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What's Left?

Guyora Binder

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What's Left?

Guyora Binder*

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Introduction: Confronting Post-Radical Chic

In positioning its participants “beyond critique,” this symposium rightly acknowledges the distance that has opened between the radical political aspirations and the deconstructive methods of “critical” scholarship in law and literature. But it wrongly suggests that in a race between political commitments and intellectual fashions, politics has left method in the dust. American radicalism is now one generation removed from the Port Huron statement. In that time, its adherents have moved “beyond” structuralism and “beyond” modernism, into a textual world they aspire not so much to change as to review.

Radical theory’s recent preoccupation with critical technique represents a strategic retreat from political engagement. No longer hoping to

* Professor of Law, S.U.N.Y. at Buffalo; Visiting Professor of Law, University of Michigan. A.B. 1977, Princeton University; J.D. 1980, Yale Law School. This essay benefitted from conversation with Alex Aleinikoff, Vince Blasi, Phoebe Ellsworth, George Kannar, Leo Katz, Larry Kramer, Jim Krier, Mark Linder, Bill Miller, Dennis Patterson, Rick Pildes, Peter Pitegoff, Nick Rine, Jack Schlegel, Jonathan Simon, Rob Steinfeld, J.B. White, Sarah Zearfoss, and Phil Zylberberg.

influence events, "progressive" intellectuals resigned themselves to keeping ahead of them. And as the tide of battle turned, the first to declare victory and flee the field could claim the honor of the avant-garde. When critical theory now advertises itself as "post"-structuralist or "post"-modern, it makes a claim to currency rather than courage; it boasts of being the latest item to appear on the shelves. This is how one persuades consumers, not citizens. But the trendy packaging cannot conceal the fact that the product itself has fallen out of fashion. Straddling the widening gap between "radical" and "chic," critical theorists are increasingly tempted to turn the cutting edge of critique against radicalism itself. Bernard Yack, a "deconstructive"¹ critic of radical theory, diagnoses this post-radical condition in the following terms:

In recent years the New Left's intoxication with Marxist theory has given way to a rather painful hangover. In the cold light of dawn, many radicals have begun to take a second, more critical look at the theories that once inspired them. As a result, we now find radical theorists taking the lead in attacking totalistic theories of human emancipation. This stunning reversal of sentiment has . . . eroded their revolutionary spirit and sense of common purpose. They can all agree that we must subvert modern social and political institutions. But why we must do so and for what alternative are questions that . . . they seem reluctant to discuss. . . .

. . . [Instead their] current obsession . . . [consists in] deconstructing all positive theoretical claims.²

This diagnosis portends the death of the patient. Finally realizing that any constructive theory of human emancipation is totalitarian, Yack implies, radicals have abandoned constructing such theories. With no constructive theory of human emancipation to implement, radicals must abandon their characteristic activity of making revolution.

This Article will challenge the reduction of radical theory to recipes for revolution, and the related assumption that any vision of human emancipation leads to totalitarian rule. The deep problem with this sort of critique of radical theory is its instrumental conception of the relationship between theory and political experience.³ The point is not that in identifying philosophy as the source of revolution, we put the train in

1. B. YACK, *THE LONGING FOR TOTAL REVOLUTION: PHILOSOPHIC SOURCES OF SOCIAL DISCONTENT FROM ROUSSEAU TO MARX AND NIETZSCHE* 368 (1986).

2. Yack, *Toward a Free Marketplace of Social Institutions: Roberto Unger's "Super-Liberal" Theory of Emancipation* (Book Review), 101 HARV. L. REV. 1961, 1961-62 (1988) (reviewing R. UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987)) (citations omitted).

3. The view that radical theory dictates radical politics is implicit in the very title of Yack's critique. See *supra* note 1.

front of Marx's "locomotive of history."⁴ The point is that, whether we see politics as an instrument of theory or theory as an instrument of politics, we wrongly assume that political values can be defined apart from the processes that realize them.⁵

Political values do not determine politics from the outside—they emerge already embodied in political experience. Thus we should not accept the testimony of revolutionaries that revolution is an instrument for the implementation of a theory. Instead, revolutionary movements are one type of social setting for the construction and articulation of political values. As a result, the pursuit of revolution has itself been a particular way of developing visions of human emancipation; and because it can be a particularly instrumental way of envisioning human emancipation, I will argue that the pursuit of revolution reinforces instrumentalism. The transcendence of instrumental culture would represent a much more radical emancipation.

I have argued that such a vision of human emancipation as the transcendence of instrumental culture is implicit in much critical legal scholarship.⁶ This challenge to instrumentalism provides the basis for a critique of the revolutionary focus of radical theory, which I present in Part I of this Article. I first identify radical politics with the aspiration to transform human nature. I then argue that, as a matter of history, radicals have generally identified the radical transformation of human nature with revolution—but, to the extent that radical revolutionaries have accepted a positivist conception of revolution as a change of legal systems, they have been misled into assuming that human nature can be legislated. The inevitable frustration of this assumption in the experience of revolution engenders an impulse to restrict authority to an ever narrower circle of the virtuous. In this way revolutionary politics tend to become focused on the instrumental control rather than the emancipation of society.

My purpose in presenting this critique of revolution is by no means to undercut the possibility of radically transforming human nature. By emphasizing the cultural construction of preferences my critique of instrumentalism reaffirms the possibility of radical change through the development of cultures of democratic participation. In Part II, I offer a conception of emancipation as collective self-realization through demo-

4. K. MARX, *The German Ideology*, in THE MARX-ENGELS READER 164 (R. Tucker ed. 1978) (translated as "driving force of history").

5. See generally Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 S. CAL. L. REV. 293 (1981) (defining instrumentalism as the separation of means and ends).

6. See Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888 (1988).

cratic participation in community life. I explain why I think such collective self-realization would require cultural change and why I think such cultural change should be viewed as radical change—as a change in human nature.

The reconstruction of radicalism I sketch in Part II depends on four concepts that post-structuralist critics have attempted to “deconstruct”: participation, community, human nature, and culture. Seeing all communication as the consumption and transmission of “scripted” discourse,⁷ deconstruction presents direct democracy as impossible and its edifying effects as illusory. From this perspective community is impossible, and its pursuit entails a totalitarian suppression of “the difference between subjects.”⁸ Similarly, the concepts of human nature and cultural identity may be seen as authorizing efforts to purify society of unnatural or inauthentic elements. And, if we cannot legitimately identify distinct cultures, we cannot hope to radically improve society by changing its cultural identity. Underlying each of these particular critiques is an image of radicalism as a pathological yearning for a simpler world, purged of heterogeneity. For deconstructive critics, a radical is one who longs for fusion with others, but, fearing that any relationship will change her, annihilates anyone she cannot absorb.

In Part III, I show how this critique distorts radicalism and I defend the concepts of participation, community, human nature, and culture against representative “deconstructions.” I demonstrate that the project of transforming human nature through participating with others in democratic communities depends on heterogeneity. Participation in a community enables us to be challenged, developed, and changed because it requires that we interact with people different from ourselves. Community is not a ruse for fixing and insulating a presocial self—it is the pursuit and development of a social identity.

I. A Critique of Revolution

In this Part, I argue that the pursuit of revolution is incompatible with radical politics. “Revolution” has come to signify an impossibly complete break with the past. Revolutionary efforts to expunge all trace of the past engender cycles of purgation and exclusion that prove incompatible with participatory democracy, an important value in the radical tradition.

7. See B. PALMER, DESCENT INTO DISCOURSE: THE REIFICATION OF LANGUAGE AND THE WRITING OF SOCIAL HISTORY 3 (1990).

8. Young, *The Ideal of Community and the Politics of Difference*, in FEMINISM/POST-MODERNISM 300, 302 (L. Nicholson ed. 1990).

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I develop this argument in four steps. First, I offer an historically grounded definition of radicalism as the aspiration to transform human nature, and explain how this goal came to be identified with revolution. Second, I show that revolution has generally been conceptualized as a legal phenomenon, an abrupt hiatus between legal orders. Third, I show how the indeterminacy critique developed by critical legal studies undermines any such concept of revolution by denying the distinguishability of discrete legal orders. Fourth, I argue that the equation of radical change with revolution rests on an impoverished conception of human nature and discourages the widespread participation in politics that radicals have traditionally seen as the means to transforming human nature.

A. The Revolutionary Model of Radical Change

We tend to equate radicalism with the urge to break with the past, to be thoroughly up to date. Yet radical political theory is linked to classical political thought by their common aspiration to fulfill human nature.⁹ The starting point for the radical tradition is Aristotle's assertion that human nature finds fulfillment in political life.¹⁰ The possibility of radical political theory is opened by an ambiguity in this formula: does the good society conform to a fixed human nature, or can human nature be reformed to realize the good society? Radicalism finds its faith in the latter ambitious aspiration.

Liberalism rejects this classical tradition as at once naive and repressive. Finding fulfillment in political life would require more virtue than humans can muster. Widespread political participation can only be won at the price of either coercion that ultimately kills political life or conflict that rips apart the polity.¹¹ One liberal tradition claimed that only a highly attenuated political life conforms to a human nature seen as largely devoid of virtue,¹² while another saw more virtue in private benevolence than in the fulfillment of public duty.¹³

Rousseau initiated the radical tradition in political theory by taking another path: he hewed to the classical tradition, insisting that social life rendered politics unavoidable.¹⁴ If private interest corrupted politics, the

9. See S. WOLIN, *POLITICS AND VISION: CONTINUITY AND INNOVATION IN WESTERN POLITICAL THOUGHT* 302 (1960).

10. See ARISTOTLE, *POLITICS* 8 (Bk. I, ch. 2) (E. Barker ed. 1948); G. SABINE, *A HISTORY OF POLITICAL THEORY* 119-22 (E. Corwin 3d ed. 1959).

11. See G. ALMOND & S. VERBA, *THE CIVIC CULTURE* 186 (1965); S. HUNTINGTON, *POLITICAL ORDER IN CHANGING SOCIETIES* 265-66, 401-02, 430-31 (1970).

12. See G. WOOD, *THE CREATION OF THE AMERICAN REPUBLIC 1776-1787*, at 608-12 (1969).

13. See G. WILLS, *INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE* 194-96 (1978) (discussing the Scottish Enlightenment).

14. See J. ROUSSEAU, *THE SOCIAL CONTRACT* 17-19 (L. Crocker ed. 1967).

solution was to expunge it from society. Since human beings could not exist apart from society, Rousseau reasoned, any interest corrosive to society ultimately threatened the self.¹⁵ Human beings literally could not afford private interest.¹⁶

While breaking with classicism on the question of humanity's capacity for virtue, liberalism followed classical tradition in considering human nature unalterable.¹⁷ Rousseau broke with both classicism and liberalism on this point, treating human nature as an alterable social product.¹⁸ Private interest was not innate, but was cultivated in each individual by others bent on dividing in order to conquer those they could not bribe. Self-interest was therefore socially imposed, and the pursuit of self-interest was an expression of slavery, not of liberty. What liberalism took to be essential to human nature—individual identity—was seen by Rousseau as an artifice subject to human will.¹⁹

Humanity might redeem itself from slavery to particular masters by a deliberate act of subordination of each to all.²⁰ Binding oneself to society as a whole, each individual would be redeemed from slavery to his or her particular will inuch as Greek slaves could be redeemed from servitude to a particular inaster through bondage to a god. In return for surrendering up one's particular self, each member of Rousseau's republic would receive in return a civic identity.²¹

Rousseau was not, of course, the first to think that human nature could be transformed. Basic to Christianity is a view of sin as self-alienation or self-enslavement. Equally basic is the belief that human faith and divine grace can redeem humanity from its fallen state. Here, too, a transformation in human nature is figured as the redemption of a slave through consecration to a god. Just as slavery was imagined to have

15. *Id.* at 23; see G. BINDER, *TREATY CONFLICT AND POLITICAL CONTRADICTION* 75-76 (1988).

16. It must be noted that Rousseau's fear and subordination of privacy reflected a fear and subordination of the women he would confine to the private sphere. See J. ROUSSEAU, *supra* note 14, at 140; J. MILLER, *ROUSSEAU: DREAMER OF DEMOCRACY* 203 (1984); S. OKIN, *WOMEN IN WESTERN POLITICAL THOUGHT* 99-194 (1979). This could give rise to a critique of the Rousseauian ideals of community and direct democracy as essentially rather than incidentally sexist. Such a critique could only succeed if it avoided reliance on the deconstructive arguments I discredit in Part III, subparts A and B.

17. Cf. A. HIRSHMANN, *THE PASSIONS AND THE INTERESTS: POLITICAL ARGUMENTS FOR CAPITALISM BEFORE ITS TRIUMPH* 12-14 (1977) (discussing the seventeenth-century emergence of the belief that a realistic understanding of human selfishness was necessary to pragmatic political theory).

18. See J. ROUSSEAU, *supra* note 14, at 19, 22-23, 43.

19. See J. ROUSSEAU, *DISCOURSE ON THE ORIGIN AND FOUNDATION OF INEQUALITY AMONG MANKIND* 211, 219-20, 224-25 (L. Crocker ed. 1967).

20. J. ROUSSEAU, *supra* note 14, at 61-62.

21. *Id.* at 17-19, 22-23, 98-99.

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originated in the slave's cowardly choice of captivity over death in battle, Christ is deemed to have purchased the slave's fidelity by dying in his place, thus restoring him to honor.²²

By supplying this image of redemption from sin, Christianity introduced the imaginative possibility of *transformation* into the classical political tradition. But that does not make Christianity in and of itself radical.²³ An additional element is needed to make the ideal of human transformation politically radical: the utopian vision of a *social context* for such transformation.

Christianity's radicalism therefore depends upon whether the redemption of humanity is conceived as a worldly project, or as a wholly spiritual event. The key question is not when redemption occurs—before or after death—but where. Radicalism requires that it occur in the social world. An inner state of grace, even one achieved by human will, has no political meaning if it is entirely self-generated. If we can each achieve redemption individually, without society's help, the health of our souls does not depend on the health of society. Since the pursuit of such redemption accepts society as it is, it does nothing to improve the prospects of others for redemption. To thus consign one's fellows to their fallen state is to make a separate peace with sin.

Extending the metaphor of alienation as a kind of enslavement, solitary redemption is like a manumission that leaves the institution of slavery intact.²⁴ This is the radical view of redemption: what does it profit one to win her own soul and lose the world? Radicalism requires both: personal transformation is its goal, but society must be its medium.

If mainstream Christianity is not necessarily radical, radicalism can nevertheless be found in Christianity's millenarian tradition. Based on interpretation of the Book of Revelation,²⁵ millenarian thought looks forward to dramatic worldly reform. Contrary to common misconception, millenarianism does not equate such reform with the last judgment and

22. See O. PATTERSON, *SLAVERY AND SOCIAL DEATH* 70-76 (1982); cf. D. DAVIS, *THE PROBLEM OF SLAVERY IN WESTERN CULTURE* 84-85 (1966) (discussing the Christian belief that Christ redeems from slavery to sin).

23. See Binder, *Angels and Infidels: Hierarchy and Historicism in Medieval Legal History*, 35 *BUFFALO L. REV.* 527, 554-72 (1986) (arguing that the idea of worldly progress was absent from medieval scholasticism).

24. Rejecting the merely spiritual redemption offered slaves by white preachers, Frederick Douglass linked his spiritual freedom to common struggle and his worldly freedom to the abolition of slavery for all. See F. DOUGLASS, *MY BONDAGE AND MY FREEDOM* 275-76, 441-45 (1855 ed. & photo. reprint 1968) (rejecting "slaveholding priestcraft" and arguing the impossibility of his celebrating the Fourth of July until "the great principles of political freedom and of natural justice, embodied in the Declaration of Independence," are extended to all slaves).

25. See *Revelation* 20:1-6 (describing the binding of Satan and the millennial age).

the ascension of all souls.²⁶ Instead, these events are foreshadowed in human history by apocalyptic conflict, leading to a last battle and the worldly triumph of good over evil.²⁷ Human good reigns on earth for one thousand years, followed by the last judgment.²⁸

Out of this tradition grows the association of radical transformation with revolution. The good society represents a catastrophic break with the past. It is initiated suddenly, violently, angrily, as if prefiguring the terrible swift sword of divine judgment. Millenarian enthusiasm was associated with violent, if somewhat aimless, popular movements in medieval Europe,²⁹ with insurrection in Renaissance Florence,³⁰ and most famously with the Puritans of seventeenth-century England. An oft-quoted sermon of the Reverend Thomas Case to Parliament in 1641 captures the brutal urgency associated with radical reform. Before being newly planted, society must be thoroughly uprooted:

Reformation must be Universall. . . . I beseech you, reform all places, all persons and callings; reform the Benches of Judgment Reform the Church. . . . Reform the Universities, reform the Cities, reform the Countries, reform the inferiour Schools of Learning; reform the Sabbath, reform the Ordinances, the worship of God. . . . You have more work to do than I can speak. Every plant which my heavenly father hath not planted shall be rooted up. . . . *Not broken off*, then it may grow, and sprout again; but *pull'd up by the very roots*. If it be not a plant of God's planting, what do's it in the Garden? Out with it, *root and branch, every plant, and every whit of every plant*.³¹

The millenarian tradition helped spawn the radical reinterpretation of classical political theory by linking the Christian project of redeeming human nature to the classical goal of erecting the good society. But it also brought to the radical tradition an apocalyptic aesthetic and an ago-

26. Cf. E. TUVESON, *REDEEMER NATION* 11-12, 29-33 (1968) (noting that seventeenth-century theologians emphasized the ultimate defeat of evil by humanity and within history).

