Proselytizing in the Religious History of the Roman Empire*, 48 *J. ECCLESIASTICAL HIST.* 302, 302-03 (1997).

42. See FREEDBERG, *supra* note 6, at 61 (crediting Greek philosophy for the beliefs that intellect outweighs sensory perception and that the deity cannot be represented in material form).

43. See HALBERTAL & MARGALIT, *supra* note 14, at 129-30.

44. See DANIEL J. SAHAS, *ICON AND LOGOS: SOURCES IN EIGHTH-CENTURY ICONOCLASM* 32-35 (1986).

45. See *id.* at 94-96; *Veneration of Images*, in 7 *ENCYCLOPEDIA OF RELIGION* 113 (Mircea Eliade ed., 1987).

Iconoclasm rocked the Church again during the Reformation and continued the representational dialectic. Sixteenth-century Protestant leaders, notably Ulrich Zwingli and Andreas Bodenstein von Karlstadt, declared that the Church had fallen “ankle-deep in the ‘filth’ of images, relics, altars, holy places, and miraculous hosts.”⁴⁶ Karlstadt’s 1522 pamphlet, “On the Abolition of Images,” also known as the *Abthung*, launched what has been called the Protestant theology of idolatry.⁴⁷ Iconoclastic violence followed these iconoclastic pronouncements. Image-smashing riots spread through France in the years 1560 to 1562,⁴⁸ and virtually every hamlet and city in the Netherlands shook with similar attacks in late 1566.⁴⁹ In England the sixteenth and seventeenth centuries witnessed great destruction in consequence of iconoclastic theology, beginning with the Reformation and continuing with Puritan hatred of Catholic aesthetics.⁵⁰ Idols did not remain smashed: following the tendency of depictionalism to withstand rationalist attacks, images survived the Reformation.⁵¹

Other religions have made a theological issue of depictionalism. Scholars have attempted to plot a continuum of beliefs about images among religious creeds, putting religions such as Islam that are hostile to images, or “aniconically inclined,” at one end and religions that favor images, such as Hinduism, at the other.⁵² But the task has proved difficult. Muslim hostility toward idolatry, for example, has not wiped out images but confined them to such places as architectural settings (such as bath tiles) and secular books; moreover, the Qur’an is equivocal on the subject, expressing hostility for “idolators” rather than idols.⁵³ Yahweh, the god that would not be seen, is nevertheless observed in his effects and manifestations.⁵⁴ Moreover, religions associated with statues

46. CARLOS M.N. EIRE, *WAR AGAINST THE IDOLS* 54-55 (1986).

47. *See id.* at 57-58 & n.19 (citations omitted).

48. *See id.* at 279-80.

49. *See* FREEDBERG, *supra* note 6, at 385.

50. *See* JOHN PHILLIPS, *THE REFORMATION OF IMAGES* 144 (1973).

51. This survival of Catholic images endured beyond the Catholic Church. *See generally* Raymond A. Mentzner, *The Persistence of “Superstition and Idolatry” Among Rural French Calvinists*, 65 *CHURCH HIST.* 220 (1996) (noting that conversions away from Catholicism did not eliminate old rites involving images in sixteenth- and seventeenth-century French peasant communities).

52. *See* *Veneration of Images*, *supra* note 45, at 101.

53. *See id.*

54. *See* CHRISTOPHER COLLINS, *READING THE WRITTEN IMAGE: VERBAL PLAY, INTERPRETATION, AND THE ROOTS OF ICONOPHOBIA* 34 (1991). The Hebrew word *Yahweh* is translated as “I am that I am,” *see Exodus* 3:14 (*THE SONCINO CHUMASH: THE FIVE BOOKS OF MOSES WITH HAPHTAROTH*, A. Cohen ed., The Soncino Press, 1947), connoting an existence that is completely inaccessible to the human senses. One scholar prefers to define Yahweh as “He is continuing to be,” and mentions another Hebrew name for God, *ehyeh asher ehyeh*, or “I will be that I will be.” Bernard Horn, *Spies, Sacrifices and Fringes*, 20 *ESSAYS ON LITERATURE* 31, 53 (1993). For a philosophical discussion of how God can be named without ever having been perceived, see

and images, such as the belief systems of ancient Egypt, Greece, and Rome, all went through episodes of iconoclasm.⁵⁵ Other creeds are of two or more minds on the question of images.⁵⁶ Established religions have oscillated for millennia. Neither depicted imagery nor pure abstraction conquers the other; religions waver on their doctrine of icons and aniconism.

As studied by the Israeli philosophers Moshe Halbertal and Avishai Margalit, the history of Western religion reveals a debate over the nature of "idolatry," and this debate mirrors the representational dialectic. Halbertal and Margalit identify a conceptual "chain of criticism of religion."⁵⁷ First monotheistic religions attack idolatry; next philosophically oriented authorities on monotheistic religions criticize "folk practitioners" for their "idolatrous assumptions and errors with respect to the divinity, especially on issues such as God's corporeality;"⁵⁸ the secular Enlightenment then criticizes religion generally for its dependence on rites and symbols; and finally the criticism of ideology attacks the secular Enlightenment for its dependence on a fiction of objectivity that yields idols in the form of imaginary reifications, such as nation, race, and class.⁵⁹ Each link in the chain of Western religious criticism perceives itself as more rational—because less depictionalist—than the earlier link that it attacks.⁶⁰ Yet depictionalism in religion and political thought endures.⁶¹

B. Political Economy

In the secular realm, developments in the area of political economy reveal the same desire to achieve progress by superseding depictionalism with rationalism.⁶² Capitalism and Marxism found a common target

Jerome I. Gellman, *Naming, and Naming God*, 29 RELIGIOUS STUD. 193, 216 n.40 (1993) (noting that YHVH, the direct transliteration of the Hebrew word often represented as "Yahweh," has no semantic meaning, according to one "strand of thinking in the Jewish tradition").

55. See FREEDBERG, *supra* note 6, at 389.

56. See *id.* at 62 ("Christians made images—even of their God—just like everyone else.").

57. HALBERTAL & MARGALIT, *supra* note 14, at 112.

58. *Id.* at 113.

59. See *id.* at 112-15. See also THE CONCISE ENCYCLOPEDIA OF WESTERN PHILOSOPHY AND PHILOSOPHERS 256 (J.O. Urmsen & Jonathan Rée eds., rev. ed. 1989) (stating that "[t]he post-modernist desire to escape the superstitions of a preceding epoch is not so much a break with traditional modernity, as a repetition of its oldest refrain").

60. One scholar goes further, arguing that the development of alphabets and the rise of literacy as a political and cultural force "subliminally coaxed users to be extremely intolerant of iconic systems and other beliefs in general." Leonard Shlain, *The Curse of Literacy*, UTNE READER, Sept.-Oct. 1998, at 71, 73. See generally LEONARD SHLAIN, THE ALPHABET VERSUS THE GODDESS (1998) (exploring implications of the triumph of words (or rationalism) over images (or depictionalism)).

61. See *infra* notes 295-298 and accompanying text.

62. Weber connected capitalism and the Reformation, arguing that the "powerful tendency toward uniformity of life, which today so immensely aids the capitalistic interest in the standardization of production, had its ideal foundations in the repudiation of all idolatry of the flesh." MAX WEBER,

in depictionalist beliefs,⁶³ deeming them vestiges of an obsolete past.⁶⁴ The political and economic ethos that accompanied industrialization in Europe and the United States claimed that money was a universal matrix by which a thing valued in the market—land, labor, consumer goods, intellectual property, fractional ownership of a business corporation—could be measured in terms of another valued commodity. In this ideology, any competing claim about the uniqueness of an object was at best primitive sentimentalism—if not a direct impediment to profit, as Henry Ford taught when he insisted in 1913 that his Model T plant use interchangeable parts.⁶⁵

Nineteenth-century developments in business history such as the large-scale separation of corporate ownership from control,⁶⁶ the proliferation of new contractual relationships,⁶⁷ the spread of stock and futures exchanges,⁶⁸ and the growth of an urban working class drawn from foreign countries and rural America⁶⁹ all testified to the power of abstraction over visible objects and traditions,⁷⁰ such as bartering⁷¹ and the family farm.⁷² Never defeated, depictionalism asserted itself alongside

THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 169 (Talcott Parsons trans., Charles Scribner's Sons 1930) (1920). See also EIRE, *supra* note 46, at 311-13 (using "rationalism" to link the revolutions of Copernicus and Calvin: "Faith was reasonable, it had to make sense.").

63. See *infra* notes 65-79 and accompanying text.

64. Philosophical affinities between Marxism and capitalism have been amply noted and studied. See, e.g., JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 26, 32-33 (1958) (discussing common ground of Marx and "the central tradition" of liberal capitalist political economics); KARL POLANYI, *THE GREAT TRANSFORMATION* 25 (1944) (arguing that devotion to the gold standard left "capitalists and socialists miraculously united. Where Ricardo and Marx were at one, the nineteenth century knew not doubt.").

65. See Drew Winter, *The Mass Production Revolution*, *WARD'S AUTO WORLD*, May 1996, at 101 (describing gains to Ford from interchangeable parts and the assembly line).

66. See ADOLF A. BERLE, JR. & GARDINER C. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 47 (1932).

67. During the nineteenth century, two major contractual contexts emerged in the United States: statutes began to permit married women to enter into contracts, and the abolition of slavery meant that servants all worked pursuant to employment contracts. See PATTERSON, *supra* note 37, at 410; cf. R.C. I. COCKS, SIR HENRY MAINE (1988) (discussing Maine's anthropological argument that (rationalist) contract supersedes (depictionalist) status as societies progress).

68. See JONATHAN BARRON BASKIN & PAUL J. MIRANTI, JR., *A HISTORY OF CORPORATE FINANCE* (1997); *THE NEW YORK STOCK EXCHANGE: THE FIRST 200 YEARS* (James E. Buck ed., 1992).

69. See Donald A. Hicks, *Revitalizing Our Cities or Restoring Ties to Them? Redirecting the Debate*, 27 U. MICH. J.L. REFORM 813, 815 (1994).

70. See generally ALFRED D. CHANDLER, JR., *THE VISIBLE HAND* 12 (1977) (relating nineteenth-century business developments to the inexorable force of the market).

71. See Lewis D. Solomon, *Local Currency: A Legal and Policy Analysis*, KAN. J.L. & PUB. POL'Y, Winter 1996 at 59, 74 (noting that barter was superseded by "the advent of paper currency").

72. See Yoav Kislev & Willis Peterson, *Prices, Technology, and Farm Size*, 90 J. POL. ECON. 578, 579 (1982) (relating decline of the family farm to increases in urban wages); see also Jim Chen, *The American Ideology*, 48 VAND. L. REV. 809, 828 (1995) (stating that the late twentieth century marks the decline of agriculture "as an autonomous enterprise and as a unique, independent way of life").

the triumphs of abstraction that characterized the Industrial Revolution in the United States. Ornate architecture, elaborate fashions in clothes and hairstyles, and conspicuous consumption marked the last two decades of the nineteenth century, making the abstraction of money visible and palpable.

From his vantage point in the middle of the nineteenth century, Karl Marx observed and attacked the tendency of capitalism to turn tangible entities into abstraction⁷³—a concept embedded in the Marxist term “alienation”—while sharing with capitalism a taste for abstract ideas powerful enough to defeat depictionalism. Building on the work of earlier philosophers including Locke and Adam Smith, who had characterized property as expressions of human personality, Marx argued that things were never completely external to man. Capital, for instance, is accumulated human labor rather than an object with independent meaning,⁷⁴ and a house is small or large only with respect to its surroundings and the perspective of its owner and onlookers.⁷⁵ Sensory perception deceives: objects to Marx were functions of political order, dependent on abstraction for their meaning. And because “any particular concept of property is relative, historically determined and ephemeral,”⁷⁶ a political and economic revolution has the power to effect not only distributive justice but reconceptions of physical subsistence.

This power of the abstract to become tangible, and the tangible abstract, was to Marx both lamentable and redemptive. What Marx called “the fetishism of commodities,” for instance, referred to a transformation whereby things become subjects and masters with human attributes, while persons, workers and capitalists alike, are divested of their personality.⁷⁷ Yet Marx could simultaneously attack the bourgeoisie for stripping human relationships of their “heavenly ecstasies,” oriented around religion and chivalry and sentiment, and substituting cold cash,

73. See HUGH COLLINS, *MARXISM AND LAW* 108-11 (1982) (outlining Marxist argument that to the bourgeoisie, commodities embody a false notion that human labor is fungible).

74. See KARL MARX, *CAPITAL* 155-65 (Ben Fowkes, trans. Vintage Books 1977); see also SHLOMO AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* 78 (1968); COLLINS, *supra* note 73, at 111.

75. See AVINERI, *supra* note 74, at 80.

76. *Id.* at 82.

77. See *id.* at 118. The complexities of Marxist “alienation” threaten to obscure this illustration of the representational dialectic. See MARX, *supra* note 74, at 163-77 (claiming that things are both masters and sources of misunderstanding). For purposes of understanding the dialectic I describe, it is of no moment which are more real, images or persons; what interests us is the facility by which one can be said to become, or substitute for, the other. See generally Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1872 (1987) (lamenting the law’s tendency to commodify, along the lines Marx proposed).

“the icy water of egotistical calculation.”⁷⁸ Thus, on the one hand, Marx thought capitalism embraced a foolish depictionalism, fetishizing things; on the other hand, he deplored the heartless rationalism of mercantile capitalism. Continuing the theme of rationalism superseding depictionalism, Marx contended that although capitalism had destroyed the concrete particulars of the past, the cure for this destruction was not a return to depictionalism but a more enlightened—and more thoroughly abstract—redemptive ideology.⁷⁹

Marxism and capitalism thus displayed common characteristics in their expressions of the representational dialectic. Like the iconoclasts who preceded them in theological realms, both shared a belief in a rationalist present and future that would supersede the depictionalist past.⁸⁰ Like aniconical religions, furthermore, Marxism and capitalism retained depictionalist sentiments and left unresolved their contradictory attitudes toward images.⁸¹ But these nineteenth-century versions of the dialectic were novel as well as familiar. The ambient ideal of progress gave new power to these conflicting rationalist faiths in the power of abstraction,⁸² while political and economic change expanded the representational dialectic beyond religion into the modern nation-state. At the turn of the new century, rationalism—always the aggressor—pressed on, finding new sites for the dialectic.

C. *Early Twentieth-Century Rationalism: The Modernist Project*

Rationalism found a power base in the work of Sigmund Freud, who extended the applications of rationalism to psychology, philosophy, sociology, and political theory. Freud found meaning in the objects found in fantasy and dreams, insisting that such images embody ideas and emotions too harsh for an individual to accept undisguised.⁸³

78. KARL MARX & FREDRICH ENGELS, *THE COMMUNIST MANIFESTO* 135 (Harold J. Laski ed., Pantheon Books 1967) (1888).

79. See SIDNEY HOOK, *MARX AND THE MARXISTS* 11, 31-32 (1955) (describing the Marxist political design); 1 RICHARD N. HUNT, *THE POLITICAL IDEAS OF MARX AND ENGELS* 212-13, 227-52 (1974) (describing Marxist agenda to overcome familiar institutions, including the state, the class system, the professions, divisions of labor, and “capitalist legality”).

80. See *supra* notes 57-62 and accompanying text.

81. On ambivalence toward images in various religions, see *supra* notes 53-56 and accompanying text. See also FREEDBERG, *supra* note 6, at 54 (using “The Myth of Aniconism” as a chapter title).

82. On the nineteenth-century culmination of the ideal of progress, see Bruce Mazlish, *Progress: A Historical and Critical Perspective*, in *PROGRESS: FACT OR ILLUSION?* 27, 31 (Leo Marx & Bruce Mazlish eds., 1996).

83. One example among many: Freud recounted treating a married woman for agoraphobia. The woman reported a dream in which she walked out of her home wearing a hat, which made her feel safe as she strolled past a group of men. Through discussion, Freud learned that the hat was shaped like a more splendid version of her husband’s scrotum, and concluded that it stood for her unfulfilled wish for sexual fulfillment from her husband, which would have made her feel safe from

Thus, a cigar might on rare occasions be just a cigar, but dream images stand for something else;⁸⁴ prayer to God is projection, or prayer to oneself.⁸⁵ Psychosexual anxiety, as Freud explained it, must be understood as yet another error of depictionalism. The child acquires misinformation from the sight of human genitals—most famously that his father, having a larger penis, will castrate him,⁸⁶ or that girls are children who have been maimed as punishment.⁸⁷ The false, or at least questionable, teachings of depictionalism contribute to neurosis, a condition that can be remedied only by rationalist treatments.⁸⁸

As feminist psychoanalysts and critics have pointed out, Freud's rationalist approach paradoxically privileged physical signifiers.⁸⁹ This paradox is ever-present within rationalism: the center of rationalism is neither its cogency nor the purity of its abstraction, but its attitude toward the physical object. Just as all religions, however aniconically inclined, depend on images, so too will rationalist ideology be caught in its depictionalist contradictions. Freud advanced the cause of rationalism not through his own rationality but by enlarging the territory that rationalism claimed for its own.

Following Freud, the rationalist quest moved to the visual arts.⁹⁰ Modern art in the twentieth century provided another venue in which

the danger of extramarital temptation. See SIGMUND FREUD, *THE INTERPRETATION OF DREAMS* 247-48 (A.A. Brill trans., Modern Library 1950) (1900).

84. See LAURENCE PORTER, *THE INTERPRETATION OF DREAMS: FREUD'S THEORIES REVISITED* 70 (1987) (likening dreams to "a rebus puzzle"); E.M. THORNTON, *THE FREUDIAN FALLACY* 216-20 (1984) (detailing dreams of Freud's patient, Dora K., and their interpretation by Freud).

85. See SIGMUND FREUD, *Totem and Taboo*, in 13 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 146-47 (James Strachey ed. & trans., Hogarth Press 1955) (1913). See generally LUDWIG FEUERBACH, *THE ESSENCE OF CHRISTIANITY* (George Eliot trans., Harper 1957) (1841) (pioneering theory of religion as projection).

86. See ALLEN ESTERSON, *SEDUCTIVE MIRAGE: AN EXPLORATION OF THE WORK OF SIGMUND FREUD* 58-60 (1993) (recounting case history of "Little Hans" and his father).

87. See SIGMUND FREUD, *Inhibitions, Symptoms, and Anxiety*, in 20 STANDARD EDITION OF THE COMPLETE PSYCHOLOGICAL WORKS OF SIGMUND FREUD 75, 123 (James Strachey ed. & trans., Hogarth Press 1955) (1926).

88. The "talking cure" understands a host of pathologies in terms of verbal expression. See Robert L. Russell, *Introduction to the Special Section on Multivariate Psychotherapy Process Research: Structure and Change in the Talking Cure*, 63 J. CONSULTING & CLINICAL PSYCHOL. 3 (1995). See also R.C. Tallis, *Burying Freud*, 347 LANCET 669, 670 (1996) (denouncing talking cure for its mischaracterization of physical organic ailments).

89. See LUCE IRIGARAY, *The Blind Spot of an Old Dream of Symmetry*, in SPECULUM OF THE OTHER WOMAN 13, 50-53 (Gillian C. Gill trans., Cornell Univ. Press 1985) (1974) (attacking views of Freud and Jacques Lacan concerning physical signifiers); GLORIA STEINEM, *What If Freud Were Phyllis?*, in MOVING BEYOND WORDS (1994) (satirizing Freud's misogyny). See also J.C. SMITH & CARLA FERSTMAN, *THE CASTRATION OF OEDIPUS: FEMINISM, PSYCHOANALYSIS, AND THE WILL TO POWER* 154-58 (1996) (arguing that Freudian symbolism is a device to assert that men, not women, possess generative power).

90. Writers had long identified a dichotomy between depictionalism and rationalism in the arts. See generally GOTTHOLD EPHRAIM LESSING, *LAOCOON: AN ESSAY ON THE LIMITS OF PAINTING*

literal depiction could be seen as a vestige of the unenlightened past. As the philosopher Arthur Danto argues, modernism began in artists' efforts to replace "cultural boundaries as artistically expressed" with "an aesthetic universal."⁹¹ One prominent figure in this movement was the impresario Hilla Rebay, founder of what became the Solomon R. Guggenheim Museum of Art, who asserted passionately that "art was progressive" and that in the twentieth century "contemporary artists had rid themselves of the need to reproduce the visual world. Non-objective painting, in which recognizable objects were completely eliminated, represented the summit of art."⁹² The art genre of which Rebay spoke became known as "abstract," over the protests of many practitioners who believed they were not abstracting from another source but instead creating anew.⁹³ Rebay herself preferred the German adjective *gegenstandlos*—free of objects—to describe her ideal.⁹⁴

More overtly than predecessor genres, modernist art also moved into the rationalist realms of psychology and politics. The spirit of modernism, Danto writes, urged museumgoers to see paintings not simply as surfaces "but as instruments for changing one's life."⁹⁵ Depictionalism, as always, fought back. Soviet authorities used Socialist Realism, a depictionalist posture, in resistance to the achievement of great Russian modernists like Kandinsky and Malevich;⁹⁶ Nazis called abstract art degenerate;⁹⁷ audiences and collectors continue to prefer figurative work.⁹⁸

AND POETRY (Edward Allen McCormick trans., Bobbs-Merrill 1962) (1766) (arguing that the visual and the verbal arts occupy separate and opposite domains). The innovation of modernism was to ascribe verbal-like traits, perhaps "arguments," to visual objects. For a summary and a refutation of the philosophical contention that visual images can argue, see David Fleming, *Can Pictures Be Arguments?*, ARGUMENTATION AND ADVOCACY, Summer 1996, at 11.

