

Review Essay

Deconstructing the Law

*The Politics of Law**

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In recent years progressive critique of the legal enterprise has derived from two principle sources: the legal realist and Marxian traditions.¹ Succinctly expressed, these traditions have rejected the law's claim to objectivity. The legal realists have argued that legal decision-making involves not formal, deductive logic but subjective choice; any legal choice made is never logically compelled.² In the Marxian tradition the objection has been not so much that the law is imbued with values, but that the distribution of legal outcomes is skewed to particular values, particular interests; the law reflects dominant economic interests.³

Stated this simply, the views of the two critical legal traditions may be subject to as much rhetorical denunciation as affirmation. In contrast, one of the key merits of the articles collected in *The Politics of Law*⁴ is that discussion is moved to a fundamentally different plane. In consonance with a growing movement in the social sciences, these essays mark a greater refinement of critical reflection. Arguments are becoming increasingly concrete and analytically precise. Most significantly, this development indicates not merely that critical legal positions have attained greater clarity but that their nature has changed. While still

* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE. Edited by David Kairys, New York: Pantheon Books, 1982, Pp. 321, \$22.50 (paper, \$9.95).

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1. A third major progressive tradition, legal critique based on feminist interpretation, is in a period of striking new growth; its impact is still largely to be felt. I shall argue later that although the feminist legal critique is still new and largely underrepresented in the legal literature, the insights it introduces are distinctive and decisive contributions to the progressive critique offered by the heirs of the legal realist and Marxian traditions. See *infra* text accompanying notes 36, 37, 39-44, 74, & 75, and notes 39, 76, 91, 102, & 103.

2. See Mensch, *The History of Mainstream Legal Thought*, *infra* note 4, 18, 26-29 (brief discussion of the claims of legal realism).

3. See, e.g., Kairys, *Introduction*, *infra* note 4, 1, 5 (criticizing this Marxist model).

4. THE POLITICS OF LAW (D. Kairys ed. 1982).

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affirming that legal decision-making does involve subjective choice and does reflect dominant economic interests, the new positions cannot be typified this transparently. These essays attest that the days of the monolithic characterization—the law as nothing but subjective choice, the law as nothing but a reflection of an underlying economic base—may swiftly be passing. The concreteness and precision of these essays aid not simply the demystification of law but the demystification of the critical stance taken toward law. This is a major advance, and it makes a critical legal position much more compelling.

In demonstrating how far critical legal analysis has progressed, the essays under review also indicate the current limits of this advance. If these essays strongly argue the invalidity of the reigning legal paradigm—the law as objective and impartial—they also suggest that a replacement paradigm is not so easily achieved. Reconstruction of a legal paradigm remains a complex and arduous task. As later sections of this review will delineate, however, reconstructive efforts may be greatly assisted by current work in philosophy and social theory. To agree with the essays under review that legal decision-making does not follow a deductive, value-neutral logic does not entail that the law allows no model of rationality whatsoever. If the correct model for legal reason is not “pure reason,” it may instead be “practical reason.” Legal positions are not arbitrary because value-laden; as the model of “practical reason”—and these essays themselves—amply demonstrate, legal positions can be and precisely must be rigorously argued. To admit the disproportionate influence powerful economic and political interests have over the law may imply not that the model of practical reason is denied but rather that it has been perverted. In reflecting on the value of these essays, the aim here will be not only to build on but also to push further the important work they have accomplished.⁵

I. The Model Challenged

Discrediting the law’s claim to objectivity is the fundamental task of these essays. The model criticized has two basic aspects. Its first contention is that legal reasoning has a formal purity that leaves it uncontaminated by questions of substance. The model acknowledges that questions of substance enter legal considerations, but they are resolved by recourse to autonomous rational criteria alone.⁶ According to this

5. The analytic framework presented in this review is not articulated directly in *THE POLITICS OF LAW*. My hope is that this framework may situate better both the arguments of this volume and the import here claimed for them.

6. *See, e.g.,* Kairys, *supra* note 3, at 1 (criticizing the pure rationality model of law).

view, rules or results are legally required; they are deductions from transcendent legal principles.⁷ Legal reasoning is said to be “distinct, as a method for reaching correct results, from ethical and political discourse in general. . . .”⁸ The law is an autonomous system of rules and concepts.⁹ Substantive questions are decided, but decision proceeds according to a formal, “objective” modality.

The second aspect of the model of legal objectivity is that the objectivity claimed is not simply formal but is also value-neutral. While it might be possible for some formal legal system to rule systematically—that is, in a formally rigorous way—either for or against the interests of a certain group,¹⁰ the contention here is that the objectivity of the law entails formally equal treatment for all. This is “the common characterization of the law and the state as neutral, value-free arbiters, independent of and unaffected by social and economic relations, political forces, and cultural phenomena.”¹¹ An implication is that all persons subject to the law have an equal opportunity to participate under—and be judged by—the law. As impartial objectivity, the law engenders formal equality.¹²

II. Early Critiques

In criticizing both the supposed formality of legal logic and the supposed value-neutrality of its decisions, the articles under review expand

7. See, e.g., Kairys, *Freedom of Speech*, *supra* note 4, 140, 161 (criticizing the stated model).

8. Kennedy, *Legal Education as Training for Hierarchy*, *supra* note 4, 40, 47 (criticizing the stated model).

9. See Greer, *Antonio Gramsci and “Legal Hegemony,” supra* note 4, 301, 308 (criticizing the stated model). Greer remarks that this position is typified by H.L.A. HART, *THE CONCEPT OF LAW* (1961). Greer, *supra* note 4, at 309 n.13.

10. Rand Rosenblatt suggests that this is a stance advocating formal inequality. See Rosenblatt, *Legal Entitlement and Welfare Benefits*, *supra* note 4, 262, 271.

11. Kairys, *supra* note 3, at 4 (criticizing the value-neutrality theory).

12. For the authors in *THE POLITICS OF LAW*, the implications of this view are several. Alan Freeman indicates the consequences for antidiscrimination law:

[M]odern American law has adopted what I have called the perpetrator perspective. It purports to be a stance of society as a whole, or of a disinterested third-party gaze looking down on the problem of discrimination, and it simply does not care about results. Discrimination becomes the action of individuals, the atomistic behavior of persons and institutions who have been abstracted out of actual society as part of a quest for villains. It is a notion of racial discrimination as something that is caused by individuals, or individual institutions, producing discrete results that can be identified as discrimination and thereafter neutralized.

Freeman, *Antidiscrimination Law: A Critical View*, *supra* note 4, 96, 98-99. Peter Gabel and Jay Feinman argue that maintenance of this model of objectivity leads to “the utopian imagery of freedom of contract.” Gabel & Feinman, *Contract Law as Ideology*, *supra* note 4, 172. See also Stone, *The Post-War Paradigm in American Labor Law*, 90 *YALE L.J.* 1509, 1511 (1981) (“[T]he industrial pluralist view of labor relations is based upon a false assumption: the assumption that management and labor have equal power in the workplace.”).

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earlier, similar critiques. Brief, more analytic excursion into the substance of these earlier critiques may better situate the new contributions. Objection to the model of an autonomous legal rationality derives principally from the legal realists of the early twentieth century. These realists argued the absence of an objective legal methodology behind which judges could hide.¹³ No pre-existing right determines a particular result, they claimed, because there are “conflicting (and contradictory) rights between which the court must always choose.”¹⁴ Early legal realism “effectively undermined the fundamental premises of liberal legalism, particularly the crucial distinction between legislation (subjective exercise of will) and adjudication (objective exercise of reason).”¹⁵

Criticism of the value-neutrality of the law springs in large part from Marxian sources. Here the argument was that the law is not at all subjectively capricious, a matter of individual judicial choice. Rather, the view was that the interests of capital determine the logic—and results—of legal decision-making.¹⁶ “[W]hether employees had won or lost a case [in labor law], doctrinal developments were viewed as ‘expressions’ or ‘emanations’ of a unified, pre-given historical subject (e.g., ‘monopoly capitalism’).”¹⁷ The law was said to be merely reflective of the power of the ruling class in the state or of the inevitable logic of capitalism.¹⁸

An abstraction called The Law is seen as an instrument through which another abstraction called The State exercises power on behalf of the bourgeoisie. The Law, while pretending to be a benign, neutral force dispensing justice, equality, and due process, actually is but a fraudulent cover-up for the force through which The State rules.¹⁹

13. See Mensch, *supra* note 2, at 28.

14. *Id.* at 27.