27. See *Revelation* 19:11-21 (describing the Second Coming of Christ, the battle of Armageddon, and its immediate aftermath).

28. See generally E. TUVESON, *supra* note 26, at 30 ("The Kingdom of God on earth . . . is to be no fantastic, preposterous dreamland in which the saints get their rewards and their revenge, but such a condition as we should expect if honest, rightly motivated men, filled with the grace of the Gospel, were to exercise supreme control." (citing J. EDWARDS, *HISTORY OF THE WORK OF REDEMPTION* 168 (1830))).

29. See N. COHN, *THE PURSUIT OF THE MILLENNIUM* 89-186 (rev. ed. 1970) (describing millenarian movements associated with the crusades, messianic deification of the Emperor Frederick II, flagellant movements, and the heresy of the Free Spirit).

30. J. POCOCK, *THE MACHIAVELLIAN MOMENT: FLORENTINE POLITICAL THOUGHT AND THE ATLANTIC REPUBLICAN TRADITION* 103-13 (1975).

31. Lasky, *The Birth of a Metaphor: On the Origins of Utopia & Revolution* (pt. II), *ENCOUNTER*, Mar. 1970, at 30, 30 (quoting T. Case, *Two Sermons Lately Preached at Westminster, before Sundry of Honorable House of Commons* (1641)); see M. WALZER, *THE REVOLUTION OF THE SAINTS: A STUDY IN THE ORIGINS OF RADICAL POLITICS* 10-11 (1965) (quoting the same sermon).

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nistic understanding of history. Thus, a third element came to be seen by many as a prerequisite to radical change, if not a defining feature. For many, radical change is the social transformation of human nature *as a consequence of violent struggle*. It was the association of change with violence that made revolution seem indispensable.

During the French Revolution, this association was made explicit. Revolutionary came to mean “expeditious and arbitrary.”³² The “revolutionary instrument” was the guillotine.³³ Rousseau’s democratic radicalism, constantly invoked by Marat³⁴ and Robespierre,³⁵ seemed to authorize such violent revolution. To the sans-culottes, Rousseau stood for the proposition that “the ultimate foundation of sovereignty . . . was . . . insurrection: the armed uprising of the citizenry,” the remaking of law “at the point of the sword.”³⁶ When conceived as a vehicle for radical change, the purpose of revolution was to remake not only laws, but also humanity. In 1793 the Lyons Surveillance Committee decreed that building a Republic would require that each citizen “experience and effect within himself a revolution equal to that which has changed the face of France.”³⁷

Even beyond France’s borders, the Revolution was greeted as radically transformative of “the whole previous constitution of the world.”³⁸ German university students in particular “identified their personal crises with the historical crisis of European culture and connected the possibility of a satisfactory resolution to the hopes for a collective historical transformation aroused by the French Revolution.”³⁹ Endorsing Rousseau’s aspiration to transform humanity,⁴⁰ they invented the new vocation of radical theorist and populated it with a dazzling array of luminaries: Hegel, Hoelderlin, Fichte, Schelling, and Schiller, followed by Strauss, Bauer, Ruge, Feuerbach, and Marx.

Within France, Rousseau’s memory received homage of a very different sort. After Robespierre’s death, Gracchus Babeuf organized a

32. Ozouf, *Revolution*, in A CRITICAL DICTIONARY OF THE FRENCH REVOLUTION 806, 813 (F. Furet & M. Ozouf eds. 1989) [hereinafter DICTIONARY].

33. *Id.*

34. See J. MILLER, *supra* note 16, at 1.

35. See *id.* at 149-50.

36. *Id.* at 151.

37. Ozouf, *supra* note 32.

38. Letter from Friedrich von Schelling to Georg Hegel (Feb. 4, 1795) (quoted in J. TOEWS, HEGELIANISM: THE PATH TOWARD DIALECTICAL HUMANISM, 1805-1841, at 31 (1980)).

39. J. TOEWS, *supra* note 38, at 31.

40. See B. YACK, *supra* note 1, at 89-98 (analyzing Rousseau’s influence on late eighteenth-century German intellectuals).

“Conspiracy for Equality” to carry on his work.⁴¹ Babeuf plotted a “dictatorship . . . designed to help a corrupt people restore themselves to goodness, while conquering their enemies through the unblinking use of violence.”⁴² Babeuf sought redistribution of wealth, the abandonment of cities, and a “moral regeneration . . . to be effected and preserved through direct popular sovereignty.”⁴³ After Babeuf’s execution, one conspirator, Philippe-Michel Buonarotti, continued attempting to plot “communist” insurrections, eventually influencing the feared Auguste Blanqui.⁴⁴ Blanqui in turn was influential in the development of an organized communist movement, and his followers eventually joined forces with Marx, uniting conspiratorial and theoretical radicalism.⁴⁵

In the wake of the French Revolution, European radicalism, both within France and without, retained its identity by awaiting the signs of a second coming.⁴⁶ In the twentieth century, radical theory organized itself epistemologically around the experience of revolution in the same way that science organizes itself around the experiment, and opinion research around the survey.⁴⁷ Radicals from Sorel to Debray embraced revolution, not only as a stratagem for seizing power, but as a source of self-knowledge, a school for virtue and an arena for existential choice.⁴⁸ Violent revolution was expected to yield the “New Socialist Man.”

Revolution may not be intrinsic to the concept of radical change, but it has so dominated the radical imagination that it has been easy to use “militant” in place of “radical,” easy to assume with Jefferson that the tree of liberty must be watered with the blood of patriots,⁴⁹ and easy to forget that revolutions have not invariably cultivated our better natures.⁵⁰

41. See J. BILLINGTON, *FIRE IN THE MINDS OF MEN: ORIGINS OF THE REVOLUTIONARY FAITH* 72-78 (1980); J. MILLER, *supra* note 16, at 207.

42. J. MILLER, *supra* note 16, at 207.

43. *Id.*

44. *Id.* See generally J. BILLINGTON, *supra* note 41, at 87-92, 173.

45. See J. BILLINGTON, *supra* note 41, at 247, 282-86.

46. Cf. K. MARX, *THE EIGHTEENTH BRUMAIRE OF LOUIS BONAPARTE* 15-18 (1963) (mocking the revolutionaries of 1848 for their obsession with the revolution of 1789); F. FURET, *MARX AND THE FRENCH REVOLUTION* 3-65 (D. Furet trans. 1988) (finding Marx guilty of the same obsession).

47. Wolin, *The Politics of the Study of Revolution*, 5 *COMP. POL.* 343, 345-52 (1973).

48. Works in this tradition include O. CABEZAS, *FIRE FROM THE MOUNTAIN* (1985); R. DEBRAY, *LA GUERRILLA DE CHE* (1975); R. DEBRAY, *REVOLUTION IN THE REVOLUTION? ARMED STRUGGLE AND POLITICAL STRUGGLE IN LATIN AMERICA* (1967); F. FANON, *WRETCHED OF THE EARTH* (1963); E. GUEVARA, *GUERRILLA WARFARE* (1985); E. GUEVARA, *SOCIALISM AND MAN IN CUBA AND OTHER WORKS* (1968); MAO TSI-TUNG, *On Protracted War*, in 2 *COLLECTED WORKS OF MAO TSI-TUNG* 113 (1967); G. SOREL, *REFLECTIONS ON VIOLENCE* (1912).

49. Letter from Thomas Jefferson to Colonel William Stevens Smith (Nov. 13, 1787), *reprinted* in 2 *THE WRITINGS OF THOMAS JEFFERSON* 317, 319 (H.A. Washington ed. 1893).

50. See F. Furet, *Revolutionary Government*, in *DICTIONARY*, *supra* note 32, at 548, 558.

B. Revolution as a Legal Concept

From its inception, the concept of revolution has been bound up with legal notions. The term does not appear to have been used to describe political upheavals before the fourteenth century, did not become used widely in this sense before the sixteenth century in Italy, and was little used in a political context in England until the seventeenth century.⁵¹ Nevertheless, the concept of revolution developed during the Renaissance and Reformation was rooted in a tradition of speculation about the patterns and causes of constitutional change most associated with Aristotle and Polybius.⁵²

Aristotle initiated the study of fundamental political change by defining democratic, oligarchic, and monarchic constitutional orders, and distinguishing a change in constitutional form from a change of ruler. In Aristotle's thought, the constitution of a state is social: the concept designates both the ruling class and the overall social composition of the society. When the ruling class is no longer the dominant class in numbers or power, a constitutional change occurs.⁵³

Polybius supplied the cyclic metaphor that would eventually give rise to the modern concept of revolution. For Polybius, a state's constitution was defined by two elements—the number of participants in the rule, and their virtue. The corrupting effect of power entailed that each of the constitutional forms discussed by Aristotle was inherently instable. Legitimate kingship would inevitably degenerate into despotism, leading to an insurrection of the virtuous few. The resulting aristocracy would degenerate into oligarchy and inspire a democratic revolt. But as the people became corrupt, democracy would degenerate into the chaos of mob rule, forcing the people to turn to a king. According to Polybius, then, a cyclic change in legal order was itself ordained by natural law.⁵⁴

In the modern era the concept of constitution grew more legal and less social than in classical thought—but, notwithstanding shifts in the meaning of constitution over time, it remained the correlative of revolution. Thus Locke's right of revolution proceeded from the theory that any illegal alteration of the constitution dissolved it and authorized soci-

51. J. BILLINGTON, *supra* note 41, at 16-20; see Griewank, *The Emergence of the Concept of Revolution*, in *WHY REVOLUTION? THEORIES AND ANALYSIS* 16 (C. Paynton & R. Blackey eds. 1969) [hereinafter *WHY REVOLUTION?*]; Hatto, "Revolution": *An Enquiry into the Usefulness of an Historical Term*, 58 *MIND* 495, 498-500 (1949); Lasky, *The Birth of a Metaphor: On the Origins of Utopia & Revolution* (pt. I), *ENCOUNTER*, Feb. 1970, at 35, 41-42; Lasky, *supra* note 31, at 30-37.

52. See Hatto, *supra* note 51; Lasky, *supra* note 31, at 33-34.

53. ARISTOTLE, *supra* note 10, at 245 (Bk. V, ch. III).

54. See POLYBIUS, *THE HISTORIES* 212-22 (Bk. VI) (E. Badian ed. 1966).

ety to establish a new one.⁵⁵ Often, especially in the early days of the English, American, and French Revolutions, revolution was conceived as a restoration of a decayed constitution, a return made necessary by a preexisting hiatus in constitutional government.⁵⁶ Occasionally, a revolutionary program was itself given constitutive content, so that a constitution was imagined as a vehicle to bring about revolutionary change.⁵⁷

Since the French Revolution, the main line of thinking has seen revolution as an interregnum between constitutional orders, a mode of constitutional change not authorized by the constitution.⁵⁸ Robespierre distinguished sharply between constitution and revolution⁵⁹ and Hannah Arendt has concurred that constitutions are the end-products and the ends of revolutionary processes.⁶⁰ Such nineteenth-century constitutional theorists as Daniel Webster and John Jameson defined revolution as extraconstitutional change and hence denied that there could ever be a constitutional right of revolution.⁶¹ Charles Evans Hughes also viewed revolution as incompatible with constitutional government.⁶² On this view insurrection aimed at restoring or realizing a constitutional order was not, by definition, revolutionary.

From its origins, then, the concept of revolution has been defined by its opposition to the concept of constitution. Moreover, the relationship between these opposites has not been an equal one. If revolution and constitution are mutually constitutive, the term constitution has clear priority, not just chronologically, but normatively and causally. For

55. See J. LOCKE, *SECOND TREATISE OF GOVERNMENT* 119-32 (T. Peardon ed. 1952).

56. See Binder, *Revolution As a Constitutional Concept*, in ASSOCIATION INTERNATIONALE DE METHODOLOGIE JURIDIQUE, *LE RECOURS AUX OBJECTIFS DE LA LOI DANS SON APPLICATION* 341, 341-52 (1990).

57. See E. MORGAN, *INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA* 118 (1988) (noting that "[t]he sovereignty of the people was a convenient . . . fiction for a convention bent on disinheriting and displacing a monarch whose beliefs and conduct offended . . . his subjects"); see also Binder, *supra* note 56, at 350 (observing that both the French and American Revolutions were "perceived by some as the expression of constitutional traditions rooted in history").

58. However, the view that a constitution could be a vehicle for the gradual achievement of revolution retained currency in American thought during the nineteenth century, and finds its most articulate expression in the writings of Abraham Lincoln. See Binder, *supra* note 56, at 351-52.

59. See H. ARENDT, *ON REVOLUTION* 132-33 (1965) (discussing Robespierre's conviction that "constitutional government is chiefly concerned with civil liberty, revolutionary government with public liberty").

60. *Id.* at 133-34.

61. See J. JAMESON, *THE CONSTITUTIONAL CONVENTION* 100 (1867) (noting that an act, to be revolutionary, must be done in violation of the customary laws); *Luther v. Borden*, 48 U.S. (How.) 7, 31 (1849) (containing Webster's argument that "[o]ur American mode of government does not draw any power from tumultuous assemblages"); cf. I F. LIEBER, *MANUAL OF POLITICAL ETHICS* 218-23, 234 (T. Woolsey rev. 2d ed. 1881) (1st ed. 1838) (arguing that society alone is sovereign and that more customary law is preserved in "revolutions" than is abrogated).

62. Hughes, *War Powers Under the Constitution*, 42 A.B.A. REP. 232 (1917).

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most political theorists, it is weakness in a constitutional order that generates revolution, rather than the exhaustion of the revolutionary impulse that forms constitutions. At best, revolutions are praised as servants of constitutional development, making the concept of revolution seem a poor dependent on the concept of a legal order.

There is, however, a major difficulty confronting the claim that revolution has been conceived primarily as a legal event. Surely the most important analyst of revolution in the Western world has been Karl Marx.⁶³ Although Marx was educated in the law, he seemed singularly uninterested in the legal conditions and consequences of revolution. He departed from the natural law tradition of revolutionary discourse by eschewing the concepts of law and justice in his critique of capitalism, viewing both as superstructural adornments of an economic reality.⁶⁴ Marx even seemed to regard legal institutions as ultimately unnecessary, not just for explanation, but for social life. After the communist revolution, he claimed, law and the state would wither away.⁶⁵ Hence Marx appears to represent a decisive departure from the classical tradition of conceiving of revolution as a hiatus between legal orders.

On closer examination, however, it is clear that Marx adapted but nevertheless perpetuated the classical tradition. The crucial concept in Marx's theory of revolution is the mode of production, which, like the classical constitutional theories of Aristotle and Polybius, combines two elements: relations of production and productive forces. As power is the parricidal child of virtue in Polybius's constitutional theory, so the forces of production are the parricidal children of the relations of production. Relations between the productive forces—labor power and the means of production⁶⁶—initially develop and ultimately retard those forces. The tension between them is resolved by a revolution which permits the productive forces to continue their development within new relations.⁶⁷ Thus change is constant, but it alternates between the normal arena of productive forces and the revolutionary arena of productive relations.⁶⁸ When the productive relations change, the revolution is complete and a new epoch has begun. Productive relations take all the bows on the stage

63. See Tucker, *The Marxian Revolutionary Idea*, in *WHY REVOLUTION?*, *supra* note 51, at 215-25.

64. See Wood, *The Marxian Critique of Justice*, in *MARX, JUSTICE, AND HISTORY* 3, 3-5 (M. Cohen, T. Nagel & T. Scanlon eds. 1980). *But cf.* Husami, *Marx on Distributive Justice*, in *id.* at 42, 43 (arguing that Marx condemned capitalism for its injustice).

65. See J. ELSTER, *MAKING SENSE OF MARX* 456-58 (1985).

66. See G. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* 32 (1978).

67. See J. ELSTER, *supra* note 65, at 243; Tucker, *supra* note 63, at 134-38.

68. See Tucker, *supra* note 63, at 220-21.

of Marxian history, while the productive forces labor backstage in obscurity.

But what are the relations of the production? When we examine the productive relations that concern Marx—slavery, feudalism, and especially capitalism—we see that he defines them largely in terms of the law of property and labor relations.⁶⁹ As Jon Elster admits, “[s]ince the property relations are ‘but a legal expression for’ the relations of production, we can characterize the latter in terms of ownership and non-ownership of the factors of production.”⁷⁰ The mode of production that was supposed to provide the social base upon which a legal superstructure could be constructed proves to be a legal construct.⁷¹

G.A. Cohen has attempted to avoid this problem by noting that since legal rights are not always enforced, they do not always confer power over productive forces.⁷² Yet the available regime for the enforcement of legal rights—“the state”—is *itself* legally defined.⁷³ Hence, a revolutionary transition from one mode of production to another is a transition between legal orders. Although grounded in “private” as well as “public” law, a mode of production is a legal code for ordering a society, a constitution.