91. Arthur C. Danto, *Abstraction*, THE NATION, Apr. 8, 1996, at 42 (describing efforts of Van Gogh, Gauguin, Picasso, and Braque, among others, to incorporate other traditions into Western art and thereby blur the distinctions between separate cultures). See also REDNER, *supra* note 6, at 289-90 (calling Picasso "the foremost exponent of these time-travelers who plundered the museums and ethnological collections," and also noting eclectic sources behind the music of Stravinsky).

92. JOAN LUKACH, HILLA REBAY: IN SEARCH OF THE SPIRIT IN ART 82 (1983).

93. See *id.* at xiii.

94. See *id.* at xii.

95. Danto, *supra* note 91, at 44.

96. See *id.* at 42.

97. "Degenerate art" was not confined to abstraction—the Nazis attacked many other categories of art, including some figurative work—but twentieth-century abstract pioneers bore the brunt of this persecution. See 1 JOHN HENRY MERRYMAN & ALBERT E. ELSEN, LAW, ETHICS AND THE VISUAL ARTS 259-60 (2d ed. 1987); LYNN H. NICHOLAS, THE RAPE OF EUROPA 3-25 (1994).

98. For a jocular and satirical expression of the popular taste for figurative work, see PAINTING BY NUMBERS: KOMAR & MELAMID'S SCIENTIFIC GUIDE TO ART (Jo Ann Wypijewski ed., 1997) (offering a figurative painting titled "America's Most Wanted" composed in response to a 102-question survey of 1001 Americans that asked them what they liked in art); Jan F. van Rooij, *The Jungian Psychological Functions Sensing and Intuition and the Preference for Art*, 79 PSYCHOL. REP. 1216 (1996) (reporting psychological experiment that found strong majority preference for figurative

It would be inaccurate, however, to attribute benign politics to modernism and rationalism while relegating depictionalism to the Nazis and the Soviets. Political theorist Harry Redner argues that modernism “killed itself” by its inevitable alliance with totalitarianism: the attack on representation in art accompanied an attack on representation in politics—that is, on “representative democracy and tolerant liberalism;”⁹⁹ the tenet of *épater le bourgeois* sneered equally at parliaments and depiction. Redner goes so far as to assert that modernism must take some responsibility for the fashionable revolutionary violence he associates with Wagner, Bakunin, Brecht, Genet, and Foucault.¹⁰⁰ This stance may go too far—as I argue below, adherence to depictionalism too can oppress citizens and arm the state¹⁰¹—but Redner’s view of the struggle helpfully illuminates the political conflict between the two modes.

Over the centuries, the representational dialectic has taken many forms—some of them bloody. From the Egyptian rulers Akenaten and Tutankhamen, who ordered selected images destroyed,¹⁰² through the almost infinite number and variety of iconoclastic conflicts barely skimmed over in this Part, the struggle persists. Depictionalism continues to withstand the ambition of rationalism to achieve a preemptive, overarching knowledge by description—in law as well as in art, politics, social science, and religion. “What is representation?” Redner queries. “This question has preoccupied philosophers, theologians, epistemologists, logicians, aestheticians, psychologists, anthropologists, and more recently semioticians, and many other types of savant . . .”¹⁰³ In the next Part, I move to “other types of savant,” focusing on lawyers, judges, litigants, and legal academics, all of whom participate in the dialectic and underscore its political implications.

II

THE DIALECTIC IN AMERICAN LAW

As expressed in the law of obscenity, forfeiture, and accidents, the representational dialectic reveals patterns similar to those identified in Part I. In all three of these areas, and elsewhere, criminal and civil law doctrines focus on the presence of a physical thing—or, more precisely, the image of a physical thing¹⁰⁴—even though the law of crimes and

rather than abstract works of art); cf. Peter Landesman, *Reality Bites Back*, NEW YORK, Oct. 2, 1995, at 35 (describing demonstration at Whitney Museum by artists, critics, and writers protesting “too little exhibition space for figurative works”).

99. REDNER, *supra* note 6, at 292.

100. *See id.* at 291-93.

101. *See infra* Section IV.A.

102. *See* FREEDBERG, *supra* note 6, at 389.

103. REDNER, *supra* note 6, at 23.

104. I thank Steve Winter for clarifying this distinction to me in conversation.

torts concerns itself with redress for, and prevention of, harms to human beings.¹⁰⁵ All three illustrations inform a study of how rationalist reforms fail, and show the persistence of depictionalism in those areas of the law that purport to address behavior rather than images.

A. *Obscenity*

The American law of obscenity originates with a decision reported as *Sir Charles Sydlyes Case*.¹⁰⁶ During the Stuart restoration, in 1663, a crony of the King named Charles Sedley mounted the balcony of a London tavern and took off his clothes, while “haranguing his audience with antireligious epithets as he showered them with bottles of urine.”¹⁰⁷ Having employed force to cause unruliness, Sedley committed a crime at common law, writes constitutional scholar Laurence Tribe; but the new common law of obscenity identified Sedley’s nakedness, rather than his actions, as a breach of the peace.¹⁰⁸ Following this precedent, English common law created a new crime of obscenity.¹⁰⁹ The tradition took hold in the United States, where both statutes and common law went on to proscribe obscenity.¹¹⁰

A study of American judicial decisions, state and federal statutes, and academic commentary in the two centuries following the importation of English law shows a focus on material itself, literal and physical like the body of Sedley, with relative neglect of the harms and incentives that such material may occasion. Although American doctrine has used several criteria to identify what is obscene—and, over the last forty years, to identify what may support a prosecution for obscenity consistent with the First Amendment freedom of speech—these tests all have a

105. See *supra* notes 22-25 and accompanying text. I note another valuable insight from the Brooklyn Law School faculty: Bailey Kuklin has commented that rationalism might really be ascendant here, exploiting images of things for their power to shape assent, or as shorthand for an array of harms that would otherwise be difficult to catalogue and repair. Accord HARRY M. CLOR, *OBSCENITY AND PUBLIC MORALITY* (1969) (arguing that too much concern about the harm of obscenity would hobble legal measures against it). In this view, images are tools rather than ends in themselves, and rationalism only pretends to cede power to depictionalism. While this assessment of the dialectic holds some appeal, I believe that depictionalism has more strength than Professor Kuklin has claimed. In obscenity, for instance, activists disagree profoundly about the harms of certain works, yet are united by their desire to suppress. If the image were merely a rhetorical and tactical device—the means to an end—then the end in question would be clearer. See *infra* notes 155-161 and accompanying text.

106. 1 Keble 620, 83 Eng. Rep. 1146 (K.B. 1663).

107. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 905 (2d ed. 1988).

108. See *id.*

109. The new crime was only fitfully enforced. See ATTORNEY GENERAL’S COMM’N ON PORNOGRAPHY, FINAL REPORT 233-43 (1986) [hereinafter FINAL REPORT] (describing reluctance of British common law courts to punish the publication of sexually explicit materials, a tendency that held strong until the middle of the nineteenth century).

110. Federal statutes were first passed in the nineteenth century. See TRIBE, *supra* note 107, at 906.

point in common: their preoccupation with the *essence* of challenged material.¹¹¹ Insofar as most of the law of obscenity pertains to crimes,¹¹² this indifference to social harm seems peculiar.¹¹³ The domain of criminal law—or any law—does not readily invite such a metaphysical quest for the essence of things.

Depictionalist preoccupation with the thing—a book, magazine, film, videotape, rather than risks, harms, norms, principles, or causal relationships—has provoked rationalist dissent. Judges have questioned the utility of a law of obscenity that does not much care about direct danger.¹¹⁴ Scholars have attempted to demonstrate the harmful nature of obscene works, thereby defending a depictionalist doctrine in rationalist terms.¹¹⁵ Despite these writings, obscenity law has kept faith with depictionalism. Judicial efforts to hold prosecutors to a harm standard are located at the margin of doctrine—in dissenting opinions and obscure lower-court decisions.¹¹⁶ Writers who present evidence of harm to justify the legal category of obscenity do not concede that this evidence is

111. For a concise statement of the essence approach, see *Roth v. United States*, 354 U.S. 476, 481 (1957) (“[O]bscenity is not protected by the freedoms of speech and press.”).

112. See FRANKLIN MARK OSANKA & SARA LEE JOHANN, SOURCEBOOK ON PORNOGRAPHY 313 (1989) (noting that “obscenity laws are criminal, not civil, in nature”). The authors go on, however, to discuss close analogues from civil law. See, e.g., *id.* at 387-89 (referring to zoning-law category of “adult” businesses); *id.* at 395-99 (discussing “indecentcy” in broadcast law, following *FCC v. Pacifica Foundation*, 438 U.S. 726, 751-55 (1978)).

113. See *supra* note 23 and accompanying text. Scholars trace the harm requirement to John Stuart Mill’s *On Liberty*. See CLOR, *supra* note 105, at 129-35; see also ROBINSON, *supra* note 23, at 11 (summarizing sources about the harm requirement); cf. MODEL PENAL CODE § 2.11(1) (1962) (providing that consent by a victim is a defense when it vitiates the harm of the offense). For a return to Mill in the context of pornography, see *infra* note 152 and accompanying text.

114. For a sampling found in only one case, see *Roth v. United States*, 354 U.S. 476, 495 (1957) (Warren, C.J., concurring) (“It is not the book that is on trial; it is a person. The conduct of the defendant is the central issue, not the obscenity of a book or picture.”); *id.* at 497 (Harlan, J., concurring and dissenting) (attacking belief that obscenity is a “genus of speech and press,” and “classifiable as poison ivy is among other plants”); *id.* at 510 (Douglas, J., dissenting) (“If we were certain that impurity of sexual thoughts impelled to action, we would be on less dangerous ground in punishing the distributors of this sex literature. But it is by no means clear that obscene literature, as so defined, is a significant factor in influencing substantial deviations from the community standards.”).

115. See CLOR, *supra* note 105, at 136-74 (discussing social science findings about harm); FINAL REPORT, *supra* note 109, at 37, 40-52 (listing harms to health and morals that justify eradication of pornography); OSANKA & JOHANN, *supra* note 112, at 130-40 (summarizing claims regarding harms of pornography, and difficulties of substantiating these claims through clinical research).

116. See *supra* note 114 (noting judicial asides and dissents in *Roth v. United States*). The strongest judicial phrasing of a harm-based obscenity test that I have encountered declares that material can be deemed legally obscene “only where there is a reasonable and demonstrable cause to believe that a crime or misdemeanor has been committed or is about to be committed as the perceptible result of the publication and distribution of the writing in question.” *Commonwealth v. Gordon*, 66 Pa. D. & C. 101, 156 (1949).

necessary to the justification.¹¹⁷ Mainstream obscenity doctrine, in sum, has generated but not heeded rationalist queries.

Whence depictionalism? For centuries the common law (and also European civil law)¹¹⁸ lived without any obscenity doctrine—and then Jacobean England inaugurated a law of obscenity, whose core remains unchanged. Explanations of origin are obscure. Morris Ernst and Alan Schwartz have speculated that laws against obscenity arose during the growth of education and literacy, when powerful élites who controlled society feared that somehow the masses “were less resistant to the corrupting influence of books than the well-to-do.”¹¹⁹ Obscenity law, according to Ernst and Schwartz, began with a declaration that an entity like a book has separate properties depending on who consumes it: *You're too common to protect yourself from corruption; my sister is too pure to protect herself from corruption; I'd just shrug it off.* A rationalist, by contrast, expects the state to explain how and why obscene entities harm a “public” that has not been proved to divide along lines of temperament or circumstance.

Seen in terms of the representational dialectic, the chronological development of obscenity law is notable for its steady rejection of rationalism. A short history may aid this discussion. The strongest illustration of Ernst and Schwartz's fear-of-common-folk hypothesis is an English case decided in 1868, *The Queen v. Hicklin*.¹²⁰ *Hicklin* held that once the essence of challenged material is identified, the court need not concern itself with “the traditional questions of cause and effect, of speech and resultant end.”¹²¹ This essence of a suppressible work, according to *Hicklin*, is a “tendency . . . to deprave and corrupt those whose minds are open to such immoral influences.”¹²² Following the

117. See CLOR, *supra* note 105, at 196-97 (arguing that if the law waits until bad acts “have been done or are about to be done,” the level of force necessary to deter these acts will have to be too draconian).

118. See generally J.G.M. van Dijk, *The Function of Fables in Graeco-Roman Romance*, 49 MNEMOSYNE 513, 515 (1996) (noting prevalence of “obscenity” in Greek and Roman literature). Ad hoc censorship, of course, has been practiced in civil-law jurisdictions for many centuries. See Norman St. John-Stevás, *The Church and Censorship*, in “TO DEPRAVE AND CORRUPT. . .” 89, 91-105 (John Chandos ed., 1962). But legal doctrines against obscenity—rules of law that bind the sovereign and offer guidance to the citizenry—have been slow to form, and many governments have a history of toleration coexisting with their history of censorship. See, e.g., Mathias Reimann, *Prurient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J.L. REF. 201, 201 (1988) (noting that German law lacks a legal concept of “obscenity”); *id.* at 232 (describing quantity of publicly displayed female nudity that German citizens tolerate); cf. Robin Morgan, *Planetary Feminism: The Politics of the 21st Century*, in *SISTERHOOD IS GLOBAL* 1, 22 (Robin Morgan ed., 1984) (noting that governments of Cuba and Poland have produced pornography for commercial distribution).

119. MORRIS L. ERNST & ALAN U. SCHWARTZ, *CENSORSHIP* 18-19 (1964).

120. 3 L.R.-Q.B. 360 (1868).

121. Note, *More Ado About Dirty Books*, 75 YALE L.J. 1364, 1368 (1966).

122. 3 L.R.-Q.B. at 371 (Cockburn, C.J.).

Hicklin approach, the criminal courts of Massachusetts punished book-sellers¹²³ for distributing *An American Tragedy*¹²⁴ and *Strange Fruit*,¹²⁵ one assistant county prosecutor in Detroit censored more than a hundred books because he feared his daughter might come across passages in them;¹²⁶ the Ninth Circuit approved a customs seizure of the *Tropics* novels of Henry Miller¹²⁷ because nothing in the books had "the grace of purity or goodness."¹²⁸

But starting in the early twentieth century *Hicklin* had become embarrassing to several cosmopolitan, well-lettered federal judges, particularly the notables of New York. Learned Hand, frowning at *Hicklin*, wondered in 1913 "whether in the end men will regard that as obscene which is honestly relevant to the adequate expression of innocent ideas" and whether "we are even to-day so lukewarm in our interest in letters or serious discussion as to be content to reduce our treatment of sex to the standard of a child's library in the supposed interest of a salacious few."¹²⁹ In *United States v. One Book Called "Ulysses,"*¹³⁰ a decision published twenty years later, Judge John Woolsey repudiated *Hicklin* on three points: first, Woolsey wrote, an obscene work must "tend" to provoke not depravity but rather sexual impulses or thoughts; second, the work must be examined in its entirety, not read selectively for lubricious passages; and third, the relevant consumer is not a corruptible child or priapic brute but rather "what the French would call *l'homme moyen sensuel*"—the average or reasonable man.¹³¹ In 1956, Jerome Frank scoffed at *Hicklin*'s prudishness, finding censorship an offense to the memory of such robust Founders as Jefferson and Franklin.¹³²

The noted repudiations of Hand, Woolsey, and Frank have received fair credit for moving obscenity law away from its Victorian mix of authoritarianism, sexual repression, and condescension toward the lower orders toward a more sophisticated view of the world.¹³³ Judges and policymakers generally agree that most readers are not children; that

123. See Note, *supra* note 121, at 1369.

124. THEODORE DREISER, *AN AMERICAN TRAGEDY* (1925).

125. LILLIAN EUGENIA SMITH, *STRANGE FRUIT* (1944).

126. See William B. Lockhart & Robert C. McClure, *Why Obscene?*, in "TO DEPRAVE AND CORRUPT..." 51, 56 (John Chandos ed., 1962).

127. HENRY MILLER, *TROPIC OF CANCER* (1934); HENRY MILLER, *TROPIC OF CAPRICORN* (1939).

128. Note, *supra* note 121, at 1370 (quoting *Besig v. United States*, 208 F.2d 142, 145 (9th Cir. 1953)).

129. *United States v. Kennerley*, 209 F. 119, 120-21 (S.D.N.Y. 1913) (Hand, J.).

130. 5 F. Supp. 182 (S.D.N.Y. 1933), *aff'd sub nom. United States v. One Book Entitled Ulysses by James Joyce*, 72 F.2d 705 (2d Cir. 1934).

131. 5 F. Supp. at 184-85.

132. See *United States v. Roth*, 237 F.2d 796, 806 (2d Cir. 1956) (Frank, J., concurring), *aff'd*, 354 U.S. 476 (1957).

133. See Lockhart & McClure, *supra* note 126, at 54-58; Note, *supra* note 121, at 1370-73.

adults should have access to descriptions of sexual relations that use words, pictures, metaphors, and other necessary means; and that suppression of material deemed obscene can threaten art, politics, science, and indeed all of culture. When the Supreme Court crushed *Hicklin* with the declaration in *Roth v. United States* that the new constitutional test for obscenity was “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest,”¹³⁴ it owed a debt to Hand, Woolsey, and Frank that the Brennan opinion for the Court did not fully acknowledge.

Yet of the progress-minded jurists from New York, only Frank had expressed any skepticism about the search for essence.¹³⁵ Hand wanted merely to liberalize the search; Woolsey had no interest in constitutional tests. Surely, though, if the First Amendment limits the regulation of obscenity—as the Supreme Court insisted in *Roth* and its sequelae¹³⁶—then obscene works must be “speech,” albeit speech of a dubious kind, and free speech law generally asserts that only danger can justify suppression. Rejecting this precept, the search for essence follows an “exclusion” approach: courts consider whether a work by its inherent nature contains a property that alone justifies excluding it from First Amendment protection. When courts find this essence, they must permit the state to suppress.¹³⁷ This outlook retains the curious and unarticulated premise that a thing has a nature.

Ernst and Schwartz paraphrase this point as a constitutional law lament. In determining whether a work is obscene, they complain,

we need not give it the benefit of the tests and standards that are required to be applied to the other kinds of speech—Holmes’s “clear and present danger” or the Brandeis variant—all of

134. *Roth v. United States*, 354 U.S. 476, 489 (1957).

135. See 237 F.2d at 801-06 (2d Cir. 1956) (Frank, J., concurring). See also *id.* at 811 (noting that one obvious effect of erotic material is the arousal of desire, which is necessary for the continuation of the human race and therefore valuable to the state).

136. The *Roth* test was reformulated in later decisions. See *Miller v. California*, 413 U.S. 15, 24 (1973) (referring to lack of “serious literary, artistic, political or scientific value”); *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Attorney General of Massachusetts*, 383 U.S. 413, 418 (1966) (using the phrase “utterly without redeeming social value”); see also *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974) (limiting the range of permissible local variation within “contemporary community standards”).

137. As a student commentator elaborates, the “exclusion” approach—the insistence that certain verbal expressions are not speech for purposes of First Amendment protection—may be traced to Zechariah Chafee’s *Free Speech in the United States*. See Note, *supra* note 121, at 1366-69. “The only sound explanation of the punishment of obscenity and profanity,” wrote Chafee, “is that the words are criminal, not because of the ideas they communicate, but like acts because of their immediate consequences to the five senses.” *Id.* at 1367 n.19 (quoting ZECARIAH CHAFEE, JR., *FREE SPEECH IN THE UNITED STATES* 149-50 (1941)). Cf. CATHARINE A. MACKINNON, *ONLY WORDS* 17 (1993) (insisting that pornography is not speech but rather a device that aids masturbation).

which require some proof of causal relation to antisocial behavior. In other words, we first decide whether some writing is obscene and then we say that because it is obscene it is not entitled to any of the tests used to judge whether other kinds of writings are entitled to the protection of the Constitution.¹³⁸

A rationalist contrast, sketched out by Harry Kalven, Jr. to inaugurate the new *Supreme Court Review*,¹³⁹ likely reached several Justices of the Supreme Court in the years following *Roth*. Having no particular investment in rationalism, Kalven appeared more baffled by depictionalism than hostile to it. "Toward what dangers was obscenity legislation directed?"¹⁴⁰ he queried in 1960, soon after the Supreme Court got into the business of constitutionalizing obscenity disputes. Had Kalven stopped short of asserting that if there are no dangers, there ought to be no crime.

