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Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory

Peter Gabel*

This essay criticizes the tendency of theorists to treat law as an animated abstraction, as if legal rules and principles had a life apart from their concrete appearance in temporal human consciousness. Instead, it suggests that law should be understood as moments of interpretive activity, arising in concrete social situations as an immediate modelling of social existence. This modelling evokes a structured language that corresponds to exigent relations of material production, yet struggles against this structure towards an understanding that would resolve its contradictions.

Most legal theory is conceived within the pose of reflective scholarship. The theorist sits in his room, looks up at the ceiling, and asks himself, "Hmm, what is law?" or something like that. And he will find his answer precisely on the ceiling, in the form of an ideal image, a "model" that he unwittingly intends and then describes. Outside of time and history, the abstraction assumes the composure of a thing, and, teleology intact, it explains the world. For the positivist, sovereigns appear as if there really were sovereigns, engaging in "social control" as if there really were a long arm of the law. His fantasy is fashioned within an atomistic ontology which intends to extirpate the social world, to present existence as a reified fragment. For the naturalist the reification is horizontal; the theme rather than the frame is made permanent, and the norm puts on the impenetrability of nature. But in either case, the vision gives to the law a substantial quality, a force that moves objects in a world in which there can be nothing but objects, a world that incarnates in mechanical form the drama of the theorist's Idea.

So concealed is the original intention that structures the orienting metaphor that what would seem obvious is decreed invisible—namely that law is an instance or mode of interpreta-

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tion by consciousness. The realist cliché that "law is what judges do" mistakes the behavior for the meaning within which the behavior is lived, and it is this meaning, partially disclosed by the interpretive structures which are denominated "legal," that ought to be the starting point for legal theory. If the inquiry is not to be falsified at the outset, it must rid itself of "objective" presuppositions that transform the lived project which knows its meaning as contingency into an ideal form within which meaning is hypostasized. Legal theory must avoid producing fiction by transforming its phenomena into facts: that is, its method must incorporate a critical phenomenology.

But the method must also be more than this, lest it fall back upon the illusions of a pure and ahistorical subjectivism. Just as the most persuasive modern phenomenology has acknowledged that consciousness cannot fully penetrate in subjectivity the objective structures within which it is made known to itself,¹ so legal theory cannot present its hermeneutic by the simple elaboration of a lucid intuition. It must begin by describing the field of necessity within which consciousness is conditioned in order to disclose the dialectical unity of the inert force of worked matter on the one hand with the transcendent intention of the legal idea on the other. A whole grasp of the legal moment

1. Among many important books are P. FOUCEYROLLAS, *LE MARXISME EN QUESTION* (1959); H. LEFEBVRE, *EVERYDAY LIFE IN THE MODERN WORLD* (1971); M. MERLEAU-PONTY, *SENSE AND NON-SENSE* (1964); *THE STRUCTURE OF BEHAVIOR* (1963); *THE PHENOMENOLOGY OF PERCEPTION* (1962).

The work which has most influenced me is J-P. SARTRE, *CRITIQUE DE LA RAISON DIALECTIQUE, THEORIE DES ENSEMBLES PRACTIQUES* (1960). A translation in entirety has just appeared under the title *CRITIQUE OF DIALECTICAL REASON, THEORY OF PRACTICAL ENSEMBLES* (1976) [hereinafter cited as *CRITIQUE*]. I obtained a copy only as I was finishing the final draft of this essay and so have made but limited use of it. The introduction to the French edition has been translated as J-P. SARTRE, *SEARCH FOR A METHOD* (1963) [hereinafter cited to the 1968 Vintage paperback edition as *SEARCH FOR A METHOD*], and selections from the main body of the work can be found in *THE PHILOSOPHY OF JEAN-PAUL SARTRE* 415-83 (R. Cumming ed. 1965). There are two summaries in English, W. DESAN, *THE MARXISM OF JEAN-PAUL SARTRE* (1965), and R. LAING & D. COOPER, *REASON AND VIOLENCE, A DECADE OF SARTRE'S PHILOSOPHY, 1950-1960* (1964).

In addition, there are several excellent discussions of the book's contents. The most helpful to me were R. ARON, *HISTORY AND THE DIALECTIC OF VIOLENCE: AN ANALYSIS OF SARTRE'S CRITIQUE DE LA RAISON DIALECTIQUE* (1975); F. JAMESON, *MARXISM AND FORM, TWENTIETH-CENTURY DIALECTICAL THEORIES OF LITERATURE* 206-305 (Princeton paperback, 1974); and M. POSTER, *EXISTENTIAL MARXISM IN POSTWAR FRANCE: FROM SARTRE TO ALTHUSSER* 264-305 (1975).

cannot be forged from a mechanical materialism that speaks of the law as merely a "form" "reflecting" the rigors of necessity, nor from an intuitive apprehension sitting smugly outside of history, ignoring the weight of its structured directional. It is the intervalence toward which each movement in the theoretical investigation must tend.

It is not an accident, of course, that a concrete dialectical analysis of this sort is not usually attempted. Legal theory, like the law about which it speaks, has an ideological function which accounts for its form. We remain in an historical period, for example, in which positivism is being surpassed by a new version of natural law,² and so the battles of jurisprudence reflect the constitutive tensions of this movement—tensions between legal and moral obligation, between force and custom. On the one side stand the cold-steelies, armed with formal rules prepared for formal deduction, ready to gun down the outlaw if habitual obeisance should weaken; on the other lie the warm-woolies, willing to find normative principles, to channel and protect expectations, to provide guideposts for the facilitation of human interaction. From the vantage point of a critical methodology, we can penetrate the contours of this struggle and sketch out its intentional ground, a ground that also serves as the base for tensions in other spheres of ideology. It is, of course, not mere coincidence that positivism and formal legal thought appear alongside empirical psychology and sociology during the hey-day of a natural science method that freezes what it studies into atomic facts, while natural law and functional legal thought re-emerge alongside behaviorism and structure-functionalism during the hegemony of a social science method that freezes what it studies into process-facts. Our effort should be to make intelligible this intentionality by which theory constitutes its object in a certain way within particular historical conditions, and in so doing to show the formal unity of the different levels of ideology that work themselves out simultaneously—here at the level of legal theory, at the level of explicit juridical acts, and

2. The orienting attitude of the modern positivist is reflected in, for example, H.L.A. HART, *THE CONCEPT OF LAW* (1961), and H. KELSEN, *GENERAL THEORY OF LAW AND STATE* (1949). That of the naturalist is found in works as diverse, for example, as L. FULLER, *THE MORALITY OF LAW* (1964); J. RAWLS, *A THEORY OF JUSTICE* (1967); and Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14 (1967). There are many similarities in the opposing views; otherwise there could be no "constitutive tensions."

at the level of the implicit legal consciousness moving within the whole of social discourse.

In attempting this preliminary work, I have taken a relatively small area of the law of contracts and used it to loosely illustrate the operation of a dialectical method. Borrowing from the later work of Jean-Paul Sartre,³ I have used the term "process" to refer to the impact of worked matter upon the legal actors called to engage it, and the term "praxis" to refer to their transcendent activity itself. By "transcendent" nothing mystical is meant: the word "praxis" means a practicing consciousness that interiorizes its phenomenal world as a conditioning and yet surpasses it as a temporal project. On the "process" side I have made use of certain structuralist concepts—notably the idea of "signification" as descriptive of the relation between legal and economic structures: here the effort has been to find a language adequate to describe the relation of law to the objective conditions that overdetermine its form.⁴ Discussions of "praxis"

3. See generally CRITIQUE, *supra* note 1.

4. I am aware that sometimes the effort to find an adequate language has made the text quite difficult. At least part of the reason for this is that we do not have an easy, shared vocabulary for describing the ambiguity of lived experience. Ordinary language presents its world from the outside, an orienting attitude that makes it difficult to speak of interior meanings. So, for example, if we refer to "the mind" or "the legal mind," we evoke an "it," a black box without spirit, a fact in a fact-world rather than a being which projects a meaningful world. Still there are some recurring words and phrases which may be unfamiliar and which ought to be elaborated upon at the outset:

The word "ontology" is usually said to mean "the study of being" or perhaps in some contexts, "the nature of being." I prefer Heidegger's notion of a "making-manifest of being," M. HEIDEGGER, BEING AND TIME 56 (1962), because it avoids the implication that being is a "thing" to be studied or that it has a factual nature. In this essay the word "ontological" means something like the same thing in relation to "being" that "mental" ordinarily means in relation to "mind." If a phrase like "the ontological dimension of legal discourse" seems obscure, one might think of the relationship of law to mental activity in general.

In modern philosophy "phenomenology" is the description of being as it appears to consciousness. Its effort has been to overcome subject-object dichotomies by restricting itself to describing phenomena, including the phenomenon of consciousness, as they are revealed in the concrete, rather than abstracting entities like "subject" and "object" which are then somehow meshed together. Thus a phenomenology of consciousness is a description of the being of consciousness as it reveals itself to itself. On the phenomenology of interpretation, see text accompanying notes 38-56 *infra*.

Jacques Ehrmann defines "structure" as "a combination and relation of formal elements which reveal their logical coherence within given objects of analysis." Ehrmann, *Introduction to STRUCTURALISM* at ix, (J. Ehrmann ed. 1970). One reservation that I have with this definition is

frequently incorporate a phenomenological description in the hope of elucidating the social and ontological meanings lived out in legal activity. It will become apparent that I do not think one chooses one or the other of these methods in the development of theory, but rather that dialectical theory subsumes them both, depending upon which "valence" of the legal moment one is

that it does not elucidate the relationship of the structured object to the reason which forms it. If I speak of "the structure of material conditions" or "the structure of legal language," am I referring to an organized matrix that somehow resides in the object of study, or am I organizing the object to facilitate my project of comprehension? My own view is that a structural analysis thematizes certain formal elements in a field, that this thematization proceeds according to an *a priori* intuitive comprehension of processes unconscious to the actors who elaborate them within the field of study, and that "the structure" is therefore found and fashioned at the same time. It is a "making-visible" of the unconscious, in the sense that the organizational coherence of the field is a human organization that is not traceable in its structure to any human who produces it.

The idea of an unconscious also underlies my use of the phrases "worked matter" and "the impact of worked matter" (though Sartre's "inertia" conveys the sense more effectively than does the objectifying word "impact"). Summarizing Sartre, Laing and Cooper write:

Matter, *in and through man*, is the motor of history, and constitutes a common future. As the stone gods, the tablets, the relics of past objectified praxis, matter is the social memory of a collectivity, a transcendent yet interior unity, a totality made by a multiplicity of dispersed activities. It is the congealed menace of the future (the stock-pile of bombs). It binds men by providing the link between them, this link whereby in objectifying myself, I become another for the other.

