

IS SUBJECTIVITY POSSIBLE? THE POST-MODERN SUBJECT IN LEGAL THEORY*

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Jurisprudence, in my judgement, need not vex itself about the "abysmal depths of personality." It can assume that a man is a real indivisible entity with body and soul; it need not busy itself with asking whether a man be anything more than a phenomenon, or at best, merely a succession of states of consciousness. It can take him as a reality and work with him, as geometry works with points, lines and planes.¹

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing crushes or subdues individuals. In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires come to be identified and constituted as individuals. The individual, that is, is not the vis-a-vis of power; it is I believe, one of its prime effects.²

This article puts forward a thesis and then attempts to prove (or at least to develop) that thesis in two related areas. The thesis is that legal theory in general, and critical legal theory in particular, has concentrated too much on critiques of objectivity, wrongly assuming that "subjectivity" was an unproblematic term.³ Subjectivity, like mortality, has seemed not only attainable but inevitable. It is objectivity which is presumed to be the problematic goal of our theories and our attempts at doctrinal interpretation. This article reverses the focus, concentrating on the construction of subjectivity in law and social theory.

In the first half of this article, I try to locate my discussion as part

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1. J. CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* 29 (1908; 2d ed. 1921).

2. M. FOUCAULT, *POWER/KNOWLEDGE* 98 (1980).

3. For exceptions, see Heller, *Structuralism and Critique*, 36 *STAN. L. REV.* 127 (1984); Peller, *The Metaphysics of American Law*, 73 *CALIF. L. REV.* 1151 (1985); Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 *U. PA. L. REV.* 685 (1985); Schlag, *The Problem of the Subject*, 69 *TEXAS L. REV.* __ (forthcoming 1991).

of a larger methodological debate. I describe the tension in critical theories between their "structuralist" and "subjectivist" strands and discuss the impact on these theories of the intellectual moment referred to, rather pretentiously, as the "death of the subject." This part of the essay builds on the ideas I developed in an earlier work,⁴ and it may help the reader unfamiliar with critical theory to understand the context of my discussion.

In the second half of the article, I turn to the topic mentioned in my title. Having pointed out that critical theories focus mainly on the impossibility of reaching "objectivity," I show that some of the same critiques can be turned on the construction of "subjectivity" as well. The parallelism is more than mere symmetry. Just as the concept of objectivity can be used to armor decisions or social practices, so theoretical results and ideological slant can be dictated by loading up the abstract "subject" of a political or economic theory with a particular set of drives, motivations, and ways of reasoning. Having given an example of this process, I then turn to the legal "subject" around whom the law revolves and try to develop a sketchy history of the changing qualities which that subject has been believed to possess. I conclude that the ideas associated with postmodernism are a useful framework for understanding the subject in legal theory and in legal practice. In fact, bizarre as it may seem, the law already incorporates a more postmodern view of the subject than either economics or mainstream political theory.

I. THE PROBLEM OF METHOD

A. *Structuralism and Subjectivism*

Any discussion of method occurs in a context. The context for the discussion of the subject put forward in this article is the theoretical project of critical legal studies. Here is my best effort at conveying that context.

Most activities, social practices, or institutions have an attached set of implicit or explicit "justifications," which play an important role in the exercise of power. (As you will see below, I use "justification" in a deliberately fuzzy way, meaning to cover everything from the fetishism of the economic system to the functional justifications of the arms race, or classroom power, or the public/private split.)

The more one looks at these justifications, the more it appears that there are remarkable similarities between the most abstract (for example, the liberal theory of the state) and the most concrete (for

4. See Boyle, *supra* note 3, at 685.

example, workplace organizing, bosses' relationships with their subordinates, or everyday assumptions about ownership and control). This analogy between high theory and politics in daily life *may* be an overly hopeful attempt to justify our professional lives by providing an illusory link to political action, or it may be a genuine fusion of theory and emancipatory action.

This focus on justification and legitimation certainly fits well into a number of intellectual traditions. The most obvious connection is to the Sartrean critique of false necessity and bad faith. Actions that seem both natural and neutral are, in fact, neither.

If we are to make anything of this critique we will need some mode of thinking that will allow us to recognize and transcend false necessity.⁵ An example might be helpful. Taking labor law as an example, the substance of the theory would look something like this: Because of the way that we divide up the world it seems as though ownership and control are inextricably linked. Thus, we find it hard even to think about ways in which more humane, democratic, and participatory workplaces could be organized.⁶ The boss is the boss. Looking at the very different social relationships that an owner has to a sweatshop and that I have to my apartment, we nevertheless choose to view them as metaphorically the same because each involves an abstraction called a "property right." Thus, a challenge to the boss' control of the workplace appears to be a challenge to my "ownership" of my own apartment.⁷ But the appearance is a false one. In fact, since the legal realists, we have viewed "property" as a bundle of rights, which can be divided up and parcelled out differently in different social contexts. There is a very different relationship of ownership to control in the context of a commercial radio frequency, a public utility, a private university which receives federal grant money, and a private house. No one relationship can dictate what the others should be. We could decide that employees should have a right to representation on the board of the company or to free speech rights comparable to those they would possess in a public park. Thus, the apparent immutability of the workplace setting is an example of false necessity. We

5. *Id.* at 693.

6. See Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 *MINN. L. REV.* 265 (1978); Klare, *Labor Law and the Liberal Political Imagination*, 62 *SOCIALIST REV.* 45 (1982); Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509 (1981); Raskin, *Reviving the Democratic Vision of Labor Law* (Book Review), 42 *HASTINGS L.J.* 1067 (1991).

7. For the classic description, see Gordon, *New Development in Legal Theory*, in *THE POLITICS OF LAW* 281-93 (D. Kairys ed. 1982).

can, and perhaps should, do things very differently.⁸

This type of theory will have to rest on, but also to transcend, the experience of those involved in the particular area of social life we are looking at. It will involve phenomenologies of personal experience and accounts of structural constraint. In the labor law example, certain experiences will be seen as false and delusionary and others as true and emancipatory. What is more, certain structures or patterns of thought will be identified as the important or relevant ones. Who is to say that the apparent immutability of the workplace comes from the objectification of "property rights," the anaesthetic grip of any status quo, the apathy of a public convinced of its inability to effect national politics, or from the replacement of the labor theory of value with the market theory of value? Which ideological structure is the important one?

The two strands (personal experience and the structural critique of ideology and false consciousness) will be in constant tension.⁹ Sometimes social reality will be presented as though it were created by heroic, acting subjects able to make history with will and consciousness. Sometimes it will seem that individual human beings are mere pawns in the hands of some structure of power, class, gender, race, or ideology. This tension between subject and structure will reappear at every level of a theory. Does linguistic meaning come from subjective intention or from frozen, external codes of signification? Does the feeling that a legal rule "should" be interpreted a particular way come from our intuitions about the "intent" of those who wrote it or from the structure of legal consciousness? Are the individual experiences of workplace alienation reducible to a structural marxist account of the political economy of oppression?

The mediating devices that are used to reduce this tension will simply defer it.¹⁰ For example, it might appear that one could escape from these methodological problems by limiting oneself to description and critique. "I can't tell you what the deep structure of workplace oppression is, but I can tell you, as a matter of factual description, that workers are deluded into thinking that value is inherent in the objects they produce, instead of realizing that value comes only from the worker's own labor." Yet if one claims merely to be criticizing the pre-existing structural delusion of many individual subjects, one must still show that X and not Y is the delusion. Think of the conflicting

8. For a general introduction, see Boyle, *Editor's Introduction to CRITICAL LEGAL STUDIES: SELECTED READINGS* (forthcoming 1991) [hereinafter *SELECTED READINGS*].

9. See Boyle, *supra* note 3, at 762-78.

10. See *id.* at 746-51.

marxist, feminist, liberal, and psychoanalytic explanations of workplace alienation. Think of the arguments that construe the feminization of poverty as a result of: a) "the delusion of women's rights," b) the social logic of the corporate welfare-state, or c) the dominance of patriarchy and "male voice" rationality.

There is no way to solve this problem—the "privileged" theory, which claims to have science or biology on its side, merely produces an oppositional form of false necessity, which is often even more murderous than the entrenched form. (I make the customary cite to Stalinism.) But this does not leave us bereft of possibilities. In fact, it ties in with a vision of provisional, local political practice: everyday morality that does not seek to erect the solution arrived at on Monday into a panacea for the rest of the week. This local theory must acknowledge the tension between subjectivist phenomenology and de-personalized structuralism—but not in the hope of settling the perfect balance between the two. To acknowledge the tension in this way, we need to *understand* the methods that each strand offers us.

The structuralist theories (which generally did pretend to a certain finality) have left us with a number of conceptual tools—tools that *work*, under most of the self-referential definitions of "working" that we could use. Their characteristic imprimatur is to claim that there is some deep (and often pernicious) logic to the activities going on around us. For example, structuralist anthropological methods apply, all too neatly, to legal doctrine and social theory.¹¹ They pull apart the rules and arguments with the kind of analytic power that a Kingfield might envy, but at the same time they cut through to an underlying political vision, a set of deep metaphors that are woven into law and social life. In fact, they seem to offer the totalizing method of formalism without its conservative politics or its arid disciplinary compartmentalization.

The subjectivist, phenomenological side of the story exalts the importance of personal experience and the immediate moment.¹² Its appeal springs from the fact that at the instant of closure, at the moment when one apparently acquiesces in the collective fantasy that things have to be this way, there is also a momentary backlash of rage, a trace of indignation that can be uncovered by a phenomenological archaeology. When you deferred to the boss (even though he was mistaken) or acted like a lawyer would act (mentally tailoring your own

11. See Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 209 (1979); Kennedy, *Theses on International Law Discourse*, 23 GERMAN Y.B. INT'L L. 353 (1980); Boyle, *supra* note 8, at 5-6.