"Analysis," continued Kalven in response to his rhetorical question, "reveals four possible evils: (1) the incitement to antisocial sexual conduct; (2) psychological excitement resulting from sexual imagery; (3) the arousing of feelings of disgust and revulsion; and (4) the advocacy of improper sexual values. All present difficulties."¹⁴¹ They do indeed. Evil 1 on the Kalven list, as I mentioned, lay virtually unexamined. Evil 2 seems to mean tumescence—a physical expression that a reader enjoys while consuming sexually explicit materials.¹⁴² Putting aside the question of whether "psychological excitement" is one of the "evils" that warrant application of the criminal law, Evil 2 is inconsistent with Evil 3, which declares that obscenity turns a man off rather than on: Kalven refers to causation of harm with the word "arousing" but what obscenity causes, according to Evil 3, is "disgust and revulsion" rather than an erection. The words "advocacy" and "improper" in Evil 4 beg all the questions on the table. In what sense do films and pictorials advocate?¹⁴³ What results from such advocacy? Whose sexual values are proper?

Following *Roth* and the Kalven article, Supreme Court case law cleared up some of this doubt by explaining "value" in terms of social

138. ERNST & SCHWARTZ, *supra* note 119, at 205.

139. Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1.

140. *Id.* at 3-4.

141. *Id.* Kalven adds, "Presumably what is meant is a physiological (sexual) response to a picture or the written word. And one suspects that the real fear is one that everyone, except Anthony Comstock, has been too reticent to mention, the fear of masturbation." *Id.* at 4 n.21.

142. I assume Kalven had a male reader in mind; his diction supports that inference. But a contemporary to *The Metaphysics of the Law of Obscenity* contended that "one presumed motive for censorship" is the male desire to "protect" female readers from arousal that might weaken their resistance to seducers. See ERNST & SCHWARTZ, *supra* note 119, at 249.

143. Cf. Fleming, *supra* note 90, at 11 (contending that images cannot argue, in part because no negation of their "argument" is possible).

utility¹⁴⁴ and identifying, albeit vaguely, an affronted “community” that consists of more than ignorant prudes.¹⁴⁵ Another post-*Roth* case forged the concept of “pandering,” a rationalist notion that finds materials that are not inherently obscene to become obscene through the manner in which purveyors distribute them.¹⁴⁶ And the Court has suggested that the “serious value” criterion, rendering a work protected, is a tacit statement about causality: serious value redeems, obscenity debases.¹⁴⁷ Yet obscenity law has never grappled with the causal questions that Justice Harlan, Judge Frank, Professor Kalven and other writers have raised.¹⁴⁸ Instead it continues to cling to “essence” and “exclusion”: Because obscenity is what it is, it may be regulated without any attention to cause and effect.¹⁴⁹

Accordingly, one finds in the pornography debate—the site of most contemporary disputes about obscenity—a “morality” justification of censorship that conflicts famously with “the feminist perspective;”¹⁵⁰ the familiar emphasis on essence appears on both sides of this conflict. Religious leaders have attacked pornography with claims that it causes harm to the spirit (to them pornography “arrests personal development,” “distorts the beauty and goodness of human love,” and “erodes the general moral fiber”)¹⁵¹ reminiscent of all that John Stuart Mill thought was none of the business of a liberal state.¹⁵² Worried about the radical-right power to silence and oppress women, anti-pornography feminists struggle to look at pornography in a way that affirms the

144. See *Miller v. California*, 413 U.S. 15, 24 (1973).

145. See *id.* at 30-32 (noting relative sophistication of the “community” in Las Vegas and New York); see also OSANKA & JOHANN, *supra* note 112, at 319 (surveying application of “community standards”).

146. See FREDERICK F. SCHAUER, *THE LAW OF OBSCENITY* 80-84 (1976) (discussing *Ginzburg v. United States*, 383 U.S. 463 (1966)).

147. See *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 63-64 (1973).

148. One writer indicates that the constitutionalization of obscenity law did not create an opportunity for rationalist influence: she describes the United States Constitution as “moralist” rather than “causalist;” in other words, the Constitution prefers absolutist statements to beneficial consequences. See Christie Davies, *How Our Rulers Argue About Censorship*, in *CENSORSHIP AND OBSCENITY* 9, 17-22 (Rajeev Dhavan & Christie Davies eds., 1978).

149. “We will permit what we will permit,” explained Zechariah Chafee. See Lockhart & McClure, *supra* note 126, at 70.

150. See OSANKA & JOHANN, *supra* note 112, at 255-65. On divisions within “the feminist perspective,” see *id.* at 266-84.

151. *Id.* at 258.

152. See JOHN STUART MILL, *ON LIBERTY* 13 (Currin V. Shields ed., Library of Liberal Arts 1956) (1859) (“[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.”). Contemporary religious leaders do advert to the harmful effects of pornography, yet these arguments are generally placed as subordinate to a larger complaint about spiritual deterioration. See Varda Burstyn, *Introduction*, in *WOMEN AGAINST CENSORSHIP* 1, 1-3 (Varda Burstyn ed., 1985); OSANKA & JOHANN, *supra* note 112, at 258-62.

splendor of its contrast, "erotica."¹⁵³ These overlapping yet contrary political agendas have together achieved some success in increasing public disapproval of pornography,¹⁵⁴ but in their strongly divergent agendas they demonstrate the gap between rationalist and depictionalist versions of obscenity law. A rationalist pornography law—absent in the United States and everywhere else—would focus first on a harm, and then identify those objects that conduce to it. The depictionalist version that prevails instead agrees that a thing is pornographic; activists use this essence only later to establish the harm of their choice.

One can observe the dialectic at work by reviewing endorsements of suppressing obscenity and pornography. Roman Catholic canon law has denounced obscenity as part of a wider condemnation of "heretical and schismatical books, books supporting divorce, dueling, suicide, or which evoke spirits, advocate magic, etc."¹⁵⁵ Harry Clor and Ernest van den Haag maintain that censorship is necessary to respect continuity, tradition, and stabilizing forces in society.¹⁵⁶ Andrea Dworkin condemns pornography because, she says, pornography begets murder, torture, racist violence, harassment of women and children, and forced prostitution.¹⁵⁷ The psychiatrist Park Dietz claims that pornography ought to be suppressed because it teaches its consumers "sexual disinformation."¹⁵⁸ Henry Hudson, chairman of the Attorney General's Commission on Pornography, has suggested that laws against pornography would aid the right side of the battle between federal law enforcement and organized crime.¹⁵⁹ A German commentator professes his concern that

153. Although a distinction between the two cannot be drawn with precision, "erotica" seems to connote nonviolence, egalitarian participation, female agency, and a cheerful atmosphere: sexual encounters seen as playful or joyous or tender, without overt aggression or dominance by one participant over another. The most famous expression of this contrast is GLORIA STEINEM, *Erotica vs. Pornography*, in *OUTRAGEOUS ACTS AND EVERYDAY REBELLIONS* 219 (1983).

154. See Anita Bernstein, *Better Living Through Crime and Tort*, 76 B.U. L. REV. 169, 185-86 (1996) (noting gains of anti-pornography effort in the battle over public opinion). For a summary of disputes among feminists about working in alliance with right-wing moralists, see KATHARINE T. BARTLETT & ANGELA P. HARRIS, *GENDER AND LAW* 654-55 (2d ed. 1998).

155. St. John-Stevas, *supra* note 118, at 106-07.

156. See CLOR, *supra* note 105, *passim*; Ernest van den Haag, *Quia Ineptum*, in 'TO DEPRAVE AND CORRUPT...' 111 (John Chandos ed., 1962). Clor works from the perspective of political theory, finding public morality affirmed in the condemnation of obscenity, see CLOR, *supra* note 105, at 48-61; van den Haag works eclectically, referring to sociology and anthropology, see van den Haag, *supra*, at 113-14, as well as psychoanalytic theory: to him censorship is a compromise "between the original wish to indulge infantile, anal, oral and ultimately all sexual desires, and the later wish to control them." *Id.* at 122.

157. See Andrea Dworkin, *Pornography Is a Civil Rights Issue for Women*, 21 U. MICH. J.L. REFORM 55, 56-57 (1988).

158. Among this "disinformation" are the notions that sex never coexists with love or marriage or procreation, and that sexual encounters routinely include fetishistic costumes, bizarre body piercings, extravaginal ejaculation, and total strangers or blood relatives as partners. See FINAL REPORT, *supra* note 109, at 42-44.

159. See *id.* at 32.

pornography jeopardizes human dignity.¹⁶⁰ These divergent assertions about harm all purport to address the same kind of material.

Of course, everybody could be right: obscene materials might threaten both traditional gender boundaries *and* the liberation of women; they might repulse *and* arouse; they might foster mechanical and imitative sexual practices *and* teach deviance; they might advocate “improper sexual values”¹⁶¹ and thereby raise a threat that the state could regulate consistent with the First Amendment *and* not be words at all, out of the range of First Amendment protection. Or, alternatively, some assertions about the causation of harm could be right and others wrong. The merits of various rationalist arguments do not concern us here. For purposes of identifying a representational dialectic in obscenity law, we need note only the proliferation of conflicting causal propositions that swirl around one point: obscenity within a thing *per se* defines and justifies an area of criminal-law regulation. Criminal law contains no exception to the harm requirement as vast as this triumph of depictionalism.

B. Forfeiture

At an oral argument in November 1995, Justice Stephen Breyer flew the rationalist flag. “What policy does it serve? What purpose does it serve? What’s the theory . . . ?” he demanded of Larry Roberts,¹⁶² an assistant state’s attorney arguing for the respondent in *Bennis v. Michigan*.¹⁶³ At issue in *Bennis* was civil asset forfeiture. Tina Bennis had challenged a Michigan forfeiture statute as unconstitutional on the ground that it lacked an innocent owner defense, and Justice Breyer wanted Michigan to justify its power to punish an “innocent” with the forfeiture of her asset, in this case a clunky Pontiac worth less than \$600.¹⁶⁴

The record shows that, consistent with the history of the dialectic, Roberts responded passively. He did not defend depictionalism or

160. See Reimann, *supra* note 118, at 226.

161. See Kalven, *supra* note 139, at 4.

162. See Transcript of Oral Argument, Nov. 29, 1995, at 51, *Bennis v. Michigan*, 516 U.S. 442 (1996) (No. 94-8729), available in Westlaw, 1995 WL 712350.

163. 516 U.S. 442 (1996).

164. John Bennis had been arrested after a police officer observed him engaged in a sex act with a prostitute in the Pontiac; his wife Tina Bennis, a homemaker, had bought the automobile using earnings from baby sitting. Husband and wife owned the Pontiac jointly. The arrest took place in a Detroit neighborhood notorious for street prostitution paid for by suburbanites like Mr. Bennis. Pursuant to an abatement statute, Michigan authorities seized the Pontiac. See *Michigan ex rel. Wayne County Prosecutor v. Bennis*, 527 N.W.2d 483, 485-86 (Mich. 1994). A trial judge approved the forfeiture despite the absence of proof that Tina Bennis had known about her husband’s detour on the way home from work. See *id.* at 486. The Michigan Supreme Court and the United States Supreme Court both permitted the forfeiture to stand.

engage his rationalist critic in an argument that questioned the need for a "policy" or "purpose."¹⁶⁵ Also consistent with this history, depictionalism survived the attack—inconclusively, as usual, and by a narrow margin.¹⁶⁶ Innocent propertyholders may continue to suffer detriment from government officials without the safeguards of constitutional criminal procedure. Civil asset forfeiture, the doctrine that focuses on things as distinct from their owners, endures as an absolute embarrassment to rationalism.¹⁶⁷

Forfeiture law permits the government to take property in a civil proceeding.¹⁶⁸ State forfeiture laws abound,¹⁶⁹ and law enforcement task forces have written model acts,¹⁷⁰ but both commentary and data-gathering have focused on the comprehensive set of federal civil forfeiture laws and federal case law,¹⁷¹ and my discussion relies on this familiar record. As many commentators have noted, the civil-law status of most asset forfeiture gives the government several procedural

165. See Linda Greenhouse, *Justices to Hear Wife's Appeal over Property Forfeiture*, N.Y. TIMES, Nov. 30, 1995, at B13 (reporting that Roberts "struggled to frame an answer").

166. Both the Supreme Court and Michigan Supreme Court decisions would have come out in favor of Tina Bennis if just one vote had been different. See *Bennis v. Michigan*, 516 U.S. 442 *passim* (1996) (expressing the Justices' sentiment that this case was very close).

167. See HYDE, *supra* note 17, at 1 (asserting that current forfeiture law was "resurrected, like some jurisprudential Frankenstein monster, from the dark recesses of past centuries"); *id.* at 71 (describing root of forfeiture as "a ridiculous legal fiction"); Leslie A. Hakala, Book Note, *Opposing Forfeiture*, 106 YALE L.J. 1319, 1320 (1997) (calling origins of forfeiture "senseless" and "irrational"); *Forfeiting Fairness*, *supra* note 38, at A30 (warning that unprincipled forfeiture law "invites cynicism" about the legal system).

168. Property can also be forfeited through criminal procedures. See, e.g., 21 U.S.C. § 853(p) (1994) (allowing for forfeiture of "substitute property" equivalent in value to forfeitable property); Anti-Drug Abuse Act of 1986, Pub. L. No. 99-570, § 1153, 100 Stat. 3207, 3207-13 (amending RICO statute, 18 U.S.C. § 1963, to provide for pretrial restraint of assets, which are later subject to forfeiture). For an analysis of federal criminal forfeiture law, see Terrance G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. SCH. L. REV. 255, 264-68 (1994).

169. See, e.g., *supra* note 164 (discussing Michigan statute); ARIZ. REV. STAT. ANN. §§ 1-253, 13-2314(N), 13-4301-4315 (West 1995) (expanding the reach of civil forfeiture); N.Y. C.P.L.R. § 1310(4) (McKinney 1997) (providing for forfeiture of "instrumentality of a crime"). All states except Iowa and Vermont have forfeiture laws. See Eric Blumenson & Eva Nilsen, *Policing for Profit: The Drug War's Hidden Economic Agenda*, 65 U. CHI. L. REV. 35, 110 n.285 (1998).

170. See COMMISSION FORFEITURE REFORM ACT (President's Comm'n on Model State Drug Laws 1993); MODEL ASSET FORFEITURE ACT (1991).

171. Federal forfeiture began in 1789, with the authorization to seize ships and cargo for customs laws violations. See George Fishman, *Civil Asset Forfeiture Reform: The Agenda Before Congress*, 39 N.Y.L. SCH. L. REV. 121, 122 (1994). Long before the Emancipation Proclamation, federal law provided for the forfeiture of certain slave ships. See Act of Mar. 22, 1794, ch. 11, 1 Stat. 347. Federal forfeiture law moved into drug trafficking with the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, §§ 408, 413, 84 Stat. 1236, 1265 (codified as amended at 21 U.S.C. §§ 848, 853 (1994)). For an overview of federal civil forfeiture law, see 1 U.S. DEP'T OF JUSTICE, CRIMINAL DIV., ASSET FORFEITURE OFFICE, FORFEITURES (1984). Civil asset forfeiture is big business for the United States government: net deposits in the Asset Forfeiture Fund totaled \$555.7 million in 1993, causing a House Judiciary Committee lawyer to remark in print that "Congress is not going to get rid of a \$500 million cash cow." Fishman, *supra*, at 124, 137.

advantages vis-à-vis a putative wrongdoer. First, the seizure provides the government with *in rem* jurisdiction, useful in cases where the wrongdoer is not subject to *in personam* jurisdiction.¹⁷² Of more value to the government are rules about the burden of proof. Property may be seized on “probable cause” that it is “guilty;”¹⁷³ the owner who wants his property back later has the burden to prove that it is “innocent,” under a more stringent preponderance-of-the-evidence standard.¹⁷⁴ The civil nature of forfeiture also means that double-jeopardy, due-process, and excessive-fines constitutional protections for property owners apply shakily, if at all,¹⁷⁵ and collateral estoppel doctrine does not preclude forfeiture even after the owner is acquitted of the crime in question.¹⁷⁶ Moreover, as Tina Bennis learned and as Congressman Hyde has documented, innocent owners often lose their property to civil asset forfeiture.¹⁷⁷

Some commentators divide property subject to civil forfeiture into three categories—“contraband,” “proceeds,” and “instrumentalities”—with the implication that these three descriptions each convey a “taint” that distinguishes things as forfeitable.¹⁷⁸ The labels indicate

172. See *The Brig Ann*, 13 U.S. (9 Cranch) 289 (1815) (Story, J.). But see *Reed v. The Yaka*, 373 U.S. 410, 419 n.2 (1963) (Harlan, J., dissenting) (decrying *in rem* liability without *in personam* liability as “a gross misapplication of a fiction”).

173. See 1 DAVID B. SMITH, PROSECUTION AND DEFENSE OF FORFEITURE CASES ¶ 11.01 at 11-10 (1998); see also *The Palmyra*, 25 U.S. (12 Wheat.) 1, 14 (1827) (Story, J.) (noting that in admiralty forfeiture, “the offense is attached primarily to the thing”). Little evidence is necessary. For example, hearsay can support a forfeiture. See *United States v. \$129,727*, 129 F.3d 486, 494 (9th Cir. 1997); *United States v. 4492 South Livonia Rd.*, 889 F.2d 1258, 1267 (2d Cir. 1989); *United States v. No. 14-I, Estate St. John*, 899 F. Supp. 1415, 1418 (D. V.I. 1995).

174. See Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y.L. SCH. L. REV. 311, 313 (1994) (discussing the allocations of burdens of proof).

175. Compare *Austin v. United States*, 509 U.S. 602 (1993) (applying Double Jeopardy Clause to some forfeitures) with *United States v. Ursery*, 518 U.S. 267, 277-83 (1996) (holding that forfeiture is not a second punishment); compare *Miller v. United States*, 78 U.S. (11 Wall.) 268, 304-06 (1871) (upholding civil forfeiture of property belonging to Confederate rebels, and rejecting Due Process challenge) with *United States v. \$49,576 U.S. Currency*, 116 F.3d 425, 428 (9th Cir. 1997) (raising due process concern in dicta). On excessive fines, see *United States v. 6040 Wentworth Ave. S.*, 123 F.3d 685, 687-89 (8th Cir. 1997) (discussing uncertainty and conflicting legal standards). In a recent 5-4 decision, the Supreme Court struck down one forfeiture as an excessive fine. See *United States v. Bajakajian*, 118 S. Ct. 2028 (1998). Writing for the Court, Justice Thomas distinguished the forfeiture of cash, at issue in *Bajakajian*, from the forfeiture of a tangible object that might have been an “instrumentality.” *Id.* at 2036 n.9.

176. See *United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 357-66 (1984).

177. See *Bennis v. Michigan*, 516 U.S. 442 (1996); LEONARD LEVY, A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY at x (1996). Congressman Hyde writes that eighty percent of persons who lose property pursuant to civil forfeiture are never charged with a crime. See HYDE, *supra* note 17, at 61-64.

178. Cheh, *supra* note 12, at 14; Eric N. Bergquist, Note, *Statutory In Rem Forfeiture, the Punishment of Innocent Owners and the Excessive Fines Clause: An Analysis of Bennis v. Michigan*, 116 S. Ct. 994 (1996), 76 NEB. L. REV. 155, 157 (1997). The principal distinction between civil forfeiture and criminal forfeiture is that civil forfeiture is “traditionally limited to property actually

rationalist bases for forfeiture. "Contraband," such as drugs or counterfeit currency, can be linked to public health and morals; the adage that a man should not profit from his own wrong explains "proceeds."¹⁷⁹ Mary Cheh pauses on "instrumentalities," however, which she defines as "properties that are used, or intended for use, to commit or facilitate a crime."¹⁸⁰ This category seems unbounded—the *Bennis* Pontiac, a condominium, a tract of land—and Professor Cheh finds nothing in "instrumentalities" law to stop the forfeiture of "whole neighborhoods where crime flourishes" and the confiscation of "every tenth house" wherever law enforcers want to encourage monitoring by citizen informants.¹⁸¹

Because of its stubborn resistance to rationalist demands like those of Justice Breyer, forfeiture stands as an extraordinary illustration of depictionalist perseverance. As one might expect, the provocative topic has inspired a host of commentary. A particular favorite of student notewriters,¹⁸² forfeiture law has also earned the ire of commentators interested in the boundary between civil and criminal law,¹⁸³ libertarians affiliated with the Cato Institute,¹⁸⁴ the criminal defense bar,¹⁸⁵ and

used to violate the law, whereas criminal forfeitures can include lawfully acquired and used property." Reed, *supra* note 168, at 268.

179. See Cheh, *supra* note 12, at 14-15. As Ronald Dworkin has pointed out, "[n]o man may profit from his own wrong" is not a true legal rule. See Ronald M. Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 26 (1967) (noting exceptions to the "rule" such as adverse possession).

180. Cheh, *supra* note 12, at 14. Justice Stevens had the same problem with "instrumentalities" in *Bennis*. See *Bennis*, 516 U.S. at 460-61 (Stevens, J., dissenting).

181. Cheh, *supra* note 12, at 17.

182. Among dozens of student writings in recent years, see Michael F. Alessio, Comment, *From Exodus to Embarrassment: Civil Forfeiture Under the Drug Abuse Prevention and Control Act*, 48 SMU L. REV. 429 (1995); Alejandro Caffarelli, Note, *Civil Forfeiture Hits Home: A Critical Analysis of United States v. Lot 5, Fox Grove*, 79 MINN. L. REV. 1447 (1995); Taline Festekjian, Note, *Civil Forfeiture and the Status of Innocent Owners After Bennis v. Michigan*, 37 B.C. L. REV. 713 (1996); Erik Grant Luna, Note, *Fiction Trumps Innocence: The Bennis Court's Constitutional House of Cards*, 49 STAN. L. REV. 409 (1997); Stacy J. Pollock, Note, *Proportionality in Civil Forfeiture: Toward a Remedial Solution*, 62 GEO. WASH. L. REV. 456 (1994).