There is a difficulty with this juristic interpretation of Marx’s theory of revolution. We have developed this interpretation by assimilating Marx’s theory into classical constitutional theory. But classical constitutional theory was essentially pessimistic—it predicted the inevitable corruption of every legal form. Marx, by contrast, is optimistic, predicting the transcendence of every legal form by an ever-improving society.⁷⁴

69. See G. COHEN, *supra* note 66, at 63-69.

70. J. ELSTER, *supra* note 65, at 253-54.

71. See Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 102-09 (1984); see also J. ELSTER, *supra* note 65, at 402-03 (noting that “since ownership must be backed by the state and hence presupposes a legal system, it cannot enter as an independent variable in the explanation of that system”). Other Marxian historians who treat wage labor as the defining feature of capitalism include C.B. Macpherson and Karl Polanyi. See C. MACPHERSON, *THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM; HOBBS TO LOCKE* 53-61 (1962); K. POLANYI, *THE GREAT TRANSFORMATION* 68-76 (1957).

72. See G. COHEN, *supra* note 66, at 217-25.

73. Kennedy, *The Legal Realist Element or the Stakes of Law*, LEGAL STUD. F. (forthcoming 1991). Cohen points out that a right to travel is ineffective if a gang of vigilantes can intimidate its holder from traveling. See G. COHEN, *supra* note 66, at 219-20. But the decision whether and how to enforce the right, and who is to do the enforcing (e.g., federal or state officials) is subject to legal decision making. See *Hodges v. United States*, 203 U.S. 1 (1906) (overturning the conviction of vigilantes for preventing black workers from fulfilling labor contracts in violation of the Thirteenth Amendment).

74. “The socialist revolution suppresses fetishism, and the condition of communism to which it leads may be described as the *conquest of form by matter*.” G. COHEN, *supra* note 66, at 129. “[N]ot only the varying contents of currently obtaining legal relations and legal norms, but the legal form itself in all its manifestations is ‘just as’ fetishistic in character as is the commodity form of political

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Accordingly, he sees the communist revolution as different from other revolutions—not just another spoke in a perpetual wheel of change, but the culmination and end of the process. Similarly, communism is different from other modes of production. Thus the role of law as an ordering and identifying device for a society is said to be characteristic of the particular modes of production that precede communism, which are all characterized by the division of labor—but not of the communist mode of production. The communist revolution, Marx insists, will be not a change of legal orders, but the end of legal order.⁷⁵

Yet the bulk of Marx's analysis is devoted to the legal construct that is capitalism; about the legally amorphous society of communism, he has little to say. It is as if a society without law cannot be analyzed, explained, or even described. Even the revolution that would create such a society commences with the transfer of ownership of the means of production from one class to another, so that only by giving meaning to the concepts of "class" and "ownership" can we assign any meaning to the idea of a communist revolution. Ultimately, even Marx's concept of communist revolution turns out to depend upon legal concepts.⁷⁶ Although attempting to develop a purely social conception of revolution, Marx could not escape the dominant legal positivist conception of revolution as unauthorized legal change.

C. *Critical Legal Studies and Revolution*

Since the French Revolution, radicalism has usually been identified with revolution and revolution has usually been conceived as the replacement of one constitutive legal order with another. Application of the concept of revolution thus appears to require that we be able to tell constitutive legal orders apart.

Yet critical legal scholars have claimed that legal doctrine is indeter-

economy." Korsch, *An Assessment*, in E. PASHUKANIS, *LAW & MARXISM: A GENERAL THEORY* 189, 189 (B. Einhorn trans., C. Arthur ed. 1978).

75. See Wood, *supra* note 64, at 30. "Previous revolutions within the framework of the division of labor were bound to lead to new political institutions; . . . the communist revolution, which removes the division of labor, ultimately abolishes political institutions." MARX & ENGELS, *THE GERMAN IDEOLOGY* 416 (S. Ryazanskaya trans. 1964). This withering away of the state is also a withering away of the relations of production and hence of law: "finally . . . the communist revolution will be guided not by . . . 'social institutions' . . . but by the productive forces." *Id.*; cf. J. ELSTER, *supra* note 65, at 456-58 (criticizing this expectation as naive).

76. See Tucker, *supra* note 63, at 224. Elster suggests that in *THE CRITIQUE OF THE GOTHA PROGRAM* Marx did not deny the need for some institutional structure in the ultimate stages of communism, but that he naively believed that these institutions would be apolitical and nonlegal because there would be no controversy over the distribution of goods. J. ELSTER, *supra* note 65, at 453-58.

minate,⁷⁷ in ways that undermine our ability to distinguish constitutive legal orders. Is labor-management strife pluralist politics or class struggle?⁷⁸ Is the coincidence of "individualist" and "altruist" norms in private law constitutive or corrosive of the liberal welfare state?⁷⁹ Are "mediated contradictions" stabilizing or destabilizing?⁸⁰ Does doctrinal conflict evidence contradiction within a single social order or confrontation between past and future social orders? Such questions subvert the criteria used by legal positivists and Marxists to identify revolutions.

77. For discussion and critique of a variety of interpretations of the indeterminacy claim, see Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462 (1987) (claiming that the underlying assumptions of current critical scholars' indeterminacy theories are problematic and that adherence to a strong view of indeterminacy is counterproductive to critical scholarship); for my discussion, see generally Binder, *supra* note 6. For various applications of post-structuralist theories of language to legal rules, see G. BINDER, *supra* note 15, at 49-67 (arguing that a deconstructive reading of legislative history explains the evolution of draft convention in terms of patterns of misreading); Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743 (1987) (introducing the theories of Derrida); Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985) (analyzing controversies within critical legal studies as a debate between subjectivist and structural strands of the movement); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985) (applying Derrida's theories to contract doctrines to demonstrate doctrinal indeterminacy reflecting larger problems of knowledge and power); Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984) (analyzing the different defenses of bureaucracy as invocations of a misleading subject-object dichotomy); Heller, *Structuralism and Critique*, 36 STAN. L. REV. 127 (1984) (suggesting that neither structuralist nor liberal theory sufficiently explains legal practices); Hutehinson, *From Cultural Construction to Historical Deconstruction* (Book Review), 94 YALE L.J. 209, 231 (1984) (reviewing J. WHITE, WHEN WORDS LOSE THEIR MEANING: CONSTITUTIONS AND RECONSTITUTIONS OF LANGUAGE, CHARACTER, AND COMMUNITY (1984)) (asserting that "[i]ndeterminacy does not require the conclusion that all texts are meaningless" but it does present the opportunity to find a meaning); David Kennedy, *The Turn to Interpretation*, 58 S. CAL. L. REV. 251 (1985) (illustrating structuralist and post-structuralist techniques of reading with an analysis of O. Henry's *Gift of the Magi*); Duncan Kennedy, *A Semiotics of Legal Argument*, in 3 LAW & SEMIOTICS 167, 175 (R. Kevelson ed. 1989); (arguing that all language is political; the language of every question encourages one type of answer and blocks other possible responses); Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1152 (1985) (arguing that the differing methods of legal analysis all mediate the social relations they represent and all rest on the subject-object metaphor in legal representational practice); Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987) (criticizing Stanley Fish's interpretive theory as covertly subjectivist); Schlag, *"Le Hors de Texte, C'est Moi": The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990) (criticizing Jack Balkin's efforts to "use" deconstruction in normative argument as covertly subjectivist). Balkin interprets the two well-known Duncan Kennedy articles cited later in this paragraph as examples of deconstruction. Balkin, *supra*, at 762-63. It seems apparent to me, however, that post-structuralism had no influence on the first wave of critical legal scholarship, published in the 1970s. The people who introduced post-structuralism into legal scholarship were the second-generation critics—those of us who encountered post-structuralism as undergraduates in the 1970s, and then in law school read first-generation critics through the prism of our post-structuralist educations. The post-structuralism of the second generation then had a feedback influence on some of the first-generation scholars.

78. See Forbath, *The Shaping of the American Labor Movement*, 102 HARV. L. REV. 1109 (1989); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978).

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

80. See generally Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383, 389 (1979); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205, 261 (1979).

How do legal positivists tell different legal systems apart? H.L.A. Hart's famous response to this problem was to claim that each system's rules are related by common pedigree.⁸¹ Each of these rule families can be identified by the rule of recognition that identifies all of its members.⁸² If constitutive legal orders are understood as rule families, the concept of revolution permits much indeterminacy within rule families, so long as the rules of recognition that differentiate them are determinate. But they can't be.

Nineteenth-century positivists like Daniel Webster and John Jameson pointed out that the amendment of a constitutive legal order need not be revolutionary.⁸³ To count as revolutionary, a constitutional change must not be constitutionally authorized. If it were, the new constitutive order would derive its authority from the old, and so the legal authority of the old would persist. Even changes in the rule of recognition are not revolutionary if they themselves conform to the rule of recognition. For example, if the American people amend article V according to the procedures required by article V, they make no revolution. Thus, revolution can occur only when the rule of recognition for constitutional law is violated. But how can a violation of the rule of recognition ever create constitutional law? If the ratification of the Thirteenth and Fourteenth Amendments appear unauthorized by article V, does that mean they were revolutionary, or does it mean that article V was never our rule of recognition?⁸⁴

The very meaning of a rule of recognition is that no violation of it can create law. How can we tell that a new rule of recognition has become legally authoritative except by reference to some rule of recognition for authoritative law? Revolutionaries never claim to make the people sovereign; rather, they recognize and defend the people's preexisting sovereignty. This may mean that the old constitutional regime was illegal, but it may also mean that the old regime derived its legal authority from popular consent—as indeed, many medieval monarchies claimed to do.⁸⁵ Because the identification of any rule of recognition invites an infinitely

81. See H. HART, *THE CONCEPT OF LAW* 97-107 (1961).

82. *Id.* at 97-98. Hart defines a rule of recognition as specifying "some feature or features possession of which by a suggested rule is taken as a conclusive affirmative indication that it is a rule of the group to be supported by the social pressure it exerts." *Id.* at 92.

83. See J. JAMESON, *A TREATISE ON THE PRINCIPLES OF AMERICAN CONSTITUTIONAL LAW AND LEGISLATION* 484 (1869 & photo. reprint 1981); E. WHELLER, *DANIEL WEBSTER: THE EX-POUNDER OF THE CONSTITUTION* 10 (1904 & photo. reprint 1986).

84. See Ackerman, *Discovering the Constitution*, 93 *YALE L.J.* 1013, 1057-70 (1984); Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 *U. CHI. L. REV.* 1043, 1054 (1988).

85. See G. SABINE, *supra* note 10, at 203-12.

regressive inquiry as to our rule of recognition for rules of recognition, rules of recognition are *always* indeterminate. If anything, it is easier to identify the content of the law than to identify its source of authority.⁸⁶

For one observing a legal system from the inside, no unauthorized change in the rule of recognition is possible. But an "external" observer faces the same difficulty: whatever criterion she employs to identify an authoritative legal system is *her* rule of recognition. There *is* no external perspective from which to identify two rule systems as distinct and legally authoritative.

How do Marxists identify revolutions? Marxian revolutions involve the replacement of one mode of production with another and, as I have argued, modes of production are constitutive legal orders.⁸⁷

Critical legal scholar Roberto Unger has argued that the Marxist theory of revolution is undermined by its inability to distinguish between modes of production.⁸⁸ How does Marx define the concept of capitalism, the paradigm for all modes of production? According to G.A. Cohen's influential analysis of Marx, at least three factors are critical for the identification of a capitalist economy: (1) a predominance of "free labor," understood as the condition in which a laborer owns all of her own labor and none of the means of production;⁸⁹ (2) commodity production for private accumulation of wealth;⁹⁰ and (3) sufficient accumulation of wealth to enable industrialization.⁹¹ But Unger points out that there is no necessary connection between commodity production and the development of a labor market, or between a labor market and industrialization, or between industrialization and private accumulation.⁹² Any rule of recognition for capitalist societies based on these criteria will be both under- and over-inclusive.

The critical assumption underlying Marx's conception of capitalism is that "free labor" is economically necessary to industrialization.⁹³ This assumption is undermined by the irreparable ambiguity of the concepts of free labor and economic necessity. Each of these concepts is analytically related to the concept of desire. To say, as Cohen does, that the "free laborer" has property in her labor, is to say that her labor can only

86. See Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 MOD. L. REV. 1, 8-9 (1956) (noting the difficulty inherent in any inquiry as to the source of authority for a particular rule of international law).

87. See *supra* notes 63-76 and accompanying text.

88. R. UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* 101-19 (1987).

89. See G. COHEN, *supra* note 66, at 64-69, 82-83, 181.

90. See *id.* at 80-81.

91. See *id.* at 180-81.

92. See R. UNGER, *supra* note 88, at 100-04.

93. See G. COHEN, *supra* note 66, at 185-93.

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be utilized with her consent.⁹⁴ To say that a “free labor” market makes possible industrialization by utilizing labor more efficiently is to say that it better fulfills desires. Because Marx’s theory of revolution is a variant of economic determinism, it shares the tendency of liberal economics to treat individual desire as an independent variable. A market is a means of aggregating desires. If one claims that the introduction of a free labor market better fulfills desires, one wrongly assumes that desires are independent of the means by which they are aggregated into social choice.⁹⁵

The instability of desire over time renders the concept of free labor indeterminate. Are specifically enforceable contracts for personal service expressions of “free labor” or involuntary servitude?⁹⁶ As early as 1821, the Indiana Supreme Court held that so enforcing an indenture would violate the prohibition on involuntary servitude in the state’s constitution.⁹⁷ But as late as 1897, the United States Supreme Court denied that the specifically enforceable labor contracts of merchant sailors violated identical language in the Thirteenth Amendment.⁹⁸ In respecting the sailor’s freedom at the time of contracting, the Court sacrificed his freedom at the time he jumped ship, thereby designating his former self custodian of his later self’s interests. In recognizing the indentured servant’s freedom at the time she left service, the Indiana court reduced her freedom at the time of contracting, effectively designating her later self custodian of her former self’s interests. The instability of desire precluded these courts from simply respecting the autonomous preferences of either laborer. Both decisions upheld “free labor”; yet both were paternalistic.⁹⁹ Because we cannot uncontroversially identify individual

94. See *id.* at 182-83 (stating that in capitalism the laborer is free to contract with the specific landlord he wishes); see also Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1105 (1972) (defining a property entitlement as one that cannot be taken from its holder without her consent).

95. See K. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963); A. MACKEY, *ARROW’S THEOREM: THE PARADOX OF SOCIAL CHOICE 2* (1980) (showing paradoxes entailed by this assumption). For a painstaking and penetrating critique of this assumption in its home terrain of social choice theory, see Pildes & Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121 (1991).

96. See generally R. STEINFELD, *THE INVENTION OF FREE LABOR IN THE UNITED STATES* (forthcoming 1991) (exploring the meanings attached to indentured servitude and its disappearance).

97. *Mary Clark’s Case*, 1 Blackf. 122, 126 (Ind. 1821).

98. *Robertson v. Baldwin*, 165 U.S. 275, 288 (1897).

99. See M. HOLLIS, *MODELS OF MAN* 99-100 (1977) (noting that preferences cannot be respected as autonomous without imposition of some independent criterion of “rational” preferences); M. KELMAN, *A GUIDE TO CRITICAL LEGAL STUDIES* 137 (1987) (acknowledging that “[i]n practice . . . paternalism and sensitivity to ambiguous choice are inevitably entwined”); Regan, *Paternalism, Freedom, Identity, and Commitment*, in *PATERNALISM* 113, 113-38 (R. Sartorius ed. 1983) (arguing that the identification of preferences involves intrapersonal paternalism); cf. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1171 (1986) (assuming that

preferences, we can give no determinate meaning to the concept of free labor that underlies Marx's concept of capitalism.

The instability of desire also undermines the determinacy of concepts like economic efficiency that aggregate individual desires.¹⁰⁰ Thus even if Marx could define free labor, he would have difficulty demonstrating that free labor was economically necessary to industrialization. And this claim is crucial to Marx's conception of capitalism as both a system and a necessary stage in the development of the productive forces.

Marx would have denied that his conception of economic necessity was based on any notion of desire. For Marx, economic life consisted in production rather than consumption, and the value of products was a function of labor rather than consumer demand. Thus "economic necessity" would have meant "necessary to production," not "necessary to the satisfaction of consumer demand." "Free labor" then, was "necessary" in the sense of necessary to the development of industrial production.

An analysis of this claim, however, will show that its validity depends on culturally contingent preferences. In characterizing bondage as a "fetter" on the development of the productive forces, Marx meant that it inhibited production by misallocating labor: bound laborers have no incentive to seek more productive tasks. And less production means less social surplus to invest in the development of industry.

But unless we specify the "consumer" preferences of laborers and employers for different labor relations, we cannot conclude that a market in free labor will allocate work more efficiently than a market in bound labor. This follows from the familiar Coase theorem that, absent transaction costs, allocative efficiency does not depend on the distribution of entitlements.¹⁰¹ From the standpoint of efficiency, the choice of remedy for personal service contracts is as irrelevant as the choice of remedy for any contract.