12. See Gabel, *Reification in Legal Reasoning*, 3 RES. L. & SOC. 25 (1980); Gabel, *The Phenomenology of Rights-Consciousness and the Past of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

intellectual straight-jacket), there was a mental energy-release, a flash of cognitive dissonance that could be pieced together with all the other times when things seemed to be wrong. In fact, it is only by doing this "quilting" of dissonant experiences that you find out what is going on and thus can act in good rather than in bad faith.

There is more to this tension than merely the question of, "When do you trust the participants' explanation of their own actions and when do you rely on some structural explanation of delusion?" The most interesting versions of structuralism and subjectivism are not merely in tension; they violently contradict each other on an epistemological level. The phenomenologists seem to endow their subjects with a measure of genuine, unalienated subjectivity: a residual true consciousness that is always threatening the closure imposed by dominant ideologies.¹³ Some notion of the subject is also fundamental to existentialism, to the liberal political vision—in fact, to most of the discourses of the Enlightenment. Yet, the modern gurus of structuralism and post-structuralism have claimed that the "subject" is dead,¹⁴ that it was an aberration caused by a particular (and particularly unpleasant) way of viewing the world. What happens to liberalism, to legal theory, to existentialism—to all of the "humanist" disciplines if the subject is indeed dead? What would that mean? What of the many left wing anti-positivist,¹⁵ anti-formalist¹⁶ critiques of the authority of "objectivity"? How are these affected by the death of the subject? What is the subject anyway? Are the reports of its death greatly exaggerated? Does it matter? The rest of this article attempts to answer these questions in some convincing way. At the same time, it orbits the subjectivist/structuralist tension I have just described in an erratic and uneasy flight.

B. The Death of the Subject

Structuralism seems to be exactly the intellectual thread to link critical legal theory, radical social thought, and the epistemological status of subjects and objects. There are two obvious reasons for this. First, structuralist anthropology seems to have been made for applica-

13. See J.P. SARTRE, *BEING AND NOTHINGNESS* (1956).

14. See F. DALLMAYR, *TWILIGHT OF SUBJECTIVITY* (1981); M. FOUCAULT, *THE ORDER OF THINGS* (1970). "Subjectivity was not waiting for philosophers. . . . They constructed it, and in more than one way. And what they have done must perhaps be undone." Merleau-Ponty, *Everywhere and Nowhere*, *SIGNS* 153 (1964).

15. See, e.g., J. HABERMAS, *The Scientization of Politics and Public Opinion*, in *TOWARD A RATIONAL SOCIETY* 62 (1970) and the other intellectual movements discussed in Boyle, *supra* note 3, at 697-702.

16. See Boyle, *supra* note 3, at 691-720.

tion to the legal system. Where else can you find such a beautifully documented belief system, complete with plausible binary oppositions and overt claims to rationality? Where else can you find a discourse that really does look as though its users are overtly fixated on denying or mediating the recurring contradictions generated by those binary oppositions? (One can tell a convincing story about legal doctrine that begins with the opposition between Self and Other and builds all the way up to the prohibition of punitive damages in contract law.) Second, in the imaginary intellectual history of the recent past, which provides academics with many of their criteria for sophistication, structuralism is *defined* by its critique of an epistemology based on subject and object. In the next few paragraphs I want to lay out something vaguely resembling this critique—all the usual disclaimers apply.

We have constructed our discourses around mythical subjects and objects. The mystical high point of knowing is supposed to come when knowledge is actually fused with the objects of its study, when it becomes “objective” in the sense that there is no way to distinguish between the object and the knowledge of the object. This is the dream of objective meaning (meaning that exists *without* or *before* interpretation) or of objective science (building on theory-free descriptions of fact).

Conceived of this way, rational discourse has a strange self-destructive role—it is a method of bridging the gap between a subject and an object that can only truly be said to have succeeded when it has annihilated itself, leaving the self-revelatory object naked to the gaze of the subject. We are all familiar with the critiques of this notion of knowledge—criticisms of the notion of value-free history or objective social science, of a transcendent and a-historical scientific method, of neutral legal principles, of objective interpretation of words or texts or social situations. These critiques occupy a strange position in the languages of power within our various institutions—accepted and avoided or ignored by the centrist sophisticates, rejected and condemned by many of the practitioners of normal science. Often, though by no means always, it has been the left that has developed the critiques of objectivity—generally on the ground that “objectivity” covered domination with the mantle of neutrality and inevitability. As examples one might cite the anti-positivist work of the Frankfurt School and of critical sociologists in general, the vague leftist tinge to the work of most textual deconstruction workers, attacks, like those of Marcuse, on ordinary language philosophy, and of course the critical legal studies critiques of legal process theory, law and economics, and

neutral legal interpretation.¹⁷

Most of these critical projects (with the possible exception of deconstruction in literary criticism) have concentrated on the notion of objectivity—assuming, as I pointed out earlier, that it was the problematic term in the subject-object dichotomy. For example, many critical legal studies articles seem to assume that, having failed to reach a privileged objective position, legal discourse must inevitably slide back down into subjectivity and politics—the underprivileged terms in the subject/object, politics/law opposition. *Subjectivity and politics are assumed to be meaningful terms*; it is the other side of the opposition that mainstream theorists aim for, so it is on those that the critique is mounted. One would no more spend one's time wondering about whether subjectivity was possible or conceivable than one would spend one's time wondering whether *mortality* was possible—the objectivity and immortality sides of the distinctions are the sexy ones; the others are just residual categories. Is this assumption justified? Let us take a closer look at the notion of subjectivity.

The structuralist story goes something like this: In our collective epistemological fantasies a presuppositionless, ageless, classless, raceless, sexless knower sits, arachnidean, in the center of the web of knowledge that constitutes the discourse. When Foucault proclaimed the “death of man,” it seems to me that it was this “person” to whom he was referring and this mode of knowing that was supposed to die. “From the beginning of this century, psychoanalytic, linguistic, and ethnographic research has ousted the subject from the forms of his speech, from the rules of his actions, and from the systems of his mythical discourses.”¹⁸

If one takes the approach suggested by the quotation above, then structures of thought come to be seen as more than the coding and decoding mechanisms through which a subject views or represents an object. Drawing on the modernist insight that a pure “subject-domain” or a pure “object-domain” is literally inconceivable, we can uncouple both ends of the classical epistemology of truth.

If all knowledge is socially located, then the subject has to be thought of as an actual person, who is part of a speech-community, a particular society, an historical period, a professional discourse, and so on. At the same time an object can never be perceived, described, or thought about, except *within* a pre-existing interpretive construct. In other words, the notions of subject and object are every bit as “meta-physical” (in the derogatory sense in which that word is now used) as

17. See *id.* at 691-720, 736-80.

18. Foucault, *Genealogy of Sciences*, 9 CAHIERS POUR L'ANALYSE 12 (Summer 1968).

the Platonic forms. Uncoupled from subjects at the perceiving end, and objects at the end perceived, truth can only be seen as the matrix of social power that constitutes the reality *in between*. But one cannot say "in between," since the structuralist epistemology seems to reject the notion of subjects or objects altogether. Both subject and object have been inducted into the notion of structure—there is only structure, thinking itself through, occasionally relying on the metaphors of subject and object.

This is the central line of the structuralist critique, a line that bears a suspicious resemblance to the free will/determinism debate. In this vision individuals do not have consciousness, as such; they merely work out the progressions and *glissades* of whatever structure they are determined, defined, and constituted by, be it material, linguistic, or cosmological. If both subject and object have disappeared into the structure, it seems bizarre that we would go on theorizing in subject/object terms. "Subjectivity" becomes just as much of a construct as "objectivity," so that we could use the same tools to show that it is impossible for law and science to be "subjective" as we had just used to show that they could not be "objective." The theories, the practitioners, the "world" to which they refer, our "own" approaches to these discourses—everything is revealed to be part of a complicated set of overlapping structures, or so say the structuralists. At the same time the "subject" at the center of our political theories falls apart. This is not just the demise of the rights-holding subject in the liberal world of formal equality. The structuralist story is equally hard on the unalienated true-consciousness to whom we dedicate our critiques of false necessity. It seems as though we can no longer appeal to the *real* self hidden under oppressive layers of work and sex roles. The real self has suffered the fate of Southern California—there is no "there," there. "Subjectivity was not waiting for philosophers . . . They constructed it, and in more than one way. And what they have done must perhaps be undone."¹⁹

This leaves us with some rather large problems:

** How do we even manage to *think* in a world in which both subjectivity and the object-domain have disappeared into the awful mushiness of a *structure*?

** More specifically, how can we theorize or act politically, given that many of the values of the "party of humanity" come from a humanistic vision of the acting subject? Luckily, these aren't our only problems. I say "luckily" because the other questions seem to

19. Merleau-Ponty, *supra* note 14, at 153.

cut exactly the opposite way. They raise the issue of whether any of this makes any sense, whether it is *right*.