15. *Id.* at 28-29.

16. No necessary contradiction exists between the realist position that the law has no autonomous, formal logic and the Marxian position that the law serves the needs of capital in a highly logical manner. The realists argue there is no abstract logic inherent in the law; legal reasoning is instead a matter of judicial choice. They also recognize, however, that judicial choice may well follow the exigencies of social policy. See *id.* at 26. The Marxians would agree that the logic maintained by the law is not autonomous, but they also would argue that the law follows a certain logic that consistently reflects certain social interests. While the legal realist and Marxian orientations do not contradict one another, it still might be of significance to pursue not only the nature of their differences but how these differences inform the views of the contemporary critical stances that the essays under review reflect.

17. Klare, *Critical Theory and Labor Relations Law*, *supra* note 4, 65, 66.

18. Greer, *supra* note 9, at 308.

19. Rabinowitz, *The Radical Tradition in the Law*, *supra* note 4, 310, 312. Rabinowitz typifies the early radical view in quoting the American socialist leader, Daniel DeLeon: “What does the class struggle mean but that the material necessities of the lawyer will compel him to commit the crimes against the working class that every lawyer in the country commits today?” *Id.* at 311.

III. Contemporary Critiques

In their argumentation against the supposed objectivity of the law, contemporary responses both advance and reformulate the earlier criticisms. Unlike earlier critiques, however, they do not fall so easily into distinctly Marxian or legal realist formulations. Comparison with the earlier critical stances may therefore be more profitable by reference to analytic rather than historical lineage.

A. *The Critique of Law as Formal Rationality*

Current discussion of the claimed formal rationality of the law does not so much modify as extend and amplify earlier criticisms. In *The Politics of Law*, this effort is exemplified by an essay on legal precedents. If legal reasoning has the autonomy it asserts, then where questions of law are presented, judges should be bound by and defer to precedents. Political judgments should have no role.²⁰ Examination of cases, however, reveals that judicial subservience to legal precedents

neither leads to nor requires any particular results or rationales in specific cases. A wide variety of precedents and a still wider variety of interpretations and distinctions are available from which to pick and choose. Social and political judgments about the substance, parties, and context of the case guide such choices, even when they are not the explicit or conscious basis of decision.²¹

The early legal realists are thus affirmed in their contention that legal reasoning is more a matter of choice than of some abstract, objective rationality.

The objective necessity of legal rationality is undermined further by historical and comparative analysis. The inviolability of legal categories is contested when definitions of criminality, for example, are seen to be "neither cross-culturally universal nor intraculturally uncontroversial."²² From a historical perspective, the independence of legal reasoning from social and political contexts—the viability of strict, predictable rules—must be questioned when it is established that "the belief-structures that rule our lives are not found in nature but are historically contingent; they have not always existed in their present form."²³

Critical commentary also demonstrates that the variability of legal judgment influences not simply the judicial decision but in fact affects every step of the legal process. Wherever there is latitude, there too is

20. See, e.g., Kairys, *Legal Reasoning*, *supra* note 4, 11.

21. *Id.* at 14.

22. Kelman, *The Origins of Crime and Criminal Violence*, *supra* note 4, 214, 221.

23. Gordon, *New Developments in Legal Theory*, *supra* note 4, 281, 289.

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the opportunity for bias, for deviation from the supposed objective norm. “The modern legal system is full of points of discretion—from the arresting officer on the beat through the prosecutor to the trial judge. The points of discretion are the portals through which much of the racism in the system enters.”²⁴ Regulatory agencies are another example of areas where the claimed formal rationality of the legal system is contravened. These agencies may fail to reach their regulatory goals because of procedural problems ranging from inadequate funding to constraints caused by excessive legal and bureaucratic formalism.²⁵ Even where procedural and substantive rights are affirmed, the law may still fail to maintain this aura of rationality. The dilemma of welfare-rights legislation is a good illustration. Even in situations where welfare rights are legally recognized, the very assertion of these rights may tend to undermine or work against recipients’ interests. A legal victory expanding welfare eligibility may well generate a political backlash, such as a state reduction in the amount of the grant.²⁶ Criticism that the law does not embody some objective, disinterested logic is confirmed not simply at the point of judicial decision-making but at each step throughout the legal process. The amount of discretion available, at a multiplicity of points in the legal system, fundamentally belies the notion that some autonomous, purely rational structure is at work.

B. *The Critique of Law as Value-Neutral*

If contemporary criticism of the law’s claim to autonomous, objective rationality basically amplifies the earlier legal realist critique, contemporary reaction to the earlier Marxian stance follows a somewhat different course. Criticism of the law’s claim to value-neutrality is perpetuated—and in some distinctively new ways—but criticism is also levied against the traditional Marxian model itself. The contention is not that the old Marxian orientation must be overthrown but that it must be transformed.

The most prominent criticism is that the depiction of the law as simply superstructural, as simply a reflection of the power of the ruling class or of the logic of capitalism, must be discarded. Significantly, this argument does not deny that economic forces have great power over the character of society; it rather rejects that law is simply a product of these economic forces. “Legal rules the state enforces and legal concepts that

24. Burns, *Race Discrimination Law and Race in America*, *supra* note 4, 89, 94. See also Rudovsky, *The Criminal Justice System and the Role of the Police*, *supra* note 4, 242, 243-44.

25. See Abel, *Torts*, *supra* note 4, 185, 192.

26. See Rosenblatt, *supra* note 10, at 272-73.

permeate all aspects of social thought constitute capitalism as well as responding to the interests that operate within it. Law is an aspect of the social totality, not just the tail of the dog."²⁷ Various areas of the law—tort law, for example—may be intimately related to capitalism as both cause and effect.²⁸ The development and elaboration of collective bargaining law, another example, may be said precisely to contribute to the character of American capitalism.²⁹

Rejection of the view that law is simply superstructural encourages the emergence of new critical theories focusing specifically on the constitutive role of law. For the traditional Marxian perspective, analysis of law was only a subcategory of economic critique; the legal structure only exemplified its economic foundation. As the essays in *The Politics of Law* document, however, evidence that law constitutes as well as responds to economic and social structures helps independent analysis of law to regain its importance.

Characterization of law as superstructural is, therefore, fundamentally transformed. Nonetheless, much of the critique deriving from Marxian sources is preserved. The contention that law is not value-neutral is both maintained and augmented. Greater analytic precision and increased empirical evidence are utilized within these essays to substantiate this claim, and the active role of law in perpetuating differential impact is reaffirmed.

The enhanced understanding of the interest-laden nature of law is in part a result of more detailed historical investigation. The neutrality of law must be challenged when the law is discerned to change in response to the values of the socioeconomic system.³⁰ In contrast to the critique focusing on the law's supposed objective rationality, where analysis reveals that underlying rules and concepts in fact change over time, the contention here is that the change correlates with specific interests.

That law is not only value-laden, but discriminatorily so, is reaffirmed by analyses of specific legal domains. "Criminal proscriptions are not class-neutral. Some crimes, such as vagrancy, disorderly conduct, public drunkenness, and certain drug offenses, are primarily aimed at the lower economic classes."³¹ The availability and generosity of legal remedies also differ by class. Employment-related injuries are far more likely to be sustained by blue-collar workers than by others. Relegation of such

27. Kennedy, *supra* note 8, at 49. See also Kairys, *supra* note 3, at 5 and Greer, *supra* note 9, at 308.

28. See Abel, *supra* note 25, at 186.

29. See Klare, *supra* note 17, at 66.

30. See Gabel & Feinman, *supra* note 12, *passim*. Their example is contract law.

31. Rudovsky, *supra* note 24, at 243.

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injuries to workers' compensation, which pays only a fraction of tort damages and rejects completely some claims otherwise valid in tort, differentially impacts on this class.³² The money bail system, another example, is responsible for the incarceration of many alleged offenders simply because of their poverty.³³ Further, even seemingly fair proscriptions and procedures may function inequitably. In criminal trials "[t]he quality of counsel, investigative efforts, and other critical aspects of the defense are greatly dependent on the wealth of the defendant."³⁴

Aside from adding greater specificity to and greater evidence for the claim that the law is discriminatorily value-laden, contemporary critique also establishes that the impact is differential along more than just economic lines. Most notably, the law discriminates according to race and sex as well. The poor discriminated against by the money bail system are disproportionately people of color.³⁵ As for discrimination according to sex, "[m]ale control in the public sphere has often been consolidated explicitly by legal means. The law, however, is in large part absent from the private sphere, and that absence itself has contributed to male dominance and female subservience."³⁶ One practical result of the law's absence from the "private" realm is the licensing of men's exploitation of women within the family unit.³⁷

The significance of these charges must not be mistaken. Evidence of the law's discriminatory impact according to sex and race does not simply render discrimination within the law more acutely visible. Instead, it moves critical discussion to a new analytic level. Thus far this review has established that the contemporary critique advances greatly over its predecessors. Analysis has demonstrated that one of the signal contributions of this criticism is the elimination of the old view, stemming from traditional Marxian sources, that law is simply a representation, a reflection, of economic interests. Contemporary criticism reaffirms that law is value-laden and that it endorses, in discriminatory fashion, particular

32. *See, e.g.*, Abel, *supra* note 25, at 189.