LAING & COOPER, *supra* note 1, at 117. As a way of sensing the meaning of this description, imagine a typical law school building with its classrooms, faculty offices, hallways, and so forth. This building is an arrangement of worked matter which gives rise to a social arrangement of persons who must make use of it. Each person's possible activity (praxis) is conditioned and restrained by each of the others, within the collectivity linked by the building's organization. Thus students assembled in a large classroom, chairs facing front, are a faceless passivity awaiting something, each superfluous to the other except as each is "of the crowd." In a sense these human beings are a residue of the chairs. Faculty offices make the faculty "nuclear": professors are "of the faculty" and yet isolated, members of a collection rather than a group. The total social arrangement and each of its parcels are as much "of the building" as are the bookshelves, the difference being that the bookshelves are lived by the faculty, students, office workers, and administrators as an interiorized past. For this building is not a "mere building" or "naked thing" arranged in a certain way; it is a law school, an unconscious social memory whose historical structure illumines and dims the possible future. Thus one might say that it is this "worked matter" that carries an abstraction ("the law") through concrete law students and illumines their future as practicing lawyers.

As phenomena rather than facts, therefore, matter appears to labor as a mediation of social relationships in a history—this desk on which I write is understood by me toward its use, establishing my relationship

trying to get hold of. What is offered is not a system or model that explains, but rather a flux of intuition (on the phenomenological side) and analysis (on the structural side) that approximates a certain sort of lived experience.

When I say that I have "loosely" used an aspect of contract law to illustrate an approach of this kind, I mean to emphasize

with its maker, at the same time that I use it toward establishing my relationship with you. And the *inertia* of worked matter is discovered in the social relations to which it gives rise. "The United States of America" is made manifest in the signification of the flag, and the flag is an inertia to the extent that we all stand around it, saying a pledge of allegiance. For a fuller discussion in an accessible paperback, see *SEARCH FOR A METHOD*, *supra* note 1, at 152-59. On the relation of worked matter to law, see text accompanying notes 52-56 *infra*.

The interrelationship of "structure," "worked matter," and "unconscious" is an important one for this essay, although the idea of an unconscious receives only limited attention. Like the psychoanalyst who is able to listen through symbols to an unconscious never directly revealed in language, the structuralist sketches out forms according to her immanent knowledge of the field. This field is an inert arrangement called out by worked matter and is unconscious to the actors who produce its discourse. But as Sartre has said, a structure is not transcendent; for the structuralist who makes of her method a philosophy, praxis is reduced to a deterministic process that does not transcend itself in action. I am more persuaded that action is made only partly intelligible by a structural analysis, and that an existential phenomenology remains essential for the intelligibility of human projects. This is because structures are not ontological objects; they are inertias in a temporal human world. How else are they made comprehensible to the understanding praxis of the structuralist who totalizes them as a field?

Finally, let me clarify what I mean by the phrase "temporal project," sometimes set against the phrase "atemporal object". The word "project" means "thrown-forward," and being thrown-forward describes the activity of consciousness in the sense that consciousness always exists in time, throwing itself forward meaningfully in its world. Therefore, meanings can be said to have a "toward-structure," see text accompanying notes 41-44 *infra*; they are grounded in time and posit satisfaction as a condition of the future. For a description of consciousness as a projecting "for-itself," see J-P. SARTRE, *BEING AND NOTHINGNESS* 89-128 (Washington Square paperback ed. 1966) [hereinafter cited as *BEING AND NOTHINGNESS*]. The word "ob-ject" has the literal meaning of "thrown-against," suggesting that the word originally described a resistance to the thrown-forwardness of consciousness. The sense of thrown-against is that in their very being "objects" have recourse to the way they are experienced by consciousness in time. During the movement toward "empirical objectivity" in the sciences, however, this contingent character of the object was somewhere forgotten, producing the peculiar assumption that the object had an independent reality apart from its appearance. In this model the "real world" floats outside of time, while we dismal subjects (thrown-unders) search for so-called "hard data" in pursuit of "facts" which are "objectively true." Phenomenology is opposed to this reification of a "real world" that exists outside of lived time, and this essay has really emerged from my discomfort with theory that sees "the law" this way.

that this has been a limited undertaking. Certainly my summary treatment of the recent history of the law of conditions is not complete, and the paragraph or two devoted to political economy is but an outline of an outline. My intention has not been to write a legal history or a political economy, but to take certain received views which I believe have some validity and to suggest a method for enlivening them, for returning what are now human products to the realm of situated human action within which they were created. Precisely because I believe that the activity of legal interpretation overflows what is said or written as "the law," I expect that these received views provide only the partial truths of helpful and important researches.

If we are to move away from *a priori*s toward a synthetic reconstruction of the ambiguity of concrete moments, our legal theory cannot be "about" the way an entity called "the law" fits into some larger entity called "society"; it must be a hermeneutic that recovers the meaning of a particular sort of interpretation by consciousness and gives back that meaning to reflection in a more intelligible, explicit way.

I. LEGAL BACKGROUND

The law of contractual conditions subsumes within its rubric rules relating both to the order of performance and to the extent of performance required of each party.⁵ In other words, once a valid contract has been formed, it is the law of conditions that indicates which person must go first and how much the first person must do before a duty of counterperformance matures. Readers who are also lawyers may remember, for example, that in a contract between *A* and *B*, if *A* must go first, then *B*'s duty to perform is subject to the "condition precedent" that *A* perform properly.

Ever since value has found its meaning in exchange, the issue of "order of performance" has been resolved by indirect reference to the credit risk. On January 1, *A* promises to sell and *B* promises to buy a cow for a certain price, delivery to be on June 1. Whereas in 1615, *A* could sue *B* on June 1 whether or not she had tendered the cow,⁶ by the mid-nineteenth century

5. See 3A A. CORBIN, CONTRACTS (1960 & Supp. 1971). External conditions are omitted from my summary because not relevant. Also, it is still possible for duties of performance to be independent, in which case neither order nor extent of performance has anything to do with "conditions."

6. See *Nichols v. Raynbred*, 80 Eng. Rep. 238 (K.B. 1615). Rules

this solution would no longer correspond to normal assumptions about what "the parties intended." Then and now the assumption would be that both parties must swap at the same time, in the absence of some very clear indication that one intended to give credit to the other. As long as *B* purchased the cow for use in a local setting, the parties' duties were seen as independent of each other; once the cow becomes a commodity, *B*'s economic security demands that *A* tender delivery before *B* can be expected to pay. Each person's duty is conditioned on a tender by the other. Similar sorts of perspectives, reflecting prevailing notions about what people should reasonably expect, have influenced the interpretation of employment and construction contracts, and so forth.

But now let us suppose that *A* is to deliver ten cows a month for a year. If she delivers only nine in June, is *B* to be excused from any further duty in the remaining months of the year because of "failure of condition?" Or has *A* done enough to obligate *B* to continue living up to his side of the bargain, taking a deduction for any damage resulting from the missing or delayed cow? If the law permitted *B* to cancel he might be able to take advantage of a small and insignificant deviation from exact performance by *A* in order to capitalize on a favorable turn of the market. A liberal observer would find such a result unfair, since an innocent, trivial error by *A* would justify a windfall gain to *B* at *A*'s expense. On the other hand, allowing *A* to perform only partially offends the conservative viewpoint that the contracting parties know their own interests, that people should be held to their bargains. If *B* dickered for ten cows in June, he is to get ten, and if *A* delivers only nine, she must bear the consequences.

It is an accepted view that legal history has seen a gradual development from the first solution, requiring exact performance of conditions, to the second, which concentrates on the materiality to *B* of *A*'s breach.⁷ In the late nineteenth century, toward

relating to the order of performance cannot be explained solely by the credit-risk, but this seems to me a more helpful way to introduce the problem to non-lawyers than would a plunge into the morass of independent and dependent covenants.

7. For a summary of this movement, see F. KESSLER & G. GILMORE, *CONTRACTS, CASES AND MATERIALS* 812-911 (2d ed. 1970). Exact performance was not generally required in "skill and labor" contracts (buildings, specially prepared goods) because it would justify uneconomic forfeitures. See, e.g., *Beck & Pauli Lithographing Co. v. Colorado Milling & Elevator Co.*, 52 F. 700 (8th Cir. 1892). Even in this area, however, courts

the crest of capital accumulation and "freedom of contract," the law aligned itself with the exigencies of laissez-faire economics. The judicial function was restricted for the most part to realizing the intentions of the parties as that intent was revealed in the document; and so "ten cows" was ten cows and "courts will not make contracts for the parties." With the advent of reform around 1910, the judge began to evaluate agreements as an arbiter of fairness. *B* must not cancel now for minor imperfections in *A*'s performance; instead he must be solicitous of *A*'s interest in counterperformance. Only if the breach is "material" is *B* entitled to treat his obligation as ended and sue for the full damage occasioned by *A*'s wrong. Otherwise, there is a continuing duty with a right of recoupment.

Two leading cases evidence this movement and offer a mini-text against which to attempt an interpretation.

Norrington v. Wright,⁸ decided by the United States Supreme Court in 1885, involved a contract in which the seller had promised to ship iron rails in monthly installments of about 1000 tons. At the time of formation, iron was in short supply, and the buyer hoped to make a killing from the seller's scavenging efforts in Europe. When there were shortages in the early shipments, however, the buyer sought to cancel the contract, no doubt because a decline in price permitted him to purchase more cheaply at home or to forego the adventure altogether. The light installments in themselves did not hurt the buyer, since he could fill out each thousand tons in the market, benefitting from the difference between the market and the contract prices. Nevertheless, the Court held the buyer entitled to cancel the entire contract and refuse all remaining shipments:

In the contracts of merchants, time is of the essence. . . . A statement descriptive of the subject-matter, or of some material incident, such as the time or place of shipment, is ordinarily to be regarded as a warranty, in the sense in which that term is used in insurance and maritime law, that is to say, a condition precedent upon the failure or nonperformance of which the party aggrieved may repudiate the whole contract.⁹

And later, quoting from a supporting English case,

"It does not appear to me to be a question for your Lordships, or for any court, to consider whether that is a contract which bears upon the face of it some reason, some explanation why it was made in that form, why the stipulation is made that the

would go a long way toward strict enforcement. See, e.g., *Smith v. Brady*, 17 N.Y. 173 (Ct. App. 1858).

8. 115 U.S. 188 (1885).