The first point is a basic one. Who says we should look at things this way? Post-structuralists and post-modernists spend a lot of time talking about the death, the erosion of the subject. They say that subject and object are fantasies. But they talk as though they were *real* fantasies, not merely metaphors by which social beings first choose and then emphasize certain aspects of experience. Subject and object are not out there waiting for us to discover. (We cannot privilege the structural side of our critique merely by insisting that it is immanent). An example might help to clarify the point. We can choose to see cubism and positivism as *the same* (since they both claim to focus on a truer layer of reality that lies beneath surface chimera). Or we can choose to see them as *different*, because one derives its authority from the transcendental subjectivity of the artist's vision and the other from the verifiable objectivity of science. Similarly, we can *choose* to see every discourse as being constituted around a subject/object division. Or we can choose to privilege some other metaphorical representation of the epistemology of the discourse, say, by focusing on the role of authoritative communities in validating the method. This is a move which has frequently been made in all of the academic discourses. ("Science is not an objective method of representing reality—it is that which is acquiesced to by the micro-community of scientists working in a particular area of research." "Law is not Langdellian science, it is what judges say it is.")²⁰

The second problem is one that besets any powerful criticism. Does the critique undermine itself? Can't we undermine the structuralist story in exactly the same way that it undermined the idea of subject and object? Both subject and object seem to collapse into the notion of structure, but unless we are going to end up doing solipsistic forestry, we have to imagine a set of minds, material processes, or patterns of culture which create the structure, as well as an analyst to observe it. In other words, both stories collapse into each other. If you start with subject and object, someone can point out to you that there is no such thing as a pure object-domain, no world of vacuum-packed facts uncontaminated by the interpretive structure of observers, and that the idea of a "subject" presupposes a vast, contingent mental structure. But if you start with a world of structures, the opposite will happen. There must be subjects to be determined by struc-

20. See T. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (2d ed. 1970); *PARADIGMS AND REVOLUTIONS* (G. Gutting ed. 1980); J. SEARLE, *SPEECH ACTS* (1969); and Boyle, *supra* note 3, at 730 n.141.

tures and objects to be filtered, processed, and re-presented. You can pick your jargon to describe all of this—an antinomy of epistemologies,²¹ dangerous supplementarity writ large,²² or whatever—anyway, they contradict each other and yet rely on each other.

The third problem is more mundane. Which structure is it that is supposed to be swallowing the subject? It is not that it is difficult to reduce subjectivity and objectivity to the workings of some implacable structure. It is that there are far *too many structures*, each of which purports to explain everything. Look at Althusserian marxism,²³ feminism in the style of Chodorow or Dinerstein,²⁴ and Levi-Straussian anthropology.²⁵ Each of them describes a structure that constitutes both the subject and the object. I cannot even conceive of “myself,” nor does “the world” exist except within:

- i. the structure of overlapping material and ideological striations and endless feedback loops which appear to be necessary to maintain marxism’s claim to be “true science;”
- ii. the mental structures, produced by mother-monopolized child-rearing, which lead me to deny my feelings of dependency by objectifying both the material world and other people, seeing them as “things” put there for my own pleasure;
- iii. the universal binary structures of differentiation, and thus of meaning, which order my world for me and which can be discovered within the pacifiers that work out conflicts between cosmology and real life through the algebra of myth.

All are convincing (some of the time). All seem to work (some of the time). All claim to be *the* structure (all of the time). Into which of these are we to dissolve subject and object?

C. Conclusion

In the first part of this article, I have tried to explain some of the problems that the subject poses to critical theory. Building on my earlier work, I claimed that all critical theories could usefully be understood as being organized around a tension between a subjectivist and a structuralist strand. Does meaning come from the intention of an acting subject or the frozen codes of meaning encoded in some social structure? Is human agency possible or are we determined by external

21. See R. UNGER, *KNOWLEDGE AND POLITICS* (1975).

22. See J. DERRIDA, *OF GRAMMATOLOGY* (G. Spivak trans. 1976).

23. See L. ALTHUSSER, *FOR MARX* (B. Brewster trans. 1969).

24. See N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* (1978).

25. See C. LEVI-STRAUSS, *STRUCTURAL ANTHROPOLOGY* (1963).

structures—whether material or ideological? Are judicial decisions “just the judge’s subjective values” or are they a mere resultant of a doctrinal structure produced by some fundamental contradiction? Increasingly, the tendency in modern thought has been to collapse the subject into the structural side of the story. The Foucault and Merleau-Ponty quotes are good examples. Is the subject is dead?

This question is not an idle one. The world of subject and object seems vital to most of the theory that we work with, whether it is a critique of objectivity or a phenomenology of the alienated subject. If we wanted a master metaphysic that was going to say something definitive about subjects and objects, then structuralism’s story about the death of the subject and the illusion of the object seems to fit. This story has fairly radical consequences for our theorizing: denying the reality of subjectivity as well as objectivity, undermining a large part of the tradition of “the party of humanity” and thus putting the “true self,” to whom we direct our critiques of false necessity, in a rather tenuous position. But there are at least three problems in all of this. There are too many structures, all of which claim to be correct. The structuralist epistemology and the subject/object epistemology depend on each other and yet deny each other. And, perhaps most interestingly, the structuralist critiques portray the epistemology of subject and object as a *real* fantasy, that is to say, something which is already out there, which we need only criticize. By doing so they ignore or minimize the act of choice necessary to pick the metaphors of subject and object out of our intellectual and social practices. In a most uncharacteristic fit of literalism for the people who taught the deconstructionists that “every reading is a re-writing,” they are claiming that the subject/object epistemology is just *there*—no contingent act of interpretation is required to establish its presence.

What is to be done? I hope I have shown already that the answer is not to return to the world of subject and object. Nor, for the reasons given in the last paragraph, do I think that we could dispense with subject and object, moving instead to some “new epistemology.” After all, the epistemology of subject-object and the epistemology of “structures of thought” are antinomian; they simultaneously depend on and contradict each other. In the second half of this paper I am going to claim that if we actually focus on the subject in context and consider the subject as it appears in legal theory, social theory, and economics, we will see that there is a more profitable way to proceed—one guided by the ideas of postmodernism. What then, does a postmodern analysis of the subject look like, and how does it deal with the methodological problems I have outlined so far?

II. POST-MODERNISM AND SUBJECTIVITY

A. *Modernism and Post-Modernism*

The first response to a paper that connects postmodernism with law would probably be disbelief. In fact, Pierre Schlag began his introduction to this conference by saying that it was interesting to think of postmodernism in the law because we had never even had modernism. I want to challenge that statement and suggest that we indeed have had modernism and that one of the reasons for the rise of critical legal studies was in an attempt to get past some of the problems that the modernist project left.

What do I mean by modernism? One vision is that modernism, particularly modernism in the arts, consists of a rage against the existing order.²⁶ Modernism exalts the attack on form, the belief that an ability to go beyond, to transcend, to break through, is the *raison d'être* of art and perhaps of life. In this sense, the idea of artistic progression is of a series of revolts against the prior form of art. In fact, the whole idea of a history of "forms" of painting—representational painting being succeeded by impressionist painting, being succeeded by surrealism, by cubism, and so on—is dependent on the idea that the new form establishes itself precisely by its challenge to the tenets of the prior form. Hence, the paradox that modernists are both obsessed and repelled by form. The form inevitably cabins, limits, distorts, and freezes human experience. It is, in one sense, a barrier to full human realization, but in another sense a tragic necessity.²⁷ And so one vision of modernism is that we must strive to go beyond form, or at least beyond the last form.

This vision of "form" should be relatively familiar, because it is in large part the idea that animated the early parts of the legal realist movement.²⁸ Consider the paradigmatic teaching method of the first year of law school. The student is presented with a case or a hypothetical that seems to cry out for some sort of resolution. The student's first response is to shoehorn the case into the doctrine—the form—at

26. See M. BERMAN, *ALL THAT IS SOLID MELTS INTO AIR* (1982); *MODERNISM, 1890-1930* (1976).

27. See R. UNGER, *PASSION: AN ESSAY ON PERSONALITY* (1984); Boyle, *Modernist Social Theory: Roberto Unger's PASSION* (Book Review), 98 *HARV. L. REV.* 1066 (1985).

28. J. Boyle, *Modernism, Realism and Critical Legal Studies* in *CRITICAL LEGAL STUDIES; A YOUNG PERSON'S GUIDE* (materials prepared for the 1984 Conference on Critical Legal Studies; unpublished manuscript on file with the University of Colorado Law Review); R. UNGER, *POLITICS: A WORK IN CONSTRUCTIVE SOCIAL THEORY* (1987) (this work is contained in three volumes: *Social Theory: Its Situation and Its Task; False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy; Plasticity into Power: Comparative-Historical Studies on the Institutional Conditions of Economic and Military Success*); Luban, *Legal Modernism*, 84 *MICH. L. REV.* 1656 (1986).

hand. Then the professor, with varying degrees of sadism, proceeds to explode first one, then another, then another part of the student's formulation to show that the doctrine would lead to unjust results, be too rigid or too flexible, be too policy-oriented or too formalist. It would be strange if this endlessly repeated experience did not lead the student to question the very idea of form. Yet this first-year experience is only one of the thousands of artifacts which bear witness to the realist critique.

The realists showed that the "form" of rights was different than had previously been imagined²⁹ and that the form of interpretive doctrinal reasoning tended to exclude considerations of value or of social science data.³⁰ They challenged the idea that the great formal or qualitative distinctions in our society, such as that between public and private, could intelligibly be maintained.³¹

When it was originally mounted, the realist critique was mounted against a heavily formalist discipline. It seemed, I think, that this critique of form might open up some free space; we would free ourselves from some of the Langdellian encrustations of the law, give ourselves a little more room, and be more free to be flexible, policy-oriented lawyers.³²

The modernists in architecture felt that once all the baroque ornamentation of traditional architectural forms was stripped away, then the only determinant of form would be function. Similarly, some of the realists believed that if the "transcendental nonsense" that went along with the "form" of legal analysis were removed, then we would gain access to the true functions of each rule. But after this critique of the limiting qualities of form comes a certain fear of the abyss.³³ "Wait a minute—if we trash this, what is left? Doesn't this lead to nihilism? Doesn't this even lead to fascism?" And just as the early modernist artists were accused of fomenting fascism, of breaking down Western civilization, of undermining the cultural forms that uphold all that is good and just, so the legal realists were accused of exactly the same thing: of breaking down the structure of society, of preparing the

29. See Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975.

30. See Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935).

31. See Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423 (1982); Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982).

32. The optimistic tone in Felix Cohen's *Transcendental Nonsense*, reveals much about the animus behind many of the realist critiques. See Cohen, *supra* note 30.