33. *See, e.g.*, Burns, *supra* note 24, at 94.

34. Rudovsky, *supra* note 24, at 243. In virtually all noncriminal cases, of course, the poor are entitled to no assistance of counsel.

35. *See, e.g.*, Burns, *supra* note 24, at 94. If in discriminating against the poor the law discriminates against people of color, it should not be forgotten that it also discriminates against women, who account for a disproportionate number of the poor.

Recall that the point here is not that the discretionary moments of the law may—and do—allow discrimination to flourish; this is an argument that the law is not formally rational but affords many occasions for choice. Instead, here the objection is that the law is value-laden, and in a discriminatory fashion.

36. Taub & Schneider, *Perspectives on Women's Subordination and the Role of Law*, *supra* note 4, 117, 118, 121-24.

37. Polan, *Toward a Theory of Law and Patriarchy*, *supra* note 4, 294, 298.

interests, but it goes beyond these claims in insisting that law is not simply responsive to these interests, it in fact helps to constitute them. Consequently, independent assessment of the role of law is made not only relevant but highly significant. This is a most important advance. With the analysis of sex and race discrimination, however, no longer can the law be said solely to reflect or constitute what are at bottom economic interests, interests that previously were thought to control and subsume all others. The monolithic view of the law, under criticism since the superstructural characterization of the law was rejected, is finally surmounted.

The argument that economic and racial discrimination are separable, if often overlapping, seems recently to have won acceptance in the camp of progressive critique.³⁸ The distinctiveness—and critical significance—of discrimination based on sex is still much less appreciated, however.³⁹ Brief recourse to—and greater substantiation of—the example of sex discrimination may elucidate how fully the old monolithic view of the law is overcome and how striking are the implications of this transformation for the progressive legal critique. If a distinction between the interests of racism and those of the dominant economic forces is legitimate, a distinction should also be made between sexist and economic interests. “[C]apitalism and patriarchy do not always operate in analogous ways, [and this] has implications for an understanding of the role of law in relationship to each of these systems.”⁴⁰ Women have been denied equal benefits under law—ranging from education to employment to the vote—that express much more distinctly patriarchal rather than purely economic interests.⁴¹ An argument might be advanced, for instance, that certain patriarchal interests—such as the denial of equal employment opportunities for women—may work in fact to the detriment of economic interests—the loss of women’s talents in

38. See Freeman, *supra* note 12, at 107-10 (agreement that economic and racial discrimination are separable does not resolve exactly how they are distinct, a query still very much in debate).

39. Polan states explicitly that integration of feminist and Marxist theoretical perspectives is still very much in process; as her discussion makes clear, part of the problem is establishing how distinct the two approaches are. See Polan, *supra* note 37, at 294-96. See also MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS: J. OF WOMEN IN CULTURE & SOCIETY 515, 515-27 (1982).

40. Polan, *supra* note 37, at 296.

41. See Taub & Schneider, *supra* note 36, at 118-20. The argument is not that women have avoided economic discrimination written into law and particular to their sex. As Taub and Schneider note, “Under English common law, not only were [women] barred from certain professions (such as law), but, once married, they were reduced to legal nonentities unable to sell, sue, or contract without the approval of their husbands or other male relatives.” *Id.* at 119. More central to the argument here, though, is that economic and sex discrimination do not proceed as one; the discriminatory interests involved are separable.

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the economy.⁴² The failure of the law to perpetuate economic interests alone again wreaks havoc with any undifferentiated characterization.

Because the law incorporates several diverse and sometimes competing interests, suspicion must also be raised about any claim that the law represents any one interest unambiguously. A return to the relation between patriarchal interests and the role of law in preserving the public/private dichotomy is illustrative. By maintaining that the law should operate only in the public realm, the courts have decided that questions of "private" rights should generally be determined without recourse to the courts or to state regulation. Often this position continues male dominance. Marital rape is still not recognized in many states. Under doctrines of interspousal and parent-child immunity, courts have refused recovery for injuries such as those resulting from domestic violence that would have otherwise been compensable but for their occurrence in the "private" realm. Contract law is unavailable during a marriage to enforce support obligations.⁴³ Yet legal decisions based on the public/private dichotomy do not always work to the detriment of women's rights. Supreme Court cases striking down restrictions on the use of contraceptives and abortion ruled precisely on the basis that the restrictions constituted unconstitutional state interference into the "private" sphere of life.⁴⁴

These essays, in sum, argue a strong case against any monolithic view of law.⁴⁵ In this they move substantially beyond their predecessors, and they do so on the basis of broadly informed critical examination. In spite of these strengths, however, it is less clear what orientation to law results from these analyses. As the editor of *The Politics of Law* notes, "[A]t this early stage, our critiques of the law and traditional legal theory are more fully developed than our formulations of a coherent alternative theory."⁴⁶ Some conclusions are drawn by various authors in the book, and these points warrant mention. Additionally, by utilizing insights drawn from contemporary work in philosophy and social theory, critical legal theory may be advanced further than the essays explicitly acknowledge.

42. *But see, e.g.,* Eisenstein, *Developing a Theory of Capitalist Patriarchy and Socialist Feminism*, in *CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM* 5 (Z. Eisenstein ed. 1979) (arguing the mutual dependence of capitalism and patriarchy as presently practiced).

43. *See* Taub & Schneider, *supra* note 36, at 121.

44. *See* Polan, *supra* note 37, at 299.

45. The claim is not that all or even any of the authors represented in *THE POLITICS OF LAW* makes this argument or would agree with each of its parts. A claim is made, though, that the argument is a fair representation of some commonly persisting themes.

46. Kairys, *supra* note 4, at 280 (introductory remarks to Part III).

IV. Critical Reconstruction

If these critical essays ably substantiate that the law is not objective but value-laden, they also demonstrate that the law does not represent only one interest exclusively nor represent any one interest unambiguously. The implications of these results for characterization of legal reasoning and the legal process in general suggest:

There is no legally required rule or result, and despite endless attempts by judges and legal scholars to find transcendent legal principles, there simply are none. But one can make sense of these decisions by examining the social and political contexts in which they were made, and by viewing legal decision making and law as political processes.⁴⁷

To maintain that law has a political character is at least in part to reiterate that law embodies certain interests.⁴⁸ The manifestation of these interests counters the law's claim to an autonomous, objective rationality, and the perpetuation of these diverse interests counters the law's claim to value-neutrality. Demonstration that law is not impartially objective but political in character is the major deconstructive insight of the essays under review.

What these essays do not generally pursue, however, are the reconstructive possibilities available from this deconstructive result.⁴⁹ Documentation that law is not impartially objective or value-neutral but instead interest-laden does not ineluctably imply that law is simply a battleground between competing interests. The model of law the essays criticize is rightly discredited, but others may be available. The model

47. Kairys, *supra* note 7, at 161.

48. Note that there is a distinction between affirming that the law has a political character and what seems Kairys' point, that the law is only a political process. *See id.* *See also* Kairys, *supra* note 20, at 17 ("Law is simply politics by other means.").

Kairys seems to reduce the law to manifestations of power; by this move, however, he also reduces the nature of politics. This reduction must be contested. In arguing later that the model for legal reasoning should best be described as "practical reason," the element of power is not dismissed but placed in coordination with efforts at practical—that is, interest-laden—argumentation. This agrees with the classical, Aristotelian affinity between practical reason and politics. *See infra* text accompanying notes 96-99.