9. *Id.* at 203.

shipment should be during these particular months. It is a mercantile contract and merchants are not in the habit of placing upon their contracts stipulations to which they do not attach some importance. . . . If it be admitted that the literal meaning would imply that the whole quantity be put on board during a specified time, it is no answer to that literal meaning . . . to say that it puts an additional burden on the seller, without a corresponding benefit to the purchaser; that is a matter of which the seller and the purchaser are the best judges. Nor is it any reason for saying that it would be a means by which purchasers, without any real cause, would frequently obtain an excuse for rejecting contracts where prices had dropped. The nonfulfillment of any term in any contract is a means by which a purchaser is able to get rid of the contract when prices have dropped; but that is no reason why a term which is found in a contract should not be fulfilled."¹⁰

The buyer's windfall is vindicated, and the seller is reprimanded from between the lines for a helpful error. This is the absolute, necessary deduction from failure of condition; because the condition of full performance did not occur the purchaser's duty to pay did not arise.

Note the difference some twenty-five years later in the language of Justice Cardozo of the New York Court of Appeals. *Helgar Corp. v. Warner's Features, Inc.*¹¹ involved a contract for the sale of films. Plaintiff was to provide at least one per month, defendant to pay by the footage within thirty days of the first public showing, plus half the net profits from foreign sales. Certain films were delivered, for which payment was properly demanded on the day before Christmas, and not receiving said payment, the seller attempted to cancel the day after Christmas. The claim was failure of condition relieving any further duty to deliver and bolstering a suit not only for the price of the films delivered but also for lost profits which the seller would have received on the remainder of the contract.¹² As in *Norrington*, the delay was not serious—in fact, the seller may well have been

10. *Id.* at 208 (quoting *Bowes v. Shand*, 2 App. Cas. 455, 463-66 (1877)).

11. 222 N.Y. 449, 119 N.E. 113 (Ct. App. 1918). From a legal-analytic point of view, the comparison with *Norrington* is imperfect because *Helgar* is a late-payment case, and because Cardozo was guided by a statute, Uniform Sales Act § 45(2). But the case is used here as illustrative of a movement in thought, and not as "analogous" in the strict analytic sense. For an expression of the full development of this movement as applied to defective deliveries like those in *Norrington*, see U.C.C. § 2-612. This provision has abandoned not only the formal language of condition, but also the "intermediate" paradigm of entire and divisible contracts which could still be felt in its predecessor, Uniform Sales Act § 45(2) (1950).

12. 222 N.Y. at 452, 119 N.E. at 114.

most interested in the percentage, which would not materialize for some time. Still, buyer had broken the word, and seller cited *Norrington v. Wright*, but the court said:

We have established a new test, which weighs the effect of the default and adjusts the rigor of the remedy to the gravity of the wrong. 'It depends in each case on the terms of the contract and the circumstances of the case,' whether the breach is 'so material' as to affect the contract as a whole.¹³

We have here a new structure, which evokes wholes and parts, gravity and levity, right and wrong. The language has new oppositions, has acquired a different shape.

Default in respect of one installment, though falling short of repudiation, may under some conditions be so material that there should be an end to the obligation to keep the contract alive. Under other conditions, the default may be nothing but a technical omission to observe the letter of a promise. . . . General statements abound that, at law, time is always of the essence (. . . *Norrington v. Wright* . . .). For some purposes this is still true. The vendor who fails to receive payment of an installment the very day that it is due may sue at once for the price. But it does not follow that he may be equally precipitate in his election to declare the contract at an end That depends upon the question whether the default is so substantial and important as in truth and in fairness to defeat the essential purpose of the parties. . . . We must know the cause of the default, the length of the delay, the needs of the vendor, and the expectations of the vendee. . . .¹⁴

The court held that the plaintiff-seller was wrong to have cancelled, and limited his recovery to payments already due.

No one in the mid to late nineteenth century could know about such matters as the "purpose," the "cause," "needs," "expectations," and so forth, or at least these interior phenomena had no proper place in legal discourse. The non-fulfillment of any contractual term had been a means by which a purchaser could "get rid of" any contract, but now the innocent purchaser must protect his partner, owes him a duty beyond that signified by the objective written word, and indeed this was really his intention: as Cardozo observed elsewhere, "There will be no assumption of a purpose to visit venial faults with oppressive retribution."¹⁵ It is of interest that not too long after *Helgar*, Fuller and Perdue would publish *The Reliance Interest in Contract Damages*,¹⁶ an article which would revise the paradigm of what

13. *Id.* at 453, 119 N.E. at 114.

14. *Id.* at 453-54, 119 N.E. at 114.

15. *Jacobs & Youngs, Inc. v. Kent*, 230 N.Y. 239, 242, 129 N.E. 889, 891 (1921).

16. Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 *YALE L.J.* 52 (1936). Almost twenty years is in some contexts a rather

constitutes contract, breach, and injury in the direction of measuring the degree of reliance by the innocent party.

The movement from *Norrington* to *Helgar*, usually described as a development from a "harsh" to a "fair" rule, contains in its structure the transformation of the entire law of contracts from its classical to its modern tort-like appearance. With the help of some recent scholarship,¹⁷ we can recognize in the movement from a strict law of conditions to a law of material breach all of the following related partial-restructurings in legal consciousness:

1. From a form of thought in which contracts impose absolute liability to one in which they impose a relative liability. (There are no degrees of default in *Norrington*; there are in *Helgar*.)

2. From a form of thought in which contracts are realized in court as raising primarily "questions of law" to one in which they are realized as raising "questions of fact." (The Court in *Norrington* makes only a formal legal judgment about the "surface" of the contract—either the condition has failed or it hasn't. In *Helgar* a variety of factual judgments relating to purpose, intent, wilfulness, and the like are left to the jury.)

3. From a form of thought in which a strictly defined written word indicates the legal result to one in which a "found" social norm (or perhaps "trade" norm) is used. (The *Norrington* Court looks at the "external" document to decide what was the contract, while the *Helgar* court reaches inward to inquire about reasonable expectations.)

4. From a form of thought in which the legal actors are conceived to be "intending" only their own narrow self-interest to one in which intention is circumscribed by, or really infused with, "good faith." (The parties in *Norrington* were conceived as intending to be able to get rid of their obligations in the event of even trivial defaults, while the *Helgar* court will assume no such purpose if the result would be unfair.)

long time. My point is that the Fuller and Perdue article realizes, at the level of jurisprudence, a formal organization of "the facts" which appears at the level of law in the earlier opinion.

17. A fuller discussion of some of these observations can be found in G. GILMORE, *THE DEATH OF CONTRACT* (1974), and in Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976). Kennedy expands upon the developmental account given here, finding three overlapping periods (1800-1870, 1850-1940, 1900-present) which he believes are phases of an enduring conflict in values between what he calls individualism and altruism. *Id.* at 1725-37.

5. From a form of thought in which reason proceeds according to a formal logic, deducing result from rule (and following rules which permit this mode of reason in their structure) to one in which reason has an *a priori* functional valence—that is, in which an ideal social theme or “end-point” guides the construction of literally “principled” decisions, inducing in a loose sense “rule” from result. (The judges in *Norrington* reason by simply identifying, in Hohfeldian fashion,¹⁸ the conditional duty, and then determining by formal logic that the condition has failed. Cardozo reasons by reference to values embodied by reasonable persons—that is, *social* values which inform the “circumstances of the case”—and those values guide the judge back to the legal result.)

Taken together, these movements in legal consciousness make up what is usually called the decline of formalism, what has even been called the “death of contract” in its classical appearance.¹⁹ Each particular movement shares this universal: a separation in thought between law and morals has given way to a form of thought in which the two are conflated. The nineteenth-century legal mind knew the *forum legi* and the *forum conscientiae* precisely as different “forums,” as not belonging to the same genus.²⁰ The former contained objects in

18. The reference is to the analytic method proposed in Hohfeld, *Some Fundamental Legal Conceptions as Applied to Judicial Reasoning*, 23 *YALE L.J.* 16, 28-59 (1913).

19. See GILMORE, *supra* note 17.

20. A very good statement of this bifocal position is given by counsel in *Laidlaw v. Organ*, 15 U.S. (2 Wheat.) 178, 193 (1817) in defense of a devious client:

The only real question in the cause is, whether the sale was invalid because the vendee did not communicate information which he received precisely as the vendor *might* have got it had he been equally diligent or equally fortunate? And, surely, on this question there can be no doubt. Even if the vendor had been entitled to the disclosure, he waived it by not insisting on an answer to his question; and the silence of the vendee might as well have been interpreted into an *affirmative* as a *negative* answer. But, on principle, he was not bound to disclose. Even admitting that his conduct was unlawful, in *foro conscientiae*, does that prove that it was so in the civil forum? Human laws are imperfect in this respect, and the sphere of morality is more extensive than the limits of civil jurisdiction. The maxim of *caveat emptor* could never have crept into the law, if the province of ethics had been co-extensive with it. There was, in the present case, no circumvention or manoeuvre practised by the vendee, unless rising earlier in the morning, and obtaining by superior diligence and alertness that intelligence by which the price of commodities was regulated, be such. It is a romantic quality that is contended for on the other side.

See also Kennedy, *supra* note 17, at 1725, who places these remarks in advance of the development of classical legal thought because they do

an objective relation to one another which could be made known by the neutral gaze of scientific logic; the latter contained a profusion of subjectivity about which nothing objective could be said, at least by lawyers. Twentieth-century legal discourse lets both be known at once—in fact there is no “both.” An objective norm presents the legal drama to the mind as already a moral drama in which reason knows what is reasonable *a priori*.

All of this movement is, of course, “insubstantial” in the sense that it reveals only the work of a certain sort of interpreting activity by consciousness. It is consciousness which invents its categories of “law” and “morals” and the systems of thought which comprise each domain. Our effort is to interpret this interpreting activity by unmasking its intentions. Although the form legal reasoning takes in language is conditioned within a structured economic process and cannot be “unmasked” phenomenologically, the intentions that find expression in this form have an ontological meaning which I believe is disclosed in a phenomenological investigation.

II. FORM: THE PROCESSED “SHAPE” OF LEGAL LANGUAGE

It has been held by some Marxists that the law is simply a form through which the relations of production are “reflected” in consciousness,²¹ a point of view that has the weakness of reducing praxis to process, relegating consciousness to the role of a delta upon which necessity deposits its appearances. This hyper-objective dialectic buries the lived situation of the legal actor in an inertia which in an odd way contradicts certain other images essential to a Marxist analysis—for example, the image of “struggle.”²² The modern integration of structuralism with

not yet separate the forums as a matter of ethics, but only as a matter of pragmatic policy.

21. The reflection theory of consciousness is articulated by Stalin in *Dialectical and Historical Materialism*, in *LENINISM: SELECTED WRITINGS* 406-33 (1942). Its mind-matter dualism gives rise to the rigid concepts of “infrastructure” and “superstructure” often associated with Marxist thought. For a Marxist analysis of law as ideology which suffers from similar dualistic difficulties, see M. CORNFORTH, *THE THEORY OF KNOWLEDGE* 80-92 (New World paperback ed. 1971); see also the discussion of legal concepts in 2 J. PLAMENATZ, *MAN AND SOCIETY* 323-50 (1963).