33. D. BELL, *THE CULTURAL CONDITIONS OF CAPITALISM* 51 (1976).

way for some sort of awful anarchy or revolution.³⁴

At that point, at least in law, you see a backing away from the abyss, a return to various forms of reconstruction.³⁵ So that is one reading, a similarity which one could draw between modernism and legal realism. I am not claiming for a moment that it is an *inevitable* similarity.

How does postmodernism come in? One of the things that interests me about postmodernism is that it suggests there is no "beyond." There is no place outside of the forms, no art that could break free from the restraints in which it is, for the moment, embedded. Instead, postmodernism suggests that the best one could hope for is ironic juxtaposition. Modernism attempted to move beyond the traditional "forms" of architecture so that the design of the building was determined solely by its function, becoming a simple geometric rectangle. In contrast, a piece of postmodernist architecture might put Victorian ornamentation next to minarets and Ionic columns. One of postmodernism's defining features is the juxtaposition of styles which, although individually they might have coherence, seem collectively to put each other into question. Merely by placing them side by side we seem to say, "Here, look how this style embodies a particular vision of a building and how it is challenged by the style next to it, and by the style next to that."

For the moment, I want to leave that version of postmodernism on the table. The notion is one of ironic juxtaposition. One relies on tradition, but not merely to restate it. Instead, we recreate something out of the shards and fragments of the past. Thus, we can do something useful—build a building—but also challenge the settled nature of the very traditions and forms upon which we relied. It is that double movement of creation and simultaneous questioning that is the heart of the legal strategy I mean to suggest here. In the final part of my paper, I will argue that this is one fruitful way of seeing the kind of legal work that is now being done, both in critical legal studies and by other people in the legal academy and in legal practice. The progress of my argument will be as follows. First, to justify my contention that "subjectivity" needs as much attention as "objectivity," I will give some examples of the way that the subject can be used to confer epistemological privilege and social authority on a particular vision of the world. Second, I will examine the recent history of the subject in

34. See E. PURCELL, *THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE* 159-78 (1973).

35. Readers interested in this aspect of modernism are referred to the wonderful account given in *The Crisis of Democratic Theory*. See *id.*

American law. Third, I will argue that post-modernism offers us some useful ways to understand and even use this history.

B. Critical Legal Studies and Objectivity

In the first part of this paper I claimed, without substantiation, that much critical legal theory is devoted to critiques of objectivity. Critical legal studies work on law and economics, for example, takes arguments that purport to be justified by objective legal economic analysis and then shows that the economic models both depend on and deny the importance of wealth distribution.³⁶ Thus, the facade of objectivity is just that, a facade.

More famously, critical legal scholars have questioned the objectivity of legal interpretation. In brief, their argument has been that any determinacy in legal interpretation in fact depends on community expectations, visions of what counts as a good legal argument, structures of legal consciousness that restrict the availability of analogies, and so forth.³⁷ Thus, determinacy is possible, although there is more free play than many people are willing to admit. But determinacy can only be achieved by relying on these community expectations and so forth—features of legal argument which are marked precisely by the fact that they are deeply charged, highly political, value-laden, and extremely socially contentious. Legal interpretation, therefore, is anything but “objective” in the sense apparently required by the liberal political vision.³⁸

Critical legal scholars have also talked about the objectivity or perceived objectivity of social forms. For example, most of American labor law has assumed that the basic question is how to divide up a very small profit margin between bosses and workers.³⁹ If one assumes that this is the central issue, then the discourse of labor law becomes a technical discussion of how potential conflict on that issue should be managed, channeled, and administered. Again, critical legal historians have argued that there is a false objectivity here. There are many other issues that could be raised even within the current legal

36. See Baker, *The Ideology of the Economic Analysis of Law*, J. PHIL. & PUB. AFF. 3 (1975); Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981).

37. See Boyle, *Politics of Reason*, *supra* note 3; Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986); Kennedy, *Towards an Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America*, 3 RES. L. & SOC. 3 (1980) [hereinafter Kennedy, *Towards an Historical Understanding*].

38. *But see* A. ALTMAN, CRITICAL LEGAL STUDIES (1990). Altman believes that all of these elements become part of the law. This seems unobjectionable, but also does not seem to solve the problem.

39. See Klare, *supra* note 6; Stone, *supra* note 6; Gordon, *supra* note 6; SELECTED READINGS, *supra* note 8.

regime, including workplace government, worker property rights in the workplace, and so forth. All of these run far beyond the conventional, objectified image of the domain of labor law and, for that reason, they are never likely to be addressed.

Finally, critical legal studies work has looked beyond objectivity to objectification—the objectification of women,⁴⁰ the objectification of texts,⁴¹ the objectification of institutions. All the critiques that I have identified so far have as their goal the idea that these apparent “objectivities” are, in fact, false. Things could be otherwise. And all of them focus on the object side of the subject/object dichotomy. They are critiques of objectivity, of objectification, of the apparent objectivity of social practices.

But, as I pointed out in the first section, there are few critiques of subjectivity. This is strange, if you think about it, because it is not obvious that the intellectual apparatus necessary in order to create a subject is any less contentious than the intellectual apparatus necessary to claim that you are being objective. For example, every day in a law school classroom you hear someone saying, “It is just my subjective viewpoint.” That means, presumably, that they are claiming there is a single “I,” not many “I’s,” that they are neither reducible to their race, their gender, nor their class. They do not dissolve back into the culture which has animated them, the language which they speak, or the various parts of their personality. They are not even constituted by various roles they adopt. But is this true? Worse still, students tend to come into law school as formalists, believing that the interpretation of law is objective, only to decide after ten weeks that it is completely subjective—that the judge simply follows his or her “subjective desires.” The idea that these “desires” might be structured by something a tad larger than the individual subject—structures of consciousness, class attitudes, ideologies, and so on—simply drops out of the picture. We are left with an image that if all these judges would stop “choosing to be subjective,” the problems would disappear.

If we are structured by a hundred cross-cutting determinants, if we are an assemblage of conflicting personas, doesn’t this challenge the notion that there is a single “I,” a single subject? Is not subjectivity, then, as contentious as objectivity? And what might we do with that notion? Let me sketch out a few potential lines of critique.

40. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982); C. MACKINNON, *FEMINISM UNMODIFIED* (1987).

41. See Frug, *Re-Reading Contracts: A Feminist Analysis of A Contracts Casebook*, 34 AM. U.L. REV. 1065 (1985).

My first question is this: Are there uses of subjectivity rather than objectivity in order to privilege, to armor, to give authority to particular statements, particular theories, particular visions of society? I think the answer is clearly "yes," and I will offer four examples to prove my point.

III. FOUR SUBJECTS

A. The Subject and Political Theory—Rawls

My first example is Rawls' theory of justice.⁴² Rawls' argument depends on the possibility of describing an essential, stripped-down subject. By "stripped-down" I mean to suggest something like a Chevette. Take away all the other attributes of car-ness—the air conditioning, the turbocharger, the leather seats—and all you have got is your basic Chevette. Imagine a set of stripped-down, Chevette-like subjects behind a veil of ignorance. Supposing they are ignorant not only of who they are going to be, but what place they are going to occupy in a society which they designed—they do not know whether they are going to be a black woman or a white man; they do not know whether they are going to be rich or poor. Rawls says the society that those subjects would design is a society that embodies the principles of justice.

The subjects floating behind the veil of ignorance are supposed to be little essences of rational subjectivity—the lowest common denominator, the residue left when you have boiled away all social particularity. It is this status as universal subjects that is supposed to give their musings about normative matters such weight. (Note the paradox; pure subjectivity has many of the privileged features of objectivity). But, as I am sure many people have pointed out before me, Rawls' rational monads end up sounding suspiciously like middle class white male American liberals. For example, they decide in their kindly but materially self-interested way that it is acceptable to have inequalities of wealth if those inequalities would put the worst-off people in the society in a better position than they would be in a more egalitarian society. Pareto must be with them behind that veil of ignorance.

Notice how these subjects have, as it were, been tricked into structural justice through individual ignorance. They do not know who they are, so they think, "Better not have a society that really screws people of color, because I might end up being one; better not have a society that's incredibly hierarchical—I might be at the bottom." But at the same time, they want a society with some level of

42. J. RAWLS, A THEORY OF JUSTICE (1971).

prosperity in primary goods, because they might not be at the bottom. The balances that they would strike, the principles that they would choose to guide their conduct, make up Rawls' theory of justice. Thus, he claims to have produced if not an objective, then at least an inter-subjective theory, a theory which claims to be more than just his political viewpoint.

To accomplish all of this, Rawls must take a number of things away from his subjects. He says that he wants subjects that are motivated neither by altruism nor envy.⁴³ It sounds as if we have a pointer with three positions. The positive extreme is altruism. The negative extreme is envy. But when the pointer is at rest, it comes back to the neutral position—the one that is the natural or essential position for the subject of a moral theory, and that position is neutrality to the interests of others. Self-interest, after all, is seen as rational.⁴⁴ Altruism, one must presume, is emotional. Envy, similarly, is emotional. But surely one could imagine subjects, even stripped-down Chevette-like subjects, who had as part of their own self-interest the idea that they didn't want to live in an inegalitarian society. What if the stripped-down subjects were designed by Kropotkin and Confucius, rather than by Mandeville, Smith, and Pareto? These imaginary subjects do not prefer egalitarianism because they care for other people. That would be altruism, which Rawls wants to rule out of the question. Instead, they have the avoidance of inegalitarian societies as part of their personal self-interest, in the same way our rational subjects would prefer sunshine to rain or wealth to poverty. Somehow Rawls means to tell us that it is a natural, neutral, or essential part of the rational subject to want wealth and pleasure but not equality.⁴⁵ That

43. Rawls' subjects do not suffer from either "envy" (*id.* at 143) or altruism (*id.* at 128). They are assumed to meet each other in conditions of moderate scarcity and mutual disinterest. "Unless these circumstances existed there would be no occasion for the virtue of justice, just as in the absence of threats of injury to life and limb there would be no occasion for physical courage." *Id.* at 128.