183. See Cheh, *supra* note 12; Mary M. Cheh, *Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, 42 HASTINGS L.J. 1325 (1991); Sean G. Alexander, Note, *The Civil-Criminal Distinction in Ohio's Forfeiture Laws*, 54 OHIO ST. L.J. 1463 (1993); Robert E. Edwards, Comment, *Forfeitures—Civil or Criminal?*, 43 TEMP. L.Q. 191 (1970); Janeice T. Martin, Note, *Final Jeopardy: Merging the Civil and Criminal Rounds in the Punishment Game*, 46 FLA. L. REV. 661, 663 (1995).

184. See TERRANCE G. REED, AMERICAN FORFEITURE LAW: PROPERTY OWNERS MEET THE PROSECUTOR (Cato Inst., Policy Analysis No. 179, Sept. 29, 1992); Pilon, *supra* note 174; Reed, *supra* note 168.

185. See *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the Committee on the Judiciary of the House of Representatives*, 105th Cong. 56 (1997) (statement of Gerald B. Lefcourt, President-Elect, National Association of Criminal Defense Lawyers); Brief Amicus Curiae of the National Association of Criminal Defense Lawyers in Support of Petitioner, *Bennis v. Michigan*, 516 U.S. 442 (1996) (No. 94-8729), available in Lexis, 1994 U.S. Briefs 8729.

members of Congress, notably Henry Hyde.¹⁸⁶ Much of what these people say and write falls loosely in the rationalist camp. Critics contend that forfeiture, a vestige of magical thinking and pre-scientific blame of the inanimate, cannot be reconciled with American traditions of punishing only wrongful conduct and enforcing procedural guarantees for individuals. Amid this uniformity, a small number of commentators attempt to deal "rationally" with forfeiture law, rather than merely label it irrational. As we will see, commentators who address civil asset forfeiture in rationalist terms ultimately emphasize its depictionalist essence.

One may dispense quickly with most published defenses of the civil forfeiture status quo, as they amount to little more than a brief for law enforcement prerogatives.¹⁸⁷ Testifying in 1997 before the House Judiciary Committee, Stefan Cassella of the U.S. Justice Department recounted that forfeiture has effected desirable ends:¹⁸⁸ if not for forfeiture, one criminal might have thwarted a restitution order by depleting his savings; another miscreant impacted by Justice Department forfeiture had been hiding, unextraditable, in Colombia; a third man, if given the long leash of due process, would have been able to move his money into a foreign bank account.¹⁸⁹ But seizure is not the same as forfeiture;¹⁹⁰ and the Cassella examples can serve to defend only seizure. The remainder of Cassella's case for civil forfeiture, even more anecdotal, describes a happy alchemy: By the magic of forfeiture, marijuana farms turn into bucolic retreats for troubled city children; crack houses become residences for poor women undergoing drug treatment; and vacant lots held by crooked banks bloom into parkland.¹⁹¹ Cassella stops short of suggesting that, in the utilitarian paradise of current forfeiture law, my house might make a nice little outbuilding for the Internal Revenue Service, although nothing in his argument would preclude such

186. See HYDE, *supra* note 17; see also Asset Forfeiture Justice Act, H.R. 3347, 103d Cong. (1993) (introduced by Congressman John Conyers).

187. See, e.g., Terrence P. Farley, *Asset Forfeiture Reform: A Law Enforcement Response*, 39 N.Y.L. SCH. L. REV. 149, 161 (1994) (describing satisfaction with forfeiture laws within the law enforcement community); see also HYDE, *supra* note 17, at 10 (quoting prosecutors' praises of forfeiture); LEVY, *supra* note 177, at 149-59 (arguing that law enforcers support forfeiture because they have a financial stake in it).

188. See *Civil Asset Forfeiture Reform Act: Hearing on H.R. 1835 Before the Committee on the Judiciary of the House of Representatives*, 105th Cong. 61 (1997) (statement of Stefan D. Cassella, Assistant Chief, Asset Forfeiture and Money Laundering Section, Department of Justice, Criminal Division) [hereinafter Cassella, Statement].

189. See *id.*; see also Stefan D. Cassella, *Establishing Probable Cause for Forfeiture in Federal Money Laundering Cases*, 39 N.Y.L. SCH. L. REV. 163, 173 (1994) (arguing that courts can determine whether money was "involved in" illegal transactions). But see Andrew Schneider & Mary P. Flaherty, *Drugs Contaminate Nearly All the Money in America*, PITT. PRESS, Aug. 12, 1991, at A6 (stating that 96% of U.S. currency in circulation has been involved in illegal drug transactions).

190. See Pilon, *supra* note 174, at 332.

191. See Cassella, Statement, *supra* note 188.

a forfeiture.¹⁹² It is true, as Mary Cheh has conceded, that a few physical entities, such as auto “chop shops,” have a presence distinct from their owners—almost a kind of *mens rea* in themselves—and forfeiture of such places can discourage confederates from carrying on criminal activities there after the owners go to prison.¹⁹³ But rationalism is still unsatisfied: How can the odd anecdote or exception support a body of law that insists on the criminality and moral taint of things?¹⁹⁴

In contrast to the cheerful rationalism that Cassella expresses— forfeiture is good because it increases aggregate happiness—libertarians Donald Boudreaux and A.C. Pritchard propound a dark, cynical rationalism.¹⁹⁵ To Boudreaux and Pritchard, the law of civil forfeiture is such thoroughgoing nonsense that only an extreme form of public choice analysis—a rationalist device—can explain it. Boudreaux and Pritchard see forfeiture as a project that law enforcement authorities advance to promote their self-interest. In the American political arena, the ill-organized population at risk of having goods forfeited can never prevail against powerful government officials.¹⁹⁶ Officialdom wants to amass forfeited goods and cash because it can use their value to augment law enforcement budgets.¹⁹⁷ This revenue escapes attention in the political process, and citizens end up with the big-government bureaucracy they might well despise if they understood it.¹⁹⁸

The consequences, as Boudreaux and Pritchard explain, are unfortunate. For example, law-abiding residential tenants pay for forfeiture in higher rent because rational landlords who know that their properties are vulnerable to forfeiture will pass on these expected costs to lessees.¹⁹⁹ As for law enforcement, officials invest too much effort in crimes where the chance of significant forfeiture is high, and too little where it is low. Opinion polls report that Americans want vigorous enforcement of laws

192. Cf. HYDE, *supra* note 17, at 7 (speculating that the House of Representatives post office might be forfeitable because of drug dealing there).

193. See Cheh, *supra* note 12, at 16.

194. See generally *Various Items of Personal Property v. United States*, 282 U.S. 577, 581 (1931) (calling forfeited property “guilty and condemned as though it were conscious instead of inanimate and insentient”).

195. See Donald J. Boudreaux & A.C. Pritchard, *Civil Forfeiture and the War on Drugs: Lessons from Economics and History*, 33 SAN DIEGO L. REV. 79 (1996).

196. See *id.* at 85-86.

197. See *id.* at 84-85; see also Blumenson & Nilsen, *supra* note 169, at 63-64 n.103 (quoting directives from Justice Department supervisors ordering more forfeiture); Naftali Bendavid, *Asset Forfeiture, Once Sacrosanct, Now Appears Ripe for Reform*, LEGAL TIMES, July 5, 1993, at 1 (describing “marching orders” at Justice Department’s Asset Forfeiture Section: “Forfeit, forfeit, forfeit. Get money, get money, get money”).

198. See Boudreaux & Pritchard, *supra* note 195, at 85-86; see also Blumenson & Nilsen, *supra* note 169, at 98-99 (arguing that the war on drugs is stoked by law enforcers’ greed and public incomprehension).

199. See Boudreaux & Pritchard, *supra* note 195, at 85-86 & n.16.

that threaten nonconsenting parties—especially violence and fraud—but law enforcers would rather pursue drug traffickers, who can deliver “personal benefits for the agents.”²⁰⁰ Drug kingpins buy their way out of incarceration through forfeiture-based plea bargaining, while impoverished low-level “mules” go to prison.²⁰¹ Incentives for drug-law violators who choose among criminal alternatives are equally pernicious. Why deal in marijuana when you can lose your automobile, no more and no less, for the more lucrative crack cocaine?²⁰² Add another fact—the tendency of high-priced drugs to increase violent behavior among those who buy and sell them—and it becomes likely that forfeiture also increases the problem of violent crimes committed without calculation.²⁰³

Boudreaux and Pritchard extend their rationalism into their study of the history of forfeiture. Many writers have been taken with such arcana as the biblical commandment to kill a goring ox as a wrongdoer,²⁰⁴ the ancient Greek practice of putting inanimate objects on trial,²⁰⁵ and especially deodand, the oldest method of forfeiture and the only one under English law that did not require conviction of the owner.²⁰⁶ Under deodand, an instrument that caused the death of a person was forfeited to the Crown.²⁰⁷ Boudreaux and Pritchard say deodand is silly: “the superstition that inanimate objects can be culpable for harming humans has been discarded with the advance of science.”²⁰⁸ Consistent with this brisk rationalism, the authors go on to say that deodand historically amounted to a minor share of the English law of *in rem* forfeiture; the basic, functional justification for *in rem* forfeiture was the admiralty

200. *Id.* at 91; see also Cheh, *supra* note 12, at 43 (noting that along the I-95 drug corridor in Florida, drug agents choose to stop southbound vehicles in the belief that they contain forfeitable cash, while choosing to ignore northbound vehicles in the belief that they contain drugs, of no value to the agents).

201. See Blumenson & Nilsen, *supra* note 169, at 71-73.

202. See Boudreaux & Pritchard, *supra* note 195, at 92, 200.

203. See *id.*

204. See Exodus 21:28 (THE SONCINO CHUMASH: THE FIVE BOOKS OF MOSES WITH HAPHTAROTH, A. Cohen ed., The Soncino Press 1947); Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 TEMP. L.Q. 169 (1973).

205. See Marilyn A. Katz, *Ox-Slaughter and Goring Oxen: Homicide, Animal Sacrifice and Judicial Process*, 4 YALE J.L. & HUMAN. 249, 269-70 (1992).

206. See HOLMES, *supra* note 34, at 24-25 (discussing deodand); Boudreaux & Pritchard, *supra* note 195, at 93.

207. The Supreme Court associated deodand with forfeiture. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.16 (1974). For references to deodand in the forfeiture literature, see Boudreaux & Pritchard, *supra* note 195, at 94; Finkelstein, *supra* note 204, at 170; Luna, *supra* note 182, at 417; James R. Maxeiner, Note, *Bane of American Forfeiture Law—Banished at Last?*, 62 CORNELL L. REV. 768, 771 (1977).

208. Boudreaux & Pritchard, *supra* note 195, at 95.

problem of absent owners, and forfeiture should therefore be limited primarily to situations where the wrongdoer cannot be reached.²⁰⁹

The analysis is masterful. In the best rationalist tradition, Boudreaux and Pritchard expose the perversity of civil asset forfeiture. Equally consistent with the dialectical tradition, however, they cannot defeat depictionalism, because they cannot account for the appeal of "superstition" within doctrine. Collective action problems help explain why the forfeited-upon do not unite to advance their interests, but do not explain why courts, legislators, and the public all accept this bureaucratic rent-seeking. Notwithstanding the cries about senselessness, forfeiture must somehow make sense. Understanding forfeiture depends on the depictionalist belief that things are not exactly commensurable with rationalist devices like money and punishment.

Another rationalist engagement with forfeiture law—an attempt at economic analysis of civil asset forfeiture—unintentionally illustrates the incompatibility of forfeiture and rationalism.²¹⁰ The student commentator Catherine Cerna argues that because forfeiture takes valued property away from an owner, it should be considered a punishment, even though it falls under civil law²¹¹ and even though the Supreme Court has stopped short of endorsing this proposition.²¹² When seen as a punishment, forfeiture must be proportionate to the harm it seeks to address. Using an "external cost index," therefore, Cerna proposes a formula to calculate the maximum dollar amount that can be forfeited for a particular crime. The formula includes the magnitude of the crime, the probability of conviction, and the per capita cost of enforcement, as well as a multiple for the sake of deterrence.²¹³

Ignoring as it does the entire set of existing criminal sanctions while insisting that forfeiture is a criminal sanction, this proposal appears peculiar. Cerna concedes that her version of forfeiture adds an extra measure of penalty to those wrongdoers who happen to have

209. See *id.* at 119.

210. See Catherine Cerna, Note, *Economic Theory Applied to Civil Forfeiture: Efficiency and Deterrence Through Reallocation of External Costs*, 46 HASTINGS L.J. 1939 (1995).

211. See *id.* at 1939-43, 1950-54.

212. See *Austin v. United States*, 509 U.S. 602 (1993) (holding, by a divided Court, that a rule of proportionality limited the quantity of forfeiture that could be imposed, thus suggesting, but not holding, that *in rem* forfeiture implicates constitutional guarantees of due process and safeguards against double jeopardy and excessive fines); see also *supra* notes 174-175 and accompanying text.

213. Cerna gives two hard-numbers examples. A Chicago tavern worth \$126,000 was once forfeited for the sake of a crime involving three kilograms of cocaine. See 4114 West North Avenue, 1990 WL 207377. Crunching her numbers, Cerna arrives at a maximum forfeitable amount of \$62,386.38. See Cerna, *supra* note 210, at 1962. In another case, one married couple lost their house because of 7.5 grams of marijuana growing in the garden. See *United States v. Cleveland Avenue*, 799 F. Supp. 824 (S.D. Ohio 1992). Cerna calculates that the maximum forfeitable amount should have been \$4,469.47. See Cerna, *supra* note 210, at 1962.

known assets.²¹⁴ Although the forfeited-upon would be better off in a Cerna regime than they are now, because they would forfeit less, Cerna dodges the task of making sense of forfeiture law in the context of criminal punishment. But the more basic deficiency of the proposal is found in two of its premises. Cerna believes that things equal money and money equals things, a claim that even economists have disproved.²¹⁵ She maintains that fines and forfeiture are the same;²¹⁶ inexplicably, however, criminal procedure safeguards apply to the former and not the latter. One cannot imagine any court, legislature, law enforcement agency, or group of citizens that would accept Cerna's proposal. This rejection originates not only in political biases of the debate that Boudreaux and Pritchard discuss,²¹⁷ but in the unintelligibility of forfeiture when policymakers deem tangible property exactly equivalent to money.

By way of conclusion, some concessions to the rationalist literature on forfeiture are in order. Forfeiture has yielded utilitarian advantages, as Cassella argues. Public choice theory, well detailed by Boudreaux and Pritchard, explains the powerful incentives that help to keep current doctrine in place. Cerna's formulations inform the question of what is at stake when assets are forfeited: her claim that things equal money and money equals things may be misguided, as I have argued; but it is in partial measure quite true, as is demonstrated by endowment-effects experiments in the laboratory²¹⁸ and auctions, markets, real property tax assessments, "book values" for used automobiles, and the like in life. Again, I stress dialectic rather than defeat. Much of forfeiture is amenable to rationalist explanation. The doctrine is depictionalist only in part and, consistent with the structure of a dialectic, rationalism exerts an ongoing and shifting influence on forfeiture law. Rationalist treatments of forfeiture law, in sum, shed light on a baffling corner of doctrine without fully explaining its refusal to conform to rationalism.

214. See Cerna, *supra* note 210, at 1955.

215. See, e.g., Kahneman et al., *supra* note 28, at 1327 (naming this lack of equivalence "the endowment effect").

216. See Cerna, *supra* note 210, at 1940. *But see* United States v. United States Coin & Currency, 401 U.S. 715, 718 (1971) (lending some support to Cerna's views: "[T]here is no difference between a man who 'forfeits' \$8,674 because he has used the money in illegal gambling activities and a man who pays a 'criminal fine' of \$8,674 as a result of the same course of conduct"). When the forfeited thing is not money but a thing accessible to sensory depiction, however, cases come out differently. See United States v. Bajakajian, 118 S. Ct. 2028 (1998); *supra* text accompanying note 175.

217. See *supra* notes 195-202 and accompanying text.

218. See *supra* note 28 (demonstrating students' partial willingness to trade tokens, cash, and coffee mugs in a market).

C. Accident Law

A final illustration of the representational dialectic emerges from accident law, which makes distinctions based on the entity harmed.²¹⁹ This focus on the image of a body or a thing—as a recipient or inflicter of injury—is a curious exception within tort law, whose rationalist commitments have been noted.²²⁰ Tort law is dominated by negligence,²²¹ and negligence illustrates rationalism more clearly, perhaps, than any other legal doctrine.

Whereas depictionalism focuses on separate images, rationalism embraces unifying concepts;²²² and as a rationalist device, negligence brings together an almost infinite array of images and behaviors. Courts redress the harms caused by wrongful adoption, deficient driving, educational malpractice, accountants' liability, slip-and-fall accidents, mixed-up pharmaceutical prescriptions, crossed telegraph messages, inadequate maintenance of residential buildings, careless entrustment of automobiles or weapons to third parties, mental health professionals' failure to warn third parties that their patients intend to do them harm, and other types of injuries under this unifying rubric. With its steady recourse to "prudence" and "due care," embodied in the reasonable man or person, negligence insists that accidents are conceptually (albeit only partially) alike.²²³ If mathematics can stand in for rationalism, then it is worth noting that the most famous bit of algebra in American law—a rule expressed in terms of three arithmetic variables—comes from the law of negligence.²²⁴

219. I have chosen the phrase "accident law" even though most writings about the problem of pure economic loss favor "tort law" or "negligence." "Tort law" includes intentional harm, whereas I wish to focus on unintended consequences. "Negligence" is underinclusive, giving short shrift to strict liability and the contracts theme present in many economic loss and products liability cases. See generally Harvey S. Perlman, *Interference with Contract and Other Economic Expectancies: A Clash of Tort and Contract Theory*, 49 U. CHI. L. REV. 61, 128 (1982) (describing the boundary between tort and contract).

220. See *supra* note 26 and accompanying text.

221. See ABRAHAM, *supra* note 26, at 47 ("most tort claims are for negligence"); JOSEPH W. GLANNON, *THE LAW OF TORTS* 61 (1995) ("Surely the most common basis for tort liability is negligent conduct.").

222. See *supra* note 19 (contrasting "the law of the horse" with doctrinal concepts such as contract and privacy).

223. Contrast the other two types of "tortious conduct," intentional torts and strict liability, which pay specific doctrinal attention to discrete categories of activity and injury. See RESTATEMENT OF TORTS, DIVISION ONE (1965) (enumerating "interests" protected by the law of intentional torts, such as the interest in freedom from harmful bodily contact and the interest in freedom from confinement); *id.* chs. 20 & 21 (1977) (outlining strict liability for certain acts of animals and for abnormally dangerous activities). By contrast Chapter 12, the negligence chapter, and Chapter 16, addressing causation as part of negligence, speak generally about concepts such as risk and foreseeability.

224. See *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (Hand, J.) (declaring that "if the probability be called P; the injury, L; and the burden, B; liability depends on whether B is less than L multiplied by P; i.e., whether $B < PL$ "). Some years before the *Carroll Towing* decision Hand had expressed a doubt about the Hand formula, worrying—as would a person given to

Rationalists, as we have seen, believe that legal remedies for wrongs ought to withstand an inquiry about their purpose.²²⁵ The rationalist vernacular relating to objectives and commitments in tort law—"compensation," "deterrence," "corrective justice," "public policy," and the like—will not permit liability to turn only on the fortuity of which entities injure or suffer injury. Nevertheless, accident law embraces exactly that fortuity.

Accident law is replete with depictionalist interest in physical images. For instance, invasions of land are covered by "trespass" when the invading entities, or the things damaged, are big and tangible, but by the less-favorable-to-plaintiffs law of "nuisance" when the invaders amount to small, intangible "particulate matter" that does not create tangible damage.²²⁶ The "impact" and "physical manifestation" rules for negligent infliction of emotional distress, still followed, bar plaintiffs whose emotional distress was not accompanied by contemporaneous physical contact or manifested in physical effects.²²⁷ Pure economic loss and products liability warrant particular attention, however, because of their relative importance within the law of torts.

1. *Pure Economic Loss.*

Courts compensate plaintiffs generously for accidental harm to their persons or their tangible property: the cymbal-like crash against a thing can herald the beginning of liability.²²⁸ Economic loss caused by wrongful conduct that is unaccompanied by damage to persons or property, however, generally lies uncompensated where it falls.²²⁹ The

depictionalism—whether it forced a choice between "incommensurables." *Conway v. O'Brien*, 111 F.2d 611, 612 (2d Cir. 1940).

225. See *supra* notes 134-137, 155-161 and accompanying text, and *infra* notes 236-257 and accompanying text.

226. See *Mock v. Potlatch Corp.*, 786 F. Supp. 1545, 1550-51 (D. Idaho 1992); *Maddy v. Vulcan Materials Co.*, 737 F. Supp. 1528, 1539-40 (D. Kan. 1990). One court has commented on the bad science underlying this distinction. See *Bradley v. American Smelting & Ref. Co.*, 709 P.2d 782, 788-89 (Wash. 1985) (reminding readers that $e=mc^2$).