22. Following Sartre, Jameson has remarked on this contradiction: Every model has its limits and produces a type of distortion characteristic of it; and it would seem clear that the classical or orthodox Marxism we have been describing here (and developed not so much by Marx himself as by Engels and later writers), with its emphasis on the primacy of the economic, has the disadvantage of drawing attention to the separation and rela-

Marxism would seem to share this weakness to the extent that it represents the activity of consciousness as mere "myth-making," the mere elaboration of signs that reveal in mythic design the fundamental relations inherent in social structures.²³ Here also

tively autonomous development of each class, rather than to their constant interaction in the form of class struggle. It is not only, and not even, a question of determinism: for if one considers each of these theories as a model, the notion that the economic factor is determinant seems less important than the picture of the autonomous, somehow self-developing evolution of each class which the parallelism with the economic evolution suggests. The insistence on the primacy of the economic over purely human agencies is a distortion not because it deprives the individual human actor, or even the individual class, of its freedom and efficacy, but rather because it abstracts from and destroys the basic concrete form which human action takes in history, namely the struggle *between* classes, and it is this which most discussions of the role of human action in history leaves out: *that on which* men act, or in other words *other* men and *other* classes. Sartre underlines this sharply in his discussion of Engels' economism: "If the two classes are each in themselves the inert—or even the practico-inert—product of economic development, if they have both equally been forged by the transformations in the mode of production, the exploiting class supporting its own statute in passivity, like a constitutional law, and the powerlessness of the wealthy reflecting that of the wretched, then struggle disappears: both serialities are purely inert, the contradictions in the system reveal themselves through them, that is to say, through each in a state of otherness to itself. That kind of opposition between capitalists and wage-workers does not deserve the name of *struggle* any more than does that of the shutter to the wall it strikes against." (669).

JAMESON, *supra* note 1, at 292-93.

23. Whether the reductive tendencies of structuralism are a "weakness" depends upon how one responds to the continuing two-decade debate between phenomenologists and structuralists on the relationship of consciousness to intelligibility. The structuralist movement identified with the work of Levi-Strauss has denied the priority of consciousness as strongly as the phenomenologists have affirmed it, seeking intelligibility instead through the relationship of linguistic signs to such structures as production and kinship arrangements. For Levi-Strauss, a person lives a life of mythical constructions which find their meaning outside of him in a structured arrangement of which he knows nothing. Therefore, he believes "the ultimate goal of the human sciences to be not to constitute, but to dissolve man," C. LEVI-STRAUSS, *THE SAVAGE MIND* 247 (Univ. of Chicago paperback ed. 1966), and he rebukes the "transcendental humanism" he sees in a philosophy that places an ultimate comprehension within the totalizing consciousness (Sartre's praxis). *Id.* at 262. In political thought this dispute has been recapitulated as a struggle between structural and existential Marxism. The leading writer on the integration of structuralism and Marxism is Louis Althusser, and the leading work is L. ALTHUSSER & E. BALIBAR, *READING CAPITAL* (1970).

My own view is that an analytical reason that discovers the significance of action within structures (Levi-Strauss) simply does not address itself to the interior intelligibility of the structure itself (Sartre) and yet probably presupposes such an interior intelligibility. For scientific anal-

there is no adequate description of struggle, of the engagement by which the situation is brought to life and made meaningful to experience. The judge sitting behind the bench, the lawyer poring over his brief, the grade school teacher giving a lesson on the constitution, the scholar who thinks up legal theory—all of these people are *concerned* about making a living, about the role they must maintain to do so, about freeing themselves from the role which distorts their relationships; in short, they are wholly involved in a meaningful way with the objective conditions that alienate them *at the same time* they perform an objective function, spinning myths. This is to say that imbued in the uttered sign evoked by a human voice is an interior relation to it, a relation of meaning.

It is important, therefore, to show the activity of legal interpretation in two dimensions—the dimension of form by which law realizes objective processes in language, and the dimension of praxis by which this interpretive activity is shot through with a lived social meaning. I am well aware that to put the problem this way is to retain a certain dualism, but this seems to me a provisional problem of method resulting from the schizoid situation I am describing. It is not that there is a metaphysical materiality which rumbles underneath while human beings struggle meaningfully on top, but rather that persons are for the moment at a distance from the historical structures which they mediate and create.²⁴ Sartre has shown, as I will

ysis is not the outcome of a so-called "neutral gaze"; it emerges from the comprehension of a theme—probably in the natural order (*see note 40 infra*), and certainly in the cultural order. As the structuralist observes a social organization, it is this comprehension that gives rise to his sense of "myth" (rather than, say, "discrepancy"), and it is this comprehension of "myth" that surpasses toward the unmythical. His analysis is not a neutrality but a totalizing praxis, and his analytical reason is able to make out the signifier only by virtue of its dialectical dependence on the intelligibility of the signified. Thus phenomenology and structuralism complement each other as movements of thought within ontology, as situated social being seeks to make itself manifest. *See also* the discussion of "structure" at note 4 *supra*. For what I take to be a similar view, see POSTER, *supra* note 1, at 353 n.100.

For a review of the literature on the dispute between Sartre and Levi-Strauss, see the references collected *id.* at 323 n.42.

24. "At a distance?" Roberto Unger concludes his recent struggles against the antinomies of thought with the words "Speak, God." R. UNGER, *KNOWLEDGE AND POLITICS* 295 (1975). On the relation between "structure," "worked matter," and "unconscious" see note 4 *supra*. *See also* M. MERLEAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* 171 n.1 (1962), in which the author makes the following statement, with which I am in agreement:

One can no more get rid of historical materialism than of

describe in the next section of this essay, that in our history, material conditions have given rise to social structures that appear as over and against us like an alien "outside;" and a praxis that interiorizes relations which appear external to it as inert structures (as "the facts of life") is living a situation which becomes intelligible only through use of a dual method. This situation does not have two levels, one "objective," the other "subjective"; it is simply a whole situation which resists a monistic description. In order to situate the living legal actors who worked out the development in the law of conditions from "failure of condition" to "material breach," we begin with the objective dimension I am calling the dimension of form—that is, we begin with the revelation of an economic structure as a legal structure.

During the period that serves as our text, I take as a provisional given that something like the following transformation occurs in economic life. There is gradual movement from a free-market capitalism, in which the accumulation of industrial capital necessitates an absolute and unregulated mobility of all factors of production, to a monopoly capitalism in which horizontally and vertically integrated industries abandon chaotic competition in favor of more stable or "planned" interrelationships among businesses, and between business and labor. This movement is brought about partly to maximize monopoly profits by reducing competition, partly because the monopoly form generates a surplus that cannot be absorbed without a certain redistribution "downward" (a surplus that reveals itself in excess capacity and unemployment), and partly because the preservation of

psychoanalysis by impugning "reductionist" conceptions and causal thought in the name of a descriptive and phenomenological method, for historical materialism is no more linked to such "causal" formulations as may have been given than is psychoanalysis, and like the latter it could be expressed in another language. It consists just as much in making economics historical as in making history economic. The economics on which it bases history is not, as in classical economics, a closed cycle of objective phenomena, *but a correlation of productive forces and forms of production, which is completed only when the former emerge from their anonymity, become aware of themselves and are thus capable of imposing a form on the future.* . . . Historical materialism is not a causality exclusive to economics. One is tempted to say that it does not base history and ways of thinking on production and ways of working, but more generally on ways of existing and co-existing, on human relationships. It does not bring the history of ideas down to economic history, but replaces these ideas in the one history which they both express, and which is that of social existence.

(emphasis added).

ideology under monopoly conditions necessitates a "reform." Like the struggle among owners, the struggle between owners and workers loses its "unregulated" character, becoming a sort of planned routinization of conflict with the eventual help of collective-bargaining agreements that structure long-term passivity and collective work-functioning into the behavior of labor. Within this movement, the state increasingly appears as a participant-umpire, entering the market to support demand for both producer and consumer goods (through military and social welfare expenditures) and facilitating the new cooperation among productive factors as their mediator in the name of the public interest. Free gives way to a linked, mass-bureaucratic, and more public enterprise.²⁵

At first glance we can see a certain analogue to this transformation of economic life in the transformations of contract law described earlier. The decline of formalism and the emergence of "affirmative duties" have brought about what Kessler and Gilmore call "a socialization of our theory of contract."²⁶ But to comprehend these processes as a human history we must go beyond mysterious analogues and parallelisms to a description of a single structured process that at any given moment appears from the outside as a totalization of effects that have a systematic coherence. A dialectical comprehension requires infusing a structural analysis with the meanings projected by a praxis or practicing consciousness, but a structural analysis alone permits us to see the totality from the outside.

From this analytical vantage-point, legal language functions as a "signifier," meaning that it makes visible by the use of communicative signs the constitutive tensions in the economic structure that organize laboring activity as a whole. These signs are intentionally produced by a praxis, but their significance depends upon the structure of actions which work back and through this praxis as a process. Thus, for example, when we

25. Well-known works on the political economy of monopoly capital are P. BARAN, *THE POLITICAL ECONOMY OF GROWTH* (1957); P. BARAN & P. SWEEZY, *MONOPOLY CAPITAL* (1966); E. MANDEL, *MARXIST ECONOMIC THEORY* (1968); P. SWEEZY, *THE THEORY OF CAPITALIST DEVELOPMENT* (1942). For interesting recent descriptions of the quality of labor under modern conditions, see S. ARONOWITZ, *FALSE PROMISES: THE DEVELOPMENT OF WORKING-CLASS CONSCIOUSNESS IN THE TWENTIETH CENTURY* (McGraw-Hill paperback ed. 1973) (especially pp. 137-213), and H. BRAVERMAN, *LABOR AND MONOPOLY CAPITAL; THE DEGRADATION OF WORK IN THE TWENTIETH CENTURY* (1974).