44. Rawls is convinced that he is not taking a particularly contentious position. "At the basis of the theory, one tries to assume as little as possible." *Id.* at 129. He sees mutual disinterest as a formal component of the conditions of justice, in the same way that conditions of relative scarcity are a formal, necessary component for the question of justice to arrive. "In an association of saints agreeing on a common ideal, if such a community could exist, disputes about justice would not occur. . . . But a human society is characterized by the circumstances of justice. The account of these conditions involves no particular theory of human motivation." *Id.* at 129-30. But this begs the question entirely. One could agree that in a society of saints, questions of justice would not have the content we give to them in our society. But the ability to state circumstances which are outside the conditions of justice does not imply that Rawls' definition of what is *inside* those conditions has the status of a universal truth. In fact, a society made up of individuals who had "selfish" desires to avoid living in inegalitarian social conditions would also raise questions of justice. To put it another way, the choice is not a binary one—either saints or Rawls' subjects. How could it be?

45. Some defenders of Rawls have argued that this critique does not hit home because Rawls is only creating a theory of justice, not a theory of human nature. Indeed, this objection was made

subject, of course, would design a very different society and hence a very different theory of justice than my selfishly egalitarian subject.

Now, this isn't even very much of a relativist move. One doesn't have to resort to worlds in outer space or tribes in Papua-New Guinea. There are many classical republicans who would have explained to Rawls that disparities of wealth (even Pareto-justified ones) are fatal to the commonweal. But Rawls does not seem to have a notion of commonweal, and his subjects can only be trapped into a functional equivalent of altruism by information deficiencies about where they are going to end up in the society they design—private greed, public good.

Another way of putting the point would be to conduct the following thought experiment. Two competing groups of stripped-down subjects sit behind veils of ignorance. One group was designed by Rawls, the other by a radical republican. They are offered a choice between two different sets of principles for the distribution of primary goods. Under scheme A, the society is marked by a considerable level of inequality. Nevertheless, the overall "wealth" generated by the society is such that the poorest and most deprived citizen under scheme A is slightly richer in terms of primary goods than the average citizen under scheme B. Society B is an extremely egalitarian society with only small disparities in distribution of primary goods. It has enough resources to supply everyone with food, clothing, shelter—as well as some of the less tangible criteria included in Rawls' list of primary goods—but it will not be as wealthy as society A. Under this scenario, one can make a fairly good argument that Rawls' subjects will choose society A and the republican's subjects, society B. Being "rational," Rawls' subjects see that—no matter who they are in the resulting society—scheme A will make them better off in Rawlsian terms. The republican subjects would disagree. Among their rational, selfish preferences (which include many of the same preferences as Rawls' subjects) is a preference for egalitarian societies. They believe that major disparities of wealth and power are subversive of community bonds

powerfully by Dale Jamieson during the conference and has been made in print by Ed Baker. "Rawls undertakes only to derive the limits that justice would impose on acceptable frameworks for human interaction. To do so, he need only postulate certain universal qualities that we do or should attribute to the person, or to acceptable human interaction. Rawls only needs a theory of those aspects of a person or of human interaction that are relevant to his enterprise." Baker, *Sandel on Rawls*, 133 U. PA. L. REV. 895, 896 (1985). I remain completely unconvinced. Needing "only" to be able to postulate universal qualities that we should attribute to personhood within a theory of justice, seems to me just as demanding as the task of postulating a universal subject, *tout seul*. The same epistemological and political difficulties are involved whether one is divining the essential features of the subject in a moral theory or the essential features of human nature. It is no easier to build a small perpetual motion machine than a large one.

in a way that will make life less pleasant for them personally—whoever they turn out to be. The likelihood of a marginal increase in their holdings of primary goods would not be enough to compensate them for the loss of the personal rewards of community. Exercising their rational self-interest, the republicans choose society B. Rawls would claim that the choice made by his subjects is correct because his subjects have the necessary universal attributes. I disagree. Familiar attributes, yes. Universal attributes, no.

So the first criticism is that the subject cannot escape to a world beyond particularity and relativism any more than knowledge can fuse with the object. Attempts like Rawls' are only convincing because the values smuggled into his subjects, such as love of material wealth and freedom of action, are too familiar to understand. De-personalized subjects rely on their supposed universality for their epistemological and rhetorical utility. But a truly universal subject is, by definition, contentless. Self-interest is an empty term, until you have defined what a self is and the kind of things it is interested in.

B. The Subject and Political Theory—Hobbes

Now that I have given the description of Rawls' stripped-down, rational subjects, it will be easier to present my second example of the authoritative subject—Thomas Hobbes' theory of law and state.⁴⁶ Where Rawls' subjects command our agreement because of their de-personalized rationality, we must obey Hobbes' "artificial man, the commonwealth," because there is *no* objective rationality that stands above particular conflicts, and thus we must put our trust in a determinate, authoritative subjectivity.

That Law can never be against Reason, our Lawyers are agreed; and that not the Letter (that is, every construction of it,) but that which is according to the Intention of the Legislator, is the Law. And it is true: but the doubt is, of whose Reason it is, that shall be received for Law. It is not meant of any private Reason; for then there would be as much contradiction in the Lawes, as there is in the Schooles; nor yet, (as Sr. Ed. Coke makes it,) an *Artificiall perfection of Reason, gotten by long study, observation, and experience*, (as his was). For it is possible long study may encrease, and confirm erroneous Sentences: and where men build on false grounds, the more they build, the greater is the ruine: and of those that study, and observe with equall time, and diligence, the reasons and resolutions are and must remain discordant: and therefore it is

46. This section was first printed, in a slightly different form, in my article, Boyle, *Thomas Hobbes and the Invented Tradition of Positivism: Reflections on Language, Power, and Essentialism*, 135 U. PA. L. REV. 383 (1987).

not that *Juris prudentia*, or wisdom of Subordinate Judges; but the Reason of this our Artificiall Man the Common-wealth, and his Command, that maketh Law. . . . The subordinate Judge, ought to have regard to the reason, which moved his Sovereign to make such Law, that his sentence be according thereunto; which then is his Sovereigns Sentence; otherwise it is his own, and an unjust one.⁴⁷

It is no wonder Hobbes' work has such a modern feel to it. In only a few lines, Hobbes stakes out a position on one of the central jurisprudential debates of our day. He finds objectivity to be impossible, and instead plumps for a kind of privileged secular subjectivity. The Sovereign becomes a "transcendental" subject, but only in the sense that the sovereign's decision on some issue of interpretation is on a different, a higher level of validity. Hobbes does this, not because the sovereign can claim a superior insight into the moral universe, not because the purposes and ideas of the legislator will always actually be clear or decipherable to the "subordinate judge"—but because all laws need interpretation, and that interpretation must be final and authoritative. Hobbes rejects the idea of self-revealing texts, and he rejects the idea that a professional speech community can acquire any meaningful degree of authoritative consistency. The "reason" that drives the law is going to have to be that of the "artificial man," the commonwealth. Legal interpretation will not, cannot, be "objective," it must come from some unanswerably authoritative subject.

Liberal political and legal philosophers have tried to edge away from this conclusion. They try to make the authority of the interpretation look as though it were "objective," as though the law came from within the fetishized textual objects rather than from some authoritative Will. But Hobbes, like Marx and Feuerbach, scorns the attempt to deny that some choice is going to have to be made. Law is about power, and when you give Hobbes the happy naturalistic conceit that it can never be against reason, he turns the whole meaning of the phrase on its head by agreeing and then saying, "[W]hose reason?"

So the first two examples give us two perspectives on the subject in liberal state theory. The critique of Rawls shows how one can "load up" one's theoretical subjects with the very choices about the *foundational arrangements* of a state that one needs to justify. The excerpt from Hobbes shows the difficulty of making it appear that decisions *within a state* come from objective reason and not a subjective will. In the next section, my third critique of the subject, inspired by a curious

47. T. HOBBS, *LEVIATHAN* 316-17 (C. B. McPherson ed. 1968).

mixture of legal realism and Marx's *On The Jewish Question*,⁴⁸ shows the connection between the idea of the stripped-down subject in philosophy and the attributes imputed to the legal subject in a liberal, Western state. At the same time it continues the progression of increasing particularity started by the first two examples—it offers a critique of formal equality that addresses the particular ideologies and legal arrangements of Western capitalist societies.

C. *The Legal Subject*

I will turn now from political theory to the subject in legal theory. At the beginning of this essay I quoted John Chipman Gray reassuring lawyers that jurisprudence need not concern itself with the “abysmal depths of personality,” that it could take the individual as “a real indivisible entity” and get on with the work at hand.⁴⁹ I followed that quote with another one, far less sanguine about the naturalness, the indivisibility and the innocence of the concept of the subject.

The individual is not to be conceived as a sort of elementary nucleus, a primitive atom, a multiple and inert material on which power comes to fasten or against which it happens to strike, and in so doing subdues or crushes individuals. In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires, come to be identified and constituted as individuals. The individual, that is, is not the *vis-à-vis* of power; it is, I believe, one of its prime effects.⁵⁰

How does this line of thought apply to the construction of the legal subject? My first suggestion is that we look at legal history in order to answer questions similar to the ones I posed about Rawls' theory of justice. Who gets to be a subject? What qualities or attributes about them are included in the box of subjectivity and what attributes are excluded? I cannot attempt such a comprehensive history here, but I venture to suggest what we might find. First, the definition of the subject will be one of the most important parts of the legal consciousness of the time—although it will probably also be seen as something that “goes without saying.” Second, the definition of the subject will change radically through time. Indeed some of the most important conflicts between modes of legal consciousness and groups in the profession will be around the definition of subjectivity, although they will not be understood that way—precisely because each side has an

48. MARX, *On the Jewish Question*, in THE MARX-ENGELS READER 26 (R. Tucker ed. 1978).

49. J. CHIPMAN GRAY, *supra* note 1, at 29.

50. M. FOUCAULT, *supra* note 2, at 98.

investment in proving that their vision of the legal subject is not artificial but natural, not chosen but discovered.