In a famous illustration of this principle, the Oklahoma Supreme Court refused to specifically enforce a mining company's promise to restore Mrs. Peevyhouse's land at the conclusion of their mining operation, because the restoration would have cost more than it would have added to the market value of the land.¹⁰² But if both parties are "rational utility maximizers," it shouldn't matter whether courts remedy breach specifically or monetarily. For some figure between the benefit to Mrs.

justifications for interfering with private preferences based on their changeability can avoid paternalism).

100. See M. KELMAN, *supra* note 99, at 124-50.

101. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

102. *Peevyhouse v. Garland Coal & Mining Co.*, 382 P.2d 109, 113-14 (Okla. 1963).

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Peevyhouse and the cost to the mining company of restoring the land, Mrs. Peevyhouse will agree to leave the land as it is. And if Mrs. Peevyhouse is "irrationally" insistent upon restoring the land, neither remedy will prevent Mrs. Peevyhouse from achieving this "inefficient" result at her own expense. If she receives damages, the irrational Mrs. Peevyhouse pays the cost of restoration directly. If she accepts specific performance, she pays the opportunity cost of foregoing a more lucrative monetary settlement. Thus the court's choice of a contract remedy distributes, but does not allocate, resources.¹⁰³

The choice between free and bound labor is simply a choice between a damage remedy and a specific performance remedy for contracts for personal service. Just as the distribution to Mrs. Peevyhouse of a property right to the mining company's landscaping services does not require that those services be used inefficiently, so too the distribution to employers of a property right in their laborer's services doesn't prevent the efficient allocation of those resources. A worker learning of a more productive position can buy her employer out, leaving both better off.¹⁰⁴ Similarly, an employer discovering a more productive use for an employee can lease her services to another employer, or to the employee herself. Like indentured labor, slave labor may also be efficiently reallocated.¹⁰⁵ The American South was probably the slave regime least hospitable to manumission. But even here, many slaves "hired their time" or purchased themselves.¹⁰⁶

We can only conclude that slavery allocated labor inefficiently by viewing labor as a consumer good rather than a factor of production. Many masters refused to manumit their slaves at market price, or to permit them to hire their time.¹⁰⁷ Few masters invested in the education

103. *But see* Kelman, *Consumption Theory, Production Theory, and Ideology in the Coase Theorem*, 52 S. CAL. L. REV. 669 (1979) (arguing that distribution affects preferences, which in turn affect efficient allocation); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981) (same).

104. If the employee doesn't have the money, she can borrow it at interest, leaving all three parties—employer, employee, and creditor—better off.

105. Cohen admits this proposition. *See* G. COHEN, *supra* note 66, at 190 (admitting that there is no reason why the vendor of the labor power must be the laborer himself and that it could be someone who owns the laborer); *see also* R. FOGEL & S. ENGERMAN, *TIME ON THE CROSS: THE ECONOMICS OF AMERICAN NEGRO SLAVERY* 261-62 (1974) (quoting Gunnar Myrdal on the relatively efficient allocation of labor in the slave South); *id.* at 234-35 (arguing that slave labor was as efficient as free labor in industry, but *more* efficient than free labor in agriculture); *cf.* H. GUTMAN, *SLAVERY AND THE NUMBERS GAME: A CRITIQUE OF TIME ON THE CROSS* 8-9, 39-48 (1975) (contesting the ability and inclination of masters to influence slaves through "positive" labor incentives).

106. *See* Binder, *Negating Slavery*, in G. BINDER, J. BUSH & K. THOMAS, *RECOGNIZING FREEDOM* (forthcoming 1992).

107. *See generally* I. BERLIN, *SLAVES WITHOUT MASTERS: THE FREE NEGRO IN THE ANTE-*

and skilling of their slaves, or permitted their slaves to so invest. Many masters felt that it demeaned their authority to bargain with their slaves.¹⁰⁸ And masters correctly feared that slaves allowed to wander in search of productive employment would run away. But this means that the slave system failed to allocate labor efficiently because neither the master nor the slave regarded the slave merely as a factor of production, to be valued according to the income she might yield. Masters owned slaves partly for the consumption value of the attendant honor, just as slaves were often willing, though not always able, to pay more than their own market value to consume the honor of self-ownership.¹⁰⁹ Thus Marx's concern with the efficient allocation of labor for production cannot be separated from the question of its efficient allocation for consumption.

Critical legal scholars have pointed out that the concept of efficiency is thoroughly indeterminate when applied to the allocation of resources for consumption. Because we often incorporate our possessions into our sense of self,¹¹⁰ how much we value a good often depends on whether we already have it. This point applies to property in labor. Employers whose identities are already invested in master status are more likely to pay a premium for slave labor, while we would be surprised to learn of freed slaves selling themselves back into slavery at any price. Thus the efficient allocation of the entitlement to dispose of labor depends in part on how the law distributes it.

Yet the value we place on entitlements is also contingent on cultural norms not recognized in the law. Thus, the fact that some slaves were willing to make great sacrifices to purchase freedom or undergo great risks to escape shows how much they already incorporated self-ownership into their self-images.

The contingency of allocative efficiency on legal and cultural norms means that legal and cultural changes can make an efficient allocation inefficient and vice-versa. Robert Steinfield has shown that indentured servitude ceased to be a profitable way to employ labor when workers

BELLUM SOUTH 138-57 (1974) (describing the legal, cultural, and economic restraints on redemption of slaves in the South).

108. See E. GENOVESE, ROLL, JORDAN, ROLL 306 (1974) (describing a master's resentment at his slave's demanding payment for finding beehives on the master's property).

109. There is little evidence to support the belief that jural freedom would have increased the earning potential of most slaves in a racially stratified society; but freedom offered more dignity. See R. FOGEL & S. ENGERMAN, *supra* note 105, at 236-39 (suggesting that slaves were materially deprived relative to white workers primarily in the sense that they would have given up a lot of material welfare for free status, and white workers would have foregone high wages to avoid slave working conditions).

110. See Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 959-61 (1982).

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would no longer stand for it, and courts became less willing to enforce it.¹¹¹ Rather than economic rationality ending bound labor, the cultural rejection of bound labor made it economically inefficient.

Marx's foremost contemporary defender denies that the cultural values that accommodate us to or alienate us from our economic roles are themselves material forces.¹¹² Yet he reluctantly admits that the relative efficiency of what we have come to call "free" labor cannot be explained without reference to such cultural values.¹¹³ What made bondage a "fetter" on the productive forces was the fact that the productive forces included laborers who saw it as demeaning. What binds "free" wage labor to the service of industrialization and accumulation to form "capitalism" is culture. This means that capitalism can never be separated from the "superstructure" it is supposed to explain. It also means that there is no necessary connection among any of the defining elements of a mode of production, and no necessary incompatibility between what are supposed to be elements of different modes of production.¹¹⁴

Critical legal scholars have argued that all legal rule systems contain contradictions. I have tried to show that the pervasiveness of such con-

111. R. STEINFELD, *supra* note 96, at 162-70.

112. G. COHEN, *supra* note 66, at 33, 113.

113. Here is Cohen's explanation:

First, it is difficult to conceive the provident habits and skilled craftsmanship which capitalism needed in the labour force it took over as faculties of slaves. The education presupposed by these abilities, and the sense of personal worth associated with them, cannot be united with slave status. . . .

Secondly, slaves must . . . be . . . strictly policed: they require more extensive supervision than do free workers. . . .

Third, rising productivity leads sooner or later to a rising standard of consumption among the producers, and that stimulates an enlarged self-awareness and a self-assertion which are difficult to reconcile with persistence of enslavement.

Id. at 191-92. That these assumptions are not universally applicable in all cultures has been demonstrated by Orlando Patterson. See O. PATTERSON, *supra* note 22, at 299-333 (discussing highly privileged, educated, and influential slaves in the Roman, Byzantine, and Ottoman empires).

In addition, Cohen's efficiency analysis treats supervision entirely as a cost of production, ignoring its positive utility as consumption. Much of the master's security against slave escape, for example, was provided free of charge by slave patrols composed largely of slaveless whites who seem to have regarded the intimidation of slaves and hounding of runaways as something between ennobling civic duty and sport.

114. Concludes Robert Steinfeld:

It has been assumed that "unfree contractual" labor and "free" labor [were] rooted in the logic of two qualitatively different social and economic systems, one in medieval economy and society, the other in market economy and society. . . . In the American colonies [, however,] indentured servitude flourished alongside "free" labor. The two merely represented alternative legal expressions of the idea that individuals owned and could freely sell the property in their own energies. In England, if there was a form of the wage relationship that had priority [in the eighteenth century] it would have been "unfree" wage labor. . . . A definitive selection . . . among these two . . . did not take place until the nineteenth century. Not the inexorable logic of the market, but a complex process of contingent social, cultural and economic struggle led . . . to the . . . repudiation of unfree contractual labor.

R. STEINFELD, *supra* note 96, at 6-7.

tradition precludes us from claiming that elements of different legal systems are incompatible. This makes it very difficult for us to distinguish conflict within a legal order from conflict between legal orders, or to distinguish change within a legal order from the replacement of one legal order with another. Thus, the indeterminacy thesis, as developed by critical legal studies, undermines the concept of a constitutive legal order on which the concept of revolution depends.¹¹⁵

This result poses a difficulty for critical legal scholars, who have seen themselves as political radicals. If one can no longer distinguish between fundamentally different social orders, what becomes of the desire for fundamental change? What does it mean to be radical without hope of revolution?

D. The Incompatibility of Radical Politics with the Pursuit of Revolution

This section will argue that radicals should cease identifying radical politics with the pursuit of revolution.¹¹⁶ As traditionally conceived, revolution involves an impossibly complete break with the old order. A political movement devoted to the pursuit of this chimera is likely to regiment supporters and demonize enemies in ways that are incompatible with democratic participation by large numbers of people. Revolutionary movements, in short, tend to develop a martial organizational form. Since, as Part II will emphasize, participatory democracy is crucial to radical transformation, the organizational form dictated by the pursuit of revolution is incompatible with the aims of radicalism.

Twentieth-century radicalism has seen revolution as central to the notion of radical transformation of human nature because it has seen revolutionary violence as encouraging solidarity and self-sacrifice.¹¹⁷ By militarizing the conflict between an unpopular government and a passively disaffected people, guerrillas hope to impose on the populace a choice between active support of the regime and active resistance. Removing the middle ground of grudging and cynical acquiescence forces an existential crisis in which the subject must redefine and resurrect her

115. See Binder, *supra* note 6, at 892-97.

116. I do not deny that the pursuit of revolution is sometimes a necessary response to intractable injustice; but I do deny that it is likely to encourage radical change. A revolutionary strategy will be the lesser of the two evils in many settings—but it will be an evil nonetheless.

117. See J. WODDIS, *NEW THEORIES OF REVOLUTION* 398 (1972) (describing two twentieth-century radicals who saw violence as a “necessary experience in itself” and as “the cleansing fire which tests and purifies revolutionaries”). The idea that conflict builds character has a venerable history. See G. BINDER, *supra* note 15, at 83 (noting that Machiavelli, Rousseau, and Hegel viewed war as “perfectly compatible with the maintenance of virtue”).

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civic identity.¹¹⁸ The mobilization of the populace is not only a means of realizing the revolutionary program—it is the revolutionary program, the desired radical change.¹¹⁹

As an answer to the question “how can one seize state power?,” popular mobilization is unexceptionable. But how does it look as an answer to the question “what does a utopian society look like?” The claim that revolutionary mobilization is a school for civic virtue now looks like an unconvincing dodge. It implies that citizens will be sufficiently improved by the process of revolution that they need not worry about what institutions the revolution will bring into being. The very process of revolution will purge society of the selfish corruption that engendered the need for revolution in the first place.

Such expectations court disaster. Lacking any legitimate institutional framework, a revolutionary society is easily tempted to base the legitimacy of its social choices on the character of its people. This explains the intense anxiety about corruption that characterizes revolutionary societies: any flagging of virtue threatens the legitimacy of the entire society. When we identify revolutionary struggle as the vehicle for purifying character, anyone lacking in revolutionary commitment becomes a source of the feared impurity. But if the new order is indistinguishable from the old, how can we be sure of anyone's revolutionary commitment? Fearing impurity in ourselves, we need endless opportunities to display our revolutionary commitment. And this means we need ever more struggle against ever more enemies, which we can only generate by setting ever higher our standards of purity.¹²⁰ In short, without a positive program for institutionalizing character reform, revolution degenerates into a self-consuming cycle of internecine purges.¹²¹ And, as

118. See Tilly, *From Mobilization to Revolution*, in ASPECTS OF THE FRENCH REVOLUTION 118-20 (A. Cobban ed. 1968) (describing revolution as a competition for loyalty between two polities); Binder, *On Critical Legal Studies As Guerilla Warfare*, 76 GEO. L.J. 1, 10 (1987).

119. The tendency of revolution to mobilize much of the populace forms the basis for Samuel Huntington's theory of revolution as a crisis of political participation. See generally S. HUNTINGTON, *supra* note 11. As Charles Tilly and his associates have argued, one reason why political participation increases dramatically during revolutions is the availability of not one but two competing “states,” each demanding active displays of affiliation. See generally Tilly, *Revolutions and Collective Action*, in HANDBOOK OF POLITICAL SCIENCE 520-21 (F. Greenstein & N. Polsby eds. 1975).

120. See generally B. BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* (1967) (exploring paranoid anxiety about corruption on the part of American revolutionaries); R. HOFSTADTERT, *THE PARANOID STYLE IN AMERICAN POLITICS* 3-40 (1966) (discussing the pre-revolutionary origins of rhetoric of infiltration); M. WALZER, *supra* note 31 (exploring psychological and social roots of the craving for purity among Calvinist revolutionaries, particularly in England); F. Furet, *supra* note 50, at 554-57 (describing how the pursuit of virtue led to terror in the French Revolution); Ozouf, *supra* note 32, at 811-16 (describing revolution as a Sisyphian task).

121. Gueniffey, *Robespierre*, in DICTIONARY, *supra* note 32, at 306-09 (noting that Robespierre's strategy for inculcating virtue was purgation, endlessly repeated). See generally H. TAINE, *THE*

revolution becomes increasingly oriented towards the purgation of enemies, it ceases to be conceived as the construction of a new human nature. Instead, revolution becomes revenge against an old order that has so incurably perverted human nature that it resists radical transformation.

An impoverished conception of identity underlies the model of revolution as an opportunity for self-redefinition. According to this view, the self is radically up for grabs—reconstructed anew at each moment of consciousness. The revolutionary situation, like any life-or-death situation, reveals the contingency of all of the self's attributes and hence frees the self from the illusory constraints of a corrupt culture.

The problem with this sort of reasoning lies in its assumption that identity is illusory because it is culturally contingent. At bottom, this casual dismissal of people's prerevolutionary identities reflects an essentially liberal belief that the "real" self of each person is presocial. Only from this perspective can people be stripped of their old social contexts with no psychological costs. But a social identity is not an outer garment covering up a true self: if we strip away the social "skin," however confining, the inner being will disintegrate. Individual identity is culturally constructed. We cannot redefine ourselves simply by dismantling the corrupt cultural and social institutions that currently sustain individual identities. Truly radical politics involve not just the desire to deconstruct, but also the desire to reconstitute society; not just the desire to uproot, but the recognition that social life requires roots.

When the goal is the destruction of an existing culture, revolution may not be necessary. Cultures are fragile—most of the traditional sources of authority in French society were already in retreat before the revolution.¹²² If the goal is the construction of a new culture, the violent conflict engendered by the pursuit of revolution is not especially integrative. As romantic critics of the French Revolution have long argued, the pursuit of revolution destroys the social contexts that sustain identity and inform human behavior with values, without necessarily replacing those contexts.¹²³

Revolutionary organization may take many forms, but none are

ANCIENT REGIME 191-251 (1962) (arguing that the abstract utopian ideology of the French Revolution led to brutality).

122. See generally S. SCHAMA, *CITIZENS: A CHRONICLE OF THE FRENCH REVOLUTION* (1989) (synthesizing recent histories stressing the fast pace of change in prerevolutionary France). The original expression of this thesis was A. DE TOCQUEVILLE, *THE OLD REGIME AND THE REVOLUTION* (S. Gilbert trans. 1955).

123. Works in this tradition include H. ARENDT, *supra* note 59; K. BAKER, *INVENTING THE FRENCH REVOLUTION* (1990); E. BURKE, *REFLECTIONS ON THE REVOLUTION IN FRANCE* (1968); O. GIERKE, *NATURAL LAW AND THE THEORY OF SOCIETY, 1500-1800* (E. Barker trans. 1934 &

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very conducive to the achievement of radical aims. The mass movements that characterize successful insurrections are neither sufficiently intimate nor sufficiently stable to sustain identity. Toppling only those governments incapable of solving preexisting problems, successful revolutionary movements inherit crises requiring an authoritarian response. Thus, Hannah Arendt argues that social revolutions quickly subordinate democracy to the more pressing problem of organizing and coercing the redistribution of resources.¹²⁴ Theda Skocpol argues that successful social revolutions are generally facilitated by foreign military or economic threats to which they must respond.¹²⁵ No matter how ideologically opposed to programmatic thinking and institutional embodiment a revolutionary movement may be, events will supply a program and engender institutions. As a result, revolutionary success generally depends upon the erection of a hierarchical bureaucracy, not participatory democracy. The revolutionary regime achieves legitimacy by more effectively mobilizing people and resources to achieve the goals of the old regime, rather than by involving more people in the definition of societal goals. To the extent that radicals find our own society already too impersonal, too instrumental, too bureaucratic, and too managed, the path of revolution will not lead in the direction of radical change.