26. KESSLER & GILMORE, *supra* note 7, at 1118.

speak of later capitalism as a partly "planned" economy, we use the word "planned" in an as-if sense, since no one "plans" the structure although each of us intentionally produces its effects. For the period that interests us here, we can characterize both the formal coherence of the signifier (the law) and the formal coherence of the signified (the organization of actions which are abstracted as "the economy") by the use of what might be called meta-terms that describe their organizing principle. In a "free market" the structure of production engenders relations of labor (here all forms of work) that are what I will call *atomic-substitutional*, meaning that labor in production functions in discrete, wholly competitive individual-units. In a "planned economy" of the sort produced by the monopoly, relations of work are structured as *cluster-cooperative*, meaning that labor functions in less competitive group-units. If these relational work-forms are to be signified and made visible, then language must fashion itself according to coordinate principles of discourse—that is, its own organization must "be" atomic-substitutional or cluster-cooperative in the sense that it must allow a reasoning capable of signifying atomic substitutional or cluster-cooperative effects.²⁷

Now this talk about language "fashioning itself" may be off-putting, but it is simply a necessary manner of speaking if we are to be able to describe a structure whose form is not produced by any individual social agent. Of course there is no "itself" in a human world, but what we are trying to get hold of is a social structure that works through an interpretive consciousness as a sort of arranged inertia whose organizing principles are "outside" the interpreter. Phenomenologically, interpretive consciousness grasps the movement of relational work-forms from atomic-substitutional to cluster-cooperative only by intentionally

27. Two points: first, there is no claim that other structures besides the economic are irrelevant to legal discourse, but only that the economic structure is dominant and mediates others. Thus the reference to "imperfect human laws" in the quote from an 1817 lawyer, note 20 *supra*, calls upon religious ideas by implication, yet these will gradually vanish under atomic-substitutional conditions which cannot tolerate the ex-contractual religious bond. See Kennedy, *supra* note 17, at 1728. I have already borrowed Althusser's term "overdetermination" as a way of suggesting this complexity. See L. Althusser, *Structure in Dominance: Contradiction and Overdetermination*, in FOR MARX 200-18 (Vintage paperback ed. 1970). Second, the terms "atomic-substitutional" and "cluster-cooperative" are provisional and oversimplified metaphors for organizing principles toward which discourse tends. A fuller study would certainly enrich and modify them, although any structural description will be de-centered by the overflow of praxis.

reconstituting the way the world appears in reflection, but the structural intelligibility of this world is, if you like, *outside in the world* precisely as the price-system organizes the market in spite of the real people who buy and sell.

Thus legal interpretation fashions itself according to a fusion of intention and structure which constitutes its way of knowing its milieu, and the transformation of this interpretation during the period which interests us conforms to the transformation of what it signifies. As the productive form of labor-behavior in the late nineteenth century is atomic-substitutional, legal discourse must work within an *épistème*²⁸—to borrow Foucault's term—which allows consciousness to know "the parties" in precisely this relation. The form of reason that reveals its object as atomistically constituted is the logic of natural science—that is, a logic that knows what it interprets as an objectivity without depth, an in-itself of external particles without immanent relation to one another. The significative intention of positivism as manifested in the legal discourse of the late nineteenth century is therefore to make visible objective conditions that demand free substitution of discrete units in—so to speak—"amoral" relation to one another. In the same vein, it is only a normative *épistème* which is capable of revealing cooperative group-units, and so the logic of legal reasoning undergoes a modification of its structure: the particles which are the object of its thought are given an "inside" and are bonded, presenting a morally constituted world. "Natural law" as a modern ideology is therefore the linguistic appearance of monopoly capital. The need for "assistance" among the factors of production works back through the intentions of interpretive activity and gives a new shape to the representation. The law will now speak of a "duty to act in good faith," and nonfeasance, formerly denoting an absence of obligation, becomes subsumed within misfeasance.

When the *Norrington* Court is asked to interpret its event concerning iron rails, therefore, it acts within the constraints of a certain epistemological compulsion that gives a definite form to the legal image. Otherwise free particles have established an external relation or covalent bond; when this bond is broken the particles are free once more. The Court asks itself certain preliminary empirical questions (Have the conditions for bonding

28. See generally M. FOUCAULT, *THE ORDER OF THINGS* (1970). The *épistème* is the hidden structure of knowledge that conditions discourse.

been met? or Is there a contract?), moves through the empirical logic dictated by the intended image to determine whether the bond has been maintained (Has the condition for continued bonding been met, or has it failed?), and deduces the legal result, supported by certain principles of reasoning, such as "Courts will not make contracts for the parties," the linguistic form of which is also epistemologically compelled.²⁹ The oppositions in this paradigm—right and duty, contract and no-contract, breach and no-breach—cannot have degrees of existence because they are properties without quality, substantial elements within a physical metaphor. Thus, "[t]he whole doctrine of contract," Holmes would say in *The Common Law's* famous footnote, "is formal and external."³⁰

The behavior of labor works back differently through Cardozo's image: his particles have a social life *a priori*, an internal relation that gives qualitative shape to the external deal. The structure of his discourse incorporates, as I have noted, degrees of bond and degrees of breach, gravity and levity, right and wrong—modes of immanence which require principles rather than rules as the exigent form of interpretive reason. Because the combinatory work-forms of monopoly capitalism necessitate a certain "looking out for the other's interests," or what might be called "moral behavior," the revelatory sign-structure gives a normal expectation to the now un-free particle, a reason to rely on faith as well as the word. To the jury is returned its pre-market function of making law through an inherent grasp of the facts,³¹ an inherent grasp of the fusion of the factual "ought" with the legal "is." In a well-known passage from an opinion decided contemporaneously with *Helgar*, Cardozo would give the new jurisprudence a lucid expression: "The law has outgrown its primitive stage of formalism when the precise word was the sovereign talisman and every slip was fatal. It takes a broader view today. A promise may be lacking and yet the whole

29. For example, "courts," "contracts," and "parties" are plural, general nouns—absolutely neutral abstractions in a world of atomic facts. "Will (not) make" and "for" bring the abstractions to a directed life, signifying action by "modelling" an atomic-substitutional effect (uncontracted parties free up). If there is any doubt about whether this linguistic form is compelled, imagine the judge of this period who insists, "courts will make contracts for the parties," and who is then shipped off to a sanatorium.

30. O. HOLMES, *THE COMMON LAW* 230 n.11 (M. Howe ed. 1963).

31. See Horwitz, *Historical Foundations of Modern Contract Law*, 87 HARV. L. REV. 917, 925-26 (1974).

writing may be 'instinct with an obligation,' imperfectly expressed. . . . If that is so, there is a contract."³²

Admittedly this is but a general sketch, but if there is validity to the suggestion that the formal function of law is merely that of a signifying structure which moves within interpretive consciousness, then certain of its claims to grandeur must be bracketed and put aside. One such claim is that of the instrumentalist, who would make of the law a moving force that facilitates the transformation of economic processes.³³ Instrumentalism retains an element of idealism in that while recognizing a connection between legal discourse and material conditions, it attributes a causal influence to the former. During the phase of unregulated capital accumulation, for example, the instrumentalist's entrepreneur required "formally realizable"³⁴ legal rules which would assure predictability of legal outcome, and therefore classical contract doctrine developed its formal rules of offer and acceptance, its restrictive bargain-theory of consideration, its absolutist construction of the Statute of Frauds and parol evidence rule, and its conservative attitude toward excuses for non-performance. Formalism would encourage investment by reducing the risk of courtroom confusion *ex post facto* and by keeping false statements from gullible juries.

The difficulty with the instrumentalist point of view is not its focus upon the relationship between legal and economic process, but its disintegration of the unity of legal and economic process. Those who perform the signifying function of announcing the legal relations among economic actors do not stand outside the directional and make useful rules, as if the law would cause an effect which might otherwise be impeded. Rather, the law is literally the effected voice of the relations of production; it allows these relations to be seen. When a judge "decides" a

32. *Wood v. Lucy, Lady Duff Gordon*, 222 N.Y. 88, 91, 118 N.E. 214, 214 (1917).

33. For a description of instrumental rationality as an aspect of the dominant social consciousness in the liberal state, see UNGER, *supra* note 24, at 152-54.

34. "The extreme of formal realizability is a directive to an official that requires him to respond to the presence together of each of a list of easily distinguishable factual aspects of a situation by intervening in a determinate way." Kennedy, *supra* note 17, at 1687-88. Kennedy cites Ihering's example of the determination of capacity by sole reference to age as an instance of a formally realizable definition of liability. In contract law, an example is the "mirror-image rule," by which an acceptance, to be legally effective, must exactly match the terms of the offer irrespective of the factual impression given to the offeror.

lawsuit, she labors within an objective role of signifier, constituting an objectified image within which energized particles (or "parties") move in a way made necessary by her reason, just as her reason is made necessary by material conditions which produce certain economic effects. Thus *Hadley v. Baxendale*³⁵ is not explained by the need for its rule, as if entrepreneurs would not otherwise have invested; it is occasioned by and makes visible a structural requirement of the signified, the requirement of a limited economic risk "as between the parties."

Similarly, instrumentalist propositions like "formal rules foster predictability" collapse into tautologies if we see legal and economic processes as a synthetic unity. Under atomic-substitutional conditions, formal reasoning rationalizes atomic-substitutional effects.³⁶ In legal discourse, these effects are signified as the predictable outcome of the reasoning to which they have given rise. Under cluster-cooperative conditions, which call for "moral behavior," standards and principles rationalize cluster-cooperative effects. This "informal" reasoning is no more or less predictable than formal logic; it is simply the linguistic form of cluster-cooperation, and so the modern businessman who has interiorized a cooperative structure as "common sense" is quite able to incorporate standards like "trade usage" within his expectation.³⁷ To take the contrary view is to break history into pieces that can be put together only by an appeal to magic.

35. 9 Ex. 341, 156 Eng. Rep. 145 (1854). The case is often identified as announcing the modern rule of general expectation damages, and as limiting liability for consequential or "special" damages to those foreseeable at the time of formation. For a discussion of the pre-*Hadley* damage cases and their relationship to the development of markets in the early part of the nineteenth century, see Horwitz, *supra* note 31, at 936-52.

36. By "effects" I mean conditioned actions, which, taken as a whole, form a behavioral structure. See also ALTHUSSER & BALBAR, *supra* note 23, at 189.

37. What we call confusion assures the Hindu of what is to come. Thus an English writer describes the "muddle" of a Hindu temple:

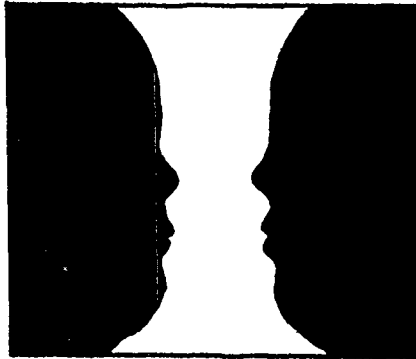
"Tukaram, Tukaram,
Thou art my father and mother and everybody.
Tukaram, Tukaram,
Thou art my father and mother and everybody.
Tukaram, Tukaram . . ."