During the period of classical legal thought,⁵¹ for example, the definition of the subject had certain rigorous requirements. When we insist on formal equality, we can do so only by drawing a very narrow picture of what it is to be a legal subject, the universal and formally defined actor of civil society. I am equal to one of the Rockefellers because we are both political subjects, we are both formally equal, and the "form" is very narrow. Disparities of wealth, power, and status are defined out of existence precisely because they are placed outside the realm of political subjectivity. Does he have the vote?⁵² Is he a citizen? Does he have the right to speak freely? Then of what relevance is it that he has no political power, that he is effectively disenfranchised, and that he does not have the resources to make himself heard? As a political subject he is equal to anyone.⁵³

My students frequently disparage the opinions in *Coppage v. Kansas*⁵⁴ and *Lochner v. New York*⁵⁵ as clear examples of biased decision making by judges eager to serve the interests of the ruling class. In the former case, the question is whether an employer who tells his workers they will be fired if they refuse to sign a yellow dog contract—a promise not to join a trade union—can be prosecuted under a Kansas statute. The statute specifies that it shall be unlawful for an employer to "coerce, require, demand, or influence" any persons to enter into such an agreement and also forbids making it a condition of employment.⁵⁶ Writing for the majority, Justice Pitney agrees that it would have been to the advantage of Hedges "from the pecuniary point of view and otherwise" to keep his job and still remain a member of the union.⁵⁷ Nevertheless, he is quick to add that "aside from this matter of pecuni-

51. See Kennedy, *Towards an Historical Understanding*, *supra* note 37; Mensch, *The History of Mainstream Legal Thought*, in *THE POLITICS OF LAW*, *supra* note 7, at 18.

52. I use the male form advisedly. Here is a quote from a 19th century constitutional text, extolling the equality of legal subjects—within limits. "Those who make the laws 'are to govern by promulgated, established laws, not to be varied in particular cases, but to have one rule for rich and poor, for the favorite at court and the countryman at plough.'" T. COOLEY, *A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION* 559 (1906). This seems fair enough until one looks at the editor's footnote which accompanies this broad statement. "This principle is not to be carried so far as to put all persons on an equality as to rights which are not natural rights. So though there be a statute providing that the masculine shall include all genders, a woman is not entitled to admission to the bar under a statute that 'any male citizen,' possessing certain qualifications, shall be admitted and such statute is valid." *Id.* at 559 n.1 (citations omitted).

53. See Marx, *supra* note 48.

54. 236 U.S. 1 (1915).

55. 198 U.S. 45 (1905).

56. *Coppage v. Kansas*, 236 U.S. at 8.

57. *Id.* at 6.

ary interest, there is nothing to show that Hedges was subject to the least pressure or influence, or that he was not a free agent, in all respects competent, and at liberty to choose what was best from the standpoint of his own interests."⁵⁸

For the railroad to tell him they will fire him (unless he contracts away the right to join the union) could only be coercion if the parties were unequal in some way. Hedges has the right to leave. The railroad has the right to fire him or refuse to hire him. In the Court's mind, the situation is one of the most profound equality, *in all cognizable respects*.

No doubt, wherever the right of private property exists, there must and will be inequalities of fortune; and thus it naturally happens that parties negotiating about a contract are not unhampered by circumstances. . . . And, since it is self-evident that, unless all things are held in common, some persons must have more property than others, it is from the nature of things impossible to uphold freedom of contract and the right of private property without at the same time recognizing as legitimate those inequalities of fortune that are the necessary result of the exercise of those rights.⁵⁹

To my students, the idea that an employer and an employee are in equal bargaining positions (particularly if employers are allowed to enforce yellow dog contracts) is a ludicrous one. They conclude that the court was biased towards the employer.⁶⁰ But to Justice Pitney, the nature of our social system logically dictates those qualities which can be included within the legal subject. Inequalities of wealth and power cannot be recognized—just as Rawls' subjects are not allowed "envy" or "altruism." Mr. Hedges must be a legal subject, formally equal to the legal subject of the corporation with which he negotiates. As the court in *Lochner* put it, the bakers are not "wards of the state." The only disabilities which can be recognized in the subject are those which affect the exercise of the will—narrowly conceived to mean the capacity to make calculations of means-ends rationality within the ex-

58. *Id.* at 8-9.

59. *Id.* at 17.

60. Actually, they say that Justice Pitney was being "subjective," a classic example of how the language of subjective and objective fails to convey the way that legal consciousness is value-laden but is also structured and constrained by belief systems which are constructed by groups rather than individuals. There is nothing of whim, caprice, or individual eccentricity in Justice Pitney's opinion. Admittedly, all categorical systems group together actions which seem entirely dissimilar if viewed from the perspective of a different system. One useful way of testing one's categorical system is to ask how well it performs the standard tasks required of it. How useful, then, is it for a lawyer or legal scholar to look at Justice Pitney's opinion and describe it as "subjective," the same word a philosopher might use about individual tastes in ice cream? In that particular act of homologization, I would say that we lose more than we gain.

isting "inequalities of fortune."⁶¹ Thus, the classical and post-classical jurists tie themselves in knots discussing exactly who does, and who does not, possess "will," and in explaining how a legal subject which does not possess will can nevertheless have rights and duties. John Chipman Gray's *Borgesian* catalogue of the types of legal subject is a fine example of the genre.

In books of the Law, as in other books, and in common speech, "person" is often used as meaning a human being, but the technical legal meaning of a "person" is a subject of rights and duties. . . . In various systems of Law different kinds of persons are recognized. They may be classified thus: (I) Normal human beings; (II) abnormal human beings, such as idiots; (III) supernatural beings; (IV) animals; (V) inanimate objects such as ships; (VI) juristic persons, such as corporations. Some of these persons, such as idiots, ships, and corporations, have no real will. How are we to deal with them? That is the most difficult question in the whole domain of Jurisprudence.⁶²

It seems as though the problems surrounding the classical project of specifying the content of real equality for formally defined legal subjects are analogous to the problems in explaining substantive knowledge-acquisition or a theory of justice, in terms of universal (contentless) epistemological subjects. In both, *it is the exclusion of the most important aspects from the constructed "subjectivity" that gives the system its privileged status.*

If we were to stop here, it would appear that the law, like philosophy, psychology, political theory, and economics, has constructed an essentialist subject, excluding on supposedly formal criteria large amounts of human experience, social context, class power, and racial, sexual, and gender difference, and thus claiming to be a universal and apolitical authority. The key feature of this subject is that it looks empty, but is actually full. To put it another way, the subject's biases, motivations, and assumptions are the same ones honored in the dominant culture. It is transparent to our gaze so, like a fragment of glass in water, it can be seen to exist as an artifact only at moments of the most severe refraction and distortion—such as the moments provided by *Coppage v. Kansas* and *Lochner v. New York*.⁶³

61. See Peller, *supra* note 3, at 1207.

62. J. CHIPMAN GRAY, *supra* note 1, at 27-28. The next stage of the histories of subject within the law would be to focus on those legal subjects who were marginal to the conceptual scheme but central to economic life—i.e., corporations. My colleague Mark Hager has already made an excellent start. Hager, *Bodies Politic: The Progressive History of Organizational 'Real Entity' Theory*, 50 U. PITT. L. REV. 575 (1989).

63. These moments of refraction are many and varied. *Bradwell v. State*, 83 U.S. (16 Wall.) 130 (1872), makes sure that women understand that they are not legal subjects, whatever the explicit lan-

The interesting twist comes when we realize that the development of the legal subject did not stop with classical legal thought. As John Chipman Gray's quote suggests, the law already had to deal with a number of "subjects" which strained the classical conception to the maximum. The debates over the nature of corporate personality are only the most obvious sign. With the coming of legal realism the subject. . . . Well, the subject exploded.

The realist attack on the classical legal subject came on a multitude of fronts. Classical legal thought had stripped its subjects of any of their social and economic power before allowing them through the gates of the law. The realists insisted that there was no coherent and epistemologically defensible way that this could be done⁶⁴ and that the attempt to do it would lead to substantively poor decisions.⁶⁵

The realist attack was particularly effective in corporation law, where the "constructed" nature of the subject was more apparent. In *Transcendental Nonsense and the Functionalist Approach*,⁶⁶ Felix Cohen suggests that the question "where is a corporation" is the kind of nonsense you can expect from scholastics drunk on their own wordy theories. In fact, talking about whether the corporation is "in the jurisdiction"—or even exists at all—is simply a way of expressing our conclusions about the "policy question" of whether we wish to hold the corporation liable, or grant its directors immunity from suit, or whatever. In other words, to talk of the legal subject is merely to restate a conclusion reached on other grounds. Legal subjects pop in

guage to the contrary. *Plessy v. Ferguson*, 163 U.S. 537 (1896), reassures black Americans, on the other hand, that they are full legal subjects and—precisely for that reason—they should not take legislated apartheid as being a form of inequality. Since as a formal matter, we have declared them legal subjects, and since the subject by definition has no race, the fact that these rules keep whites separate from blacks does not mean there is any inequality between each side as formally defined legal subjects. One group of raceless subjects is simply being told to occupy a different space than another group of raceless subjects. If there is any inferiority or stigma, reasons the court, it must be entirely in the minds of the black population.