227. See *Consolidated Rail Corp. v. Gotshall*, 512 U.S. 532, 547 n.5 (1994) (noting that "impact rule" persists in at least five states); *id.* at 549 n.11 (noting prevalence of "physical manifestation" rule).

228. Apparently, I am not alone in my taste for over-the-top metaphors about the economic loss anomaly. See *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107, 111 (N.J. 1985) (asserting that economic loss rule "capriciously showers compensation along the path of physical destruction").

229. Like many tort rules hostile to plaintiffs, this tradition gained acceptance with the help of Oliver Wendell Holmes. See *Robins Dry Dock & Repair Co. v. Flint*, 275 U.S. 303, 308-09 (1927) (declining to award damages in tort because plaintiff suffered no damage to his personal property). The first case to state the rule of no liability for economic injury unaccompanied by physical damage was decided in Britain. See *Cattle v. Stockton Waterworks Co.*, 10 L.R.-Q.B. 453, 457 (1875). A Connecticut case had reached a similar result in 1856. See *Connecticut Mutual Life Ins. Co. v. New York & New Haven R.R. Co.*, 25 Conn. 265 (1856) (holding that a railroad, which had negligently caused the death of an insured person, had no duty to avoid financial loss to an insurance company).

tangibility of a harmed interest—not the nature of a defendant’s conduct or any other criterion associated with rationalist policy—determines whether a plaintiff can receive compensation for wrongfully inflicted harm.²³⁰ Richard Epstein notes the anomaly:

The defendant is by hypothesis negligent; the plaintiff’s harm is typically foreseeable, even if the precise identity of the plaintiff is not; there are rarely any intervening acts or events sufficient to sever the causal connection; and typically there are no affirmative defenses based on the plaintiff’s misconduct. Why then the denial?²³¹

Well, to start, there are always our friends the floodgates.²³² Meritorious theory, one might say, but too many potential claims.²³³ This response is flimsy. Litigants can abuse or overuse any legal category, yet tort law retains categorization. Established tort categories such as products liability and negligent infliction of emotional distress once provoked courts and commentators to raise a false alarm about floodgates.²³⁴ But the dockets have proved moderate.²³⁵

The rule limiting recovery for economic loss in tort prevails today in the United States, although this ascendancy has been shaken. See Joseph W. Little, *Erosion of No-Duty Negligence Rules in England, The United States, and Common Law Commonwealth Nations*, 20 HOUS. L. REV. 959, 1007 (1983).

230. See *Mattingly v. Sheldon Jackson College*, 743 P.2d 356, 360 (Alaska 1987) (critiquing and rejecting the traditional economic damage no duty rule). Compare *Corpus Christi Oil & Gas Co. v. Zapata Gulf Marine Corp.*, 71 F.3d 198, 202 (5th Cir. 1995) (permitting claim for damages ascribed to property damage while rejecting claim ascribed to lost profits based on the inability to sell the property) with *Guido v. Hudson Transit Lines*, 178 F.2d 740, 742 (3d Cir. 1950) (holding that because the plaintiff could recover for the destruction of his truck, he could also recover lost profits attributable to that destruction). See also *Saratoga Fishing Co. v. Marco Seattle, Inc.* 69 F.3d 1432, 1445 (9th Cir. 1995) (classifying lost tuna catch as property damage); *Moorman Mfg. Co. v. National Tank Co.*, 414 N.E.2d 1302, 1308 (Ill. App. 1980) (pointing out that harms caused by a faulty herbicide have been classified judicially both as economic loss (no recovery) and by other courts as property damage (compensable)).

231. RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* 1354 (6th ed. 1995).

232. See David W. Robertson, *Recovery in Louisiana Tort Law for Intangible Economic Loss: Negligence Actions and the Tort of Intentional Interference with Contractual Relations*, 46 LA. L. REV. 737, 749-50 (1986) (listing eight “floodgates factors” that make courts adverse to recovery for economic loss).

233. See Ann O’Brien, *Limited Recovery Rule as a Dam: Preventing a Flood of Litigation for Negligent Infliction of Pure Economic Loss*, 31 ARIZ. L. REV. 959, 966 (1989) (expressing worry about “overloading the courts”); Kelly M. Hnatt, Note, *Purely Economic Loss: A Standard for Recovery*, 73 IOWA L. REV. 1181, 1182-83 (1988) (calling the rule “a convenient touchstone for limiting recovery”).

234. See *Winterbottom v. Wright*, 152 Eng. Rep. 402, 405 (1842) (Abinger, C.B.) (predicting “the most absurd and outrageous consequences, to which [the author of the opinion could] see no limit,” if privity were abandoned); see also *Womack v. Eldridge*, 210 S.E.2d 145 (Va. 1974) (establishing high hurdle of causation for plaintiffs who allege negligent infliction of emotional distress).

235. See Leslie Benton Sandor & Carol Berry, *Recovery for Negligent Infliction of Emotional Distress Attendant to Economic Loss: A Reassessment*, 37 ARIZ. L. REV. 1247, 1253-59 (1995) (discussing floodgates). See generally Bernstein, *supra* note 31, at 1543 (noting manageability of these two causes of action).

After pausing to comment briefly on the floodgates,²³⁶ Professor Epstein goes on to consider two answers to his question from the law and economics literature,²³⁷ the source of many rationalist efforts to deny the embarrassing presence of depictionalism in the law. The first "answer" comes from the English scholar William Bishop, who claims that rejecting economic loss claims is proper because in such cases there are usually no net social costs, merely "transfers" from one set of firms to another.²³⁸ Economist Mario Rizzo has refuted this argument,²³⁹ and in any event one does not need training in economics to spot the costs of finding alternative sources to meet one's needs after a breach, as well as the costs of precautions (in anticipation of an unremediable breach) that potential plaintiffs must take.²⁴⁰

The second law-and-economics "answer," almost equally unconvincing, comes from an argument by Professor Rizzo that the rule of no recovery is designed to encourage "channeling contracts."²⁴¹ Channeling contracts are indemnity agreements between those who suffer physical impact and those who suffer only economic loss from that impact.²⁴² According to Rizzo, courts want parties to enter into channeling contracts presumably because these contracts reduce the costs of litigation and therefore help to maximize wealth. The courts express this encouragement by siding with defendants where the plaintiff could have "channeled" but did not, Rizzo contends, and siding with plaintiffs when channeling would have been impossible.²⁴³

A couple of basic flaws mar this argument. First, neither tort nor contract law shares such heavyhanded enthusiasm for efficiency in general or indemnification and other "channeling" in particular; the common law frequently indulges in wasteful and expensive procedures.²⁴⁴ Courts have not cooperated reliably in the enforcement of even

236. See EPSTEIN, *supra* note 231, at 1330.

237. See *id.* at 1354-55.

238. See W. Bishop, *Economic Loss in Tort*, 2 OXFORD J. LEGAL STUD. 1, 4-5 (1982).

239. See Mario J. Rizzo, *The Economic Loss Problem: A Comment on Bishop*, 2 OXFORD J. LEGAL STUD. 197, 201-04 (1982).

240. See EPSTEIN, *supra* note 231, at 1355.

241. Mario J. Rizzo, *A Theory of Economic Loss in the Law of Torts*, 11 J. LEGAL STUD. 281, 282 (1982).

242. See *id.* at 291.

243. See *id.* at 292-99, 304-07.

244. See Richard A. Epstein, *Law and Economics: Its Glorious Past and Cloudy Future*, 64 U. CHI. L. REV. 1167, 1170 (1997) (noting that "efficient common law" hypothesis has not explained why judicial regulation has increased while transaction costs have declined, nor why statutes and the common law move in the same direction); Note, *The Inefficient Common Law*, 92 YALE L.J. 862, 869-73 (1983) (giving examples of inefficient rules, including some strict liability and "stop look and listen" rules for railroad crossings). These illustrations contradict some law and economics scholarship of the last twenty years, which has contended that common law development follows the prescriptions of efficiency analysis. See Paul H. Rubin, *Why is the Common Law Efficient?*, 6 J. LEGAL STUD. 51 (1977) (stating the efficiency thesis); Eric A. Posner, *Law, Economics, and*

simple indemnity contracts.²⁴⁵ Second, as Robert Rabin has pointed out, case law does not comport with the Rizzo "channeling" theory: courts have denied recovery to plaintiffs even where channeling would have been impossible.²⁴⁶

Yet this defense of a no-recovery rule has value, even though I would contend that Rizzo has exaggerated the strength of his argument. No empirical evidence supports Rizzo's claim that encouraging channeling is an efficient legal rule, nor that channeling is desirable for any other reason. Courts, accordingly, have no reason to endorse the Rizzo analysis when they decide pure economic loss cases. Despite this normative vacuum, however, and despite Professor Rabin's point about descriptive inaccuracy with respect to case law,²⁴⁷ the channeling theory does contribute to a richer description of the economic loss problem. The Rizzo metaphor evokes physical convergence, a flowing-together of disparate materials. The ephemera of pure economic loss can, through "channeling," merge into the solid thud of physical impact. Impact, being the weightier of the two, dominates and consumes pure economic loss.²⁴⁸

Some writers have stated this point in normative terms, arguing that this physical wallop should matter. One commentator contends that even though economic loss claims can resemble harms to persons or property, "laws of physics" support the current rule. In this view, an impact against person or property serves as a blunt instrument to keep down the number of plaintiffs who could otherwise, given the complexity of financial interrelation, bring an infinite number of tort claims.²⁴⁹ Also borrowing physics jargon, Fleming James contends that financial loss is part of a "chain reaction" best addressed by business planning and insurance.²⁵⁰

Economic loss, in both reported decisions and scholarship, thus wafts away from the tangibility of accident law.²⁵¹ With the coolness that

Inefficient Norms, 144 U. PA. L. REV. 1697, 1703-05 (1996) (presenting variations on this thesis); J.B. Ruhl, *The Fitness of Law: Using Complexity Theory to Describe the Evolution of Law and Society and Its Practical Meaning for Democracy*, 49 VAND. L. REV. 1407, 1433-34 (1996) (detailing view that the common law evolves, in quasi-biological fashion, toward efficiency).

245. See W. PAGE KEETON, ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 341 n.5 (5th ed. 1984).

246. See Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513, 1536 (1985).

247. See *id.*

248. Nowhere does Rizzo imagine a reverse phenomenon, whereby physical injuries channel themselves into economic loss claims.

249. See Perlman, *supra* note 219, at 71-72.

250. See Fleming James Jr., *Limitations on Liability for Economic Loss Caused by Negligence: A Pragmatic Appraisal*, 25 VAND. L. REV. 43, 45 (1972).

251. See Hartwin Bungert, *Compensating Harm to the Defective Product Itself—A Comparative Analysis of American and German Products Liability Law*, 66 TUL. L. REV. 1179, 1261 (1992) ("other

characterizes rationalism, a person may anticipate losing her money. Breached contracts, financial reversals, erratic supplies, and lapses of professional judgment in business plans fit calmly into the design of one's life. But a physical blow, even if "foreseeable," lands with impact. Its force is unexpected. A thing—the body or tangible property—gets hit. Following this predilection, courts not only favor personal and property injury claims at the expense of economic loss (where the plaintiff "could have known better"),²⁵² but also frown on contractual disclaimers of personal injury liability.²⁵³

By way of summary: Were accident law rationalist rather than depictionalist, it would choose one of two alternatives to the current rules that honor personal and property interests and disfavor "pure economic" interests. A rationalist accident law could accept the implicit Epstein invitation and inerge personal, property, and economic interests into the same rule, looking in all cases for rationalist landmarks such as breach of duty, proximate cause, and plaintiff's-conduct defenses.²⁵⁴ Alternatively, a rationalist could distinguish, as Richard Abel does, between injury to the human body and injury to "property."²⁵⁵ Under this approach, accidentally hurting someone's finances would be treated the same as accidentally hurting her airplane or warehouse: no recovery for either injury.²⁵⁶ In other words, one could choose either to expand or constrict liability for economic loss while remaining within the confines of rationalism. Current doctrine, classifying interests based on their tangibility, has rejected both of these rationalist courses.²⁵⁷

compensable harm is the floating element that carries harm to the product itself into the scope of recovery").

252. See *Pulte Home Corp. v. Osmose Wood Preserving, Inc.*, 60 F.3d 734, 739-40 (11th Cir. 1995) (maintaining that plaintiffs can protect themselves in contract negotiation); *Bocre Leasing Corp. v. General Motors Corp.*, 645 N.E.2d 1195, 1197 (N.Y. 1995) (asserting that the plaintiff should lose because during the negotiations over its contract with the defendant, it had "eschewed the very protections" it wanted later, in hindsight).

253. See *Henningsen v. Bloomfield Motors Inc.*, 161 A.2d 69, 89-95 (N.J. 1960) (striking down disclaimer); JAMES J. WHITE & ROBERT S. SUMMERS, *HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE* 485 (1980) ("[W]henever a consumer's blood is spilled, even wild horses could not stop a synpathetic court from plowing through the most artfully drafted and conspicuously printed disclaimer in order to grant relief.").

254. See *infra* note 257 (describing one judge's effort in that direction); *Mattingly v. Sheldon Jackson College*, 743 P.2d 356, 360-61 (Alaska 1987); *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107, 110-114 (N.J. 1985); *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979). See also William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 15 (1953) ("When we find a duty, breach and damage, everything has been said.").

255. See Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, 23 SAN DIEGO L. REV. 79, 101-06 (1986).

256. See *id.* at 101.

257. A recent case may be a straw in the wind of future change. After a lengthy exegesis on the economic loss rule, one district court opinion proposed to replace depictionalism with rationalism: "[A]pplication of the economic loss doctrine should not pivot on the type of damage suffered by the plaintiff (e.g. personal injury v. property damage), but rather should turn on

2. *Products Liability.*

Unless objects matter *qua* things, it is hard to explain the emergence and persistence of products liability as a separate legal category with unique rules.²⁵⁸ Nor can one understand why the doctrinal label is not "producer's liability" or "seller's liability," given that the defining trait of a products liability case is a defendant who regularly sells the type of thing in question.²⁵⁹ Rationalist rules from torts and contracts could have handled things-related injury without building a separate doctrine relating to injurious products. Yet depictionalism in this area has to date withstood rationalist incursions.

By now some recurring elements of the representational dialectic will look familiar to readers. From rationalist scholars we hear the cries about perversity and senselessness. They argue that products liability ought to be abolished because it adds nothing to negligence law, while adding plenty to confusion and error.²⁶⁰ Why, then, did the concept evolve? Politics, say some rationalists; "products liability" made a convenient banner first for social engineers like Judge Roger Traynor of the California Supreme Court,²⁶¹ and later for tort reformers who needed a handy scapegoat for the benefit of their liability-dodging corporate sponsors.²⁶² Reminiscent of the forfeiture rationales,²⁶³ this *realpolitik* answer cannot explain the appeal of "products liability," especially its resonance among constituencies with no agenda to advance. The dialectic goes on. Rationalists argue. Depictionalism survives.

Unlike obscenity, forfeiture, and pure economic loss, however, products liability has been a locus of well-coordinated, intellectually serious reform efforts that seek to replace depictionalism with rationalism. Many products liability reform measures emphasize rationalist goals like consistency and predictability,²⁶⁴ and despite the claims of

considerations such as the use of the product (e.g. commercial v. residential), characteristics of plaintiff (e.g. manufacturer v. private consumer) and policies implicated in the case (e.g. contract law v. tort law)." *Republic Ins. Co. v. Broan Mfg. Co.*, 960 F. Supp. 1247, 1252 (E.D. Mich. 1997).

258. See Bernstein, *supra* note 22, at 1-3.

259. See *id.* A similar question was first posed by the British comparativist J.A. Jolowicz. See J.A. Jolowicz, *Product Liability in the EEC*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY* 369, 370-76 (David S. Clark ed., 1990) (querying whether products liability amounts to liability for "producing" or "selling").

260. See Bernstein, *supra* note 22, at 3-6 (citing sources).

261. The Traynor landmarks are *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (Traynor, J., concurring) and *Greenman v. Yuba Power Prod.*, 377 P.2d 897 (Cal. 1962).

262. See Bernstein, *supra* note 22, at 4-6.

263. See *supra* text accompanying notes 196-209.

264. See Victor E. Schwartz & Mark A. Behrens, *Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now*, 64 TENN. L. REV. 595, 603 (1997) (stressing themes of consistency and predictability); Model Uniform Product Liability Act, 44 Fed.

some critics that proponents seek crudely to shift distributions of wealth in favor of manufacturers or insurers,²⁶⁵ this rationalist rhetoric should not be dismissed out of hand.²⁶⁶ Two prominent endeavors in products liability reform, the *Restatement (Third) of Torts*²⁶⁷ and a bill that passed both houses of Congress in 1996,²⁶⁸ illustrate the relation between a depictionalist legal category and rationalist inroads.

The products liability *Restatement*, which American Law Institute director Geoffrey Hazard has described as standing stalwart against “tendentious but unreasoned argumentation,”²⁶⁹ maintains a commitment to rationalism. Its boldest stance—a requirement that a plaintiff in design defect cases prove that “a reasonable alternative design” could have reduced or avoided foreseeable risks of harm²⁷⁰—emphasizes rationalist themes of negligence and risk-utility balancing.²⁷¹ The reasonable alternative design rule stands in opposition to its depictionalist counterpart, a “consumer expectations test” that finds an essence within every product, independent of alternatives, tradeoffs, or other expressions of ratiocination.²⁷²

Continuing down the rationalist path, the *Restatement* conceives of three types of “product defect”—manufacturing defect, design defect, and defect based on inadequate instructions or warnings—of which all but one, manufacturing defect, can be expressed in terms of negligence, a rationalist tenet.²⁷³ In a comment, the Reporters of the *Restatement* defend the anomalous treatment of manufacturing flaws by explaining that liability without fault for manufacturing defects will “foster several

Reg. 62,714, 62,716 (1979) (asserting that unpredictability stemming from inconsistencies among states in products liability law harms the availability of insurance).

265. See Ralph Nader, *Lawyers and Law Students as Tools of Democracy*, 17 WHITTIER L. REV. 3, 5 (1995) (referring to the influence of the “tortfeasors lobby”); Remarks of Prof. Larry Garvin, Transcript of the *Florida Tobacco Litigation Symposium: Fact, Law, Policy, and Significance*, 25 FLA. ST. U. L. REV. 737, 810-11 (1998) (calling tort and products liability reform “retrograde” and the product of “fierce advocacy”).

266. I elaborate in Anita Bernstein, *A Model of Products Liability Reform*, 27 VAL. U. L. REV. 637, 645-47 (1993).

267. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (1997) [hereinafter PRODUCTS LIABILITY RESTATEMENT].

268. See Common Sense Product Liability Legal Reform Act of 1996, H.R. CONF. REP. NO. 104-481 (1996); see also Jerry J. Phillips et al., *Foreword*, 64 TENN. L. REV. 557, 557 n.1 (1997).

269. Geoffrey C. Hazard, Jr., *Foreword* to PRODUCTS LIABILITY RESTATEMENT, *supra* note 267, at xvi.

270. See PRODUCTS LIABILITY RESTATEMENT, *supra* note 267, § 2, at 12.

271. See Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 U. MICH. J. L. REFORM 197, 204 (1997).

272. See Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995) (describing the *Restatement*'s choice of risk-utility over consumer expectations). See generally Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 386-88 (1988) (detailing theoretical complexities of economic analysis in risk-utility balancing).

273. See PRODUCTS LIABILITY RESTATEMENT, *supra* note 267, § 2, at 12.

objectives,” and in this way insist that even the most depictionalist element of their three-part division comports with rationalism.²⁷⁴

Attempting to take products liability law from depictionalism into rationalism, the *Restatement* attempts a transformation comparable to the famous Fall of the Citadel.²⁷⁵ That great fall traditionally is seen as a rationalist triumph²⁷⁶—Cardozo’s logic overcoming an archaic privity rule and its “vague and imperfectly defined” exceptions²⁷⁷—but as usual depictionalism had a later, if not the last, laugh: “products liability” is arguably more depictionalist than “privity of contract.”²⁷⁸ So too does the *Restatement* espouse rationalism while ultimately affirming the separate nature of product-caused injury and, thus, the unique nature of tangible entities.

The second endeavor in reform, the effort to enact national products liability reform, has hewed more closely to a rationalist line. In its iteration as the Common Sense Product Liability Legal Reform Act of 1996, which Congress passed in March 1996 and President Clinton vetoed the following May,²⁷⁹ federal products liability reform proclaimed various “findings” about the current liability regime. These findings included arbitrariness, inconsistency, adverse effects on consumers, harms to international competitiveness, and burdens on interstate commerce.²⁸⁰ By refusing to isolate “products liability” as a bounded category,²⁸¹ and insisting that the United States needs a products liability law tailored to address the legal and economic policies of the nation, this reform act continued rationalist incursions into a depictionalist law that had been underway for two decades.²⁸²

274. *Id.* at 13.