Of course, not all revolutionary movements achieve success. What are the cultural consequences of revolutionary politics prior to revolution? The more serious people are about making revolution, the more they risk repression. The more they risk repression, the more likely they are to act and meet in secret. And secret organizations tend not to be very democratic. A secret conspiracy can provide its participants with an intimate context for the construction and recognition of identity, but the risk of betrayal makes the participants dependent on one another to a degree that invites paranoia. The rigid military discipline imposed by the need for secrecy makes the revolutionary cell an outpost of instrumental culture, rather than a prefiguration of utopia. Accordingly, professional revolutionaries are social technicians, analyzing, predicting, and manipulating society from the outside. In this respect, their self-images resemble those of mainstream policy analysts.¹²⁶ Far from advancing radical goals, "professional" revolution reproduces and reinforces the instru-

photo. reprint 1950); G. HEGEL, *HEGEL'S PHILOSOPHY OF RIGHT* (T. Knox trans. 1967); and A. DE TOCQUEVILLE, *supra* note 122.

124. H. ARENDT, *supra* note 59, at 60-114.

125. T. SKOCPOL, *STATES AND SOCIAL REVOLUTIONS: A COMPARATIVE ANALYSIS OF FRANCE, RUSSIA, AND CHINA* 50 (1979).

126. See MacIntyre, *Ideology, Social Science, and Revolution*, 5 *COMP. POL.* 321, 340-42 (1973).

mental culture that, Part II will argue, it is the contemporary task of radical politics to transform.

II. Radicalism Reconstructed

A. *A Cultural Concept of Radical Change*

Radicals have traditionally aspired to revolution, and revolution has generally been perceived as a change of legal systems. Since critical legal studies persuasively argues that the concept of a legal system is incoherent, it undermines the aspiration to revolution that has supplied radicals with their dominant image of radical change. Hence, if we wish to preserve the aspiration to radical social change, we have to separate it from the revolutionary aspiration. In Part I, I argued that the pursuit of revolution is probably incompatible with the attainment of the kind of society that most self-identified radicals desire: a society characterized by community, participatory democracy, and self-realization. "Radical" goals need not be pursued by revolutionary means. In fact, radicals should probably reject revolution for political, as well as conceptual, reasons.

But there remains a conceptual problem that this political argument does not address. Is radical social change *conceptually* distinguishable from revolution? As my critique of the concept of mode of production illustrates, conceptions of social order tend to be just as lawlike as conceptions of legal order—and just as indeterminate. If we are skeptical about constitutive or foundational changes in law, are we not compelled to be equally skeptical about radical changes in society? Isn't the critique of legal determinacy built on a *foundation* of thoroughgoing epistemological skepticism?

Not necessarily. Critical legal scholars have stressed the indeterminacy of legal and sociological concepts based on some notion of preference or consent. And they have denied that legal and social orders have foundations—that is, determinate rules of recognition. But these critiques need not be "founded" on skepticism or any other epistemological position. Nor does a rejection of foundation metaphors require a rejection of the concept of radical change.

Radical change is not necessarily fundamental change. Because foundation metaphors are essentialist, fundamental change is a contradiction in terms. Alter the essence of the thing and you don't change it—you destroy it, creating something new. Change is thus inherently limited; change takes place only if some aspect of the object remains the same. Root metaphors express this limitation. To be rooted is to be situated. Uprooted, a plant can be transplanted in a different context. A

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root can be seen as merely one part of an organic system, each element of which depends on every other but which, as a whole, is in a constant flux of growth, decay, reproduction, and evolution.

We can call change radical to the extent that it changes the identity of human beings. But we can also recognize that personal identity is culturally constructed rather than “natural” or “essential.” Thus, identities fit into cultures in the way that roots fit into organic systems.

What is a culture? It is a stable, mutually constituting combination of socioeconomic structures, affective associations, collectively recognized identities, and individual value commitments. When I say that each of these elements—distributions of wealth and power, associative relationships, identities, and values—constitute each other, I do *not* mean they logically entail each other. I mean that they supply meaning to one another. Any one of these elements is “iterable,” which is to say that it can be abstracted from its relationship to the other elements. This means both that it can be represented in language, and that it can be retained or reproduced in a different social context.¹²⁷ Represented in isolation from the other elements of a culture, the meaning of an identity (“citizen of the United States,” “psychological parent”) or an institution (“family,” “private club,” “trust,” “school district”) is indeterminate, because we can easily imagine it in combination with a different social context.

Despite the independence of each of these elements, some combinations turn out to be self-sustaining:

[Social] structure has consequences for the formation of associative relationships which in turn have consequences for the formation of character. By character I mean . . . those values that people are committed to because they have invested their sense of self in them. Associations affect those value commitments because they provide contexts in which people can be recognized and identified by others as individuals defined by particular character traits. Because such traits or perceptions are built into people's self-conceptions and are reinforced by their social relationships, they have a much stronger hold than any ideology. A stable culture exists when the identities encouraged by the structure of social life direct people to behave in ways that reproduce that structure.¹²⁸

Americans currently inhabit and reproduce a culture that I have described as instrumental:

Instrumentalism is a culture of calculating individuals and imper-

127. See J. CULLER, *ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM* 110-34 (1982) (discussing the relationship between meaning and iterability); Balkin, *supra* note 77, at 749 (arguing that iterability, “the property of being able to be repeated in many different contexts,” is “essential to any form of communication”).

128. Binder, *supra* note 6, at 906.

sonal social forces. Its participants believe in the separability of means and ends, with its corollary that ends can be defined in advance of the processes that realize them. They are planners and resume builders, looking past every experience to its consequences. Individually, they pride themselves on choosing their own ends; collectively, they stockpile those resources that can serve any end. . . .

. . . .

Instrumentalism flourishes where socially stunted selves combine to form the impersonal forces that inhibit the social development of personal identity.¹²⁹

Belief in the determinacy of desire plays an important role in instrumental culture, encouraging individuals to identify themselves with their present desires. A person with such an instrumental identity is a "natural" consumer: when she consumes she expresses her authentic self. In demonstrating the indeterminacy of desire, critical legal scholars have critiqued the human nature constructed by instrumental culture. In the next section I explicate the vision of human beings as self-realizing participants in politics that inspires this critique. In a third section I show how the collective pursuit of self-realization can build a cultural alternative to instrumentalism, that, even in local settings, would represent radical change.

B. Radicalizing Human Nature

Human nature, as understood by Aristotle, was both the way people are and the way they should be. This complex concept of nature was designed to take account of ontogenetic development, the paradox that immature members of the same species resemble one another more than they resemble their future selves.¹³⁰ It resolved this paradox by portraying human beings as naturally developing toward a particular purpose. But it also introduced another paradox by permitting human beings to simultaneously conform to their nature and not conform to it—they could be on the path towards their purpose and not yet have reached it. Hence, they could be alienated from human nature and nevertheless human. This paradox recognized a dynamic element within human na-

129. *Id.* at 907-09.

130. The "nature" of an entity could be its present form, its future form, its pattern of growth, or its purpose. See ARISTOTLE, *Physics*, in THE COMPLETE WORKS OF ARISTOTLE 329-30 (Bk. II, ch. 1), 339-41 (Bk. II, ch. 8) (R. Hardie & R. Gaye trans. 1984). In some respects, immature members of one species may resemble mature members of another species more than mature members of their own. See S. GOULD, ONTOGENY AND PHYLOGENY 390 (1977) (noting that the skeletal features of some types of less evolved juvenile primates resemble those of human adults more than they resemble their own adult forms).

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ture which radicalism has reinterpreted as the possibility that human nature itself can change.

The most familiar use of the concept of human nature in political argument is to identify innate human needs that societies are bound to serve. Radical political theory departs from this conventional model in two important respects. It conceives of human nature as a set of capacities rather than a set of needs, and it sees these capacities as cultivated rather than innate. The radical thus seeks to identify capacities that societies are bound to develop in human beings.

Human nature may be conceived of in terms of such "natural" needs as food and air, without which one cannot continue to exist as a human being. Alternatively, human nature may be visualized as a need prerequisite to one's full development as a human being, such as economic independence, or political participation, or the nurturance of another life. The fulfillment of these "cultural" needs may not be required in order to be human. Instead, merely having such a need can mark one as human, as when we identify alienation as the human condition. "Natural" and "cultural" needs can never be kept neatly separate: we need education just to survive into adulthood.

Human nature may also be viewed as an ability or disposition, such as the disposition to rationally maximize utility, or the capacity to make one's own tools. Need and capacity converge in some dynamic conception of human nature as self-revising. One who sees human nature as the capacity to redefine one's needs fulfills herself by constantly inventing new ways of frustrating herself. This paradox is particularly evident when the creation of new needs is a sort of unintended by-product of the satisfaction of old ones. Desire typically has this sort of dialectical structure in writing influenced by Hegel and Marx, whether its instability is lauded as fertile¹³¹ or scorched as self-consuming.¹³²

One can see the deployment of both the need and the capacity conceptions of human nature in Robin West's "Jurisprudence and Gender."¹³³ Based on a reading of Duncan Kennedy, Peter Gabel, and other male critical legal theorists, West speculates that men are naturally isolated but desire connection.¹³⁴ Relative to their own desires, then, men are naturally flawed, contradictory, and incomplete. They are defined primarily in terms of a need which, according to West, men hope that

131. *E.g.*, the desires for recognition, self-consciousness, or meaningful work.

132. *E.g.*, decadent compulsions such as skepticism in Hegel or the fetishism of commodities in Marx.

133. *See* West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1 (1988).

134. *See id.* at 44, 51-52 (discussing contradictions between the "human being" assumed by legal theory and "women" described by feminism).

society can artificially supply. By contrast, West sees women as naturally "connected" by virtue of their capacities for pregnancy and lactation. Where men long for the connection their biology has failed to supply, women long for the autonomy that society has deprived them of.¹³⁵ Thus men are naturally barren or empty, and in need of artificial fulfillment. Women are naturally fertile and abundant, but are socially oppressed.

There are difficulties here.¹³⁶ West persuasively refutes the view that human beings are, as a matter of natural fact rather than cultural identification, distinct from each other. But she then resurrects it by treating the isolation of males as a natural fact.

This tension in West's thinking illustrates a second dimension along which conceptions of human nature vary: the axis between the innate and the artificial elements of human nature. Any radical political theory must see at least some important human characteristics as artificial, in the sense that human action can alter or replace them with other traits. A theory which holds that human needs can be met or that human capacities can be realized by social reform without altering human nature is not a radical theory.

The prospects of radical theory are made happier by the fact that human needs and capacities are alterable. Consider first human needs. What economists call preferences change constantly, for at least three reasons. One reason is adaptive preference formation: a good is less available, and so a consumer wants it less. Of course, this is what the economist would predict: when a good is less available, its price will go up and consumers will demand less. Their demand curves haven't changed. However, the status degradation or the gnawing frustration implicit in wanting something we cannot afford may induce us to say "sour grapes," adapting our preferences as well as our habits to our newly straitened circumstances.¹³⁷ One need, cognitive dissonance reduction, compels the abandonment of another.¹³⁸

Another reason preferences change lies in the capacity of people to become addicted to certain goods. Addicts demand more and more of a particular good and are satisfied by it less and less. Jon Elster speculates

135. *See id.* at 35-37.

136. Just who are these naturally connected women connected to? Aren't some fetuses, breast-feeding infants, and older but nevertheless dependent children male? And for children of both sexes, isn't connection a need rather than a potentiality or inevitability? On the other hand, not all adult women become pregnant, breast-feed, or otherwise nurture children. Isn't the decision to bear or rear children social and in this sense artificial?

137. J. ELSTER, *SOUR GRAPES: STUDIES IN THE SUBVERSION OF RATIONALITY* 109-40 (1983).

138. L. FESTINGER, *A THEORY OF COGNITIVE DISSONANCE* (1957).

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that consumption in general is an addiction. If Elster is right, such an addiction is a variant of adaptive preference formation—we want consumer goods because they are available. Because acquiring them does not reduce their availability, we keep wanting them. But as we acquire more and more, the utility we derive from each decreases. Thus, while the activity of consumption as a whole may be addictive, consumption is restless with respect to any particular object. The consumer's self is the dead calm at the eye of a raging storm. Her desires are ever-changing, but they leave her unaffected because she commits herself to none.¹³⁹

Elster contrasts addictive consumption with self-realization. Activities that contribute to self-realization generate more utility the more we engage in them, because we get better at them. Therefore, one of the most important reasons why our *needs* can change is that our *capacities* can change. We derive satisfaction from doing things well because this enables us to see ourselves as more capable.

The “human” capacity for self-realization is not innate; it is culturally contingent. Because performing an activity well is socially defined, the utility generated by self-realization depends upon recognition by others. Activities which may engender such self-realization include meaningful work and participation in democratic politics.¹⁴⁰ Such activities yield increasing satisfaction only to the extent that they are sustained over time.¹⁴¹ Thus, they can radically transform their participants only by providing a stable social context in which desire can deepen.

Self-realization is very much a collective pursuit. Unlike consumption, self-realization is not a zero-sum game in which my gain is your loss. Opportunities for self-realization depend on stable political engagements, intimate associations, and work environments. Accordingly, to the extent that I commit myself over time to a particular political community or intimate association, I enhance the ability of others to do the same. To the extent that I avoid commitment, allowing myself to be absorbed in a whirlwind of consumption, I decrease the opportunities of others to realize themselves. Work environments provide a variety of opportunities for self-realization. They are potential settings for participatory democracy and friendship, of course, but they are also potential settings for the mutual recognition of a job well done.¹⁴² This mutual

139. Elster, *Self-Realization in Work and Politics: The Marxist Conception of the Good Life*, 3 SOC. PHIL. & POL'Y 97, 103-04 (1986).

140. *Id.* at 99. Elster notes that friendship and love can also involve increasing satisfaction, personal transformation, and mutual recognition, but claims that they differ in that the mutual recognition is not mediated by any instrumental purpose. *Id.*

141. *Id.*

142. *See id.* at 115 (noting that recognition from coworkers is more important than from super-

recognition requires colleagues who have developed competence and have also invested their identities in the value of performing work well. Ultimately, all types of self-realization depend on and enable the pursuit of self-realization by others. Therefore, the rarer opportunities for self-realization become, the more likely I am to adapt my preferences to consumption, further undermining the motivation of my fellows to realize themselves. In an instrumental culture, self-realization is hampered by collective-action problems; its pursuit may be in the long-term interest of all, but in the short-term interest of none.¹⁴³

Self-realization is better viewed as a capacity than as a need: we can survive without it. Self-realizing pursuits may become addictive for those already pursuing them; they may be necessary to the maintenance or development of an identity that the pursuer has chosen. But, self-realization may not recommend itself to those who are not already committed to it. Self-realization is hard work. To say that it yields increasing satisfaction over time is to acknowledge that it yields little happiness in the short run. In fact, its initial returns may be negative.¹⁴⁴

Nor is self-realization "necessary" for maintaining the ordinary person's self-image. To the contrary, self-realization changes one's identity. The fascination with contradiction that characterized romanticism stemmed from the conflict between the romantic aspiration to create the self and the romantic aspiration to express the self.¹⁴⁵ The latter aspiration proudly flaunts the self that we have—the former aspiration ruthlessly rejects it. Self-realization entails the alienation of the self we start out with. Of course, we may conclude that the original self is impoverished. But the instant that we claim that self-realization is a human need, we contemptuously dismiss as inhuman those who have not realized themselves.

A final reason for rejecting the characterization of self-realization as a human need is that the language of needs is the language of consumption. Self-realization does not replenish us; it is not a fuel that we use up in order to maintain ourselves. Instead it is a quest, a hard road. It uses us up. It increasingly possesses us and discards what we were.

By definition, no radical political theory can base its normative conclusions on invariant human needs. But it can rest on our capacity to

visors, since the latter are paid to use profitability rather than quality of performance as the criterion for evaluating work).

143. Sunstein, *supra* note 99, at 1140-47.

144. Elster, *supra* note 139, at 100.

145. C. TAYLOR, *HEGEL & MODERN SOCIETY* 48 (1979).

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collectively cultivate new needs and capacities. This is the vision of human nature implicit in Mark Kelman's overly sanguine claim that

all choices are part of a never-equilibrating, dynamic process of self-discovery. We continually try to establish conditions in which more desirable selves, with particular preferences, will flourish. Then, we reevaluate our vision of whether the chooser we create by working to establish those conditions seems more or less realized, then work some more to redo background conditions.¹⁴⁶

Kelman is right: all choice is self-choice. But Kelman is also wrong: the only self-definitions available on the shelves of instrumental culture are self-consuming needs, not self-cultivating capacities. "We" cannot "establish conditions in which more desirable selves . . . will flourish" all by ourselves. That is why the establishment of such conditions would represent radical change.