49. The contention that reconstruction must go forward and that it must do so and can do so by following deconstructive efforts to their limits is one of the major contributions of the work of Paul Ricoeur. On the nature of deconstruction refer to the work of Jacques Derrida. *See, e.g.*, J. DERRIDA, *OF GRAMMATOLOGY* (1976); *WRITING AND DIFFERENCE* (1978); *POSITIONS* (1981). Ricoeur's most direct criticism of Derrida is available in P. RICOEUR, *THE RULE OF METAPHOR* 280-95 (1977). The struggle between what are here termed deconstruction and reconstruction is a persistent theme throughout Ricoeur's corpus. *See, e.g.*, P. RICOEUR, *FREUD AND PHILOSOPHY* (1970) at 32-35 (differentiation between a hermeneutics of suspicion and a hermeneutics of reappropriation) and 419-94 (the tension between archeology—from Freud, not Foucault—and teleology).

A final comment on reconstruction: it should not be viewed as necessarily conservative because *re*-constructive. A reconstruction is not equivalent to a recreation; the latter is passively imitative, the former may be transformative.

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this review proposes is that law be seen as a “constructed totality.” Karl Klare typifies the concerns of this paradigm as applied to an analysis of society as a whole.

[W]e have . . . lacked an explanatory model that goes significantly beyond referring the results in all instances to the omnipresent “needs of capital”; that is, we have been slow to develop a theory of capitalist society as a “constructed totality” of the diverse dimensions of social and political life, of the multifarious relations of power, forms of organization, and institutional and communication patterns that together constitute our social world.⁵⁰

The reconstructive effort undertaken in the remainder of this review will explore the applicability of the alternative paradigm in two different ways. Each of these approaches will respond to the law’s incorporation of various interests, the first by attempting to reconstruct the character of law in general, the second by attempting to reconstruct the nature of legal reasoning. This division corresponds to the two forms of progressive legal critique articulated earlier, criticism of the law’s claim both to value-neutrality and to a formal, autonomous rationality.

A. *Reconstruction of the Character of Law*

In attempting to utilize the paradigm of a constructed totality to reconstruct the character of law, the first requirement is clarification of the proposed model itself. Most helpful here is the analysis of the concept of hegemony elaborated by the early twentieth century Italian Marxist, Antonio Gramsci.⁵¹ Gramsci developed the concept of hegemony to explain the pervasive power of the dominant forces in society. Economic and class interests do not rule society, says Gramsci, simply through the coercive apparatus of the state. Rather, the power of these dominant forces is also exercised through the permeation of its values and interests in the private organizations—churches, trade unions, schools—that compose and define civil society. This permeation of the dominant forces’ interests throughout civil society defines their hegemony.⁵² The dominant forces do not control civil society merely externally, then, but exercise subtle internal control as well.

The pervasiveness of the dominant interests’ influence might at first

50. Klare, *supra* note 17, at 66.

51. For references to Gramsci in *THE POLITICS OF LAW*, see Greer, *supra* note 9, *passim*, and Gordon, *supra* note 23, at 286-87.

52. See A. GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS OF ANTONIO GRAMSCI* 56 n.5 (Q. Hoare & G. Smith eds. & trans. 1971). See also Greer, *supra* note 9, at 305 (quoting C. BOGGS, *GRAMSCI’S MARXISM* 39-40 (1976)).

glance seem a prescription for political resignation,⁵³ but this is too limited a reading of Gramsci's insights. The interrelation between the dominant forces and the forces composing civil society is complex. While the interests of the dominant forces do pervade civil society, the perpetuation of these interests depends on a measure of active and independent support by the institutions that compose civil society. The dominant forces do not unilaterally influence or determine the forces of civil society; the relationship is much more one of interdependence.⁵⁴ Further, the interests of the forces that form civil society are to a degree separable from those of the dominant forces, and the dominant forces must be at least partly responsive to these interests.

[T]he dominant group is coordinated concretely with the general interests of the subordinate groups, and the life of the State is conceived of as a continuous process of formation and superseding of unstable equilibria (on the juridical plane) between the interests of the fundamental group and those of the subordinate groups—equilibria in which the interests of the dominant group prevail, but only up to a certain point, i.e. stopping short

53. In fact Gramsci did develop the concept of hegemony in response to the Bolshevik Revolution's failure to be replicated in the West. Gramsci concluded that because civil society was much more elaborated in the West than in the Soviet Union, the hegemonic forces were that much more difficult to defeat. See Greer, *supra* note 9, at 304.

54. To indicate the complexity of the structure of society Gramsci frequently uses the imagery of trench warfare. The social structure is so complex that it is

resistant to the catastrophic 'incursions' of the immediate economic element (crises, depressions, etc.). . . . In war it would sometimes happen that a fierce artillery attack seemed to have destroyed the enemy's entire defensive system, whereas in fact it had only destroyed the outer perimeter; and at the moment of their advance and attack the assailants would find themselves confronted by a line of defence which was still effective. The same thing happens in politics, during the great economic crises.

A. GRAMSCI, *supra* note 52, at 235. Gramsci returns to the same theme a few pages later: "The massive structures of the modern democracies, both as State organisations, and as complexes of associations in civil society, constitute for the art of politics as it were the 'trenches' of the permanent fortifications of the front in the war of position. . . ." *Id.* at 243.

Despite such continuing evidence of the role played by those forces in the "trenches" of society, critics may rightly question whether I am true to Gramsci in my interpretation that these forces play an active, and not merely responsive, role in the perpetuation of the society's dominant forces. Indeed, Gramsci does seem to maintain at points the traditional Marxist model that the forces of civil society are merely superstructural. (For example, see the sentence deleted in the extended quotation cited above, where Gramsci says: "The superstructures of civil society are like the trench-systems of modern warfare." *Id.* at 235.) As Gramsci's editors point out, however, Gramsci himself is not consistent on this matter. The relationships between the state, civil society, and economic activity remain ambiguous. Sometimes, for example, as in the citation just mentioned, civil society composes the outer trenches; at other times the outer trench is the state. See Hoare & Smith, *Introduction to Notes on State and Civil Society*, *supra* note 52, at 207-09. Whatever the interpretive difficulties, however, Gramsci's basic conception of hegemony makes no sense if the forces of civil society do not have at least some independent powers. Otherwise, the dominant forces would not need to be responsive to the forces of civil society, no possibility of the development of counter-hegemonic forces would exist, and the possibility of radical social transformation, the most basic of Gramsci's aims, would be rendered completely void.

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of narrowly corporate economic interest.⁵⁵

Based on this complex characterization, it becomes more apparent how counter-hegemonic forces can arise and thrive. To the extent individual forces in civil society are able to maintain their independence, they are also able to establish their own identity. This may require great discipline, patience, and self-awareness. Development of counter-hegemonic forces also depends on creation of alternative cultures and alternative bases of power. A radical strike at the dominant forces will not counter-balance the persisting hegemonic influences in civil society. Battle must first be waged—and won—in the trenches of civil society before any direct attack on the dominant forces themselves will be effective.⁵⁶

The great contribution of Gramsci's analysis of hegemony is that it provides a framework for understanding how society—and, further, law—can be a whole, a constructed totality, without being monolithic. The deconstruction of any undifferentiated interpretation must be maintained, but a view of the totality may nevertheless be resurrected. To elucidate better what this transformation in perspective might entail for characterization of law, the implications of this model should be considered at three different levels. Recourse to the constructed totality model will affect, first, the depiction of society as a whole, second, description of the role of law within society, and third, representation of the possibilities for change and action in relation to law.

1. *The Transformed Depiction of Society*

To contend that society may be a totality without being ruled by one interest exclusively is to retrieve some of Gramsci's most basic insights. No one force dominates society to the exclusion of all others. Dominant forces may permeate civil society, but they do not permeate it exhaustively. The diverse interests that civil society encompasses—labor unions, schools, churches, families—can act on their own behalf and in partial independence from not only the dominant forces but the interests of each other. Further, no organizational group within civil society maintains its interests in isolation; the influences of these interests extend out into and, to greater or lesser degrees, permeate society themselves. The character of society is formed by the contribution of its parts. “[T]he internal relations of any nation,” notes Gramsci, “are the result of a combination which is ‘original’ and (in a certain sense)

55. A. GRAMSCI, *supra* note 52, at 182.

56. *See id.* at 185.

unique. . . ."⁵⁷ While the line of global development is toward internationalism, Gramsci continues, nevertheless "the point of departure is 'national'—and it is from this point of departure that one must begin."⁵⁸ The internal relations of a nation or a society, then, must be understood and conceived in their originality and uniqueness. The diverse interests that compose society must not be collapsed into the interests of class or of anything else; there will be regional, racial, ethnic, sexual, and class variations, and no uniform cultural assimilation should be expected. It is from these "trenches" that the existence of society as a whole must be viewed.