64. For example, decisions about duress could not be made using a decontextualized subject because duress flowed precisely from the disparities of power, information, and wealth between actual parties. To put it another way, no objectively justified line could be drawn between permissible (economic) and impermissible (physically coercive or overreaching) forms of duress. Hale, *Bargaining, Duress, and Economic Liberty*, 43 COLUM. L. REV. 603 (1943); Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Peller, *supra* note 3.

65. The realist arguments are still being restated. The power of Judge Noonan's book (J. NOONAN, *PERSONS AND MASKS OF THE LAW* (1976)) comes from the fact that it is one of the few mainstream accounts to recognize how impoverished a conception of a person the legal subject provides and to argue that this results in definite unfairness to those who do not fit into the Procrustean box of legal subjectivity. I suspect that Judge Noonan and I disagree on many political issues. Still, after reading his elegant and humane account I was unsurprised to find that he had been a student of Lon Fuller's. Somehow, it is hard to imagine a student currently studying law and economics producing a similar book in the year 2021.

66. See *supra* note 30.

and out of being as a (mysteriously arrived at) set of policy conclusions changes and shifts. In this, Cohen and Foucault are in complete agreement. "In fact, it is already one of the prime effects of power that certain bodies, certain gestures, certain discourses, certain desires come to be identified and constituted as individuals."⁶⁷

Of course, it is only in jurisprudence courses that the adoption of ideas produces a completely consistent set of results in the world. The result of the realist revolution has been to produce not one, but a host of legal subjects. Sometimes, we decide that the subjects who are allowed inside the veil of the law will not merely be "competent contracting parties"—who meet some minimum standard of age and rationality but otherwise have no identifying characteristics. Thus, the illustrations to section 364 of the Second Restatement of Contracts indicate specific performance will be refused on the grounds of unfairness where "an aged illiterate farmer, inexperienced in business" makes a contract with an "experienced speculator in real estate" who "takes advantage of [the farmer's] ignorance" of a developer's offer in order to make a killing.⁶⁸ We have, in other words, decided to allow some more features of the subject inside the charmed circle of the law.⁶⁹ Sometimes we decide that the subject needs to be identified by gender or race—as in the varying levels of scrutiny in constitutional law. But although the law sometimes acts as if it had abandoned the classical conception of the subject, it does not necessarily talk that way. Thus, when the Reagan or Bush administrations wanted to roll back civil rights decisions or scholarships to historically disadvantaged groups, they conjured up the world of formally equal race-less, class-less subjects and decried as "discrimination" any attempts either to remedy past oppression or to distribute social wealth to disadvantaged communities.⁷⁰ It is the unacknowledged paradox of a professional practice, which challenges the classical subject and a public discourse which pays homage to it, that is typical of legal discourse at the end of the twentieth century.

D. The Professional Subject

The subject is not merely of theoretical interest. My final suggestion is that we might focus on the way that the people who work with

67. M. FOUCAULT, *supra* note 2.

68. RESTATEMENT (SECOND) OF CONTRACTS § 364 (1981).

69. Although, in this case, the "features" are considered only where specific performance is involved.

70. For a sense of how the post-modern slant fits into all of this, see Kennedy, *A Cultural Pluralist Case for Affirmative Action in Legal Academia*, 1990 DUKE L.J. 705; Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

the languages of power in our society (law, science, economics, policy science) are actually constituted as social subjects by a set of reified roles which they imagine they are deducing from the structure of their disciplines. The scientist creates herself as "a scientist" by imagining, rehearsing, and then playing out the features that are appropriate to the subject in the scientific world of subject and object. Desire, gender, class, political judgment—all of these are extraneous to the disciplinary boundaries of subjectivity. The law professor thinks that there is a role which comes ready-made—attached to the professional discourse of the law. In other words, it is not simply that these disciplines lay false claims to objectivity. They are also thought by their practitioners to contain a blue-print for the professional subject.

My thesis—and I take this to be one of Pierre Schlag's points⁷¹—is that we should concentrate on the constitution of legal *subjectivity* in another sense as well: in the creation and maintenance of the "purified" fantasy persona that confronts and receives legal knowledge. "I do not demand the respect for myself, you understand. It's the robe, not the man, the law, not its servant." Instead of writing another critique of law and economics, we should be looking at the bizarre mechanisms by which a fancy formal discourse produces the felt necessity of a "real life" persona—a false subject for a false objectivity. Sartre expresses the point nicely in one of his spurts of amphetamine prose.

[A]mong the thousands of ways which the for-itself has of trying to wrench itself away from its original contingency, there is one which consists in trying to make itself recognized by the Other as an existence by right. We insist on our individual rights only within the compass of a vast project which would tend to confer existence on us in terms of the functions which we fulfill. This is the reason why man tries so often to identify himself with his function and seeks to see in himself only the "Presiding Judge of the Court of Appeal," the "Chief Treasurer and Paymaster" etc. . . . But these efforts to escape original contingency succeed only in better establishing the existence of this contingency. Freedom can not determine its existence by the end which it posits. . . . Actually, freedom is not a simple undetermined power. . . . It determines itself by its very upsurge as a "doing." But as we have seen, *to do* supposes the nihilation of a given.⁷²

For Pierre Schlag, the question is, "Who is the 'we' to whom our discussions are aimed?" For me, the question is also, "How is the professional self that we construct shaped by a reified set of functions we imagine ourselves having to fulfill?" Lyotard or Merleau-Ponty

71. Schlag, *supra* note 3.

72. J.-P. SARTRE, *supra* note 13, at 485.

might help one answer the first question. Melville and Kafka have some interesting things to say about the second.⁷³

E. A Toolkit for Making Subjects

In a useful sense, the four “subjects” that I have just described are actually the same. The subject is loaded up, consciously or unconsciously, with a particular set of qualities or attributes. That subject then reflexively produces a kind of society, a legal decision, or a professional practice. I could have multiplied my examples *ad nauseam*. For instance, I think one sees the same thing in law and economics, where the subjects are motivated by just that degree of graspingness and selfish paranoia which economists deem to be so laudable—but in a way which fundamentally begs the question. The assumptions of exogenous preferences, risk neutrality, and so on, have profound political consequences that are concealed because they are loaded into the subject at such an early point in the theory.⁷⁴ Clearly it is not just objectivity which is used as a device in order to armor, to protect our languages of power.

Hopefully, my four examples of subjectivity have shown the varied roles and consistent importance which may be imputed to subjectivity. If we put all of those examples together with the idea that the subject/object split is projected into, rather than present within, each theory we can actually generate a taxonomy of subjectivity.

In each of the examples I have given so far, the *leverage* of the subject depends on what role the subject and the object have been “given” to play. These roles are not random, but neither are they hierarchically organized. The standard role pairs are:

Universal	—	Particular
Constitutive	—	Residual
Formal	—	Substantive
Swallowed-by-structure	—	Swallowing-structure
Purified	—	Corrupt
Disciplined	—	Un-disciplined
Public	—	Private

and a whole lot more depending on how you cut it up.

In the Rawls example, the philosophical privilege comes from the particular/universal opposition. Subjects occupy a constitutive role in working out the details of the state. They are imbued with a kind of rationality that Rawls sees as universal and uncontentious and, given

73. H. MELVILLE, *Bartleby*, in *BILLY BUDD AND OTHER STORIES* (H. Beaver ed. 1956); F. KAFKA, *THE TRIAL* (1937).

74. See Kelman, *Choice and Utility*, 1979 WIS. L. REV. 769.

only this drive, their lack of knowledge about what substantive position they will occupy in the resultant society deparicularizes their choices, thus purifying them of the "tainted" kind of subjectivity, which is partial (in both senses), undisciplined, and private. The "bad" parts of their subjectivity are swallowed by the framework within which they are constructed, and Rawls imagines (wrongly, I believe) that this structure does not also "load them up" with the very set of choices they were supposed to justify.

Hobbes starts from exactly the opposite premise. There is no universal reason that can oversee legal interpretation, and thus we must privilege a particular subjectivity. Because society is made up of those who share the undisciplined, corrupt, and private qualities of the right hand side of the table, we must construct an authoritative subjectivity that balances them with the formal, disciplined, and public qualities of the left. Thus the analysis does, in the end, rely on a universal description of subjects—the theory of appetites and aversions, which lays bare the need for the authoritative subject.

The marxist and neo-marxist critiques of liberal legal equality point out the formal nature of the legal subject, its "freedom" from the substantive realities of social life, and the way that it defines most of the "real" inequalities into the residual capacity of private life, thus favoring the particular interests of one class while operating under the banner of universality.⁷⁵ The legal realist attack on the formal, universal classical subject offered instead a vision of the subject that reversed the categories: a subject that was particularized and substantively determined, shaped by the structure of social interaction to such an extent that it popped in and out of existence according to the dictates of public policy. To Cohen, as to most of the realists, the question of corporate personality was simply a shorthand for every policy goal concerning corporations.

Finally, the professional persona, the role constructed in the interstices of the economic or scientific or legal language of power—what of it? More than any of the others, I think, it goes down the left side of the oppositions—formal, public, disciplined, swallowed by the structure into which it fits. The professional persona is, in other

75. Marxism itself repeats this process of theoretical construction. In the Marxist vision, the working class is a particular historical actor with universal potential—as the historical vehicle for the realization of the species being, it has the potential to achieve a world in which all of these dichotomies will be erased. It is precisely because the working class has been thrust into the position of the guardian of the residual interests of the species, unrealized in bourgeois society, that it is granted its temporary warrant of universality. The working class is swallowed, determined by capitalist society in just the same way as the bourgeoisie, but it is pushing history in the direction of a world in which free subjects will make history with will and consciousness, will swallow rather than be swallowed by the structures of determination.

words, the exact opposite of the person conjured up by the phrase, "But that's just my subjective view" (particular, private, substantive, impure, etc.).