C. The Practical Possibility of Radical Change

Self-realization radically changes an individual in the sense that it alters her identity. But self-realization is not an individual pursuit—it requires the active participation of others. As a result, the radical change of any individual requires radical social change. By this I mean that for any individual to change many must change, and that these changes are mutually dependent. I think this sort of change is possible because projects of self-realization are not just mutually dependent—they are mutually reinforcing. Self-realization, in other words, is a characteristic of a culture.

I call instrumentalism a culture because instrumental behavior is causally related to other instrumental behavior. The more I view the other people as instruments and obstacles to the realization of purposes I define on my own, the less available I am for the kind of long-term dialogue and cooperation that facilitates self-realization. This has consequences both for others and for myself. My instrumentalism reduces the opportunities and incentives for others to self-realize and encourages them to define their purposes in isolation. This in turn reduces my opportunities for self-realization in the future. In addition, since the rewards of self-realization increase over time, current consumption reduces my future incentive to self-realize. Thus instrumentalism is a culture in the sense that instrumental behavior and instrumental attitudes reproduce themselves.

Self-realization could define a culture in this same sense. Because self-realizing behavior increases the future opportunities and rewards of

146. Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769, 787.

self-realization for the actor and for others, self-realization also can reproduce itself. Empirical studies of worker participation in workplace decision making suggest that it permanently changes not only the way people view themselves, but the way they treat others. Participation builds self-esteem by changing the experience of work. This enhances workers' belief in their political competence and motivates them to organize other settings in which they can exercise it.

Participation in management can make even "dirty" work a source of pride. One former member of a garbageman's cooperative lamented, "I miss the meetings. . . . It was a terrific feeling to own a company at 22. . . . I used to walk out of here at night, look back at all the trucks, and say to myself, 'this is mine. I own one of these trucks.'"¹⁴⁷ Said a member of one such co-op to his interviewer: "Look, it's Jerry isn't it? Jerry, if you want to work along with us, that's fine, but watch the spillage in the street when you dump your sack into the hopper. . . . Public Relations, you know. It means everything for the company. That's what makes us."¹⁴⁸ Said a woman who worked in an illegal abortion collective in the 1960s:

You think you could never stick your hand into a toilet bowl full of blood and vomit and pull out a placenta and look at it. You think you could never put a needle into somebody's ass. But you have to do it and you're the only person who can do it—you do it. And once you've done it, you say, my God, I can do this.¹⁴⁹

Despite such traumatic work, another member of this collective concluded "My participation in the service grew me into the person I was meant to be."¹⁵⁰ These quotes reveal that participation is transformative because it is more than just talk, it is sharing in responsibility for one's own actions. Doing a dirty job has a completely different meaning when one is taking responsibility rather than taking orders: it feels like a courageous sacrifice rather than a craven surrender.

Because participation changes the way that workers view themselves, it can change their beliefs about their capacity for participation.¹⁵¹ Workers who have never been offered managerial responsibility often deem themselves incompetent.¹⁵² But

147. Russell, *The Rewards of Participation in a Worker-Owned Firm*, in *WORKPLACE DEMOCRACY AND SOCIAL CHANGE* 109, 116 (F. Lindenfeld & J. Rothschild-Whitte eds. 1982).

148. *Id.* at 113.

149. Schlesinger & Bart, *Collective Work and Self-Identity: Working in a Feminist Illegal Abortion Collective*, in *WORKPLACE DEMOCRACY AND SOCIAL CHANGE*, *supra* note 147, at 139, 146.

150. *Id.*

151. See generally *POLITICAL LEARNING IN ADULTHOOD* 89-202 (R. Sigel ed. 1989) (discussing studies and theories of political socialization in the workplace).

152. C. PATEMAN, *PARTICIPATION AND DEMOCRATIC THEORY* 40, 82, 85, 107 (1970).

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a structure of participation . . . in the long run becomes more effective because of the eventual compatibility of personality with structure. In other words, the organization that permits participation ultimately produces individuals who are responsible to participation.¹⁵³

One British auto worker's description of participation at his plant reveals as much about him as it does about his work:

[it] provides a natural frame of security, it gives confidence, shares money equally, uses all degrees of skill without distinction and enables jobs to be allocated to the man or woman best suited to them, the allocation frequently being made by the workers themselves.¹⁵⁴

The political self-confidence engendered by workplace participation can have radiating effects beyond the workplace. Political scientists have long noted that people with high self-esteem and confidence in their own political efficacy are more likely to participate in civic affairs.¹⁵⁵ As a consequence, workers who participate in the organization of work are more active politically.¹⁵⁶ Thus, several participants in the abortion collective called the experience "radicalizing" or "politicizing," and said it led to other involvements.¹⁵⁷ But participation can also influence the political self-image of nonparticipants. Participants come to understand that they are politically effective because they listen to and learn from others. By contrast, those who are given little input into decisions that affect them allow others little input into *their own* decisions, both at home and at work.¹⁵⁸ But if coercion and manipulation reproduce themselves, so may democratic participation. And that means that introducing any amount of democratic participation, anywhere in our society, at any time, can produce real and lasting change.

III. Defending Radicalism Against Deconstruction

The conception of radical change I outlined in Part II depends on

153. P. BLUMBERG, *INDUSTRIAL DEMOCRACY: THE SOCIOLOGY OF PARTICIPATION* 109 (1968); see also C. PATEMAN, *supra* note 152, at 64 (quoting Blumberg); Tannenbaum, *Personality Change As a Result of an Experimental Change of Environmental Conditions*, 55 J. ABNORMAL & SOC. PSYCH. 404, 406 (1957) (noting a trend in personality toward "equilibrium" with its environment).

154. Wright, *The Gang System in Coventry*, 2 ANARCHY 47, 50 (1961).

155. See, e.g., G. ALMOND & S. VERBA, *supra* note 11, at 206-07; A. CAMPBELL, G. GURIN & W. MILLER, *THE VOTER DECIDES* 187 (1954); L. MILBRATH, *POLITICAL PARTICIPATION* 59 (1965).

156. See C. PATEMAN, *supra* note 152, at 52; see also R. BLAUNER, *FREEDOM AND ALIENATION: THE FACTORY WORKER AND HIS INDUSTRY* 51-57 (1964) (reporting that printers, who are involved in their work and have a high level of control and freedom, extend that control to their social relations); Lipsitz, *Work Life and Political Attitudes*, 58 AM. POL. SCI. REV. 951 (1964).

157. Schlesinger & Bart, *supra* note 149, at 147-48.

158. C. PATEMAN, *supra* note 152, at 49, 53.

four concepts stressed by Rousseau: participatory democracy, community, human nature, and culture. I argued that democratic participation in community decision making changes people in ways that commit them more strongly to the sustenance of democratic communities. I defined this sort of mutual reproduction of personal identity and social relations as a culture. Because our identities are culturally rooted in relations with others, I argued that our cultural surroundings set what appear to us to be "natural" constraints on our possibilities. We can change ourselves, I concluded, but only by altering the cultural environment that shapes us; and in this sense, the construction of a culture of democratic participation changes our nature. By rooting us in a culture of self-realization, democratic participation can change us radically.

Deconstructive critics, such as Jacques Derrida, Iris Marion Young, and Bernard Yack, see such Rousseauian radicalism as expressing a totalitarian drive for homogeneity. Hence they charge that demands for democratic participation are motivated by an anti-intellectualism that limits political argument to the repetition of prevalent clichés and the reinforcement of common prejudices; that devotion to community is motivated by a need for insularity and conformity; and that the longing to fulfill one's humanity or root one's identity in a culture reflects a need to stigmatize others as inhuman or inauthentic. In sum, deconstructive critics read the desire for self-realization as a yearning to overcome alienation by restoring a natural or authentic self. Arguing that all of our thoughts and desires are mediated, deconstructive critics view any such aspiration as unachievable. But in an effort to purify the self of external influence, deconstructive critics charge, radicals are prone to purge their social environments of dissenting voices and heterogeneous populations.

As the ensuing sections demonstrate, this deconstructive critique profoundly misconstrues radicalism.

First, radicals demand universal participation in politics, not to lower debate to the level of the least educated and most parochial, but to broaden and educate all citizens by involving them in intellectual debate; assuming that everyone is capable of self-realization, radicals are anti-elitist, not anti-intellectual.

Second, far from privileging an authentic, unmediated self, radicalism proceeds from the premise that all self-knowledge is mediated through the eyes of others, so that we can change only with the help of others who are different from us. This entails a community premised on difference and dissent, not conformity and comfort.

Third, radicalism doesn't seek to restore a natural self, insulated from external influence, but to cultivate new selves by means of mutual

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influence. Thus, the “nature” radicalism hopes to realize is conceived as a cultural artifact.

Finally, radical theory's identification of discrete cultures is not motivated by the pursuit of cultural purity. The concept of culture explains how instrumental identity can be at once contingent and resistant to change; and gives hope that self-realizing identities can be similarly reinforced by their cultural surroundings. By depicting social life as more contingent, unstructured, and unpredictable than it really is, deconstruction discourages the long-term commitment to a community or calling that self-realization requires, and so reinforces instrumental culture.

A. *Deconstruction and Democracy*

This section will explicate and evaluate Jacques Derrida's critique of participatory democracy.

Derrida's most important critical work, *Of Grammatology*, critiques the privileging of speech over writing he finds implicit in the ideal of direct democracy, as developed by Rousseau. Derrida argues that political communication is always mediated rather than direct, so that Rousseau's critique of representation undermines all political arguments, including Rousseau's own.

Distinguishing social from natural freedom, Rousseau associates social freedom with direct, deliberative participation in politics—the open assembly or town meeting.¹⁵⁹ Rousseau's critique of political representation is based on the educative, virtue-inculcating function of participatory democracy.¹⁶⁰ Believing that “everything was radically connected with politics, and that however one proceeded, no people would be other than the nature of its government,”¹⁶¹ Rousseau favors participation because of its effects on character.¹⁶² His emphasis on political participation flows from his beliefs that both independence and cooperation require self-reliance.¹⁶³ “In a country that is really free, the citizens do everything with their hands and nothing with money . . .”¹⁶⁴ Rousseau's rejection of political representation reflects this general commitment to the view that human beings fulfill and develop their capaci-

159. See J. ROUSSEAU, *supra* note 14, at 98-101 (only direct democracy preserves freedom); *id.* at 19-23 (social contract entails exchange of natural for civil liberty).

160. See G. BINDER, *supra* note 15, at 75-76 (discussing Rousseau's critique of representation).

161. B. BARBER, *STRONG DEMOCRACY: PARTICIPATORY POLITICS FOR A NEW AGE* 213 n.1 (1984) (quoting J. ROUSSEAU, *CONFESSIONS*, bk. 9).

162. See C. PATEMAN, *supra* note 152, at 24-25; 1 J. PLAMENATZ, *MAN AND SOCIETY* 440-42 (1963).

163. J. MILLER, *supra* note 16, at 31-32 (discussing the benefits of work—particularly farming—and commitment to family and community).

164. J. ROUSSEAU, *supra* note 14, at 98.

ties only through action, and that only by trying to affect the world could they learn from it: "man is born to act and to think, and not to reflect."¹⁶⁵ Rousseau therefore conceives of political participation as active experience, not just as the use of language. Deprived of the opportunity to deliberate with others, Rousseau implies, citizens can develop no will.¹⁶⁶ Unless citizens do their own decision making, they can have no preferences or interests for their representatives to represent.

Derrida offers two related attacks on this position. Derrida's first objection is that a preference for direct rather than representative democracy reflects a sentimental belief that direct democracy enables the expression of authentic or unmediated desires. According to Derrida's account, Rousseau favors speech over writing because writing is a representation of speech, using formulaic media of representation. Yet speech itself is a representation of something else—passion.¹⁶⁷ Even though he admits that speech contains conventional elements, Rousseau argues that it also contains a nonformulaic, nonconventional element—the musical inflection of the particular living voice.¹⁶⁸ However, this live element of speech turns out to be conventional as well. The alterations of pitch that give expression to the spoken word, are also dependent, argues Derrida, on regular, notatable intervals—the intervals that allow music to be reproduced.¹⁶⁹ In order to deny the conventionality and artificiality of music, Rousseau must say that music grew out of song, which grew out of impassioned speech.¹⁷⁰ Thus, the nonlinguistic aspect of speech turns out to be a representation of language. Hence, Derrida concludes, there is no origin at which the expression of feeling is any less conventional, or mediated.

All of this would be quite devastating if Rousseau objected to writing's artificiality. To the contrary, however, he scorns writing as more private and hence as *less* socially constructed than conversation. Writing facilitates the representation of what the sovereign people would say if they were assembled together. Rousseau fears that such representation fixes individual preferences in advance of the political dialogue that alone can transform them into a sovereign will. The direct dialogue demanded by Rousseau mediates individual preferences *more* than representation.

165. Rousseau, *Preface to "Narcisse: or the Lover of Himself,"* in 6 POL. THEORY 543, 550 (1978).

166. See J. ROUSSEAU, *supra* note 14, at 28, 99 (the "general will" cannot be divided).

167. J. DERRIDA, OF GRAMMATOLOGY 195 (G. Spivak trans. 1976).

168. J. ROUSSEAU, THE FIRST AND SECOND DISCOURSES AND ESSAY ON THE ORIGIN OF LANGUAGES 239, 255-58 (V. Gourevitch ed. 1986).

169. See J. DERRIDA, *supra* note 167, at 199-200; see also J. ROUSSEAU, *supra* note 168, at 288-90.

170. See J. DERRIDA, *supra* note 167, at 195-97.

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Representative democracy rests on the fiction that individual preferences can be accurately depicted and reflected in social decision making. Direct democracy openly aims at changing them.

Derrida's second objection to Rousseau's critique of representation is that it is self-consuming. After all, Rousseau writes. And although his work inspired much political struggle in his native community of Geneva, Rousseau lived in exile and resisted engagement with that struggle.¹⁷¹ Derrida demonstrates that Rousseau's view of writing as shameful, sterile, and solitary frequently finds expression in an association of writing with what Rousseau regarded as his own particular vice of masturbation.¹⁷² To write, according to Rousseau, is to fantasize in isolation and spill ink at an absent reader who is helpless to argue or respond.¹⁷³ Writing is sterile in the sense that it cannot engender the voluntary communion established by conversation.¹⁷⁴

Derrida argues that isolation, far from being the haven of unnatural acts, is natural and original: masturbation precedes sexual relations, writing precedes speech, self-reference precedes communication. Derrida sees all experience as requiring the active interpretation of its recipient. Accordingly, all experience is a form of self-stimulation:

Auto-affection is a universal structure of experience. All living things are capable of auto-affection. And only a being capable of symbolizing, that is to say of auto-affecting, may let itself be affected by the other in general. Auto-affection is the condition of an experience in general.¹⁷⁵

This startlingly solipsistic position—that others affect us only if we “let” them—leads to a thoroughly subjectivist account of language, in which meaning is constructed not *culturally* but *individually*.

Conversation is, then, a communication between two absolute origins that, if one may venture the formula, auto-affect reciprocally, repeating as immediate echo the auto-affection produced by the other. Immediacy is here the myth of consciousness.¹⁷⁶

In conversation—or *any other social experience*—we are affected not by the other, but by a fantasy that we conjure up and control.¹⁷⁷ Thus

171. See generally J. MILLER, *supra* note 16, at 52-54 (describing Rousseau's voluntary lifelong exile); *id.* at 126-27 (describing how Rousseau provoked unrest in Geneva, then denied responsibility and refused involvement).

172. J. DERRIDA, *supra* note 167, at 150-54.

173. See *id.* at 151.

174. See *id.* at 168. Rousseau consoles himself that the victim of his corruption is only himself—that his self-imposed isolation in a world of libidinal fantasy has at least harmed no one else. *Id.* at 156.

175. *Id.* at 165.

176. *Id.* at 166.

177. Derrida seeks support for this masturbatory vision of experience in Rousseau's statement

“[s]peech and the consciousness of speech—that is to say consciousness simply as self-presence—are the phenomenon of an auto-affection lived as suppression of difference.”¹⁷⁸

This reinterpretation of social life as nothing more than a solitary communion between each individual and a fantasy of her own creation is individualism pure and simple. Few accounts of communication better illustrate Marx's claim that “in bourgeois ethics speaking and loving ‘are interpreted as expressions and manifestations of a third artificially introduced Relation, the Relation of utility.’”¹⁷⁹ The Derridean self relates not to other people but only to her own desires. While ostensibly deconstructing the concepts of subjectivity, nature, and origin, Derrida in fact treats the autonomous subject, isolated in an experiential world of her own creation, as natural and original.¹⁸⁰

Thus it is Derrida rather than Rousseau who gives voice to nostalgia for a presocial origin. Granted, Rousseau offers a *Discourse on the Origins of Inequality* and an *Essay on the Origin of Languages*. But as Paul de Man points out, in a critique of Derrida's reading of Rousseau, Rousseau's rhetoric favors

[d]iachronic structures . . . over pseudo-synchronic structures . . . because the latter mislead one into believing in a stability of meaning that does not exist. The elegiac tone that is occasionally sounded does not express a nostalgia for an original presence but is a purely dramatic device. . . . The origin here “precedes” the present for purely structural and not chronological reasons.¹⁸¹

Seen in this light, Rousseau's “nature” is not a presocial condition located in the historical past; it is instead the world conjured by the imagination.¹⁸² The exclusive pursuit of this “natural” freedom, however, is contrary to a human nature that fulfills itself by transcending the natural. Human beings live in a social world, and so can experience only social freedom.¹⁸³ As radical democrat Benjamin Barber writes,

that “[h]e who imagines nothing senses no-one but himself; he is alone in the midst of humankind.” *Id.* at 187 (quoting J. ROUSSEAU, *supra* note 168, at 32). But there is a profound difference between Rousseau's position and Derrida's: Derrida thinks that even he who uses his imagination sees no one but himself.