The significance of this interpretation of society may be clarified by comparison to a rigorous structuralist perspective.⁵⁹ While the structuralist orientation avows that society is governed by impersonal forces, the model argued here maintains that these forces are not all-encompassing. The existence of different interests indicates that the structure of society is not unambiguous; the interests of capital are not exactly those of patriarchy. Further, the existence of these different interests creates the structural indeterminacy and tension that allows opportunities for action to occur. The results of these actions are not certain; there is no suggestion that progressive change is inevitable. But most critical is the persistence of the opportunity for change. The claim that there is some underlying logic of historical necessity is fundamentally undermined.⁶⁰ The transformed depiction of society entails that neither the nature of society nor the path of history is assured.

Analysis therefore underscores the hegemonic control exerted by the dominant forces in a society, but it establishes at the same time that this influence depends on the support given to the dominant forces by the organizations composing civil society. These organizations are thus partly the cause for the perpetuation of the hegemonic influences; to the extent they are able to assert their own independent or counter-hegemonic interests, they may also assist in the hegemonic forces' downfall. The concept of hegemony elucidates how a society assumes a certain character as a whole; it also demonstrates that the whole is defined by and depends on the confluence of its parts. The interests at work in a society are neither singular and uniform nor insular and atomistic.

2. *The Transformed Description of the Nature of Law within Society*

This picture of intertwining interests at work in society reorients char-

57. *Id.* at 240.

58. *Id.*

59. The most germane example of a structuralist position for purposes here might be L. ALTHUSSER, *FOR MARX* (1970).

60. See Gordon, *supra* note 23, at 291.

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acterization of the nature of law within society. Comparison with views maintained in *The Politics of Law* illuminates this perspective. As delineated earlier, a number of articles in the book continue the important legal realist argument that political and economic factors situate and influence legal reasoning.⁶¹ In so doing, however, they perpetuate a view that whatever legal reasoning or law is, it exists within and is legitimated by well-defined institutional boundaries: the courts and the state. Unquestionably these institutions do have a pervasive influence, and lawyers and legal academics have a most understandable interest in attending to these institutions' workings and decisions. Restriction of critical attention solely to these institutions is not well founded, however, and has distortive implications. The law must not be defined simply by what lawyers do or by what courts decide.

The narrowing of the definition of law can be criticized on both social scientific and analytic bases. Findings in the sociology of law, for example, establish that law is not uniquely associated with the state. Instead, law may be most fundamentally "an ordering" of human behavior, in any group of interacting people, no matter how small or how complex."⁶² Insights from the anthropology of law substantiate that there are multiple legal levels; there are as many legal systems, in fact, as there are functioning subgroups within society.⁶³ Philosophic investigation could amplify these findings by verifying how the concept of law has a variety of meanings in daily usage, usages that may well involve different language games and not some one institutionally validated form.⁶⁴

This critique allows for the reintegration of law within the model of society previously advanced. The different meanings and forms law possesses within society condition its character and power as an institution. Plainly, the law as an institution exerts pervasive influence over the various participants and interests in modern society. Yet the influence of any interest, it has been established, is not total. While the power of law as an institution pervades society, the institution is in turn influenced by

61. See *supra* notes 6-9, 13-15.

62. Pospisil, *Legal Levels and the Multiplicity of Legal Systems in Human Societies*, 9 J. CONFLICT RESOLUTION 2, 6 (1967) (citing E. EHRlich, *FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* 24, 36-37 (1936)).

The work of Myres McDougal and Michael Reisman exemplifies the incorporation of this sociological approach into legal analysis. See, e.g., Reisman, *Law from the Policy Perspective*, in *INTERNATIONAL LAW ESSAYS* 1 (M. McDougal & M. Reisman eds. 1981).

The sociology of law approach is best illustrated in *THE POLITICS OF LAW* by Chambliss' reappraisal of criminology. See Chambliss, *Toward a Radical Criminology*, *supra* note 4, 230, 231.

63. See Pospisil, *supra* note 62, at 24.

64. See L. WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe tran. 3rd ed. 1968) and J.L. AUSTIN, *PHILOSOPHICAL PAPERS* (J.O. Urmson & G.J. Warnock eds. 3rd ed. 1979). For an explication of Wittgenstein's relevance to social and political thought, see H.F. PITKIN, *WITTGENSTEIN AND JUSTICE* (1973).

various political and economic interests within society. It should be recalled that this is one of the most important arguments elaborated by the essays under review.⁶⁵ Also a central argument advanced is that the law does not express merely one political or economic interest nor does it express any one interest in an unvarying fashion. Not only does the law as an institution permeate society, therefore, but the various interests at work in society permeate the law; the sources for the characterization of law extend beyond the law's institutional confines. As the social scientific evidence documents, not only may interests external to the law influence its institutional nature, but they may also establish alternative and partly independent legal systems.

3. *The Transformed Representation of the Relation between Action and Law*

Greater clarification of the many dimensions and sources of law yields a more accurate conception of the relation between social change and law. Most generally, there should be little doubt that any attempt to effect fundamental change in or through the law is a demanding and arduous task. The power of the existing legal structure is great and highly pervasive. This power ranges from influences on persons' beliefs through the generation of complex cultural codes⁶⁶ to the ability to exert social control through force. Because of the massiveness of these factors, efforts to confront and change legal institutions in any kind of frontal and fundamental manner should not expect to be successful. Further, even if successful in a limited sense, the eradication of certain legal institutions would not eliminate the law's persisting influence throughout the rest of society.

Despite these many levels of complexity and influence, however, the power of the legal structure is finite. To reiterate, no power's influence is complete; its character is influenced by diverse and often competing interests. With reference to the law, this entails minimally that there are gaps in the legal structure, spaces that allow some protection and crevices that offer a toehold for resistance and opposition. Further, because the law's character is not homogeneous, battles can be waged to differentiate and promote laws that are more progressive and socially desirable.⁶⁷ Not only may there be spaces for progressive interests within the law, but the interests of the law itself—due process, for example—may have beneficial impact. The existence of legal rules may provide protection against the extremes of arbitrary state action.⁶⁸ It may be that “any

65. See *supra* text accompanying notes 30-37.

66. See Gordon, *supra* note 23, at 287.

67. See Rabinowitz, *supra* note 9, at 312.

68. See *id.* at 313.

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legal system . . . carries with it large components of equity and justice that can provide some degree of protection to the masses of the people, that provide a platform from which further progress can be made, and that also provide a vision of social justice that inspires action.”⁶⁹

All these possibilities for action and change depend on the structure of existing legal institutions. The structure of the law, however, must not be reified.⁷⁰ As delineated above, perpetuation of this structure does not exist totally independent of human activity. If society and the legal structure within society are at least in part in the process of continuous creation by human beings,⁷¹ then the possibilities of action do not depend merely on gaps in the legal structure or on certain progressive rulings. The possibility of social change is not simply a result of what the existing legal system allows, for the legal structure depends on human activity for its perpetuation and reproduction. Because partly dependent on human activity, the legal structure may be changed by human activity as well. This point is admittedly only theoretical; the resistance of the structure to change must not and cannot be minimized. What the argument against reification does establish, however, is that the persistence of the legal structure is not mandated by some underlying historical necessity but partly by the actions of human beings. Because human actions help to determine and to maintain the nature of the constructed totality that is the law, when these actions are redirected, the legal structure may change too. Hence, the argument is that society and the legal structure within society do not operate simply on the basis of large-scale influences and forces—whether political or economic. Society and the law may well operate—and be transfigured—depending on how individuals and groups within society act in their most routine and ordinary interactions, how they dominate, acquiesce, resist, and challenge. The perpetuation—and transformation—of the legitimating power of a legal or social system may in fact depend on such myriad tiny instances.⁷² The most significant battles for social change, then, may be the battles in the trenches.

With rare exceptions the essays collected in *The Politics of Law* do not

69. *Id.* at 317 (referring to E.P. THOMPSON, *WHIGS AND HUNTERS* (1975)).

70. *See, e.g.*, Gordon, *supra* note 23, at 290. *See also* Tushnet, *Corporations and Free Speech*, *supra* note 4, 253, 260.

71. *See* Gordon, *supra* note 23, at 290. *See generally* R. BERNSTEIN, *PRAXIS AND ACTION* (1971).