It is fairly easy to fit other theories into this matrix—a sort of "social-thought-by-numbers." Just go down the menu and pick your arrangement of factors—"I'll have a constituting, structure-swallowing, substantively defined, purified subject, please, easy on the mayo." And the radical emancipatory theories are ordering from the same menu, making the same moves as the theories they criticize. Habermas' ideal speech situation focuses on qualities that are supposed to be immanent in speech in order to allow him to create a universal subject which is less fixated on form than the liberal Lockean equivalent and more interested in holding social relations up to a purified (constitutive?) benchmark of social and discursive substantive equality.⁷⁶ Alienation theories appear to depend on the idea of a pure, undisciplined private and residual subject, which will be revealed in all of its glory when we strip away the seven veils of false consciousness and formal roles. The critical legal studies critiques of legal neutrality often sound as though they are being directed to a subject who is as pure in her capacity for rational, liberated subjectivity as the words of the law were supposed to be in their rational, self-revealing objectivity. Feminist theorists have long stressed the possible connections between the qualities described in the grid above and a gendered reading of life, law, or social theory. Sartre's picture of bad faith is dependent on a picture of the acting subject that, at times, simply seems to be a mirror (i.e., reversed) image of Rawls'. It really does start to look like social theory by numbers, with the critical and emancipatory theories just picking a different configuration of the "subject" from the matrix given above.

Yet social theory by numbers is a profoundly depressing idea. It also fails to capture the experience of (some) legal scholarship and political practice—an experience of creative, useful transformative activity—informed by tradition but not reducible to it. And this is where postmodernism comes in.

F. A Postmodern Subject

I can now state the appropriately ironic conclusion towards which I have been wending my way. Professor Wicke's paper gives a fascinating and erudite discussion of a postmodern view of the subject. She discusses the way in which postmodernism emphasizes the multi-

76. J. HABERMAS, *LEGITIMATION CRISIS* (1975); J. HABERMAS, *THEORY OF COMMUNICATIVE ACTION* (1984).

itudinous, cross-cutting definition of each of us as subjects. In the extreme version of postmodernism, the determinants of class and race and age and group and religion and sexual orientation and role and mood and context constitute us in a changing pattern from moment to moment. From their varied intersection springs up a postmodern self. "I" am merely the place where these things happen. To be a postmodernist is to echo Walt Whitman. "Do I contradict myself? Very well then, I contradict myself. I am large. I contain multitudes."

Professor Wicke expresses guarded approval of the postmodern tendency in culture, but she draws the line at law. In law, she suggests, we need to keep the unitary, rights-holding subject of liberalism—at least if we are to hold out hope for the disadvantaged in our society. I disagree, but in any case the point is moot. In my view, the legal subject has seemed distinctly postmodern for a very long time indeed.

Take corporations. (Surely the coldest of all examples.) What is a corporate entity? Well, it depends. In one mode we think of a corporate entity as a vehicle that aims at protecting shareholders from liability and that seeks to maximize economic output. In another mode we think of it as a legal fiction. The legal subject is overtly a fiction, the placeholder for a set of policy goals, only one of which is the protection of shareholders. At another moment, we act as if the corporation was a real entity—with concerns and entitlements indistinguishable from a breathing person. At moments in legal history, the corporate form has even seemed to offer a higher form of commonality, of togetherness.⁷⁷ Gierke meets "Ben & Jerry's." These clashing visions of corporation-ness, of corporate personality, are clearly postmodern. We accept all of them. We talk as though all of them were equally true. They are obviously mutually exclusive, and we have no theory for explaining why we are "in" one rather than in the other.

As far as I am concerned (to the extent such unabashedly first person singular comments are still allowed), this is not necessarily a bad thing. At the beginning of this essay, I offered a vision of modernism and postmodernism. Modernism always wanted to go beyond, to stress the extent to which the "form" distorted and limited human experience. A modernist attack on the subject would try to take Cohen's article one stage further—to say that every "form" must be dictated entirely by mysteriously arrived at policy goals. There would be no stable legal subject whatsoever. We would go beyond the current

77. Hager, *supra* note 62.

form . . . only to discover that, in the process, we had created another one.

The idea of postmodernism that I tried to develop indicated that there was no "beyond." We would always be both limited and empowered by the traditions and forms of our past. The postmodernist's "freedom" lies in the notion of ironic juxtaposition. To repeat the example I used before, just as the conflicting architectural styles and genres of a postmodern building both create something together and simultaneously call each component part into question, I think our legal practice, our scholarship, and our vision of the subject are usefully illuminated by the postmodern paradigm. The double movement of simultaneously using and challenging tradition should be familiar to us. It is what we do every day. Professor Wicke's paper seems to suggest we should keep, or perhaps reconstruct, the classical subject.⁷⁸ The modernist mood suggests we should abandon it altogether. To my mind, neither of these strategies is epistemologically possible, politically feasible, or morally desirable—at least as compared to the postmodern vision I offer here instead. I draw some comfort from the fact that this vision of theory seems accurately to describe existing forms of scholarship and legal practice. Let me give two final examples.

Think of the battered spouse defense. You have a woman who is in a marriage which is extremely abusive; she has been beaten for five years, she has been repeatedly threatened, her husband has shot her in the leg on one occasion. Finally, when he's asleep, she grabs up a knife and stabs him. The standard notion of legal self-defense, given our stripped-down subject, sees no self-defense here. How can there be? The husband is asleep. There is no immediate threat in the brief time horizon of our genderless, contracting subject. But the battered spouse's defense lengthens the time horizon of the subject and makes the subject exist through time.⁷⁹ The lawyers and scholars who created this defense argued that the time-horizon for self-defense in this case was five years and not five minutes. Now what is that but a broadening, a temporal stretching, if you will, of the legal subject? Yet, at the same time that they are using the traditional genre of legal arguments about the subject and self-defense, these advocates are also calling that genre into question—the apparently fixed world of free will and its limited exceptions around which criminal law is constructed.

78. See Wicke, *Postmodern Identity and the Legal Subject*, 62 U. COLO. L. REV. 455 (1991).

79. See Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986).

The postmodern metaphor seems to work beyond legal practice that is directed at the construction of subjects. The lawyers who are working to have gay marriages recognized believe that gays should be entitled to the important legal rights that marriage gives. At the same time, their actions are an opening up, a destabilization of the very notion behind marriage—that mutual commitment, support, and love are exclusively heterosexual. This is the optimistic vision of postmodern legal practice. You can both work with and destabilize; you can have your minarets and your Victorian garrets; both will function, and they might at the same time ironically call each other into question, and thus leave us with an area of free play otherwise unavailable.

What about the other subjects in my list of examples? At the very least, I hope I have met the first goal of the paper, which was to show that the subject and subjectivity deserved far more attention than they have hitherto been given. Each of these subjects was capable of reflexively producing the view of society or professional practice that had been coded into it. Using the toolkit of subjectivity, we can deconstruct the subjects at the center of our discourses. But what comes after deconstruction? The answers are not as clear as they seemed to be with the legal subject. We might ask ourselves, for example, why it is that law—out of all the disciplines of market and society—has been the only one with a postmodern subject? (Even if it was not often recognized as such.) We might try to imagine a new political theory, a new economics, built around a subject which, precisely because of its multitudinous and variegated qualities, could not claim to offer the deductive authority of its unitary ancestors. As for the professional subject, it has always been important to show that more than one persona can be deduced from the alleged functional requisites of the discipline. The rhetoric of postmodernism carries the argument a little further. After all, if the abstract legal subject can do it, why can't we?

IV. CONCLUSION

The message of this article is that the debates about subject and object are most important on a more mundane level than that at which they are normally discussed. Rather than attempting to engage in cosmic philosophy about the configuration of the "new" epistemology which might appear "now that the subject has been removed from the picture,"⁸⁰ our work should be concentrating on the social realities represented by these arguments about epistemology. If I say a certain mode of knowledge is "breaking down," I am implicitly referring to

80. As if it ever could be.

the social situations (in courts, prisons, classrooms, hospitals, or even in the pages of political theory) where a particular kind of authority has been challenged or undermined by an attack on the mode of discourse that supports it. The fancy philosophical abstraction is only useful insofar as it allows us to think about the roots of these diverse challenges. For this to mean anything interesting (as far as I am concerned) it would have to make a concrete difference to something—be it the experience of a deconstructionist critique, a political strategy, or the configuration of power in the courtroom. This was the idea behind my earlier work on methodology: the vision of local theory and the tension between subjectivism and structuralism. To my eyes, that vision of methodology seems to have been reinforced and amplified by the rhetoric of postmodernism.

In this article I have argued that in those concrete situations the critique of objectivity has drawn attention away from the profound implications of our subjects. Throughout the article I have quoted a passage from Foucault, a passage which concludes, "The individual, that is, is not the *vis-à-vis* of power; it is, I believe, one of its prime effects." My thesis takes Foucault one step further. The subject is not only an effect of power, it is also a cause. Thus I have argued that contemporary legal and political argument can best be understood as a debate over the essential characteristics of the subjects whose actions those arguments describe and prescribe. The subjects of our economic theories and the legal subjects of corporate law, the subjects behind the veil of ignorance and the subjects of civil society all mingle uneasily, finding little in common, like guests at a bad cocktail party. If postmodernism has anything to offer here, it is by giving us another stylistic prejudice, which might offer a new arrangement of our material—not the modernist "man without qualities," but a riotously clashing collage of subjects, *homo faber* and *homo oeconomicus*, the transcendental subject and Mrs. Daly. Bizarre as it may seem, the way we handle the legal subject could offer us a vision of postmodern practice—a practice that could simultaneously use and transform its raw material. For lawyers and legal scholars, that might be enough. If we could generalize that vision beyond law, into political theory and economics, who knows? The subject would still be basic to our theorizing but there would be important differences. We might desert deduction for biography.