178. *Id.* at 166. “Difference” is Derrida's term for the distinction between contexts that prevents any unit of language from ever meaning—or even being—the same thing twice. *Id.*

179. B. OLLMAN, *ALIENATION: MARX'S CONCEPTION OF MAN IN CAPITALIST SOCIETY* 43 (1971) (quoting Marx's *German Ideology*).

180. See A. NORTON, *REFLECTIONS ON POLITICAL IDENTITY* 30 (1988).

181. P. DE MAN, *BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM* 133-34 (W. Godzich ed. 1971).

182. See J. MILLER, *supra* note 16, at 177. Derrida notes the place of imagination in Rousseau's conception of human nature, see J. DERRIDA, *supra* note 167, at 185-87, but suppresses the implication that human nature is therefore artificial rather than original.

183. For Rousseau, therefore, purely intellectual activity, though natural, bespeaks alienation:

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If the human essence is social, then men and women have to choose not between independence or dependence but between citizenship or slavery. . . .

To a strong democrat, Rousseau's assertion . . . that man is born free yet is everywhere in chains does not mean that man is free by nature but society enchains him. It means rather that natural freedom is an abstraction, whereas dependency is the concrete human reality, and that the aim of politics must therefore be not to rescue natural freedom from politics but to invent and pursue artificial freedom within and through politics.¹⁸⁴

Rousseau presents all of his key political values—freedom, community, and democracy—as achievements of human artifice.

Yet Derrida associates these values with a metaphysics of “presence” that views artifice as inauthentic. Derrida mocks the “affective impulse” he detects in Rousseau and in Claude Levi-Strauss toward the “islets of resistance” to commercial capitalism found in “the small communities that have provisionally protected themselves from . . . a corruption linked . . . to writing and to the dislocation of a unanimous people assembled in the self-presence of its speech.”¹⁸⁵ Derrida then broadens his attack from Rousseau and Levi-Strauss to the whole radical tradition:

Self-presence, transparent proximity in the face-to-face of countenances and the immediate range of the voice, this determination of social authenticity . . . relates . . . to the Anarchistic and Libertarian protestations against Law, the Powers, and the State in general, and also with the dream of the nineteenth-century Utopian Socialists, most specifically with the dream of Fourierism.¹⁸⁶

Derrida's charge that radicalism embodies a metaphysics of presence generalizes to all radicals his reading of a Rousseau wracked by self-hatred and self-delusion.

First, Derrida means to generalize his charge that a *written* critique of representation is self-contradictory. In privileging presence over representation, radicals reveal themselves to be self-hating intellectuals, romanticizing ignorance as innocence and inarticulateness as authenticity. Derrida, whose idiosyncratic images and daunting constructions resist interpretation, could not disagree more with Rousseau's axiom that “any tongue with which one cannot make oneself understood to the people

“[M]an is born to act and to think, and not reflect.” Rousseau, *supra* note 165, at 550. To merely imagine freedom is to endure the most perfect form of subjection. J. ROUSSEAU, *EMILE, OR ON EDUCATION* 120 (A. Bloom trans. 1979). The real freedom made possible by social engagement requires just as much imagination. *See supra* note 177.

184. B. BARBER, *supra* note 161, at 216 (footnote omitted). In rhetoric deliberately evocative of Rousseau, Barber continues, “We are born insufficient, we need cooperation; we are born with potential natures, we require society to realize them.” *Id.*

185. J. DERRIDA, *supra* note 167, at 134.

186. *Id.* at 138.

assembled is a slavish tongue. It is impossible for a people to remain free and speak the tongue.”¹⁸⁷ For Derrida this requirement of rhetorical humility debases political argument and ultimately requires the intellectual to present herself inauthentically. But this characterization of direct democracy as anti-intellectual ignores the educative function of political participation. Radical democrats value intellectual debate so much, they think everyone will benefit by engaging in it—even intellectuals. Thus the requirement that intellectuals address the public is not a requirement that they disguise their views, but that they communicate them. And while their views may change in the process of communication, that is what politics is all about—transforming its participants, not preserving an authentic, prepolitical self.

In associating radicalism with the metaphysics of presence, Derrida depicts all radicals as not only self-hating, but self-deluded. Accordingly, the radical ideals of direct democracy and community rest on the “delusion” that face-to-face politics can avoid the alienation and mediation that are the preconditions of communication.¹⁸⁸ But radical democrats are not so deluded. What they demand is not speech but dialogue, not “presence” but interaction. “At the heart of strong democracy,” writes Benjamin Barber, “is talk. . . . [T]alk is not mere speech. It refers here to every interaction that involves language or linguistic symbols.”¹⁸⁹ The mischaracterization of democratic deliberation as “speech” depends on the instrumentalist assumption that its purpose is to reveal rather than to change preferences.¹⁹⁰ The advantage of face-to-face political debate is not that it “presents” us to one another without distortion, but that it enables us to change and be changed by one another.

Is this belief in the power of citizens to reshape themselves through language naive? Not if experience is any guide. After studying participation in a cooperative crisis intervention center and a New England town meeting, Jane Mansbridge concluded:

Face-to-face assemblies have their advantages. In an assembly of all the members, ideas, emotions, and points of view surface that rarely reach elected or appointed representatives. The rank-and-filers can themselves listen to points in a debate, mull the issues over, ask questions, draw their own conclusions, and make their decisions on how to act. By acting themselves, they make themselves responsible for the collective action. The government becomes *us* not *them*. Moreover, in an assembly, one sees the

187. *Id.*

188. *Id.* at 139.

189. B. BARBER, *supra* note 161, at 173.

190. *Id.* at 174.

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opposition. Ideas that one would normally reject out of hand come from people one knows, people who may have believable reasons for espousing them. Finally, when an assembly struggles through to a satisfactory conclusion on a difficult issue, the very act of congregating produces mutual pride and a feeling of communion.¹⁹¹

Participation, then, is more than just talk. It changes the participants by confronting them with opposing views and with the human consequences of their decisions. It also changes them by conferring personal responsibility to support and implement their own decisions. As we have seen, the increased self-confidence engendered by this responsibility makes participants in workplace democracy more willing to consult others. And by thus sharing responsibility, democratic participants reproduce self-confidence in others.

The radical critique of representation is not based on the belief that conversation is more "natural" than writing. To the contrary, the problem with political representation is that it leaves people in their original state, whereas political deliberation engages them and transforms them into citizens. This transformation is possible because the citizens are different from each other. Participation in a political community continually transforms the participants by exposing them to one another, not by making them all the same.¹⁹² Deconstructive critics systematically misread radical democrats because, viewing discussion as a solipsistic exercise, they deny it can change people.

B. *Deconstruction and Community*

Philosopher Iris Marion Young exemplifies this assumption in applying Derrida's critique of radicalism to the ideal of community. Young argues:

[T]he ideal of community participates in what Derrida calls the metaphysics of presence . . . , a metaphysics that denies difference. The ideal of community presumes subjects can understand one another as they understand themselves. It thus denies the difference between subjects.¹⁹³

191. Mansbridge, *Fears of Conflict in Face-to-Face Democracies*, in *WORKPLACE DEMOCRACY AND SOCIAL CHANGE*, *supra* note 147, at 125, 126-27. See generally J. MANSBRIDGE, *BEYOND ADVERSARY DEMOCRACY* (1980).

192.

Because conversation responds to the endless variety of human experience and respects the initial legitimacy of every human perspective, it is served by many voices rather than by one and achieves a rich ambiguity rather than a narrow clarity. It aims at creating a sense of commonality, not of unity, and the mutualism it aspires to weaves into one carpet the threads of a hundred viewpoints.

B. BARBER, *supra* note 161, at 185.

193. Young, *supra* note 8, at 302.

According to Young, "most radical theorists seek to understand community as a unification of particular persons through the sharing of subjectivities: Persons will cease to be opaque, other, not understood, and instead become fused, mutually sympathetic, understanding one another as they understand themselves."¹⁹⁴ Young points out that such a vision of community would be futile, since individuals are not transparently self-aware.¹⁹⁵ We cannot understand others as ourselves if we do not understand ourselves.

But is the naive assumption that individuals are transparently self-aware inherent in the value of community? Radicals are drawn to the idea of community to the extent they believe we can only realize ourselves with the help of others. Why would they embrace the view that we can know ourselves without the help of others? Young endorses Hegel's claim that others understand us better than we understand ourselves,¹⁹⁶ but ignores its implication that we need relations with others in order to understand ourselves.¹⁹⁷ Thus community is created not by allowing the other to see us through our own eyes, but by allowing the other to see herself through our eyes. That is why community can occasion self-realization—because it constantly changes the way we see ourselves. It is the self-transformation generated by commitment to others that enables us collectively to recreate society—and that is what opens up the possibility of radical change. But Young sees this very possibility of self-transformation as a threat of violence from the other that renders community impossible: "The other person may at the next moment understand my words differently from the way I meant them or carry my actions to consequences I do not intend."¹⁹⁸ Communitarians would say that it is the other person's capacity to reinterpret our actions that makes self-knowledge possible and community desirable. By contrast, Young perpetuates the liberal vision of the self as an autonomous source of meaning and value, unaffected by others.

Having misrepresented radical communitarianism, Young goes on—in a tactic common among post-structuralists¹⁹⁹—to condemn it by asso-

194. *Id.* at 309.

195. *Id.* at 310.

196. *Id.* at 309-11.

197. See G. HEGEL, *THE PHENOMENOLOGY OF MIND* 218-40 (J. Baillie trans. 1967).

198. Young, *supra* note 8, at 310.

199. See Derrida, *Like the Sound of the Sea Deep Within a Shell: Paul de Man's War*, 14 *CRITICAL INQUIRY* 590 (1988) (identifying unsympathetic readers of de Man's anti-Semitic wartime writing with Nazism, "in that to condemn de Man on the basis of a brief episode is to reproduce the exterminating gesture of which he is accused"); cf. Binder, *Representing Nazism: Advocacy and Identity at the Trial of Klaus Barbie* (pt. IV), 98 *YALE L.J.* 1321, 1323-24 (1989) (showing that Derrida equates even the embrace of Jewish identity with Nazism). See J. LYOTARD, *THE POST-MODERN CONDITION: A REPORT ON KNOWLEDGE* 81-82 (G. Bennington & B. Massumi trans.

ciation. "The desire for community relies on the same desire for social wholeness and identification that underlies racism and ethnic chauvinism on the one hand and political sectarianism on the other."²⁰⁰ This sort of hyperbole provokes a number of questions. Is the desire for interracial community really the same desire that underlies racism? Is the desire to participate in debate with one's fellow citizens really the same desire that underlies political sectarianism? Does membership in, say, an *intellectual* community preclude the expression of "differences"?²⁰¹ Precisely *which* political positions are being denoted by "political sectarianism" and thereby associated with racism? Are we being cowed into equating intolerance of racism with racist intolerance? Identifying Marxism or participatory democracy with racism? Separated only by a few seemingly ornamental letters from the embarrassment of communism, communitarianism makes otherwise careful thinkers see red.

C. *Deconstruction and Human Nature*

Deconstructive critics have seen a totalitarian "desire for social wholeness" implicit in the concept of human nature as well as that of community.

Like Derrida, Bernard Yack critiques radicalism as a futile longing to overcome humanity's alienation from nature. But while Derrida represents this longing as a desire to discard artifice and naturalize humanity, Yack represents the radical impulse as a desire to conquer, or to humanize nature. For Yack, radicals are control freaks, seeking to absorb and subdue every alien element in their surroundings by viewing society as a totality which is either entirely subject to their will or unbearably alien. "Longing for total revolution," radicals are inevitably totalitarian.

According to Yack, "Left-Kantians" such as the young Hegel, and "Left-Hegelians" like the young Marx, sought to reconcile human freedom and natural necessity by realizing human freedom in the world. Arguing that human freedom is purely intellectual, Yack insists that this aspiration to embody it in social relations reflected a category mistake.²⁰² This philosophical error, Yack argues, engendered a sense of alienation

1984) (holding Kant and Hegel responsible for 20th-century terror); cf. Benhabib, *Epistemologies of Post-Modernism: A Rejoinder to Jean-François Lyotard*, in *FEMINISM/POST-MODERNISM*, *supra* note 8, at 107, 121 (calling this hyperbole).

200. Young, *supra* note 8, at 302.

201. See M. MINOW, *MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 293-94* (1990) (arguing that the right to argue is a community-affirming recognition of difference).

202. B. YACK, *supra* note 1, at 98-208.

in a world resistant to human will, which in turn inspired a futile longing to eradicate all constraint.

This critique of radicalism hinges upon a conflation of two types of constraint—the societal determination of the individual and the natural determination of society.

Yack first mischaracterizes radicalism as an individualist doctrine, claiming it offers “a definition of man’s humanity in terms of the individual’s ability to resist external conditioning.”²⁰³ He rightly concludes that such a definition would rule out “the realization of our humanity in the [social] world,” because it would condemn as dehumanizing any social relationship that “conditions our behavior”—which is to say any social relationship at all.²⁰⁴ But since radicals regard the individual’s responsiveness to social conditioning as the source of humanity’s collective capacity for radical change, they do not aspire to free the individual from social determination.

Even if radicalism is conceived as an effort to create social conditions conducive to “realizing humanity,” however, Yack argues that it is vitiated by a “contradiction.” If the radical admits that social relations are not inherently dehumanizing, Yack asks, how can she explain the presence in society of any dehumanizing relations? The radical’s only alternative, Yack concludes, is to attribute dehumanization to an all-pervasive “spirit of modern society, rather than social interaction per se.”²⁰⁵

This argument involves an excluded middle fallacy. Its unstated premise is that radicals must view all social relations as dehumanizing, or none. Accordingly, Yack assumes what he should prove—that radicals necessarily see dehumanization and human fulfillment as totalities.²⁰⁶

The kernel of truth that gives this assumption a surface plausibility is the fact that radicals do see dehumanization as systemic. But to say that dehumanizing relations are causally related to one another is not to say that they are caused by some force outside of social relations. That social relations affect one another is a testament to society’s self-determination rather than its determination by external forces. Social relations influence each other because people affect one another. Thus, as I have argued, the pursuit of self-realization through participation in self-government has an enabling effect on self-realization by others. Similarly, coercion and manipulation has a disabling effect on the efforts of others

203. *Id.* at 366.

204. *Id.*

205. *Id.*

206. If “necessarily” seems to place an unfairly heavy burden on Yack, consider his claim that “any attempt to define the obstacle to the realization of humanity in terms of a particular, historical form of social interaction will eventually fall into something like this self-contradiction.” *Id.*

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to realize themselves. It induces instrumental behavior in return. Thus dehumanizing social relations are systemic because they have a multiplier effect. But by the same token, humanizing social relations have a multiplier effect as well. And that means that radicals can aspire to identify, uproot, and replace dehumanizing systems of social relations by strategies short of "total revolution."²⁰⁷ Because humanizing and dehumanizing relations are both inherently expansionist, they cannot coexist peacefully or stably. But they can and do coexist.

Having excluded that middle possibility, Yack reasons that radicals are condemned to explain systemic dehumanization by forces beyond the capacity of human beings to control. "If every social phenomenon is always shaped by the spirit of social interaction that informs its epoch or society as a whole, then social phenomena will always be externally conditioned."²⁰⁸ Given that social relations are mutually reinforcing, however, Yack's conclusion does not follow. Systems of mutually reinforcing social relations could be characterized by a single, self-sustaining "spirit"—what I have called a culture—without being externally conditioned.

The source of Yack's insistence that social relations are necessarily conditioned by something outside of themselves is his assumption that there is an irreducible gap between a material world determined by nature, and a mental domain in which humans are free to think what they will without effect. This is more than a claim that social relations are conditioned by material scarcity, for Yack views nature as a "social source[] of dissatisfaction."²⁰⁹ Because social interaction takes place in a material world to which the mind is alien, Yack implies, every social interaction is dehumanizing. Yack proceeds from mind-body dualism to the individualist conclusion that each person is utterly alien from every other. Like Derrida and Young, Yack ignores the fact that individual identity is a social construct, that we are more ourselves in a social world than in isolation.

207. Barber is an example of a radical democrat whose faith in the transformative power of participation is so great that he thinks it can and should be introduced piecemeal, through incremental reform. B. BARBER, *supra* note 161, at 309. Radicals who, following Marx, believe that participatory enclaves will inevitably be swept under by market forces, should be even more pessimistic about the prospects of revolutionary change than they are about the efficacy of reform. Przeworski is an example of such a rigorously pessimistic radical. See A. PRZEWSKI, *CAPITALISM AND SOCIAL DEMOCRACY* (1985).