275. See William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791 (1966) (using a metaphor of collapse to describe the abolition of the privity rule for product-caused injury); see also PRODUCTS LIABILITY RESTATEMENT, *supra* note 267, at xxxi-xxxii; James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992) (describing the *Restatement* agenda). The *Restatement*, and restatements in general, are ambitious works, attempting what is almost impossible to achieve. See Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1688-94 (1995); see also Shapo, *supra* note 272 (warning about dangers of restating).

276. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 20-25 (1949).

277. KEETON ET AL., *supra* note 245, at 682.

278. See *id.* at 681-82 (reciting rationalist defenses of the privity rule, now discredited, based on foreseeability, contractual freedom, and economic policy); see also *Groppe Co. v. United States Gypsum Co.*, 616 S.W.2d 49, 56 (Mo. App. 1981) (noting that privity rule helps to define duty). Cf. *Pelham v. Griesheimer*, 440 N.E.2d 96, 99 (Ill. 1982) (defending privity rule for attorney malpractice claims).

279. See PRODUCTS LIABILITY RESTATEMENT, *supra* note 267.

280. See Common Sense Product Liability Legal Reform Act of 1996, H.R. CONF. REP. NO. 104-481 (1996).

281. See *id.* (mingling non-products related reforms, such as incentives to alternative dispute resolution, into the legislation).

282. See Schwartz & Behrens, *supra* note 264, at 598-601 (describing history of failed efforts at federalizing products liability law).

If the congressional-reform contingent is right, the interesting question is *why* products liability remains arbitrary, inconsistent, bad for competitiveness, worse for consumers, and everything else that tort reformers charge, despite well-funded efforts at change.²⁸³ We have already heard a few rationales.²⁸⁴ Similar rationalist explanations have continued during the debate over federal reform. Tort reformers Victor Schwartz and Mark Behrens identify the Association of Trial Lawyers of America and “its allied professional consumer groups” as the culprits.²⁸⁵ Jerry Phillips suggests that federal products liability reform may be unconstitutional as of 1995.²⁸⁶ In his 1996 veto message, President Clinton averted to the argument that some reform provisions, particularly a cap on pain and suffering damages, unfairly burden female plaintiffs.²⁸⁷ These statements indicate that defenders of the unreformed status quo, as well as critics, find products liability law intelligible through rationalism.

Contrary to both rationalist attack and rationalist explanations of the status quo, however, products liability remains at its heart still unreformed and depictionalist, writing separate rules for detriment caused by tangible physical entities. As commentators have detailed, courts take pains to distinguish products from conduct,²⁸⁸ sales from services,²⁸⁹ “foreign” contaminants in food from “natural” ones,²⁹⁰ and workplace products liability from workers’ compensation.²⁹¹ The fortuity of a physical object in a case can divert punitive damages to a state

283. For a summary of complaints presented by tort reformers, see JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY* 707-14 (3d ed. 1997).

284. See *supra* notes 261-263 and accompanying text.

285. Schwartz & Behrens, *supra* note 264, at 597.

286. See Jerry J. Phillips, *Hoist by One's Own Petard: When a Conservative Commerce Clause Interpretation Meets Conservative Tort Reform*, 64 TENN. L. REV. 647, 654-56 (1997) (citing *United States v. Lopez*, 514 U.S. 549 (1995)).

287. Clinton contended that the statute “unfairly discriminates against the most vulnerable members of our society—the elderly, the poor, children, and nonworking women” because of its devaluation of noneconomic injury. See William J. Clinton, *Why Clinton Vetoes Product Liability Reform*, IND. LAW., May 29-June 11, 1996, at 21 (printing veto message in full); see also Thomas Koenig & Michael Rustad, *His and Her Tort Reform: Gender Injustice in Disguise*, 70 WASH. L. REV. 1 (1995) (arguing that women bear the brunt of much tort reform); Lisa M. Ruda, Note, *Caps on Noneconomic Damages and the Female Plaintiff: Heeding the Warning Signs*, 44 CASE W. RES. L. REV. 197, 197-202 (1993) (describing effects on women plaintiffs from reform measures at the state level).

288. See Bernstein, *supra* note 22, at 65-68.

289. See Ellen Taylor, *Applicability of Strict Liability Warranty Theories to Service Transactions*, 47 S.C. L. REV. 231, 245-47 (1996).

290. See HENDERSON & TWERSKI, *supra* note 283, at 96-97.

291. See Thomas A. Eaton, *Revisiting the Intersection of Workers' Compensation and Product Liability: An Assessment of a Proposed Federal Solution to an Old Problem*, 64 TENN. L. REV. 881, 883-97 (1997).

treasury,²⁹² determine which statute of limitation will control,²⁹³ and, when the object consists of a small noncommercial airplane, invoke the only federal time limit on litigation about a defective product.²⁹⁴ As the dialectic between depictionalism and rationalism proceeds, products liability warrants attention as a possible site of significant rationalist change. Despite its many successes in the states and near-successes at the federal level, however, products liability reform has not abandoned the depictionalism on which it rests.

III

THE BASES OF DEPICTIONALISM

The previous two Parts of this Article showed the triumphs—or at least the stamina—of depictionalism within the representational dialectic. We may now consider the sources of this strength. Depictionalism endures in legal doctrine because it corresponds to the way human beings think, learn, and coexist. These cognitive and political implications not only illuminate the successes of depictionalism, but also point up some of its worrisome characteristics, a point to be explored in Part IV.

A. *Philosophy and Politics*

Distinguishing between phenomena and noumena, Kant noted the limits of abstraction and the great power of images: “[W]e cannot cogitate relations of things *in abstracto*, if we commence with conceptions alone.”²⁹⁵ This assertion from *Critique of Pure Reason* suggests that the dialectic between depictionalism and rationalism in American law follows a more fundamental division in philosophy. Knowledge, as philosophers put the point, arises from both direct observation of phenomena and the application of intellect to that experience. While the phrases vary—Locke contrasted “sensation” with “the operation of our minds,”²⁹⁶ Kant paired “phenomena” with “noumena” and *mundus sensibilis* with *mundus intelligibilis*²⁹⁷—the dichotomy endures. Even

292. See *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993) (upholding statute against constitutional challenge).

293. See *Doe v. American Nat'l Red Cross*, 798 F. Supp. 301 (E.D.N.C. 1992); Catherine Colyer, *Wrongful Infection With the HIV Virus: When Should the Clock Start Ticking on the Statute of Limitations?*, 4 VA. J. Soc. POL'Y & L. 235, 256-59 (1996) (discussing the statute of limitations issue in products liability cases).

294. See General Aviation Revitalization Act of 1994, Pub. L. No. 103-298, 108 Stat. 1552 (codified at 49 U.S.C. §§ 40101-40120 (1996)). See generally Victor E. Schwartz & Mark A. Behrens, *The Road to Federal Product Liability Reform*, 55 MD. L. REV. 1363, 1374 (1996) (discussing unique nature of this law).

295. KANT, *supra* note 7, at 106.

296. See LOCKE, *supra* note 4.

297. See KANT, *supra* note 7, at 93-97 (identifying phenomena as “empirical objects” and noumena as “the conception of such objects”).

philosophical traditions that assert the unity between things and abstractions, such as Idealism and branches of Eastern philosophy, depend on contrasts between depictionalist and rationalist ways of knowing.²⁹⁸

From these wide-ranging philosophical sources, a law reformer may infer that depictionalism as a source of knowledge will not readily go away. Human cognition depends on knowledge by acquaintance. Sometimes misinforming and sometimes catalysts of insights, images of objects are necessary constituents of understanding. A person may build on knowledge by acquaintance to achieve a more complex knowledge by description of a related phenomenon; but as a method, knowledge by acquaintance is fundamental, and cannot be superseded by abstraction. Three lessons follow.

First, devotees of positivist versions of law and economics that pursue efficiency,²⁹⁹ framers of restatements and comprehensive codes who attempt to clean up disarray,³⁰⁰ partisans of free expression who want to limit censorship,³⁰¹ and their colleagues in other areas of rationalist law reform must recognize that they cannot overcome a depictionalist legal rule simply by asserting—or even proving—its lack of rationality. As we have seen, the experiences of law reform pertaining to obscenity, forfeiture, and accidents bear out what philosophers might have predicted. Depictionalism sticks because it resonates with human understanding, even after rationalists demonstrate its pernicious effects in a particular legal context.

A second warning from philosophy reminds reformers that the desire to supersede depictionalism with rationalism can lead to error, in a philosophical sense. Philosophers generally accept the dichotomy in perception described above, between knowledge by acquaintance and knowledge by description. More contested, but also widely held, is the philosophical outlook called “naturalism,” which demands fidelity to empirical, observed reality rather than to a prior “first philosophy.”³⁰² Describing naturalist philosophy, Ernest Nagel explains that “the manifest plurality and variety of things, of their qualities and their functions, are an irreducible feature of the cosmos, not a deceptive appearance

298. See *id.* (maintaining that “real things” may not exist outside the world); Mark Siderits, *Buddhist Reductionism*, 47 PHIL. EAST & WEST 455, 457 (1997) (distinguishing “reductionism,” characteristic of Buddhism, with “eliminativism,” a stance contrary to Buddhism that disparages even the conventional utility of recognizing entities as real). See generally NINIAN SMART, DIMENSIONS OF THE SACRED *passim* (1996) (linking theological and philosophical belief systems to find common themes of depictionalism and rationalism).

299. See *supra* notes 210-215, 238-244 and accompanying text.

300. See Bernstein, *supra* note 275 (questioning prospect of restatements).

301. See *supra* notes 129-143 and accompanying text.

302. See Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267, 285-93 (1997) (describing current ascendant status of naturalist philosophy and outlining its variants).

cloaking some more homogeneous 'ultimate reality' or transempirical substance."³⁰³ Like Kant, Nagel does not intend to disparage all of abstraction—he takes a moment to note the value of Newtonian mechanics, for instance³⁰⁴—but instead questions the philosophical search for all-encompassing universality.

Naturalism has its critics, and their rejection of this philosophical outlook—some of which has been aired in the law reviews³⁰⁵—will not be adjudged in this Article. I want to say only that naturalist philosophy, despite once having been labeled “a species of philosophical monism,”³⁰⁶ lends support, perhaps in a normative as well as a descriptive sense, to depictionalism in the law. If reality is indeed varied, eclectic, and empirically derived, rather than an unchanging absolute truth, then “senseless” depictionalist legal rules necessarily might make sense.

This reference to the dichotomy between pluralism and monism³⁰⁷ brings us to a third philosophical basis—pluralism—for the depictionalist status quo in American law. In its rejection of the unification that rationalism delivers within law reform, depictionalist doctrine takes a stand in favor of pluralistic philosophy. This tradition has enjoyed a strong philosophical pedigree for a century.

Whereas monism insists on unity, wrote William James in 1909, pluralism allows things to exist “in a distributive form of reality, the *each*-form.”³⁰⁸ Like depictionalism, James’s pluralism denied the existence of finality, absolute truths, and “single-word answers.”³⁰⁹ Affirmations of this philosophy of pluralism appear in literary works as well as philosophical writings.³¹⁰

Of James’s heirs in pluralist philosophy, Isaiah Berlin achieved particular distinction. Berlin’s famous revival of an aphorism by the Greek poet Archilochus, “The fox knows many things, but the hedgehog knows one big thing,” restates the dichotomy between pluralism and monism. One might say that depictionalism knows many things and

303. Ernest Nagel, *Naturalism Reconsidered*, in ENCOUNTER: AN INTRODUCTION TO PHILOSOPHY 101, 104 (Ramona Cormier et al. eds., 1970).

304. See *id.* at 103; see also *id.* at 104 (noting well-supported conclusions from physical cosmology about the evolutionary development of stars and galactic systems).

305. See Leiter, *supra* note 302, at 286 (naming Hilary Putnam, Richard Rorty, and John McDowell as prominent critics); Hilary Putnam, *Pragmatism and Realism*, 18 CARDOZO L. REV. 153, 160 (1996) (equating “naturalism” with “materialism”).

306. See Arthur C. Danto, *Naturalism*, in 5 THE ENCYCLOPEDIA OF PHILOSOPHY 448 (Paul Edwards ed., 1972).

307. See WILLIAM JAMES, A PLURALISTIC UNIVERSE (1909).

308. *Id.* at 34 (emphasis in original).

309. Arthur M. Schlesinger, Jr., *The Thirteen Books You Must Read to Understand America: Schlesinger’s Syllabus*, 49 AM. HERITAGE 30, 34 (1998).

310. See Stanley Wertheim, *The Pluralistic Philosophy of Stephen Crane*, 7 ANQ: A Q. J. OF SHORT ARTICLES, NOTES, & REVIEWS 173, 174 (1994) (reviewing PATRICK K. DOOLEY, THE PLURALISTIC PHILOSOPHY OF STEPHEN CRANE).

rationalism knows one big thing. Berlin favored the fox, associating the hedgehog with totalitarianism.³¹¹ Berlin's dichotomy helps to extract a normative aspect of depictionalism. When Berlin emphasized the relation between pluralist philosophy and pluralist politics—if the universe is multiple and unfinished, then society must be multiple too³¹²—he showed that links therefore exist between (pluralist) depictionalism and a variety of social and political developments of the late-twentieth-century United States. As Leon Wieseltier argues, this eclecticism and rejection of totality can support a renascent liberalism.³¹³

A similar link connects pluralism and libertarianism.³¹⁴ Libertarian political theory depends on the premise, which its patriarch Friedrich von Hayek rightly called “non-rational,” that the chaos resulting from individual freedom is better than centralized order. The eclectic players of depictionalism can scatter power among many, while rationalism centralizes.³¹⁵ In preferring “democratization” to “democracy” as a nominal form, one political theorist argues that the task of democratic societies is to grow more inclusive, recognizing ever more groups, categories, and individuals.³¹⁶ These participants, varied and eclectic (like images, in this respect), are the constituents of liberal democracy.³¹⁷

Complementing this endorsement of liberalism, some critics of liberalism make a similar point about power-scattering. Ethicists Willard Gaylin and Bruce Jennings attack the monolithic use of rationalism as a

311. ISAIAH BERLIN, *THE HEDGEHOG AND THE FOX I* (1953); see also Louis Menand, *The Return of Pragmatism*, 48 AM. HERITAGE 48, 51 (1997).

312. See Menand, *supra* note 311.

313. See Leon Wieseltier, *When a Sage Dies, All Are His Kin*, NEW REPUBLIC, Dec. 1, 1997, at 27 (eulogizing Isaiah Berlin); see also MACEDO, *supra* note 39, at 237-38 (noting importance of “social pluralism” within liberal regimes); Hedy Nai-Lin Chang, *Democracy, Diversity, and Social Capital*, 86 NAT'L CIVIC REV. 141, 144 (1997) (discussing the relation between diversity and the philosophy of pluralism).

314. See F.A. HAYEK, *THE CONSTITUTION OF LIBERTY* 30 (1960). Evoking the dialectic, Hayek proposed a dichotomy between French “rationalism” and British “empiricism,” expressing a strong preference for the latter. See *id.* at 56-58. He went so far as to enlist Adam Smith in his cause, with the argument that the invisible hand depends on plural sources. See *id.* Reason, Hayek continued, is “man's most precious possession,” but by no means the sole answer to questions of state policy. *Id.* at 69.

315. An analogy appears in the law of charities. Commenting on the American decision to subsidize charities indirectly (through favorable tax treatment) rather than directly (through transfer payments), economist Estelle James mentioned pluralism as part of the reason for the choice: “I think one of the reasons why we use the indirect tax subsidy approach is that we are a very heterogeneous society. As such, we find it difficult to agree on which functions to subsidize . . . We avoid making these choices explicitly by decentralizing our decision-making.” Comment of Estelle James in *Discussant Remarks and Audience Questions*, 39 CASE W. RES. L. REV. 829, 831 (1989).

316. See John S. Dryzek, *Political Inclusion and the Dynamics of Democratization*, 90 AM. POL. SCI. REV. 475, 476 (1996).

317. See generally Seyla Benhabib, *Toward a Deliberative Model of Democratic Legitimacy*, in *DEMOCRACY AND DIFFERENCE* 73-74 (Seyla Benhabib ed., 1996) (referring to an “interlocking net of . . . multiple forms of associations, networks, and organizations”).

means of setting social policy.³¹⁸ Rationalism alone, Gaylin and Jennings argue, cannot yield the best policy prescription—especially if it clings to the precept that coercion is presumptively wrong.³¹⁹ Though inclined personally to fear coercion more and autonomy less, I find in the Gaylin and Jennings thesis a pertinent distinction between “political liberalism” and “social liberalism.”³²⁰ Political liberalism fears the tyranny and physical force of the state. Social liberalism twists this fear into a vague, generalized distrust “of all forms of social or interpersonal control.”³²¹ Applauding the former and condemning the latter, Gaylin and Jennings make a point that is relevant to the representational dialectic. Images—like the forms of social and interpersonal control that interest Gaylin and Jennings—evoke emotion, link up cognitively with other images and ideas, and imply controls on behavior of a more plural origin than mere state fiat. Although depictionalism is closely bound up with legal control,³²² it cannot be reduced simply to authoritarianism. Sociological perspectives on the control of citizens’ behavior underscore a similar variety of controls, which correspond to the eclectic inputs of depictionalism.³²³

Writers and activists who prefer to focus on government find pluralism integral to their law reform endeavors. All decisions to make a change, including those to change legal doctrine, carry with them some peril. A pluralist ideology defends this risk with its premise that legal change usually occurs at different stages in different environments, so that its effects can be observed, and often remedied, before all of the relevant population suffers.³²⁴ Louis Brandeis invoked this strategy when he described the states as laboratories in the federal system.³²⁵ In

318. See WILLARD GAYLIN & BRUCE JENNINGS, *THE PERVERSION OF AUTONOMY* 174-76 (1996).

319. See *id.* at 179-82.

320. *Id.* at 229.

321. *Id.*

322. See *supra* Part II.

323. The vast “norms” literature that followed ROBERT C. ELLICKSON, *ORDER WITHOUT LAW* (1991), describes eclectic sources of constraint and coercion that are at least partially independent of the state. For a short review of this literature, see Posner, *supra* note 244, at 1697-98. One noted constraint is shame: in some societies, shame functions effectively as a diversified, extralegal source of order. See Toni M. Massaro, *Shame, Culture, and American Criminal Law*, 89 MICH. L. REV. 1880 (1991).

324. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country”); see also Jim Davis II, Note, *BMW v. Gore: Why the States (Not the U.S. Supreme Court) Should Review Substantive Due Process Challenges to Large Punitive Damage Awards*, 46 KAN. L. REV. 395, 404-05 (1998) (commending “laboratories”).

325. See *supra* note 324; see also *Federal Energy Regulatory Comm’n v. Mississippi*, 456 U.S. 742, 788-89 (1982) (O’Connor, J., concurring) (listing successful innovations created in the federalist

scholarly journals, writers sometimes describe their more fanciful law-reform ideas as “thought experiments.”³²⁶ Judges and activists speak of “test cases.”³²⁷

These metaphors borrowed from the natural sciences³²⁸ indicate tensions within reform struggles. Law reform must be pluralist, but rationalist reforms are monist. Experiment and observation occur in the absence of certainty,³²⁹ whereas rationalist crusaders express their confidence that a legal tradition is senseless and that anti-depictionalist reform can defeat that which is irrational and perverse.³³⁰ The experience of successful law reform shows the tenacity of depictionalism. The life of law reform, to recall Holmes, has not been logic but rather experience.³³¹ One reason that depictionalism in obscenity, forfeiture, and accident law withstands assaults may relate to an inherent requirement that law reform be pluralist rather than monist.

In sum, philosophical writings help to explain the perseverance of depictionalism in at least three ways. First, they establish the primacy of

“laboratories”); DAVID L. SHAPIRO, *FEDERALISM* 87-88 (1995) (concluding that although the record is mixed, state governments do innovate).

326. See Akhil Reed Amar, Note, *Choosing Representatives by Lottery Voting*, 93 *YALE L.J.* 1283, 1283 (1984); Louis Kaplow, *On the Divergence Between “Ideal” and Conventional Income-Tax Treatment of Human Capital*, 86 *AM. ECON. REV.* 347, 349 (1996).

327. See *Barrera v. Gober*, 122 F.3d 1030, 1032 (Fed. Cir. 1997) (Plager, J., concurring); *In re American Honda Motor Co., Dealer Relations Litigation*, 979 F. Supp. 365, 368 (D. Md. 1997) (proposing “test case” method of adjudicating the lawsuit, with limited jury trial and a series of rounds). See generally William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 *YALE L.J.* 1623, 1667-68 (1997) (describing dynamics of test cases in civil rights movement).

328. For an early invocation of the metaphor, see *Anderson v. Dunn*, 19 U.S. (6 Wheat.) 204, 226 (1821) (“the science of government . . . is the science of experiment”). We need not belabor the analogy. See generally James A. Gardner, *The “States-as-Laboratories” Metaphor in State Constitutional Law*, 30 *VAL. U. L. REV.* 475, 480-85 (1996) (critiquing the metaphor); Edward L. Rubin & Malcolm Feeley, *Federalism: Some Notes on a National Neurosis*, 41 *UCLA L. REV.* 903, 926 (1994) (noting that government action has little in common with the practices of experimental science). My point is only that in the United States various governments work with different statutes, constitutions, and precedents to create differing results within a federal whole; this eclecticism comports with the variety that is inherent in depictionalism.