They sang not even to the God who confronted them, but to a saint; they did not one thing which the non-Hindu would feel dramatically correct; this approaching triumph of India was a muddle (as we call it), a frustration of reason and form. Where was the God Himself, in whose honor the congregation had gathered? Indistinguishable in the jumble of His own altar, huddled out of sight amid images of inferior descent, smothered under rose-leaves, overhung by oleographs, out-blazed by golden tablets representing the Rajah's ancestors, and entirely ob-

But perhaps I should stop here and admit to the apparent appeals to magic of which I have been guilty in the account given thus far. To speak of a "fusion of intention and structure" which culminates in the reasoning of a signifier is hardly to comprehend the human activity of legal interpretation, because there is no indication of how the structure "gets in"—that is, of how a schematic appearance (the relation of signifier to signified) is to be made dialectically intelligible as the meaningful activity of a temporal praxis. As I have said, the purpose of a structural analysis is to make sense of a unified process as it appears "from the outside." The ontology of this inside-outside requires a phenomenological description of the being of legal interpretation as the inert structures of worked matter move back and through its shape.

III. MEANING: THE PRAXIS OF ALIENATED INTERPRETATION

If reason takes its form from the reflexive influence of worked matter upon the significations of human actors, how then are these signs also intended by their makers, or how can the sign be both given and constructed at the same time? This difficulty is resolvable if it is remembered that "intentionality" is being used in the sense given to the term by phenomenology—that is, as an inherent existential, as a "quality" which is constitutive of consciousness. For readers not familiar with the phenomenological tradition in philosophy, this idea can be illustrated by a well-known example from Gestalt psychology:



scured, when the wind blew, by the tattered foliage of a banana. Hundreds of electric lights had been lit in His honor (worked by an engine whose thumps destroyed the rhythm of the hymn). Yet His face could not be seen. Hundreds of His silver dishes were piled around Him with a minimum of effect. The inscriptions which the poets of the State had composed were hung

In looking at this drawing, one can see either a vase or two faces or perhaps even an inaccurate map of Kentucky turned sideways, but it "is" none of these "in reality." The constitution of the image as meaningful in one or the other of these ways is inherently intended, results from an *a priori* intentional orientation on the part of the perceiver. References to "epistemological compulsion" in the previous section, therefore, are not to be understood as meaning that the intentions of the knower are somehow cancelled out, but rather that they are given a definite structural form by material conditions. When "the facts" of *Norrington* or *Helgar* are given form in the reflective acts of the presiding judges, they are at the same time intentionally constituted so as to appear in this way rather than that, and yet that appearance is conditioned by historicity. This is to say that legal interpretation is meaningful because it is lived, even though its particular form is overdetermined.

These observations draw us immediately to ontological questions, for if this interpretation is lived, if it has a meaning for being-in-the-world rather than being simply a still-life photo which is plopped into consciousness, then the meaning for the legal actor must be elaborated and, if possible, made explicit. This is an effort of real difficulty because just as the sign in common sense points toward a signified outside of itself, so the intention that fashions the sign points toward a meaning inside itself, a meaning that is not immediately intelligible even though it inherently makes sense. To say that a few days' delay in paying for films is "not a material breach" makes sense to the twentieth-century legal mind, but the phenomenology of this feeling of making-sense is by no means self-evident. How is it, for example, that consciousness decides to interpret, and what is the meaning for consciousness of interpretation as a mode of consciousness? Is interpretation praxis, or in other words, does interpretive-being-in-the-world find its meaning as a mode of action-in-the-world? And if interpretation is social activity rather than merely private thoughts in the head, is the mode of

where they could not be read, or had twitched their drawing-pins out of the stucco, and one of them (composed in English to indicate His universality) consisted, by an unfortunate slip of the draftsman, of the words,

"God si Love."

"God si Love."

Is this the first message of India?

E. M. FORSTER, *A PASSAGE TO INDIA* 284-85 (1924).

interpretation coincident with the mode of social inter-experience?

Heidegger provided a groundwork for this inquiry in his phenomenological description of interpretation,³⁸ a detailed, precise account of how consciousness reveals itself to itself when it adopts the interpretive mode of being-in-the-world. Utilizing Husserl's method of phenomenological reduction, he works toward elucidating the meanings of conscious acts by an intuition that "goes alongside" the intention and permits an explicit revelation of the meaning the intention discloses.³⁹ Because consciousness *intends* the world interpretively when it interprets, interpretation has an immanent meaning that is constitutive of the intention, that is "in" the intention. Suppose I see a vase in that drawing: it is not simply "that it is a vase as opposed to two faces" which is meaningful, but also "that I am perceiving rather than interpreting what I perceive." And as I write these words there is a meaning to the fact that I am now interpreting my perception, letting the original vase-perception or perhaps "vase-ness" be seen as a vase when I say to myself "that is a vase." The perception and the interpretation each have immanent meaning; each is constituted by its own intentionality, and in each case the meaning of the intention is understood by consciousness and is disclosed to the reductive intuition.

The word "understanding," however, has a meaning for Heidegger different from its ordinary usage. Understanding (*verstehen*) does not describe something that happens after the conscious act in the sense of "I understand why I did that"; that usage is more properly restricted to what Heidegger would call "interpretation" and has an explicitly reflexive character. Understanding is rather constitutive of meaning and immanent to it, an irreducible existential which is, in a way, the being of knowledge.⁴⁰ In philosophical language, consciousness is an

38. See HEIDEGGER, *supra* note 4, at 188-203.

39. Husserl referred to this "going alongside" as the "epoche" (from the Greek "epokhe," meaning abstention). In the epoche consciousness brackets its immediate responses so as to describe not simply "the world" as if it were "simply there" as a natural phenomenon, but the world as constituted by consciousness-in-the-world. See E. HUSSERL, *IDEAS* 96-99 (1962).

40. Heidegger argues that all theory, even the most abstract mathematical physics, has its ground in the understanding of a praxis. This is so because before a theory can give an account of any "facts" at all, that which is made a fact must be thematized according to some understood meaning of the data for consciousness. For a discussion of his "existential conception of science," see HEIDEGGER, *supra* note 4, at 408-15.

entity whose being is such that it understands the meaning which it intends, or which it projects "onto" its world.

Interpretation is the "working out of possibilities projected in understanding,"⁴¹ permitting meaning to come explicitly into sight, and permitting understanding to be appropriated by consciousness. The ontological structure of interpretation takes the form of "something-as-something," by which is meant that interpretation, in making that which is understood stand out explicitly, gives meaning the modification of "as-itself." The perception of "vase" and the interpretation "that is a vase" are temporally discrete conscious acts, and the latter arises when my intention is to allow the perception to be known explicitly. In an ontological sense, therefore, interpretation is not analytical; what is understood is not "figured out" but recognized:

In interpreting, we do not, so to speak, throw a 'signification' over some naked thing which is present-at-hand, we do not stick a value on it; but when something within-the-world is encountered as such, the thing in question already has an involvement which is disclosed in our understanding of the world, and this involvement is one which gets laid out by the interpretation.⁴²

Understanding and interpretation, then, are modes of being which disclose meaning.

But before moving on to a phenomenology of legal interpretation in an effort to say something about its meaning, the relationship of understanding and interpretation to meaning needs further clarification. Suppose that as I walk into this room, I notice a vase. What does Heidegger mean when he says this vase "already has an involvement" which is understood? One way of getting at his meaning is to realize how unlikely it would be for me to notice the vase as a mere object, or as Heidegger puts it, as a "naked thing," and for me to then say to myself "that is a vase." If I were a scientist whose academic interest were in the properties of vases, then understanding the vase as a "naked thing" might not be quite so peculiar because I would naturally have an intention to see it that way. But as I am not a vase-scientist, my noticing the vase would likely have a very different meaning—namely, as toward something other than an objective analysis of its properties. Perhaps the "involvement" of the vase with my meaning would be toward "something possible to do with flowers," perhaps toward some possible mastery of a vase-related childhood memory, perhaps almost

41. *Id.* at 189.

42. *Id.* at 190-91.

anything. But whatever the meaning that calls out the involvement, it must have the ontological structure of "toward"—that is, of possibility rather than fact. When the scientist has his attention drawn to the vase as a "naked thing," this fact-perception of his attentiveness is not its meaning, for the meaning is a toward-analysis. And we might even say that to perceive the vase as a naked thing does a certain violence to its "vaseness," neutralizing the available meanings of what one might call the possible vase. A vase so perceived is in a certain sense no longer a vase.

Returning to the drawing of the vase or two faces, we can now say a bit more about what it means to perceive "vase" and to say "that is a vase," perhaps as a way toward understanding more about the meaning of "that is failure of condition" or "that is material breach." For the involvement of these lines on paper I call a drawing emerges as already situated toward a meaning—that is, toward figuring out what things can be identified there as objects—and when I perceive "vase" and interpret "that is a vase," I am no longer aware of the meaning this activity has for me. When interpretation presents the world as fact, it has severed itself from understood meaning. This is not to say that the situated meaning is no longer, but rather that I am no longer aware of the meaning it has for me. Heidegger calls this "assertion"—an empiricist modification of ontological interpretation that seeks to say something definite *about* the world, precluding consciousness from interpreting the meaning it understands. "When we merely stare at something, our just-having-it-before-us lies before us *as a failure to understand it any more.*"⁴³

For Heidegger, the tendency of consciousness to conceal understanding by restructuring its experience of the world into fact-interpretations is itself an ontological tendency: consciousness tends to flee from authentic knowledge and to fall into the inauthentic fact-thinking of what he calls the "They-world"⁴⁴ because of ontological anxiety brought about by the contingency of authentic understanding, its merely-possible quality. Under the strain of the contingency that haunts being-in-the-world

43. *Id.* at 190.

44. *Id.* at 163-68. In "the They," "everyone is the other, and no one is himself." *Id.* at 165. The They speaks "idle talk." *Id.* at 211. More obvious manifestations are disclosed at cocktail parties and on the evening news, although for Heidegger this falling into the They is an ontological condition rather than a disparagement.

(variously described by other existential phenomenologists as "dread," "angst," "nausea," etc.), consciousness tends to engage in self-deception, splitting cognition from authentic knowledge and re-presenting its world to itself as a reification, an atemporal object.⁴⁵ But this false consciousness, or more accurately, false interpretation, contains its own intentionality, the intention being precisely not to be aware of what is understood, to repress understanding beneath a reassuring image of externally related facts. To recall the legal-theorist-in-reflection whose ruminations began this essay, whether positivist or naturalist he makes of the law an object, replete with sovereigns, guideposts, and so forth, in order not to be thrown back upon the very insubstantiality of what he is talking about—namely, interpretive activity. The law does not exist, and his uneasy knowledge of this state of affairs moves him toward a reaction-formation, an affirmation in cognition of precisely the opposite of what he knows ontologically. So also the lawyer who intends his client's story into that contradiction in terms, a "fact-situation," and then proceeds to analyze its properties (failure of condition, material breach), as if.