72. *See* Gordon, *supra* note 23, at 290. While emphasizing the role played by individuals at the level of daily interactions, Gordon stresses only the opportunities for domination and acquiescence, not for resistance and challenge. *See also* M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977); E.P. THOMPSON, *supra* note 69; D. HAY, P. LINEBAUGH, J. RULE, E.P. THOMPSON, C. WINSLOW, *ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH-CENTURY ENGLAND* (1975).

elucidate either the possibilities for legal change or the role human activity may have in effecting this change.⁷³ This may result partly because the general intent is critique of the existing legal structure rather than elaboration of its possible reformation. Partially, though, it is also a result of a limitation in perspective. Up to this point the argument here has been that this view is a product of a limitation in theory, a failure to pursue the insight that any societal influence is not total but allows space for different interests, even oppositional interests, to exist and possibly thrive. An additional argument must also be made, however, that this limitation is not simply a limitation of insight into theory but is also a limitation of insight into practice. Not only is change in the law or change through the law a theoretical possibility: this possibility is being actualized in current, ongoing practice.

Perhaps the most abiding implication of these ongoing practical efforts is that people can use the law to gain greater control over their own lives. Sometimes this occurs through effective use of existing legal structures, whether the example be tenant or community organizing, labor battles, or pro se divorce.⁷⁴ In other cases, the need is to go beyond existing legal structures and create new areas and categories of the law. Feminist concerns—sexual harassment, domestic violence, comparable worth⁷⁵—are important examples here. There are also instances where particular interests work to extend legal control not so much by recourse to the law of the state but by creation of contract and enforcement structures at a quite separate legal level. Union labor contracts are most illustrative.⁷⁶ The insights of practice also demonstrate that recourse to

73. The major exceptions are the articles by Klare, *supra* note 7, Gordon, *supra* note 23, and Rabinowitz, *supra* note 19.

74. On tenant and community organizing, see S. KAHN, ORGANIZING (1982). On pro se divorce, see M. AVERY, D. POLAN, & S. ELDRICH, DO YOUR OWN DIVORCE IN CONNECTICUT: THE PRO SE DISSOLUTION KIT FOR CONNECTICUT (1975).

75. For bibliographies—including general background material, legal articles, and cases—on all three areas, see 13TH NATIONAL CONFERENCE ON WOMEN AND THE LAW, 1982 SOURCEBOOK at 63-65 (domestic violence); 239 (sexual harassment in education); 103-13 (comparable worth).

76. While a union contract may strengthen existing state or national regulations, often of greater importance is the certainty of enforcement that the contract helps to ensure. For example, while well aware that state and national regulations exist concerning pesticide use, the United Farm Workers (UFW) have included specific provisions in their contracts regarding both what pesticides may not be used and what procedures shall be followed to make sure workers do not enter treated fields before the pesticides have broken down into nontoxic substances. See *Agreement between the Almaden Vineyards, Inc. and the United Farm Workers of America, AFL-CIO* 7 (1974). In creating such provisions, the UFW not only ensures that pesticide control does not depend on state enforcement, which is weak at best, but gives concrete enforcement abilities to the workers, something that contributes to their own sense of power. See also WOMEN'S LABOR PROJECT, BARGAINING FOR EQUALITY (1980) (provides strategies and sample bargaining agreements union women may utilize to achieve sex equity in employment).

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the law, at whatever level, may not be beneficial unless enough of a power base is established to protect or assert one's interests. This may apply whether the attempt is to resort to existing law or to create new law.⁷⁷ Finally, there is evidence that actions are still available even when recourse to the law is either unavailable or ineffective.⁷⁸

The implication of these examples is not that victories are easy, frequent, or permanent. Despite their difficulty, infrequency, and impermanency, victories do occur, successful actions are possible. Further, actions undertaken in relation to the law may employ any of a number of possible approaches, whether in dependence on existing legal structures, in creation of new areas of legal attention and protection, in maintenance of legal levels other than the state, or in action independent, but not necessarily in contravention, of any established legal forms. Not only may battles in the trenches be won but, if Gramsci's analysis is correct, they may be unavoidably necessary if change is to take place.⁷⁹ Many small acts may not be sufficient for basic change, but they may be the necessary precondition. More importantly for objectives here, investigation at both theoretical and practical levels confirms that action

77. Again using the United Farm Workers as an example, the UFW waited until the mid-1970's to push actively for a state law in California that would govern the rights of farmworkers to organize. Prior to that time the UFW knew that it lacked sufficient political power to protect any such law from reflecting grower more than farmworker interests. Only the force of a nationwide boycott against certain power products during the mid-1970's gave the UFW the power it needed to make the growers agree to a law strongly supportive of farm workers' rights, a law finally enacted in the spring of 1975. See Agricultural Labor Relations Act (ALRA), CAL. LABOR CODE §§ 1140-66 (West Supp. 1981-82). Any suggestion that Governor Jerry Brown played the critical role in passage of the ALRA is not so much inaccurate as misleading. Without the political power the UFW had gained through the boycott, the growers either would have refused to accede to any law or would have pushed through a law extremely favorable to their own position. For accounts of the UFW's legislative efforts during 1974-75, see J. LEVY, *CESAR CHAVEZ* 428-35 (1975) and R. TAYLOR, *CHAVEZ AND THE FARM WORKERS* 328-30 (1975).

78. In its union organizing campaign against J.P. Stevens & Co., the Amalgamated Clothing and Textile Workers' Union (ACTWU) was repeatedly frustrated by Stevens' violation of the National Labor Relation Act and by its refusal to comply with National Labor Relation Board orders. See *J.P. Stevens Boycott Fact Sheets* (1978). To pressure Stevens' into resuming good-faith bargaining talks, ACTWU began a successful campaign, waged entirely outside the labor law framework, of isolating Stevens' board of directors from other businesses by forcing their resignations from interlocking directorates. See Wall St. J. 8 (September 13, 1978).

Other, more local examples of efforts taken independently of existing law include pressuring employers without or in addition to a strike, see *Strike Back*, 18 *AMERICAN LABOR* 1 (1982), and local actions on job safety, see *Do-It-Yourself Tactics*, 15 *AMERICAN LABOR* 1 (1981).

79. Perhaps one of the problems of legal training is that the model for practice, legal or bureaucratic, does not take this view into account. Even where legal change is desired, frequently the model is one that works from the top of the power hierarchy down rather than from the bottom up. An approach like Gramsci's seriously questions how much this model can possibly do to effect basic legal change at the top or to create any sense of personal or group self-control at the bottom. On the issue of legal training in general, see Kennedy, *supra* note 8.

taken in relation to law may be one central way for this change to occur.⁸⁰

B. *Reconstruction of the Character of Legal Reasoning*

Significant parallels exist between reconstruction of the character of law and reconstruction of the character of legal reasoning. Just as reconstruction of law depends on a transformed characterization of society, so typification of legal reasoning rests on a renewed delineation of the reasoning available within society. Reconfirmation of the characterization of society achieved in the last section will therefore assist ascertainment of the reasoning appropriate to the social and political spheres and, consequently, to law.

The analysis proffered in this section supports the critique advanced in *The Politics of Law* that legal reasoning is not an autonomous and objective process of rationality. It also demonstrates that the failure of the pure reasoning paradigm does not ineluctably entail that legal reasoning merely reflects personal choice, policy preference, or the perpetuation of various political and economic interests by means of power. While it may be true that the law affords no comprehensive, objective rationality, the conclusion need not be that the law embodies no model of reasoning whatsoever. Countering arguments within social, legal, and philosophic theory establish that this conclusion is too constricted. Precisely the applicability to the law of a model of practical rationality must be entertained. Importantly, reappropriation of the category of practical reason also entails revivification of the concept of politics.

Reconstruction of the character of legal reasoning depends, then, on a transformed understanding of the nature of reason available within human society. The central role the various interests play in society, emphasized in the last section, must be reasserted. The possibility that interests may act independently of hegemonic influences challenges any affirmation of an underlying logic of historical necessity⁸¹ and brings into question the availability of a transcendent rationality uniformly applicable to the determination of each concrete interest.⁸² The inviolable role performed by these diverse interests help to demonstrate that the structure of human society is neither uniform nor unambiguously predetermined.