329. See, e.g., Bernard Williams, *Descartes*, in 2 *ENCYCLOPEDIA OF PHILOSOPHY* 344, 353 (Paul Edwards ed., 1967) (faulting Descartes for favoring deduction over “experiment and observation” in physical science). As some philosophers like to point out, Descartes purported to “deduce” a theory of blood circulation and was wrong, whereas William Harvey dissected cadavers and was right. See Geoffrey Gorham, *Mind-Body Dualism and the Harvey-Descartes Controversy*, 55 *J. HIST. IDEAS* 211 (1994).

330. See Coase, *supra* note 20, *passim* (contending nuisance law should put aside its aggressors and victims in order to achieve allocative efficiency); text accompanying notes 162-165 (recounting Justice Breyer’s call for a rational forfeiture law), text accompanying notes 210-216 (summarizing proposal to measure forfeiture by an “external cost index”), text accompanying note 231 (analyzing pure commercial loss rule in rationalist terms), text accompanying notes 260-262 (noting rationalist attacks on products liability doctrine).

331. See HOLMES, *supra* note 34, at 1 (“The life of the law has not been logic: it has been experience.”).

knowledge by acquaintance, suggesting that what rationalism tries to obliterate is fundamental and essential, rather than primitive. Second, the philosophical tradition labeled naturalism finds congenial the depiction-alist insistence on particulars and empirics. Third, pluralism—a centerpiece of political philosophy linked closely to representative government—illuminates the importance of depictionalism to law reform efforts, even though law reformers often like to identify with the universalist abstractions associated with rationalism. Regardless of whether the endurance of depictionalism is a good thing, then, lawmakers and law reformers must take this continued existence into account.

B. Learning Theory

Psychologists identify numerous ways for human beings to acquire information. They deem verbal means, which law tends to favor, to be just one of several routes to cognition.³³² Rationalist efforts at persuasion depend on words, a flow of speech-and-writing varied by an occasional foray into mathematics or symbolic notation.³³³ Depictionalism, by contrast, embraces the tangible, the visible, and the concrete nonverbal image. Relatively indifferent to arguments, policies, incentives, causal relationships, consistency with that-which-is-similar, and the presence of commensurability that characterizes legal thinking, depictionalism aligns itself with the eclecticism of learning theory.

Just as philosophers have maintained that knowledge by acquaintance precedes knowledge by description, developmental psychologists have contended that the image is necessary to the commencement of learning. The grandfather of developmental psychology, Jean Piaget, argued that learning proceeds in sequence, with abstraction impossible until the child masters the concrete.³³⁴ Psychologists following Piaget built on this premise by recommending a pedagogy of “discovery,” or cognition through interaction with objects.³³⁵ Feminist interpretations of

332. See generally JAMES J. THOMPSON, *BEYOND WORDS passim* (1973) (identifying time, space, color, gestures, and touch as constituents of classroom learning); BERNICE Y.L. WONG, *The Relevance of Metacognition to Learning Disabilities*, in *LEARNING ABOUT LEARNING DISABILITIES* 231, 234 (1991) (urging clinicians and learning-disabled persons to recognize the variety of cognitive styles that can be manipulated to maximize comprehension).

333. See, e.g., Cerna, *supra* note 210 (attempting to quantify the law of forfeiture). For a facetious treatment of mathematics in law reviews, see 19 Authors, *The Law of Prime Numbers*, 68 N.Y.U. L. REV. 185 (1993). Compare JULIUS GETMAN, *IN THE COMPANY OF SCHOLARS* 47 (1992) (lamenting effects of “esoteric” and “mathematical” legal scholarship) with Richard A. Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827, 835 (1988) (lamenting lack of training for lawyers in formal logic).

334. See Jean Piaget, *Piaget's Theory*, in 1 *HANDBOOK OF CHILD PSYCHOLOGY* 117-22 (Paul H. Mussen ed., 1983); see also von Glasersfeld, *supra* note 4, at 373-74 (describing Piaget's concept of “empirical abstraction”).

335. See JEROME S. BRUNER, *TOWARD A THEORY OF INSTRUCTION* 44-45 (1966) (describing stages of learning from concrete to abstract); *id.* at 84 (advocating visual and spatial puzzles to

Piaget stress the enduring value of concrete particulars.³³⁶ Piaget's description has thus metamorphosed into prescription: Because things educate, they ought to be integrated into education. Advances in computer technology have augmented these views.³³⁷

As with philosophy and political theory discussed above,³³⁸ learning theory connects depictionalism to law. Trial lawyers cite learning theory to praise demonstrative exhibits.³³⁹ In the law reviews, writers have bolstered the depictionalist cause by arguing that current pedagogical practices in law schools neglect the power of visual imagery.³⁴⁰ Some law professors have castigated their colleagues by pointing out the disregard of visual imagery in law teaching.³⁴¹ William Patton, a staunch exponent

expand learning); see also Anne Field, *Parents Not Admitted Without Child Guardians*, BUS. WEEK, May 27, 1996, at 150 (noting rise of interactive children's museums).

336. Most famous among these efforts is the work of Carol Gilligan. Responding to Lawrence Kohlberg, a follower of Piaget who had described a tendency of girls to remain stuck at pre-abstract levels of cognition, Gilligan has argued that this commitment to the particular does not indicate a failure to advance, but rather a different conception of moral reasoning. See Carol Gilligan, *Moral Orientation and Moral Development*, in WOMEN AND MORAL THEORY 19, 21-22 (Eva Feder Kittay & Diana T. Meyers eds., 1987).

337. See SEYMOUR PAPERT, *THE CHILDREN'S MACHINE: RETHINKING SCHOOL IN THE AGE OF THE COMPUTER* (1993) (claiming that computers can revolutionize childhood education: many children, particularly girls, learn "kinesthetically" rather than "abstractly"); Seymour Papert, *Obsolete Skill Set: The 3Rs*, WIRED, May-June 1993, at 50 (arguing that literacy in a visual age encompasses more than reading-and-writing "letteracy"); Robert H. Thomas, "Hey, Did You Get My E-Mail?" *Reflections of a Retro-Grouch in the Computer Age of Legal Education*, 44 J. LEGAL EDUC. 233, 241 (1994) (conceding that the electronic classroom benefits many types of learners, whereas its nonelectronic predecessor benefits only aural learners).

338. See *supra* Section III.A.

339. See, e.g., Melvin M. Belli, *Demonstrative Evidence and the Adequate Award*, 22 MISS. L.J. 284 (1950-51) (contending that demonstrative exhibits increase amount of awards to plaintiffs); R. Dennis Donoghue, *Demonstrative Exhibits: A Key to Effective Jury Presentations*, 349 PLI/PAT. LITIG. 369, 371 (1992) ("we are essentially visual learners"); see also Evelyn D. Kousoubris, *Computer Animation: Creativity in the Courtroom*, 14 TEMP. ENVTL. L. & TECH. J. 257, 272-73 (1995) (describing accounts from courtroom litigators, who identify jurors' overreliance on visual images as the only real drawback of this technique).

340. See James Eagar, *The Right Tool for the Job: The Effective Use of Pedagogical Methods in Legal Education*, 32 GONZ. L. REV. 389, 410-11 (1996-97) (arguing that legal pedagogy lags behind other pedagogies in its use of visual materials); William M. Richman, *Graphic Forms in Conflict of Laws*, 27 U. TOL. L. REV. 631, 631 (1996) (noting that conflicts, a "spatial" topic, is well suited to visual presentation); Thomas, *supra* note 337, at 241.

341. See C. Garrison Lepow, *Deconstructing Los Angeles or a Secret Fax from Magritte Regarding Postliterate Legal Reasoning: A Critique of Legal Education*, 26 U. MICH. J.L. REFORM 69, 77 (1992) (commenting on the extraordinary impact of the Rodney King videotape, a visual work set amidst uninspiring verbiage); William Wesley Patton, *Opening Students' Eyes: Visual Learning Theory in the Socratic Classroom*, 15 LAW & PSYCH. REV. 1, 1-5 (1991) (noting deficiencies of traditional pedagogy). But see Molly Warner Lien, *Technocentrism and the Soul of the Common Law Lawyer* 48 AM. U.L. REV. (forthcoming Mar. 1999) (questioning benefits of visual pedagogy, specifically computer technology, in legal education).

of the newer pedagogy, evokes a landmark of the representational dialectic when he urges law teachers to create and use icons.³⁴²

This reversal of iconoclasm that Professor Patton has envisioned—whereby images would supersede words—casts doubt on the rationalist conviction that depictionalism has a rendezvous with the dustbin of history. Interpretations of venerable teachings stress the value of the visual and the concrete in cognition,³⁴³ at the same time that information technology—graphic, multimedia, interactive—moves society in a depictionalist direction. But regardless of which side of the dialectic is “winning,”³⁴⁴ learning theory has maintained continually that abstraction and argument cannot vanquish the other methods of understanding, and they face an especially formidable competitor in the visual image.

C. Legitimation

As Bernard Hibbitts has noted, depictionalism is a source of legitimation in a visually oriented society that likes to see its law at work.³⁴⁵ Additional legitimation derives from the function of the image as a brake on rapid legal change. The three areas of law used as illustrations in this Article demonstrate some beneficial effects of this retardation. In obscenity and accident law, this delaying function has proved advantageous, and in forfeiture, delays have rendered benefits as well as detriments to doctrine.

Once obscenity entered the realm of the First Amendment, for instance, concepts such as “clear and present danger” could have opened a wide avenue for rationalist reform.³⁴⁶ Constitutional obscenity law might have developed differently if rationalism controlled: government would have to show the harm of a work before suppressing it.³⁴⁷ Instead, as we know, an “exclusion” approach stayed in place, whereby the classification of a particular thing as obscene determines its fate. Depictionalism has hampered freedom, then, if suppression is presumptively contrary to freedom and if government does in fact take advantage of its power to suppress, or if it chills expression merely by having such power. Yet in practice this retardation of the freedom to consume putatively obscene materials has respected liberal values, and coexisted with

342. See William Wesley Patton, *An Opening Gambit in Teaching Juvenile Law: Creating Icons of Normative Family Structures*, 20 LAW & PSYCH. REV. 1 (1996).

343. See *supra* notes 334-336 (describing the teachings of Piaget and others).

344. See *supra* note 36.

345. See Bernard J. Hibbitts, *Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse*, 16 CARDOZO L. REV. 229, 244 (1994) (noting that “visual legal metaphors have arguably helped make American law familiar and legitimate” because they are situated in our “visually biased society”).

346. See *supra* note 138-140 and accompanying text.

347. See *supra* notes 133-149 and accompanying text.

considerable opportunity to read and consume.³⁴⁸ Many thoughtful and open-minded commentators would have struck the balance in favor of more suppression than what our current depictionalist compromise has achieved.³⁴⁹ Depictionalism in obscenity doctrine has helped to achieve a valuable degree of moderation within the law.³⁵⁰

Civil forfeiture law poses the toughest challenge for the “retardation” argument; both anecdotes and reasoning support the conclusion that current law clings to an unfortunate error.³⁵¹ Yet even this lamentable doctrine suggests that moving slowly in reform can offer advantages. For instance, although innocent property owners have been made to suffer by forfeiture, another class of victims—those from whom criminals have stolen money or property—have received compensation that would have otherwise been unavailable.³⁵² I do not mean to echo the notorious argument, familiar from the law and economics literature on predatory pricing and insider trading, that it is all right to let Peter steal from Paul so long as overall social losses are zero or close to zero.³⁵³ Victims of forfeiture have suffered unjustly, but not in vain: American law underutilizes restitution, and forfeiture keeps restitution alive in both

348. The novelist John Updike wrote in 1986 to the chairman of the Attorney General’s Commission on Pornography to defend the effects of these freedoms as they developed over the prior twenty-five years:

I think that the relative sexual openness of recent times, including the public sale of magazines and books which many consider reprehensible, has made my fellow-Americans more tolerant and genial, less condemnatory and ignorant than they were before, in these long-shrouded areas of human intimacy. It would be a great step backwards to rescind this openness, and to strengthen the dark forces of censorship.

Quoted in PHILIP NOBILE & ERIC NADLER, UNITED STATES OF AMERICA VS. SEX 194-95 (1986).

349. See CLOR, *supra* note 105; Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275 (1998).

350. Cf. Heyman, *supra* note 349 (arguing that although current First Amendment doctrine makes middle positions analytically unprincipled and hard to articulate, moderation has been achieved).

351. For anecdotes, see HYDE, *supra* note 17, at 11-15 (summarizing nine “representative” accounts of harm by forfeiture); LEVY, *supra* note 177, at 128-29 (recounting stories of innocent, or relatively innocent, persons who lost automobiles and homes). In response to the one-sided nature of writing about forfeiture, one student commentator has rather wistfully wondered what “the proforfeiture camp” would say. See Hakala, *supra* note 167, at 1324. We don’t know.

352. See Cassella Statement, *supra* note 188. Elsewhere, Cassella has lamented the limited availability of restitution under federal civil forfeiture laws. See Stefan D. Cassella, *Forfeiture Reform: A View From the Justice Department*, 21 J. LEGIS. 211, 222 (1995) (noting that property forfeited at the federal level has never been used to pay restitution, “except in bank fraud cases. And that’s got to change.”).

353. On predatory pricing, see ROBERT H. BORK, THE ANTITRUST PARADOX 144-60 (1978) (suggesting that market forces will defeat predatory pricing, rendering judicial remediation unnecessary). For a response to Bork, see Robert Prentice, *Vaporware: Imaginary High-Tech Products and Real Antitrust Liability in a Post-Chicago World*, 57 OHIO ST. L.J. 1163, 1192-95 (1996). On insider trading, see HENRY G. MANNE, INSIDER TRADING AND THE STOCK MARKET 110 (1966) (contending that insider trading is harmless, and indeed benefits innovative risk-takers). For a summary of attacks on this thesis, see ROBERT W. HAMILTON, CASES AND MATERIALS ON CORPORATIONS AND LIMITED PARTNERSHIPS 977 (5th ed. 1994). Cf. Bishop, *supra* note 238 (making a similar argument in behalf of the economic loss rule).

principle and practice. At the doctrinal level, forfeiture has engendered a rich line of Supreme Court cases that help to explain the boundary between civil and criminal law.³⁵⁴ Finally—and cynically, I admit—one may note that forfeiture creates middle-class victims of the “war on drugs,” a constituency that may need to develop before this disastrous enterprise can be put to an end.³⁵⁵

The delaying of rationalist reform in accident law has yielded a clearer set of benefits. Depictionalism behind the rule of no recovery for pure economic loss has not only served to limit the number of claims (in a way that tends to burden enterprises more than individuals, and thereby to permit loss spreading) but also helped to shape gradually such problematic tort concepts as duty and proximate cause.³⁵⁶ Accident law was thus spared some of the instability experienced in California, where in the late 1970s foreseeability abruptly overtook narrow duty rules—only to be jolted out of its ascendancy after a conservative state supreme court judiciary took office.³⁵⁷ The economic loss rule has also kept contract principles relatively intact against the hegemonic tendencies of tort, an outcome with considerable support among practitioners and scholars.³⁵⁸ Products liability also keeps contract doctrine vigorous, whereas rationalist critics would subsume virtually all products liability into negligence.³⁵⁹ Depictionalism in products liability preserves a

354. The effect of double-jeopardy rights on the combination of civil and criminal penalties has received attention recently from the Court. *See, e.g., Hudson v. United States*, 118 S. Ct. 488 (1997) (holding that administrative action did not, under Double Jeopardy Clause, preclude subsequent criminal indictment); *United States v. Ursery*, 518 U.S. 267 (1996) (finding no violation of Double Jeopardy Clause in criminal prosecution coupled with forfeiture); *Department of Revenue v. Kurth Ranch*, 511 U.S. 767 (1994) (holding that “marijuana tax” violates Double Jeopardy Clause). A former Assistant to the Solicitor General who wrote an amicus brief in *Bennis v. Michigan* defends *Bennis* by arguing that a contrary outcome would have disturbed the delicately evolving doctrinal treatment of the civil-criminal distinction. *See* Richard H. Seamon, “Not Now” Does Not Necessarily Mean “Not Ever:” *The Supreme Court’s Refusal in Bennis v. Michigan to Abandon the “Guilty Property” Fiction of Forfeiture Law*, 48 S.C. L. REV. 389, 391 (1997).

355. For one of many arguments that the war on drugs is a spectacular failure, see Blumenson & Nilsen, *supra* note 169, at 37 n.18 (providing poll data); *id.* at 37-39 (citing staggering statistics of war on drugs—\$50 billion per year in federal and state law enforcement budgets; 500,000 possession-of-marijuana arrests per year—and noting that a majority of federal inmates are incarcerated for drug offenses).

356. *See* MARC A. FRANKLIN & ROBERT L. RABIN, *TORT LAW AND ALTERNATIVES* 289-92 (6th ed. 1996) (discussing cases).

357. For a survey of expansion and retreat in California tort law, see Rabin, *supra* note 246, at 1518 (noting extraordinary influence of activist jurisprudence in California tort law); Nicolas P. Terry, *Collapsing Torts*, 25 CONN. L. REV. 717, 770-75 (1993) (describing rise-and-fall pattern of California tort expansions).

358. *See* Bernstein, *supra* note 31, at 1544 n.25, 1548-51 (discussing preference for contract over tort among business persons, practicing lawyers, and scholars).

359. *See* Bernstein, *supra* note 22, at 5.

heritage stretching back at least as far as Rome, and the loss of contract in products liability would be regrettable.³⁶⁰

Certainly it is awkward to praise—or appear to praise—an equivalent to “all deliberate speed” that allows irrational doctrines to continue hurting innocent people. The history of court-sanctioned segregation warns against such complacency.³⁶¹ Aware of this awkwardness, I offer my defense of depictionalist delay as distinctly subordinate to a description of the phenomenon. Depictionalism is ineradicable, but also (and here it differs from *de jure* segregation in schools) not entirely pernicious.

Even the best-laid plans of rationalist law reform have had unfortunate consequences. Whereas rationalism thinks of itself as a force for healthy simplicity—improvement through streamlining—it also adds to an existing clutter. Observers of efforts to improve the Internal Revenue Code have testified to the rarity of true simplification.³⁶² One need not join the chorus of alarm about “hyperlexis” or a “litigation explosion” to worry about the problem of making more law.³⁶³ Depictionalism, a far-from-ideal source of delay, curbs some of the tendency to haste and excess that is inherent in law reform agendas.

IV

FREEDOM AND THE REPRESENTATIONAL DIALECTIC

Even though they stand at opposite sides in the dialectic, both depictionalism and rationalism threaten freedom. The Nobel laureate Friedrich von Hayek, famous for his writings on freedom,³⁶⁴ recognized this paradox. His student, Shirley Robin Letwin, has written that, according to Hayek, “freedom” cannot be counterposed to “power;” the choice for human beings is “only between different kinds of constraint.”³⁶⁵ Depictionalism and rationalism each offer a different kind of

360. See Jolowicz, *supra* note 259, at 381 (discussing the survival of contract liability in the face of products liability reform efforts in the European Economic Community).

361. See Richard Delgado & Jean Stefancic, *The Social Construction of Brown: Law Reform and the Reconstructive Paradox*, 36 WM. & MARY L. REV. 547 (1995) (arguing that the *Brown* experience illustrates limitations of too-slow law reform). Although the victims of obscenity law are more famous, it bears mention that Americans have been killed because of forfeiture. See Blumenson & Nilson, *supra* note 169, at 97 (recounting the death of an innocent property owner following forfeiture excesses).

362. See Bayless Manning, *Hyperlexis and the Law of Conservation of Ambiguity: Thoughts on Section 385*, 36 TAX LAW. 9, 15 (1982); Sheldon D. Pollack, *Tax Complexity, Reform, and the Illusions of Tax Simplification*, 2 GEO. MASON INDIANA L. REV. 319, 351 (1994).

363. See J.B. Ruhl, *Thinking of Environmental Law as a Complex Adaptive System: How to Clean Up the Environment by Making a Mess of Environmental Law*, 34 HOUS. L. REV. 933, 942 (1997) (recommending a slow pace in progressive law reform).

364. See F.A. HAYEK, *THE ROAD TO SERFDOM* (1944); HAYEK, *supra* note 314.

365. Shirley Robin Letwin, *The Achievement of Friedrich A. Hayek*, in *ESSAYS ON HAYEK* 147, 163 (Fritz Machlup ed., 1976).

constraint. Below I elaborate on my view that the constraint of depictionalism, because of its opacity, is the more worrisome of the two.

Having evoked the controversial figure of Hayek, I should clarify my use of the word "freedom." Of the many writers who have expressed their interest in this concept, some (myself excluded) call themselves "libertarian," a divisive and misunderstood term³⁶⁶ whose fraught meanings I hope to sidestep with the help of parsimonious ground rules. One working definition of libertarianism mentions three credos of the faith: "*laissez-faire* in economic policy, isolationism in foreign policy, and liberalism on the question of criminal prohibitions."³⁶⁷ The first two tenets being irrelevant to this Article, I focus here on the third, the one that I espouse. A liberal approach to criminal prohibitions—or to legal regulation in general—suggests a need to influence the representational dialectic in the direction of greater public justification. Such a move requires us to recognize that depictionalism does not reliably cooperate in this goal.