And yet we have already seen that legal interpretation always takes a definite social form. While Heidegger would find all such interpretation inauthentic from the viewpoint of an idealist phenomenology, the use of the term "inauthentic" must be integrated with the explicitly social structure of the legal sign-system. When consciousness interprets legally, it is not simply lost in a random "They"; it totalizes a concrete historical situation. The question is, what is the relationship between fact-interpretation and the situated social existence of economic actors who are, so to speak, fact-interpreted? A one-sentence answer which in a way synthesizes the positions of Heidegger and Marx⁴⁶ might read as follows: To give a fact-interpretation of

45. This is a formulation of Sartre's early concept of "bad faith." See BEING AND NOTHINGNESS, *supra* note 4, at 56-86. To the extent that it implies a choice made by a radically free subjectivity, it is no longer his view. His movement toward an existential Marxism has also involved a reconciliation with Freudianism, at least to the extent that he accepts the idea of an unconscious. For a description of this reconciliation, see JAMESON, *supra* note 1, at 214-19. Sartre compares Freud's view of the unconscious with his own in an interview in which he suggests that "the unconscious" is not an entity, but a dialectical process within which "consciousness plays the trick of determining itself by forgetfulness." 58 NEW LEFT REVIEW 43, 48 (1969). This seems to me quite close to Heidegger's idea of the understanding, except that the "trick" is existential-deterministic rather than merely existential.

46. I am referring to Marx's description of commodity fetishism, in

a human relationship is to describe a relation between persons as a relation between things, and the ontological meaning of such an interpretation is to conceal that persons are not things. But such an answer seems unacceptable, for how is it that persons appear and are ready to be seen as thing-like at the same time that they understand that they are not things?

Sartre's later work has been an effort to close the gap between an existential idealism that elaborates meanings from the sole viewpoint of a subjective being, and a positivist Marxism that makes persons objects in a wholly objective dialectic. For our purposes his descriptions help to make intelligible the fusion of intention and structure in legal discourse. In *The Critique of Dialectical Reason*,⁴⁷ he has tried to show that the starting point for ontology is social existence, and that social existence is revealed as mediated reciprocities within which there are no pure subjects as such, but groupings in which persons act and are conditioned. The idea of reciprocity has its origin in the Hegelian concept of recognition: human beings are such that they come to recognize themselves as social through an immanent awareness of being recognized by others.⁴⁸ This reciprocity of

which he describes the commodity as a "mysterious thing" that produces "a definite social relation between men that assumes, in their eyes, the fantastic form of a relation between things." 1 K. MARX, CAPITAL, 72 (New World paperback ed. 1967).

47. See note 1 *supra*.

48. See G. HEGEL, PHENOMENOLOGY OF MIND (1967) (especially the famous chapter on lordship and bondage which begins, "Self-consciousness exists in itself and for itself, in that, and by the fact that it exists for another self-consciousness; that is to say, it is only by being acknowledged or 'recognized.'" *Id.* at 229.) Sartre writes that for Hegel, "the appearance of the Other is indispensable . . . to the very existence of my consciousness as self-consciousness," and "as self-consciousness the Self itself apprehends itself." BEING AND NOTHINGNESS, *supra* note 4, at 319. Put more simply, before I can be conscious of myself as a person in the ordinary sense, I must have had the experience of being recognized as such by someone else. Therefore, to recognize myself as myself is to be already a social being. Thus there are no such beings as "individuals" if that term means "separate persons" who are also human.

The psychiatrist Harry Stack Sullivan has based an entire theory of psychology on this idea, although without reference to Hegel or later existential phenomenologists. His theory is in essence that the child interiorizes the recognition provided by his family in the development of what Sullivan calls the "self-system." The one whom the parents recognize as their child is interiorized by the child as "good-me." With the development of language the child comes to signify "good-me" as "I," in varying degrees dissociating experience which is not recognized as "him" in his social world. These dissociations are structured as "not-me," a concept which presents the Freudian unconscious in a social lan-

recognitions was a central theme of Sartre's early work,⁴⁹ but had the weakness of reducing social existence to a two-person encounter. In the idea of "mediation" which emerges in the *Critique*, he has been able to link reciprocal recognitions to the group, discovering that the reciprocities that constitute our experience as social are mediated by a "third" whose presence may be felt as an actual third person, as an institution, or most relevantly from our point of view, as a sort of inhabitant of worked matter.⁵⁰

At first this must strike us as odd. Perhaps we can grasp the ontological significance of an actual third person (as in the lawyers' interior relation to each other before a judge), or that of an institution (as in the interior relation of two students within a law school), but inhabitants of matter? The difficulty of this idea is alleviated, however, if we remember that *worked matter* is not lived as the uninhabitable and massive in-itself unveiled by the natural sciences, but as a sign that traces a past and points toward a future. As such it is structured like a language, whose rules we know as a past as we use them to signify our possibilities. Worked matter is inhabited by neither God nor Soul, but by an Other who is our history.

So it is the machine, to take a Sartrean example, which establishes the reciprocity of the workers, not as a hypothetical Metal Thing with hypothetically infinite possibilities for use, but as an historical sign that materializes a general destiny for the

guage. See H. SULLIVAN, *THE INTERPERSONAL THEORY OF PSYCHIATRY* (1953).

Although Sullivan's social theory has been justly criticized as a conservative and normative ego-psychology by writers like Marcuse, see H. MARCUSE, *EROS AND CIVILIZATION* 238-74 (1969), I think his perceptions provide a basis for a genuinely radical psychology, particularly as his work has been integrated with an analysis of the family as a group by R.D. Laing. See, e.g., R. LAING, *THE POLITICS OF THE FAMILY* (1969), and R. LAING & A. ESTERSON, *SANITY, MADNESS, AND THE FAMILY* (1964). For a work that tries to show the influence of Sullivan and Sartre on Laing's thought, see E. FRIEDENBERG, R.D. LAING (1974).

49. See *BEING AND NOTHINGNESS*, *supra* note 4 (especially the chapter entitled *Concrete Relations with Others*, at 471-553). Here human relations are described as an ontological conflict: each person's recognition of the other is inherently alienating because it makes of the other an object, negating the other's freedom. The result is an endless struggle of subjectivities; each seeking to recover the freedom snatched away by the other through reciprocal objectifications.

50. See the section entitled *Duality and the Third Party* in *CRITIQUE*, *supra* note 1, at 100-09. Sartre's description of the exigency brought about by the relation of "need" to "scarcity" is omitted here and can be found *id.* at 79-94 (need) and 122-52 (scarcity).

workers who must manipulate it as a collective but dispersed activity. As both a collective "social memory"⁵¹ (for the sign was shaped teleologically by another's past labor) and as an exigent common future (for it *must* be used in a certain way for production and subsistence), the machine mediates not only the objective functioning of the workers but their concrete recognition of each other as grouped beings. Thus the machine speaks to persons and orders them in both senses of the word, as "a parasitic inertia which vampirizes human action."⁵²

Material forces gathered together in the passive unity of tools or machines *perform actions*; they unify other inorganic dispersals and thereby impose a material unification on the plurality of men. The movement of materiality, in fact, derives from men. But the praxis inscribed in the instrument by past labour defines behavior *a priori* by sketching in its passive rigidity the outline of a sort of mechanical alterity (otherness). Precisely because matter mediates between men, men mediate between materialized *praxes*, and dispersal orders itself into a sort of quasi-synthetic hierarchy reproducing the particular ordering imposed on materiality by past labour in the form of a human order.⁵³

If we return to the facts of *Helgar* but include within these "facts" *the film* as a sign of what the parties must do, we can see more easily how the parties appear to each other as thing-like within a mediated reciprocity. For the situated film appears to its seller and its buyer as pointing toward its consumption in "the market," and so it orders the seller to recognize the buyer as a buyer, and orders the buyer to recognize the seller as a seller. In seeing the other as his reciprocal function—as "seller" or "buyer" under conditions of necessity—each recognizes the other precisely as Other, that is, as other than himself, as bathed in a functional "outside." And since each interiorizes the other's mediated recognition as a quasi-objective role or "self-image", each is to himself as the other sees him—that is, as other to the other and as other to himself.⁵⁴ Crushed into passivity by the

51. *Id.* at 184.

52. *Id.*

53. *Id.* (parentheses added).

54. See also Heidegger's description of "the They," note 44 *supra*, and compare these words of the psychiatrist R.D. Laing:

Gossip and scandal are always and everywhere elsewhere. Each person is the other to the others. . . .

Now the peculiar thing about Them is that They are created only by each one of us repudiating his own identity. When we have installed Them in our hearts, we are only a plurality of solitudes in which what each person has in common is his allocation to the other of the necessity for his own actions. Each person, however, as other to the other, is the other's necessity. Each denies any internal bond with the others; each person

signifying inertia of the film as worked matter, "seller" and "buyer" struggle as a twosome in a reciprocal solitude, not as "individuals", but as bonded in solitude within a milieu which makes of their relatedness an alienated series, a "one-and-one" of solitary antagonism mediated by matter. In their very being they exist together in mutual recognition, but it is no longer a matter of abstract "subjects" who objectify each other: they are grouped and given their divisively joined existence by a "third" embedded in the inorganic sign. It is the practical ensemble of all such mediated reciprocities, each mediating other reciprocities, that comprises the totality and situates human action in a social world.

What is exciting about Sartre's description of the ontology of groups is that it offers a path from the brute language of traditional Marxism—a language of economic functions in which alienation is an hypostasized and slightly mystical outcome of the capitalist division of labor—to a language of existential Marxism in which alienation is temporalized as a living objectivity, an outside-of-itself-toward of the group in action. The multiple reifications of inert collectivities, these "one-and-one" arrangements of reciprocal solitudes which Sartre calls a "series"⁵⁵ and which characterize social life under modern conditions, are not alienated as a factual inertia like pure matter (in which case persons would be things and could not be "alien"), but are meaningfully alienated toward a social existence which would not be other-than-itself-toward but the same-as-itself-toward. And this is not a romantic fantasy of an end-state in perfect repose. The existential experience of an alienness in which each is experienced as other to the other and other to himself is made possible only by its negative project: a moment in which "each person continues to see himself in the Other, but sees himself there as *himself*."⁵⁶

claims his own inessentiality . . . Yet although I can make no difference, I cannot act differently. No single other person is any more necessary to me than I claim to be to Them. But just as he is "one of Them" to me, so I am "one of Them" to him. In this collection of reciprocal indifference, of reciprocal inessentiality and solitude, there appears to exist no freedom. There is conformity to a *presence* that is everywhere *elsewhere*.