This depiction reconfirms that recourse to pure reason is inappropriate for analysis of human society; attention should turn instead to

80. See Taub & Schneider, *supra* note 36, at 124, and Klare, *supra* note 17, at 84.

81. See Gordon, *supra* note 23, at 291.

82. On both points in this sentence, see the text accompanying note 59.

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whether practical reason is the proper analytic model. Contemporary inquiry into the concept of practical reason locates the source of its inspiration in Aristotle. Aristotle maintains that when the subject under investigation is human action, attainment of the precision available in theoretical knowledge is not possible. Investigation is always limited to “that degree of precision in each kind of study which the nature of the subject at hand admits . . .,”⁸³ and “there are not fixed data in matters concerning action and questions of what is beneficial. . . .”⁸⁴ Examination of the character of the good illustrates the precision available to practical reason. The good may be defined as that at which all things aim,⁸⁵ but yet the nature of the good is not unitary. “[T]he good cannot be something universal, common to all cases, and single; for if it were, it would not be applicable in all categories but only in one.”⁸⁶ In contrast to the Platonic perspective, therefore, the good is not some element common to all its uses as though derived from one “Form,” one transcendent essence.⁸⁷ Practical reason cannot impose a universal form on all examples; it is rather directed toward the concrete situations themselves and must grasp these circumstances in all their particularity.⁸⁸

Contemporary reflection on practical reason extends Aristotle’s analysis. The most important insight is that the precision of practical reason is dependent not simply on the object it studies but on the concrete, situated perspective that informs the analysis undertaken. Hans-Georg Gadamer comments:

Is not . . . all human existence, even the freest, limited and qualified in various ways? If this is true, then the idea of an absolute reason is impossible for historical humanity. Reason exists for us only in concrete, historical terms, i.e., it is not its own master, but remains constantly dependent on the given circumstances in which it operates.⁸⁹

While the situated nature of human existence may well contribute to the distortions in the ability to reason, more significantly this situated existence is also *constitutive* of the ability to reason.⁹⁰ What an individual

83. ARISTOTLE, *NICHOMACHEAN ETHICS* I, 3, 1094b 24 (Ostwald trans. 1962).

84. *Id.* at II, 2, 1104a 3.

85. *Id.* at I, 1, 1094a 2.

86. *Id.* at I, 6, 1096a 28.

87. *Id.* at I, 6, 1096b 25.

88. See H.-G. GADAMER, *TRUTH AND METHOD* 21 (1975).

89. *Id.* at 245.

90. See H. ARENDT, *THE HUMAN CONDITION* 9 (1958). Paul Ricoeur explores the social and political implications of this constitutive/distortive tension in his work on ideology and utopia. Ricoeur argues that a nonpejorative dimension of ideology must be affirmed; ideology here is constitutive of the situated character of human understanding. The distortive possibilities of ideology are not at all dismissed, but there must be recognition that distortion depends on a prior (logical not necessarily temporal) sense of constitution. For the most amplified presentation of Ricoeur’s views here, see his forthcoming volume on ideology and utopia.

brings to a situation from tradition, history, race, ethnic background, sex, class, region, or religion may prejudice his or her understanding, choice, or reason, but these factors are also the very capacities that make understanding, choice, and reason possible.⁹¹ Knowledge is not independent of the interests that inform the character of an individual or group; knowledge is inextricably *bound* to these interests. Indeed, says Jurgen Habermas, “[T]he interest of reason . . . can no longer be conceived as an autarchic self-explication of reason. . . . [I]f we comprehend the cognitive capacity and critical power of reason as deriving from the self-constitution of the human species under contingent natural conditions, then it is *reason that inheres in interest*.”⁹²

If emphasis on the concreteness of objects and perspectives informs the nature of practical reason *qua* practical, a similar emphasis also enlightens the character of practical reason *qua* reason. In any examination of human society the loss of a universal form or an omniscient perspective eliminates any possibility of pure reason; practical reason, however, does not depend on these “objective” and aperspectival qualities. Instead, the contention of practical reason is that whatever whole or totality may exist, it can be known only through—and on the basis of—the parts (objects and perspectives) that compose it. Roberto Unger agrees, noting that this orientation is quite contrary to most contemporary analyses. Unger argues that whatever sense of the universal can be affirmed is attained not through abstraction from particularity but rather through “the direct elucidation of the particular.”⁹³ It is incorrect to reduce the universal to abstract propositions; it is embodied only in its separate expressions.⁹⁴ Wittgenstein’s concept of family resemblance—the interrelation of particulars without one underlying element common to all—is also pertinent here.⁹⁵ Rational determination of a practical

pia, which I am presently editing for publication. A more abbreviated presentation is available in P. RICOEUR, *Science and Ideology*, in *HERMENEUTICS AND THE HUMAN SCIENCES* 222 (J. Thompson ed. & trans. 1981).

91. See H.-G. GADAMER, *supra* note 88, at 263. For a feminist contribution to this hermeneutic analysis, see MacKinnon, *supra* note 39, at 538 n.56 (“Ultimately, the feminist approach turns social inquiry into political hermeneutics: inquiry into situated meaning, one in which the inquiry itself participates. A feminist political hermeneutics would be a theory of the answer to the question, What does it mean? that would comprehend that the first question to address is, To whom? within a context that comprehends gender as a social division of power.”).

92. J. HABERMAS, *KNOWLEDGE AND HUMAN INTERESTS* 287 (1972) (emphasis in original). In his more recent work, Habermas seems to have modified his position from the one cited here. See, e.g., J. HABERMAS, *What is Universal Pragmatics*, in *COMMUNICATION AND THE EVOLUTION OF SOCIETY* 1 (1979).

93. R. UNGER, *KNOWLEDGE AND POLITICS* 36 (1976).

94. *Id.* at 144.

95. See L. WITTGENSTEIN, *supra* note 64, at §§ 65-67.

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concept like the good may proceed without the requirement that such determination depends on a universal form.

Perhaps it is not too problematic to accept that a practical concept like the good is known only through its particular manifestations in diverse objects. As noted, however, incorporation of diverse manifestations is only one aspect of the task of practical reason. Practical reason must also take account of the different perspectives on a subject, perspectives that may vary widely according to the interests—racial, ethnic, religious, sexual—that inform them. If Habermas is correct that reason inheres in interest, it is less plain how practical reason reconciles these interests.

Reappropriation of the concept of politics provides a fruitful approach to this problem. Like the renewed consideration of practical reason, contemporary attention to a revived conception of politics finds its source in Aristotle. Consistent with recent insight that practical reason does not permit any uniformity of perspective, Aristotle argues of politics that the political whole, the “polis,” is a compound: “a single ‘whole’, but a ‘whole’ composed, none the less, of a number of different parts.”⁹⁶ He adds that unity is necessary to some extent but complete unity is not. In fact, “[t]here is a point at which a polis, by advancing in unity, will cease to be a polis. . . . It is as if you were to turn harmony into mere unison, or to reduce a theme to a single beat. The truth is that the polis . . . is an aggregate of many members. . . .”⁹⁷ In agreement with Aristotle here, Hannah Arendt maintains that “the human condition of plurality, . . . the fact that men, not Man, live on the earth and inhabit the world . . . is specifically *the* condition . . . of all political life.”⁹⁸ Parallels with the characterization of society advanced in the last section are patent.

In this conception, politics is the location where disputes between interests⁹⁹ occur. If reason inheres in interest, then the manifestation of interests in politics means something quite different than customary usage dictates. No longer is politics merely a competition between interests; the rationality of one’s interests can be cogently argued. Action and speech, Aristotle claims, are the preeminent political activities; the

96. ARISTOTLE, *POLITICS*, III, 1, 1274b § 2 (E. Barker trans. 1958).

97. *Id.* at II, 5, 1263b §§ 14-15.

98. H. ARENDT, *supra* note 90, at 7 (emphasis in original).

99. The Habermasian perspective on interests must be maintained here. Interests are not subjective predilections but basic principles and attitudes. Interests are not deviations from reason but instead the foundation for its constitution. *See supra* text accompanying notes 89-92.

emphasis is on persuasion and not force or violence.¹⁰⁰ Comparison with the role of action elaborated in the last section clarifies that political action taken on behalf of one's interests helps to constitute the character of rationality available within society. The rationality of society is not something uniform or pre-given; it is defined by the interests that compose it. Society's rationality is specified not in abstraction from its parts but through their elucidation; it is a product of an ongoing process of political argumentation and struggle.

This conception of politics does not suggest that reconciliation between interests will ever be fully attained. Partly this is a result of the limitation of precision the subject allows; practical solutions are rarely able to encompass particularities equally. Reconciliation is also limited, though, by the fact that various interests will define differently what rationality signifies. The new conception of politics does not thereby dismiss the possibilities of argumentation; different perspectives need not be totally incommensurate. This conception does acknowledge, however, that differences will remain, and it emphasizes that the political arena is the appropriate location for these struggles over the institution of different interests.