208. B. YACK, *supra* note 1, at 366-67.

209. *Id.* at 366, 369 (emphasis added). Yack says very little about what he takes to be these irreducible social sources of dissatisfaction. But he does say that "we cannot separate the forms taken by our social interaction from that which is dehumanizing: the external conditioning of our institutions and needs by the natural contingencies that remain indifferent to human purposes." *Id.* at 367.

The mind-body dualism underlying Yack's individualism cannot be sustained. We are neither disembodied minds, nor prisoners of our bodies: to the contrary, the fact that we are bodies situated in a natural world is what enables us to organize, communicate, indeed to have experience.²¹⁰ At the same time we are active participants in our experience, not just by interpreting "nature," not just by constructing the language and culture that enable interpretation, but by influencing the "natural" conditions of perception—including the human body.

Consider Alison Jaggar's discussion of the social conditioning of apparently "natural" sex differences.

The hand is not the only organ that is a result as well as a cause of our system of social organization. Even our reproductive biology, the most basic sex difference of all, is in part a social product. In the course of human evolution, as our ancestors became bipedal tool-users through [a] historical process . . . bipedalism reduced the size of the bony birth canal in women. Simultaneously tool use selected for larger brain size and consequently for larger bony skulls in infants. This "obstetrical dilemma" . . . was solved by the infants' being born in an earlier state of development. But this in itself was possible only insofar as adults, being already bipedal, were able to carry the infants who were too small to cling on by themselves. And it was possible only because human social organization was so far developed that other adults would cooperate with the mother sufficiently to support a long period of infant dependence.²¹¹

Examples of this sort can be multiplied: the increase in human life expectancy is a collective cultural achievement that removes natural constraints to individual achievement. In a more striking example of the cultural dependence of such natural constraints, psychologists Ellen Langer and Judith Rodin found that participation in decision making increased not just the psychic but the physical health of nursing home patients—they lived longer.²¹²

In general, concludes Dorothy Dinnerstein, humans are by nature unnatural. We do not yet walk "naturally" on our hindlegs Yet this unnatural posture, forced on the unwilling body by the project of tool-using, is precisely what has made possible the development of important aspects of our "nature": the hand and the brain, and the complex system of skills, language, and social arrangements which were both effects and causes of hand and brain. Man-made and physiological structures

210. See generally M. JOHNSON, *THE BODY IN THE MIND: THE BODILY BASIS OF MEANING, IMAGINATION, AND REASON* (1987).

211. A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 11 (1984).

212. E. LANGER, *MINDFULNESS* 82-84 (1989).

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have thus come to interpenetrate so thoroughly that to call a human project contrary to human biology is naive: we are what we have made ourselves, and we must continue to make ourselves as long as we exist at all.²¹³

A similarly cultural conception of human nature is offered by Peter Berger and Thomas Luckmann:

Man is biologically predestined to construct and inhabit a world with others. This world becomes for him the dominant and definitive reality. Its limits are set by nature, but once constructed, this world acts back on nature. In the dialectic between nature and the socially constructed world the human organism is itself transformed. In this same dialectic, man produces reality and thereby produces himself.²¹⁴

From the perspective of these radical social theorists, the distinction between natural constraint and human adaptability is insupportable. Human inventiveness is a natural capacity with consequences in the natural world. It is not that humanity is faced with no constraints—it is that constraint is what human beings naturally adapt themselves to.

The reconstruction of radicalism I have offered in this essay sees nothing alien in our dependence on others and so nothing troubling in our adaptation to circumstances beyond our control. The radical hope that our social relations will challenge us to discover the unexpected in ourselves is inconsistent with the totalitarian impulse to control our experience in advance.

D. Deconstruction and Cultural Identity

We have seen that deconstructive critics ascribe totalitarian implications to the concepts of participation, community, and human nature. According to these critics, radicals deploy these terms in an effort to portray social relations among heterogeneous elements as inauthentic, incoherent, unnatural, or inhuman. Deconstructive critics assign the concept of cultural identity a similar rhetorical function: by bounding off discrete cultures, we stigmatize the rest of our social surroundings as foreign or inauthentic. And by identifying ourselves with discrete cultures, we suppress heterogeneity within ourselves. Accordingly, the deconstructive critics view the radical's aspiration to redefine her culture as a totalitarian impulse to purify herself.

This section will argue that the deconstructive critique of cultural

213. D. DINNERSTEIN, *THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE* 21-22 (1976).

214. P. BERGER & T. LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY* 183 (1966). For an early expression of a similar perspective, see 1 F. LIEBER, *supra* note 61, at 132-33.

identity relies on psychological intuitions peculiarly applicable to instrumental culture. As a result, the deconstructive claim that there are no identifiable cultures is revealed to be ethnocentric.

Why do radicals seek to identify discrete cultures? Rooting oppression in human nature, radicals wager their hopes for progressive change on a view of human nature as contingent because culturally produced. But the more contingent human nature becomes, the less work it can do in explaining the persistence of oppression. Thus the concept of culture plays a mediating role in radical thought: the cultural construction of a stable human nature explains why social change is possible, but also why society is resistant to change. It enables radicals to treat society as a contingent system or structure.

Dissatisfaction with the instrumentalist assumptions of Marxism has compelled radicals to reconceive society as a system of contingent meanings rather than fixed material interests. Accordingly, radical theorists have been attracted to the deconstructive claim that

language, broadly conceived as systems of signification that extend well beyond mere words to include the symbols and structures of all ways of communicating . . . is the essential ground within which social life is embedded.²¹⁵

But where radicalism requires a conception of cultural meaning as both contingent and systematic, deconstruction emphasizes only the contingency of meaning, denying that it is systematic. Deconstructive critics and reconstructed radicals can agree that social orders lack any constitutive foundation: there is no law determining any social order that is distinguishable from the social order itself. But deconstructive critics go on to conclude that the social order has no order—that the cultural system is not a system. Because cultures have no constitutive law, deconstruction denies that they have any regulative structure.²¹⁶ If society can have no regularity, no identity over time, it also cannot change its identity. Radical social change becomes an impossibility.

For Derrida, there can be no local cultures, because culture is a boundless and seamless web. Referring to culturally mediated meaning as “discourse,” Derrida defines discourse as “the present, living, conscious *representation* of a *text* within the experience of the person who writes or reads it,” but observes that a text “constantly goes beyond this representation by the entire system of its resources and its own laws.”²¹⁷

215. B. PALMER, *supra* note 7, at 3.

216. K. SOPER, HUMANISM AND ANTI-HUMANISM 141-42 (1986).

217. J. DERRIDA, *supra* note 167, at 101.

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Accordingly, "there is nothing outside of the text,"²¹⁸ in the double sense that any discourse refers to all other discourse, and that all social life is discursive. There is no place outside of one's own culture from which to critique it, no boundary beyond which alien values may be expelled.

One implication of the seamlessness of culture is that every attempt at radical critique must be self-consuming. Endemic to cultural communication itself, the cultural sources of oppression can never be isolated and eradicated.²¹⁹ Doomed to futility, the effort to expunge oppressive elements from a culture will entail the kind of compulsive repetition we have already associated with revolutionary purges. Derrida concludes that every effort to eradicate oppression reproduces it.²²⁰

Because any criterion of cultural authenticity bounds culture artificially, its correlative criterion of inauthenticity carves out an internal Gulag to which we can exile all the parts of ourselves we would prefer to view as alien. Unable to purify ourselves of shameful traits, we disown them and blame their presence within us on foreign influences. And the more we unjustly project our sins onto others, the greater the burden of sin we have to displace; so that our cultural traditions consist in the bequest of memories repressed rather than preserved. On this view, there are no continuous cultures. The construction of any cultural tradition involves a lie, violently erasing the evidence of earlier lies.²²¹ Since there

218. *Id.* at 158.

219.

And if a text always gives itself a certain representation of its own roots, those roots live only by that representation, by never touching the soil, so to speak. Which undoubtedly destroys their *radical essence* [T]o say that a text is never anything but a *system of roots*, is undoubtedly to contradict at once the concept of system and the pattern of the root.

Id. at 101-02.

220.

Is there a systematic set of themes . . . which, forming a closed and identifiable coherence with what we call totalitarianism, fascism, nazism, racism, antisemitism, never appear outside these formations and especially never on the opposite side? . . . Is there some property so closed and so pure that one may not find any element of these systems in discourses that are commonly opposed to them? . . . I do not believe that there is.

Derrida, *supra* note 199, at 645. This position is an illustration of the modern proverb that there is such a thing as being so open-minded that your brains fall out.

221. See J. DERRIDA, *Violence and Metaphysics: An Essay on the Thought of Emmanuel Levinas*, in *WRITING AND DIFFERENCE* 79-153 (A. Bass trans. 1978) (arguing that the concept of identity is intolerant and violent); R. GIRARD, *VIOLENCE AND THE SACRED* (P. Gregory trans. 1977) (asserting that all cultural signification is based on the pattern of scapegoating); P. DE MAN, *Excuses (Confessions)*, in *ALLEGORIES OF READING: FIGURAL LANGUAGE IN ROUSSEAU, NIETZSCHE, RILKE, AND PROUST* 278, 279 (1979) (suggesting that literary language faces the repetitive task of covering up its crimes of covering up crimes); E. SAID, *ORIENTALISM* (1978) (suggesting that the sentimental study of foreign cultures is a projection of desires repressed in Western culture). For the roots of the idea that all culture consists in the displacement of guilt over an original crime, see S. FREUD, *TOTEM AND TABOO* (A. Brill trans. 1918), and S. FREUD, *MOSES AND MONOTHEISM* (1967).

can be no discrete, self-identical cultures, culture cannot confer the kind of bounded and coherent identities its participants yearn for.

This deconstructive critique of cultural identity rests on a series of superficially plausible psychological²²² intuitions which we might schematize as follows:

1. Everyone yearns for identity.
2. Identity implies consistency.
3. But identity also implies stability.
4. Everyone has inconsistent characteristics.
5. So everyone faces a dilemma between inconsistency or instability.
6. This dilemma can be avoided by disavowing some characteristics and projecting them onto others.

The first and fourth intuitions are unexceptionable; the fifth and sixth follow from the first four; but what about the second and third intuitions? Does the yearning for identity necessarily involve a desire for stability and consistency? It probably does in an instrumental culture that associates autonomy and integrity with the ability to resist the influence of others. Such a culture expects us to define our goals independently and stick to them. But what kind of identity do we commit ourselves to when we pursue self-realization? Self-realizers commit themselves to change in response to experience. If we hope to realize civic identities through democratic participation, we commit ourselves to be affected by one another and we make the realization of our identities dependent on one another's participation.

But won't we still be tempted to seek scapegoats for our own inadequacies, even in a culture of self-realization? Perhaps, but the temptation will be weaker because the recognition of one's own inadequacies poses no threat to the identity of a self-realizer. To the contrary, self-realization depends on the perpetual identification and transcendence of inadequacy. My point is not that a culture of democratic participation turns its participants into angels—only that it absolves them of the obligation to regard themselves as angels. The identities conferred by such a culture don't necessarily preclude the pathologies deconstructive critics ascribe to all culture—but neither do they compel such pathologies.

If the deconstructive critique of cultural identity resonates with our psychological experience, that may be because its psychological assumptions fit our particular culture. Denying that there are any discrete cul-

222. An often overlooked irony in deconstruction's attack on the identity of the "subject" is its covert reliance on psychological defense mechanisms to coherently account for the contradictions it finds in every text.

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tures, deconstructive critics assume that psychological intuitions applicable in one cultural setting are universally valid. But in so doing they assume what they should prove.

The claim that there are no discrete cultures is probably true within an instrumental culture that treats cultural commitments as the choice of a garnish or an ornamental façade—Dijon or Teriyaki, Tudor or French Provincial. And skepticism about personal identity is justified when consumers are reduced to identifying themselves by such choices. The more we consume empty packages of cultural associations, the emptier we feel inside—an emptiness we hasten to conceal with another image-making purchase.²²³ All of this is true of our particular culture. But it doesn't prove that we cannot construct a radically different culture. By treating instrumental culture as the only possible culture, deconstruction discourages any effort to replace it.

Because the deconstructive critique of instrumental culture is premised on that culture's inevitability, it has a disturbingly ambiguous quality. It is made to look like the scaffolding that attends the dismantling of a condemned building. But it can also be read as the latest fashion in architectural illusion, a façade of ironic detachment suspended from the sturdy structure it ornaments. Deconstruction offers us a hip attitude toward what we are destined, in any case, to accept. And so makes its acceptance that much easier.

This ambiguity between critique and ornament is typical of postmodernist cultural movements generally. In postmodern art, for example, "the fiction of the creating subject gives way to frank confiscation, quotation, excerption, accumulation and repetition of already existing images."²²⁴ Such art protests its own commodification—but how seriously can we take a protest of consumerism that offers itself for sale? In postmodern society, observes Frederic Jameson, the production of culture "has become integrated into commodity production generally: the frantic economic urgency of producing fresh waves of ever more novel-seeming goods (from clothes to airplanes), at ever greater rates of turnover, now assigns an increasingly essential structural function and position to aesthetic innovation and experimentation."²²⁵ In such a context, the critical content of postmodernism is far less important than its stylistic celebration of novelty, ephemerality, and fragmentation.

223. See M. KELMAN, *supra* note 99, at 132 (discussing goods-addiction and status-purchases); Kelman, *supra* note 146, at 772-73.

224. Crimp, *On the Museum's Ruins*, in *THE ANTI-AESTHETIC: ESSAYS ON POST-MODERN CULTURE* 43, 44-45 (H. Foster ed. 1983).

225. D. HARVEY, *THE CONDITION OF POSTMODERNITY* 63 (1989) (quoting Jameson, *Postmodernism, or the Cultural Logic of Late Capitalism*, 146 *NEW LEFT REV.* 53, 56 (1984)).

Presenting politics as a "created world of images, sounds, and scenarios," broadcast by unseen powers,²²⁶ postmodernism teaches us that we might as well sit back and enjoy it, because participation is pointless.

Postmodernism began as a critique of modernist culture and its obsession with planning social life. But like so many other rhetorics of resistance, postmodernism was quickly bought up by the very culture it critiqued and then resold for profit. Developers slapped art deco façades on suburban shopping malls, while motel chains repapered their walls in aubergine and British racing green. Behind the ornament, however, the machinery of modernism proceeded according to plan: "We feel that postmodernism is over," a prominent United States developer told the architect Moshe Safdie. "For projects which are going to be ready in five years, we are now considering new architectural appointments."²²⁷ The planned obsolescence of postmodernism, however, merely reiterates the original joke: that the term refutes itself. What could be more modernist than a critique of modernism as outmoded? And what could be more complicit than trashing a culture designed for disposal?

IV. Conclusion: Between Revolution and Critique

Two practices have organized radical theorizing since World War II: revolution and critique. For the postwar generation, witnessing the worldwide process of decolonization, to identify with the left was to support revolutionary struggles for national liberation. Marxism supplied the dominant rhetoric. But during the last third of the twentieth century, the revolutionary engagement of radical theory has gradually been supplanted by a posture of critical withdrawal, and deconstruction has supplied the dominant rhetoric.

This essay has argued that neither practice can ground a conceptually coherent and politically appealing account of radical change.

Conceptually, neither revolutionary theorizing in the tradition of Marx nor deconstructive criticism as practiced by Derrida can account for radical change, because both view society as a totality. Misconceiving radical change as total change, revolutionary theorists have slighted local and incremental strategies, while revolutionaries have consumed their societies in Sisiphean struggles to purge every vestige of the past. Recognizing the impossibility of total change, deconstructive critics assume the impossibility of radical change, reducing their own radicalism to a matter of aesthetic attitude.

226. Wolin, *Democracy in the Discourse of Post-Modernism*, 57 SOC. RES. 1, 27-28 (1990).

227. D. HARVEY, *supra* note 225, at 356 (citation omitted).

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Politically, both practices reinforce instrumental culture. The high stakes at risk in all-or-nothing revolutionary strategies have a tendency to concentrate decision making in the hands of a zealous elite. On the other hand, the postmodern attitude that politics is a superficial realm of imagery in which nothing is really at stake integrates supposedly radical criticism into the production and consumption of commodities. Both strategies recognize that individual identity is socially determined, but both forget the capacity of communities of social agents to collectively redefine themselves that originally inspired the radical tradition.

This essay has urged that radical theorizing reorganize itself around this venerable model of radical change. By focusing on the transformation of social actors rather than social orders, radical theory can recognize the possibility of change that is less self-consuming than the pursuit of total revolution and more meaningful than the reproduction of planned obsolescence. The point of focusing in on social actors is not to detach the individuals from their cultural context, but to recognize that these cultural contexts are mediated through and reproduced by the individual identities they construct. Individuals cannot change by themselves—but the cultural settings in which their identities are rooted are sufficiently localized to permit meaningful change through collective action.

The way that social actors can radically transform themselves is by constructing social settings which enable self-realization for themselves and others—typically by constituting communities which define and allocate the responsibilities of their members through participatory decision making. Such communities need not be universal or all-encompassing. Democratic culture is no lighthouse specimen that shrivels upon exposure to heterogeneity. It is an open system, robustly capable of influencing its surroundings and reproducing itself in an inhospitable environment. The task for radical theory is to look hard at the glittering façade of instrumental culture: in the tiniest crack, democracy can take root.