A. *The Peril of Depictionalism*

Left unexamined, depictionalism erodes liberty. Depictionalism purports to locate power, agency, or meaning within objects. These images block the view of the manipulators who can stand behind them. Such an obstruction might take place by design. When former Attorney General Richard Thornburgh proclaimed, for instance, that "it's now possible for a drug dealer to serve time in a forfeiture-financed prison after being arrested by agents driving a forfeiture-provided automobile while working in a forfeiture-funded sting operation,"³⁶⁸ he set up physical things—persons, automobiles, operations—in a tableau, distracting public attention from forfeiture in its rationalist sense. To the rationalist, forfeiture is a function of money, incentives, and violence.³⁶⁹ Officials have found it advantageous to hide behind things.³⁷⁰

More often, the statism of depictionalist legal doctrines does not line up with an official agenda. Government officials do not profit directly from products liability or the rule of no recovery for pure economic loss. But even in these gentler doctrinal incarnations, depictionalism gives unseen power to the state. For example, with products liability, government power expanded in the form of wider remedies and a larger writ for judicial involvement. Products liability shares this power with injured persons; when the term "products liability"

366. On the difficulties surrounding the term libertarianism, see DAVID BOAZ, *Introduction*, in *THE LIBERTARIAN READER* at iii, xiii-xvi (1997).

367. 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* 15 (1984).

368. Blumenson & Nilsen, *supra* note 169, at 89.

369. See *supra* notes 195-218 and accompanying text.

370. See Blumenson & Nilsen, *supra* note 169, at 88-92.

crystallized, legal rules became more generous to plaintiffs. The rule of no recovery for pure economic loss appears on the surface to be a contrary development. Product liability lets plaintiffs into court; pure economic loss keeps them out. But this rule too augments judicial power, particularly to create tort jurisdiction beyond the planning of parties bound by contract and to make outcomes, as well as taxonomies, depend on fortuitous consequences rather than on events that the parties control.

Similarly, obscenity law seems moderate in its effects—I have said so myself³⁷¹—especially given the absence of a neo-Comstock figure carrying out an agenda of censorship at the national level. Yet obscenity, like other depictionalist legal rules, has augmented state power without providing for appropriate accountability in rationalist terms. As we have seen, obscenity law has declined to emphasize causal propositions about harm, looking instead for essence.³⁷²

This lack of analytic precision about harm has hidden the consolidation of government power. Agents of the government have suppressed works of great merit, imprisoned and persecuted and fined their distributors, and discouraged publishers from making available other material, forever unknown because unpublished, to an audience of readers.³⁷³ The lack of precision has helped to delineate artistic boundaries to exclude erotic material, thereby promoting an impoverished understanding of what can be art and literature.³⁷⁴ And some writers have contended—against opposition—that the suppression of material deemed obscene has oppressed women, with the assistance and acquiescence of the state.³⁷⁵

371. See *supra* text accompanying note 348.

372. See *supra* Section II.A.

373. "Not a week passes," wrote H.L. Mencken in 1917, "that I do not decline to publish some sound and honest piece of work," for fear that "some roving Methodist preacher, self-commissioned to keep watch on letters, will read indecency into it." Mencken enumerated as casualties "four or five short stories of the very first rank, and the best one-act play yet done . . . by an American." Quoted in Lockhart & McClure, *supra* note 126, at 63. See also 2 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW* 130-32 (1985) (summarizing views of Anthony Burgess on the costs of censorship). Some social scientists identify other foregone benefits, arguing that the cathartic effect of pornography can help to prevent rape. Compare NOBILE & NADLER, *supra* note 348, at 253-54 (describing findings of Emory psychiatrist Gene Abel about cathartic benefits of pornography), with OSANKA & JOHANN, *supra* note 112, at 142-43 (summarizing skepticism about catharsis among psychologists).

374. See FEINBERG, *supra* note 373, at 132-33 (quoting Kenneth Tynan: "Because hard-core performs an obvious physical function, literary critics have traditionally refused to consider it a form of art. By their standards, art is something that applies to such intangibles as the soul and the imagination: anything that appeals to the genitals belongs in the category of massage"); see also *id.* at 128 (noting that the Supreme Court has followed this line of thought, limiting obscenity to the erotic even though it could have expanded obscenity to cover such expressions as profanity).

375. See BARTLETT & HARRIS, *supra* note 154, at 650-51 (describing concern that allowing the government to suppress pornography will result in censorship of lesbian erotica); Carlin Meyer, *Sex*,

The result of these effects of depictionalism has been to render law lawless. Images distract public attention from the state's tendency to augment its power by available means. For example, law enforcers do not request or demand bluntly that their budgets be hidden from public or legislative scrutiny; such a posture would provoke complaints about separation of powers. These officials can, however, hide behind forfeited property to effect a comparable result.³⁷⁶ In a similar strategy of exploiting visible objects, partisans in the products liability debate thrust an image—or in Gary Schwartz's term, a myth³⁷⁷—against their antagonists: the flaming Pinto and the creepy, spidery Dalkon Shield do battle against hot spilled coffee and noble, valiant drugs martyred to corporate fears about liability.³⁷⁸ In the next Section, I argue that rationalism can put these images in a more suitable context, and thereby help restore lawfulness to law.

B. Rationalism and Public Justification

The United States Constitution holds government accountable to citizens. Due process rights protect individuals in their dealings with the state.³⁷⁹ The constitutional law principle called "substantive due process" establishes an analogous requirement for law generally: law ought to be intelligible through reason.³⁸⁰ As legal scholars, notably Lon Fuller, have explained, reason would be integral to American law even if constitutional law had said nothing about it: without reasoning one cannot argue, interpret texts, create or follow precedent, link cases together to form doctrine, or predict judicial outcomes.³⁸¹ Moreover,

Sin, and Women's Liberation: Against Porn-Suppression, 72 TEX. L. REV. 1097, 1138-41 (1994) (arguing that whether pornography subordinates or liberates women depends on context, a point lost in the current debate over pornography); John Money, *A Conspiracy Against Women*, in NOBILE & NADLER, *supra* note 348, at 339 (arguing that anti-pornography stance of the Meese commission "affirms that women have no right to be sexual. They are obliged only to be loving wives committed to their men, whom they must treat not as sex, but as status and success, objects"). Marcia Pally, an outspoken critic of feminist efforts against pornography, denies that pornography harms women: "It seems more reasonable that violence against women begins with economic discrimination, so that men learn to consider women burdens and pains in the ass, and with the infantilization of women—either as fragile figurines or hormonal hurricanes—so that men hold women in contempt." Marcia Pally, *Ban Sexism, Not Sex*, in NOBILE & NADLER, *supra* note 348, at 343-44.

376. See Blumenson & Nilsen, *supra* note 169, at 84-100.

377. Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 RUTGERS L. REV. 1013 (1991).

378. I elaborate in Bernstein, *supra* note 22, at 45-49.

379. See U.S. CONST. amends. V, XIV.

380. See *Mugler v. Kansas*, 123 U.S. 623, 661 (1887) (stating that if a statute purports to protect "the public health, the public morals, or the public safety, [but] has no real or substantive relation to those objects," it is unconstitutional); see also Suzanna Sherry, *The Sleep of Reason*, 84 GEO. L.J. 453, 455 (1996).

381. See Lon Fuller, *Reason and Fiat in Case Law*, 59 HARV. L. REV. 376, 381 (1946) (describing common law in terms of a relation between reason and fiat, which corresponds to natural and positive law); see also STEVEN J. BURTON, AN INTRODUCTION TO LAW AND LEGAL REASONING

citizens cannot follow the law unless their facility for reason aids them in understanding legal rules.³⁸²

Commentators call this obligation "public reasonableness" or "public justification."³⁸³ "[T]he application of power," writes political theorist Stephen Macedo, "should be accompanied by conscientious and open efforts to meet objections with reasons . . ."³⁸⁴ To be sure, the historical record does include some dissent from this liberal ideal in Western societies.³⁸⁵ Readers who accept the desirability of public justification, however, ought to agree that rationalism rather than depictionalism advances the pursuit.

Candor forces examiners of the dialectic to acknowledge the comforts of depictionalism within a divided political culture. Agreement that obscenity or pornography is bad, for instance, unites a fragmented population that might otherwise expend its energies on hopeless quarrels; a demand for public justification of obscenity law would uncover conflicts, or at least a multiplicity of justifications, that might upset an unspoken compromise among factions.³⁸⁶ Even Professor Macedo, the public-justification partisan, admits that on occasion he would favor "papering over divisive questions."³⁸⁷ As Macedo elaborates, downplaying public justification offers other benefits, including "domestic peace" and the need to make liberalism an attractive "export-commodity" whose price in certain regions of the world might seem too high.³⁸⁸

Yet the demands of rationalism suggest that unexamined depictionalism in legal doctrines threatens such fundamentals as citizenship, democracy, liberal politics, and justice through law. In a democracy, state power ought to be visible rather than hidden, and amenable to verbal explanation rather than concealed behind images. Only when the state

25-26 (1985) (noting the importance of both inductive and deductive reasoning in legal development); Stanley Mosk, *The Common Law and the Judicial Decision-Making Process*, 11 HARV. J.L. & PUB. POL'Y 35, 35-36 (1988) (offering, from the perspective of an appellate judge, a view that the common law is "the embodiment" of reason and justice). It may be necessary for me to warn against esteeming reason as lofty above everything else, even though I have already sounded this warning in another context. See Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 455-64 (1997) (contending that current sexual harassment doctrine overstates the value of reason and reasonableness).

382. See PATTERSON, *supra* note 37.

383. See MACEDO, *supra* note 39, at 40; Lawrence B. Solum, *Faith and Justice*, 39 DEPAUL L. REV. 1083, 1091 (1990); see also RAWLS, *supra* note 39, at 17 (describing the conditions of justice in terms of what "rational persons" will choose in the original position thought experiment).

384. MACEDO, *supra* note 39, at 40.

385. See *supra* Part I (adverting to illiberal regimes and ideologies); see also MACEDO, *supra* note 39, at 41-43 (summarizing criticisms).

386. See *supra* notes 155-160 and accompanying text.

387. MACEDO, *supra* note 39, at 68.

388. *Id.*

acknowledges and illuminates its exercise of power can citizens decide whether to support or reject this constraint on their freedom—a freedom that, according to American political theory, predates and outweighs the power of government.³⁸⁹

This process of delivering accountability in rationalist terms must, and does, occur in stages, initiated by various participants in the legal system and perpetually subject to debate, refutation, and expansion. Much of this accounting has begun. For example, the Supreme Court has shown a longstanding interest in the interrelation of civil asset forfeiture and the constitutional rights of individuals. Its 1996 forfeiture decisions, *Bennis v. Michigan*³⁹⁰ and *United States v. Ursery*,³⁹¹ recognize a need to make sense of this depictionalist category and suggest that more detail will be forthcoming from the Justices.³⁹² In Congress, Henry Hyde continues to make a case for rationalism that has won praise for its pragmatic compromises and its inclusion of a wide range of views across the liberal-to-conservative spectrum.³⁹³ Other political actors could augment these rationalist efforts. Instead of denouncing irrationality in her next forfeiture brief, for example, a litigator might acknowledge the appeal and resonance of depictionalism and argue for some attainable, moderate quantity of public justification. Trial judges who decide accident law cases have opportunities to consider the burden of depictionalist rules.³⁹⁴

To balance the blandness of these suggestions—try a little public justification, concede some of the appeal of depictionalism rather than declaim the irrationality and senselessness of one's opponents, horse-trade with the Justice Department as does Congressman Hyde—I mention a more disquieting idea: readers should reflect on what is probably the most potent phrase in all of depictionalist law, "child pornography." As I must hasten to say, this invitation is not to change the absolutist posture of current law, nor to condone or even tolerate material that falls under this label, but to open a line of thought about rationalism and public justification.

In *New York v. Ferber*,³⁹⁵ the Supreme Court held unanimously that "child pornography" warrants no constitutional protection.³⁹⁶ "For the first time in four decades," writes Professor Tribe, "all nine Justices

389. See U.S. CONST. amends. IX, X (noting reservation of unenumerated rights and powers); TRIBE, *supra* note 107, at 2-5.

390. 516 U.S. 442 (1996).

391. 518 U.S. 267 (1996).

392. See Seamon, *supra* note 354, at 398-400 (laying out potential directions for the Court to take).

393. See Blumenson & Nilsen, *supra* note 169, at 105-07 (describing Hyde's efforts).

394. See *supra* note 257.

395. 458 U.S. 747 (1982).

396. *Id.* at 756-66.

agreed that a particular kind of communicative material enjoys no first amendment protection whatsoever.³⁹⁷ The decision has provoked almost no hostility in the law reviews, and commentators seem to find little of interest in the opinion for an undivided Court. This neglect is unfortunate, because *Ferber* illustrates how public justification can improve depictionalist doctrines like obscenity.

The New York statute upheld in *Ferber* criminalized the distribution of material depicting sexual performances by children younger than sixteen.³⁹⁸ For many members of the public, I believe, a simple affirmation of Paul Ferber's conviction would have sufficed. Yet four Justices wrote opinions. These opinions are replete with rationalist effort.

As many antagonists of pornography have observed, the mere framing of criminal, abusive, or exploitative behavior into a "work" does not negate the prior fact of crime or abuse or exploitation.³⁹⁹ Here it is reasonable to presuppose the presence of harm. The New York legislature made a finding that children were in danger, and supported that finding with evidence.⁴⁰⁰ Tribe commends *Ferber* for having taken "careful note" of the problem of harm to underage performers in pornographic displays.⁴⁰¹ As Frederick Schauer has added, *Ferber* contains not one word about the harm to viewers that child pornography might occasion.⁴⁰² Lacking better data that effects on viewers threaten third-party victims, the Court rightly adhered to the liberal and rationalist precept that the ambition to uplift human souls does not justify the use of government power.⁴⁰³ A focus on harm unites the *Ferber* opinions and justifies putting Paul Ferber in prison.

The Court also expressed an admirable rationalist concern for consequences and possible excesses. For instance, Justice White's opinion for the Court demands scienter, and so a defendant cannot be convicted unless he knows the nature of the material.⁴⁰⁴ The Court also expressed legitimate worries about overbreadth and vagueness, deciding in the end

397. TRIBE, *supra* note 107, at 914. Moreover, the topics from 1942 to which Tribe alludes—commercial speech and fighting words—are no longer considered utterly out of the reach of First Amendment protection, rendering child pornography almost unique.

398. See 458 U.S. at 749. Strictly speaking, *Ferber* is not an obscenity decision, because its holding applies to material that cannot be classified as obscene. See *id.* at 764 (noting that "[t]he test for child pornography is separate from the obscenity standard . . .").

399. See MACKINNON, *supra* note 137, *passim*.

400. See *Ferber*, 458 U.S. at 757-58.

401. TRIBE, *supra* note 107, at 914.

402. See Frederick Schauer, *Codifying the First Amendment: New York v. Ferber*, 1982 SUP. CT. REV. 285, 291.

403. See *supra* note 152 and accompanying text.

404. See *Ferber*, 458 U.S. at 765. See also SCHAUER, *supra* note 146, at 222-26 (discussing value of scienter requirement in obscenity law).

that the danger to children outweighed these concerns.⁴⁰⁵ These rationalist articulations deal honestly with the bugbear of child pornography, recognizing that it could override reason if the state does not fulfill the demands of public justification.

Professor Schauer has praised *Ferber* for its subtle and careful handling of the question of harm. Settled—though perhaps erratically applied—First Amendment precedent allows the government to suppress speech that raises a danger of imminent harm.⁴⁰⁶ *Ferber* does not rely on this tradition, Schauer argues, preferring a more eclectic array of state interests in the regulation of pornography: “Not every enormous state interest can fit neatly into *Brandenburg*’s incitement-immediacy-inevitability formula,” Schauer continues, and *Ferber* thus contributes to a dynamic and evolving conception of harm.⁴⁰⁷ Absolutists might worry about public justification offered so imprecisely. But even for readers who want incitement and immediacy and inevitability, *Ferber* is a rationalist triumph. If a category like child pornography can withstand the rigors of public justification, then citizens should not flinch from rationalism.⁴⁰⁸

CONCLUSION

It is perilous for a law review writer to express, however guardedly, her esteem for images. Despite the occasional claim that reason is in disrepute within jurisprudence,⁴⁰⁹ divergent approaches to law unite around their common enthusiasm about rationality. Naturalist lawyers have written that human reason tells individuals what the law is.⁴¹⁰ Formalists think that legal categories grounded in logic explain the past, and predict the outcome of future disputes.⁴¹¹ Legal realists applaud rational attention to the functions of law.⁴¹² Critical theorists explain law in terms

405. See *Ferber*, 458 U.S. at 766-69.

406. See Schauer, *supra* note 402, at 304-06 (citing *Hess v. Indiana*, 414 U.S. 105 (1973); *Brandenburg v. Ohio*, 395 U.S. 444 (1969)).

407. *Id.* at 305.

408. Justice Breyer has written a script: “What policy does [any law] serve? What purpose does it serve? What’s the theory . . . ?” See *supra* note 162 and accompanying text.

409. See Sherry, *supra* note 380, at 458-59 (naming various legal scholars who have “exposed” and “rejected” reason); DANIEL A. FARBER & SUZANNA SHERRY, *BEYOND ALL REASON* 27-31 (1997) (ascribing to “multiculturalists” the view that knowledge and reason are contingent, socially constructed, and manipulated).

410. See, e.g., 2 WILLIAM BLACKSTONE, *COMMENTARIES* *41; LON L. FULLER, *THE MORALITY OF LAW* (rev. ed. 1969).

411. See Frederick Schauer, *Formalism*, 97 *YALE L.J.* 509, 547 (1988) (ascribing to formalism the virtues of “predictability, stability, and constraint of decisionmakers”); Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949, 955 (1988).

412. See JEROME FRANK, *LAW AND THE MODERN MIND* 260 (1930) (urging skepticism and the shedding of illusions); Roscoe Pound, *Liberty of Contract*, 18 *YALE L.J.* 454, 464 (1909) (noting the law’s lack of attention to “human conditions”).

of power and other articulable interests.⁴¹³ Jurisprudential liberals, advocating “fundamental rights,”⁴¹⁴ believe that shared and accepted concepts about law align disparate cases into a legal system.⁴¹⁵ Legal economists, who we have seen to be exceedingly devout rationalists, work from a behavioral ideal that posits away anything tangible, unique, or incommensurable.⁴¹⁶

Among these traditions that are usually inclined to quarrel with one another, we find one point of harmonious agreement: all are congruent with law efforts opposed to the entrenchment of physical objects in certain areas of American law. I have used the word “depictionalism” to describe this entrenchment. This Article has examined three areas of law where depictionalism flourishes, noting several others along the way.⁴¹⁷ By clinging to objects and images, crucial elements of obscenity, forfeiture, and accident law defy or ignore fundamentals of rationalism. Obscenity criminalizes things without identifying their harm. Forfeiture ascribes guilt and evil to inanimate objects. Accident law has separate rules for harm *to* things and harms *by* things, putting plaintiffs in a stronger position when a defendant hits something tangible (the economic loss rule) and when a tangible entity hits them (products liability) even if the presence of a thing is entirely incidental to tortious conduct. Rationalist critics decry these postures, but have not succeeded in changing them.

In an effort to explain both the development of non-rational legal rules and the patterns of argument against them, I have described a representational dialectic. Throughout Western history, rationalists have denounced images for their power: this same strength protects images from attack. Rationalists also denounce persons who yield to this power, using pejoratives like “superstition” and “idolatry.” In the realms of art, religion, political theory, philosophy and elsewhere, these condemnations have all achieved very little enduring success. I have attributed this failure to the enduring appeal—the necessity—of images in human understanding. Philosophers, political theorists, and experts in learning theory agree that the physical image is indispensable to knowledge.

This strength of the image, however, should never be deemed preemptive: abstractions and verbalization are needed to make order of images. Moreover, the rationalist quest to make law amenable to reasoned understanding is often admirable. I have tried to lend support to

413. See BAILEY KUKLIN & JEFFREY W. STEMPER, FOUNDATIONS OF THE LAW 174-76 (1994).

414. See *id.* at 164-65.

415. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 80 (1977).

416. See *supra* note 19 and accompanying text; Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 797 n.62 (1994).

417. See *supra* notes 9, 27, 226, and 315.

the rationalist cause by arguing that its position on public justification is a good thing. Law must challenge citizens to accept their human burden of reason, as well as defend the monopoly that law holds on sanctioned coercion.⁴¹⁸ By referring to depictionalism and rationalism as paired within a dialectic, I have contended implicitly that the two inform, negate, and support each other in a perpetually dynamic relation.⁴¹⁹ The representational dialectic, connecting American law with cultural change by way of eclectic sources, helps to situate legal doctrine and law reform within their larger history.

418. See John Rawls, *The Idea of an Overlapping Consensus*, 7 OXFORD J. LEGAL STUD. 1, 16-17 (1987).

419. See ROBERT HEILBRONER, *MARXISM: FOR AND AGAINST* 79 (1980) (calling the dialectical method "always self-consciously interpretational, because its concern for 'essence'—rather than facts—forces it to confront the ambiguous, many-layered context of events"); Schneider, *supra* note 1, at 599.