This change in the concept of politics does not imply any necessary alteration in the present political sphere. The change effected is a difference in model only. What the change does accomplish is a modification and enlargement of perspective. As one author in *The Politics of Law* comments, "If politics is conceived as the process and the institution by which communities collectively guide their destinies, allocate their resources, resolve their disputes, and protect their members' experience of personhood, then politics should flourish, not disappear in the radical ideal."¹⁰¹

Reappropriation of the concepts of practical reason and politics significantly informs the reconstruction of the character of legal reasoning. When legal reasoning is discerned to be not simply either the imposition of a unique rational form or the residue of a competition between interests, then its nature has quite a different cast. Attention to how this reformulated conception of legal reasoning might approach the difficult legal question of equality may prove a provocative illustration of the reorientation this change admits. Traditionally, an approach advocating substantive equality argues that a formal equality approach is insufficient. Treating people as if they were already equal does not eliminate

100. See H. ARENDT, *supra* note 90, at 25, 26.

101. Klare, *supra* note 17, at 84.

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the systematic inequalities (for example, by race or sex) that currently exist. Instead, the substantive approach argues, an equality of results must be pursued.¹⁰² Insights from the analysis of practical reason and politics demands, however, that the character of these “equal results” be carefully scrutinized. Equality must not mean homogeneity, a universal form applied to all.¹⁰³ Equality is not the elimination of differences but instead their nondiscriminatory preservation. Whatever equality is as a whole or a totality, it can be known only through the parts that compose it. The interests of these parts are rational articulations of their selfhood; for equality to be truly substantive and not merely formal, the integrity of these interests must be preserved.¹⁰⁴ By incorporating the reinvigorated characteristics of practical reason and politics, therefore, legal reasoning may be at its best a most serious attempt to constitute, maintain, and perpetuate the real interests and values of the individuals and groups within the collectivity.

102. See Rosenblatt, *supra* note 10, at 271.

103. For a feminist perspective here, see MacKinnon, *supra* note 39, at 537 (“Feminism not only challenges masculine partiality but questions the universality imperative itself. Aperspectivity is revealed as a strategy of male hegemony.”).

104. Feminist analysis of sex discrimination law has developed this perspective in much greater detail. One recent feminist critique concludes that the courts have taken two distinct paths on the problem of sex discrimination. The first approach affirms that the social situation of the sexes is an expression of a pattern of sex differences. Here sex discrimination occurs when a rule or practice is irrationally grounded upon a sex difference. The second approach goes beyond the first in asserting that the social situation of the sexes is unequal, rather than merely or basically different. This latter approach would prohibit practices that have disparate impact upon one sex, discrimination in effects. See C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 101-02 (1979).

Significantly, this feminist critique does not advocate either mere repudiation of the “differences approach” or unqualified approval of the “inequality approach.” The efforts of the inequality approach to eliminate disparate impact are indeed most crucial, and, as the current legal and social climate readily suggests, these efforts are extremely difficult battles to wage. This feminist critique maintains, however, that the inequality approach is limited to the extent its goal is the creation of some neutral personhood. Instead, argues this critique, “if sex discrimination is a problem of inequality, as chances for parity between the sexes are opened, women’s differences from men must be equally accommodated and equally valued, without penalty or preference.” *Id.* at 106. The differences approach can be reappropriated. By reintegrating it with the inequality approach, these two approaches together can “guarantee an equality that begins to comprehend womanhood as distinct *and* fully human.” *Id.* at 221 (emphasis in original). This attempt to eliminate inequality while preserving difference is a most distinctive contribution of the new feminist jurisprudence. The definition of equality is transformed.

On the applicability of this concept of equality to racial discrimination, see Freeman’s critique of color-blindness:

Why should color-blindness be an end in itself, a reference point against which to test questions of racial discrimination? It has become a way of abstracting the American black experience out of its own historical setting to the point where all ethnics become fungible. The ideology of fungibility is part of the process of refusing to deal with the concreteness of black experience.

Freeman, supra note 12, at 101.

Reconstruction of the character of legal reasoning unifies response to the critique advanced on this subject in *The Politics of Law*. The heirs of legal realism are correct that legal reasoning does not follow a model of pure, autonomous, objective reasoning. This criticism is conclusive. This position miscarries, however, when it holds that if legal reasoning does not follow this objective model it is then not a process of reasoning but merely subjective choice or policy preference. The heirs of legal realism neglect the alternative model that exists in practical reason. As for the heirs of the Marxian tradition, they are correct that legal reasoning is composed of diverse political, economic, and social interests. They are incorrect, however, to the extent they maintain the influence of these interests is necessarily distortive. As for the criticism that legal reasoning is political, both critical stances merit objection to the extent their conception of the political is too constricted. That legal reasoning is political in the narrow, distortive sense—a battle between wills—is a telling criticism; that legal reasoning is political in the positive constitutive sense—a preservation and enhancement of the interests of society's members—may be its highest ideal.

V. Conclusion

Law is a whole, a constructed totality, known through the contributions of its parts. As an institution, law attempts to incorporate the needs and goals of the diverse interests that make up society; this is inevitably a political process. Both the definition and the achievement of legal principles are the results of political struggles, both historical and contemporary.¹⁰⁵ Just as legal reasoning, so are legal principles products of practical reason and political processes. No legal principle has an independent, transcendent derivation. This may also help explain why laws rightly change and why no legal battle is ever finally won. Law is not simply a political process but it is inextricably bound to a political process.¹⁰⁶

105. On the application of this argument to the concept of free speech, see Kairys, *supra* note 7, *passim*.

106. Though this review does not focus explicitly on theories of legal interpretation, this paragraph alludes to some implications the analysis may offer for that inquiry. Comparison of this analysis with recent work by Owen Fiss and Paul Brest better situates the perspective argued here. Fiss maintains that a bounded objectivity is available to the law. Any interpretive activity is governed by disciplining rules; an interpretive community consists of those who recognize the rules as authoritative. In law, Fiss says, the interpretive community is a reality. "Judges . . . belong to an interpretive community . . . by virtue of a commitment to uphold and advance the rule of law itself. . . . Judges know that if they relinquish their membership in the interpretive community, or deny its authority, they lose their right to speak with the authority of the law." Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739, 746-47 (1982).

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The great insight of the essays collected in *The Politics of Law* is that law is political and not the objective, rational process it is often claimed to be. This deconstructive insight is achieved in a sophisticated and probing fashion. The limitation of these essays is that they do not pursue far enough how reconstructive efforts may proceed on the basis of the deconstructive analysis advanced. In presenting some analyses helpful to the reconstructive task—Gramsci's concept of hegemony, revived concepts of practical reason and politics—the attempt has been to demonstrate not only their availability but their fruitfulness. It is right and proper to criticize the distortive politics of law; it is also necessary to reclaim for law its constitutive character as political.

In contrast, Brest argues that interpretive rules themselves respond to their interpreters' backgrounds and experiences. "Much of our commitment to *the* rule of law really seems a commitment to the rule of *our* law." Brest, *Interpretation and Interest*, 34 STAN. L. REV. 765, 772 (1982) (emphasis in original). Brest concludes that

the line separating law from politics is not all that distinct and that its very location is a question of politics. I do not think this is nihilism. Rather, I believe that examining 'rule of law'—even at the risk of discovering that it is entirely illusory—is a necessary step toward a society that can satisfy the aspirations that make us hold to the concept so tenaciously.

Id. at 773. See also Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U.L. REV. 204 (1980) and Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L. REV. 1063 (1981).

It should be apparent that this review concurs with, and attempts to push further, a position like Brest's. Brest's viewpoint resonates well with the hermeneutic insights by Gadamer, Ricoeur, and Habermas cited favorably in this review. See text accompanying notes 89-92 and notes 90, 91. Fiss' argument, on the other hand, locates itself within quite a different hermeneutic stance. In contending that interpretation may be objective, even if in a bounded or limited way, Fiss allies himself with the hermeneutics advanced by E.D. Hirsch and Emilio Betti. There is a growing literature contrasting the two hermeneutic approaches. For Hirsch's criticism of Gadamer, see E.D. HIRSCH, JR., *Gadamer's Theory of Interpretation*, in *VALIDITY IN INTERPRETATION* 245 (1967). Gadamer responds to Betti in H.-G. GADAMER, *Hermeneutics and Historicism*, *supra* note 88, 460, 464-66. For essays by and commentary on Betti, Gadamer, Habermas, and Ricoeur, see J. BLEICHER, *CONTEMPORARY HERMENEUTICS* (1980).