R. LAING, *THE POLITICS OF EXPERIENCE* 81, 83-84 (1968).

55. For Sartre's description of the series as a generality, see *CRITIQUE*, *supra* note 1, at 256-59. For his discussion of the mediated reciprocities which make up "the market," see the section entitled *Impotence as a bond: the free market*, *id.* at 277-93.

56. This is the translation of S. & J. Atkinson in *THE PHILOSOPHY*

Under conditions that bring about inert rather than organic social arrangements, the law is not inauthentic interpretation, but alienated interpretation. It is not "lost in the They," but descriptive of a structured, situated ontological relation—an alienated reciprocity—that wishes to signify itself as a legal relation. The mode of interpretation that will re-present "the parties" to themselves as they in fact are in their real social activity together is one that makes assertions about them (in Heidegger's sense)—that is, that re-presents their quasi-objective reciprocity as a reciprocity of fact-entities, linked atomic-substitutionally or cluster-cooperatively. And yet they are not *really* facts, not *really* things because each has interiorized intentionally (in the phenomenological sense) the role each has assumed. So also the judge does not really see facts or things, a thing herself. The signs do not come tumbling out of her being like quarters from a slot-machine. Her interpretation is *resorted to* as the voice of her own interiorized and mediated role, and its intention is to conceal beneath the causal reasoning of analytical thought, with attendant rules, principles, and so forth, an understood social schism too painful to be made explicit. Her interpretation can be called alienated only because it is both praxis and process, intention and structure, meaning and form: it is a conspiracy of a collective understanding against itself.

Here, then, is a glimmer of how an "outside" form, made intelligible by a structural-analytic method, and an interior meaning, made intelligible by a phenomenological method, are fused dialectically in the interpretive act. Legal structures have their intelligibility "outside" precisely because they work back and through us as an Other who haunts our social being, who allows us to be recognized only as other than ourselves. As our intentions rise up to deceive us, we see facts that we know are not facts, repeating a struggle that is repeatedly dispersed in an

OF JEAN-PAUL SARTRE 467 (R. Cumming ed. 1965). A slightly different wording is given in *CRITIQUE*, *supra* note 1, at 354.

The sense of this negative project is not grasped by the image of one individual somehow "seeing himself" in the Other, but rather by calling up the experience of "we" in the face of a mortal threat. Sartre calls this "we" a "fused-group," *id.* at 345-404. The "fused-group" is in no sense a utopian end of history, and Sartre follows out all of the ossifications against which the group must continue to struggle. One of the few moments of our current daily life which seems to me to evoke the sense of a fused "we" is the phenomenon of spontaneous applause, where each discovers the meaning of her own act in the act of the other person.

For an interesting comparison, see Roberto Unger's theory of "organic groups" in UNGER, *supra* note 24, at 236-95, and also the description of principles of altruism in Kennedy, *supra* note 17, at 1771-76.

inertia. Thus we signify ourselves as who we in fact are, and are not.

IV. CONCRETE APPEARANCES OF LAW: IMPLICIT AND EXPLICIT LEGAL INTERPRETATION

To summarize: a praxis is a practicing consciousness that interiorizes its phenomenal world as a conditioning and yet surpasses it as a temporal project. This conditioning is an alienating process within which worked matter gives rise to social arrangements that cut us off from one another, and from ourselves. The experience of being cut-off is ontological; it is the experience of a social being who is recognized as Other, and who therefore recognizes herself as Other. The mode of interpretation which intentionally signifies such a social arrangement is a fact-interpretation that conceals an understood alienation. Fact-interpretation produces legal signs structured according to organizing principles that correspond to the organizing principles of the signified structure—that is, the relational work-forms that constitute the social structure of worked matter itself. And yet as a temporal project that understands what it cannot interpret, legal praxis struggles against itself.

But the concrete existence of legal interpretation is revealed only in the moments of its appearance. If this essay is really to be an "outline of a method," at least brief attention must be given to law as it suddenly comes into the world. Although it would be too much to attempt a phenomenology of every instance of legal interpretation (in court, out of court, in the classrooms, families, law books, and so forth), we can detect two dialectically related phases of its appearance: first, the production of an implicitly legal sign in language as a response to anxiety about disclosure of a concealed understanding (in psychoanalytic language one could speak of the "return of the repressed"); second, the ritualized explication or making-explicit that occurs largely, at least in the case of contract law, in the judicial opinion which "systematizes" the sign in a doctrinal language. I call the first phase "implicitly legal" not because it is any less legal from the ontological-interpretive point of view, but only because we do not ordinarily think of its activity as law-making. Also, I use the terms "first and second phases" only for convenience and do not wish to imply some sort of causal sequence. Dialectical reason does not admit of causal descriptions in which factors stand apart from and influence each other in a this-then-that fashion, *partes extra partes*; rather, these

phases are to be grasped as constituents of living form which are elaborated within the movement of a social totality.

In the first or more implicit mode legal interpretation is resorted to as a particular way of allowing a difficult situation to be seen. Let me give a rather elaborate example of this in order to get at it from the ground up. I am working at a table in a coffee house. Across from me is a woman. Each of us has a cup of coffee, and there are sugar cubes in a bowl. As I am engaged non-reflectively in a series of acts designed to get coffee of a particular sweetness into my body, all the while intending toward a particular foreseen satisfaction, I reach for a sugar cube, and at a certain point in the reach, a particular cube begins to be understood as "mine" in a dim sense because of its gradual implication with what I have come to know as my body and its satisfactions. Then, "too late" in light of prevailing social meanings, the woman quickly reaches out and grabs that cube, and suddenly, before a word has been spoken, interpretation erupts into this minor drama—in fact lets the drama be known as drama. In the ensuing discussion, or if there is no discussion, in the exchange of glances, the sugar cube will be re-presented to consciousness as an object, a naked thing that calls out assertions about its "social properties"—that is, is it "mine" or "hers" or still "the restaurant's"? Certainly the law of property, probably of contracts, and perhaps also of torts and crimes have allowed themselves to be shown, but in a rather implicit mode. The language used is not what we would ordinarily consider "legal," but the exchange of words or glances has recourse in its very structure to "the law": we are "doing interpretation" to our relationship in a way that re-establishes our alienated inter-experience by reference to an abstract, reified set of facts about the sugar cube, and that does so along lines that are called out ultimately by the global structure of the historical situation within which we are thrown.

What are these "lines," and in what way do they call out an interpretation that re-establishes an alienated inter-experience? In socio-economic language, the scarcity of the sugar cube has established competitive relations of consumption,⁵⁷ and therefore she and I as "us" have a serialized relatedness—that is,

57. The cube is not objectively scarce if there are other cubes in the bowl. But she and I are not being "objective" about whether there is an abundance. The cube of our struggle is already a sign in a world of scarcity and competition, and so we experience it in our conditioning as a limited sweetness.

as a dyad we are "individualized" into passivity by the cube, and in this sense, scarcity impels an alienation, or the social structure of matter calls out a schismatic relation. In social-psychological language, the experience of intrusion, or violation of the "mine-boundary," engenders an anxiety which calls out assertive interpretation as a defense of my role, experienced subjectively as a defense of what I conceive to be "me." In social-phenomenological language, the meaning of the shift into fact-interpretation about the sugar cube is precisely towards concealment of an understood "unconscious" frustration—the frustration of the social division brought about by the force of processed matter upon our inter-experience—and this "shift" is meaningful praxis by virtue of its intentionality. She and I *make* the cube-as-object in order to be painfully reassured by the *ratio decidendi* that emerges from our interpretive logic. While the signs we use, whether linguistic or gestural, have reference to a structure of which we know next to nothing, our activity in producing them has an ontological meaning, an intentional failure to understand.

In the same fashion the parties in what will later become *Helgar Corp. v. Warner's Features, Inc.* resort to implicitly legal interpretation when they approach the bargaining table with the intention of making a contract—that is, with the intention of doing interpretation to their relationship in a way that comforts it in abstract assertions. Contrary to what "common sense" would indicate, these parties are not simply planning their possible economic relationship, allocating rights and duties and the like, any more than the waiter who sashays up to my table with a tray barely balanced on an upturned wrist is "really" just serving food and drink to customers. The actual economic relationship involving the sale and distribution of moving pictures is in fact reified by the economic structure, which works back and through "the parties" as a process. Their praxis is the engaging of this situation with its social meaning for them, which they accomplish in part at the bargaining table by this mystification we are calling "doing interpretation." Unlike in the sugar cube situation, however, the parties are gathered not for the purpose of interpreting the "what happened," but rather to interpret the "what will happen," a formal distinction without ontological significance. In the concrete moment as the parties and their lawyers look each other in the eye preparing to haggle over terms and so forth, the ontological objective remains to put this present temporal moment into an abstract order, in which one

object, the abstract party-of-the-first-part, is to be possessed of certain rights, and the other objective party-of-the-second-part is to be burdened with certain duties, and then vice-versa, until a piece of paper with writing on it is signed by two living people who can now feel a certain relief that the "what will happen" has been given a certain substance. Whatever language we use to describe the reason for this resort to fact-interpretation (socio-economic, social-psychological, or social-phenomenological), can we not simply say that the lawyers now know that they are *lawyers*, and the parties now know that they are *parties*? This chaotic group event has been charmed into submission to the structure of matter which dominates it by an ideological activity which has concealed alienated reciprocity in a thing: The contract. They have all gotten together and "made law."

When I say this first phase is characterized by the production of a legal sign, I mean only that the abstract order given in this contract is accomplished by the use of language that makes visible as an "outside" the prevailing tendency in the structure of matter. Between the making of the *Norrington* rail contract and the making of the *Helgar* film contract, there will have occurred a certain reconfiguring of the shape of language that lines up the "talk" according to the transformation of the situation, or structure. The call the *Helgar* film makes upon the human beings who are to process it will not be the same as that of the *Norrington* rails, and the signs used to allow the change to appear will suffer a dialectical modification analogous to the movement noted earlier from positivism to normism in legal theory. Although a linguistic-structural analysis of this kind cannot be managed here (recovering the documents themselves would be a difficult task), its accomplishment would be of value in showing the synchronic relation between signs in the implicit and explicit modes—between, say, the *Helgar* contract and Cardozo's later opinion. Yet here again we must emphasize that these signs are not "all there is." They are revelatory of the inertial movement of the structure, but they are made by living human consciousness in a practical struggle against its own oppression by matter even as the sign itself permits that oppression to come into existence. These lawyers, these parties, are *doing* something socially meaningful—namely, this activity of alienated interpretation—which is revealed as such phenomenologically and cannot be flattened out into the noises of a mechanism.

This first appearance of law, then, arises in a sphere that is

not ordinarily the object of legal theory as such, as that discipline focuses itself ordinarily on the formal juridical act taken, in Heidegger's phrase, as present-at-hand, or in its ideal form.⁵⁸ Yet this first phase must of necessity be included in a dialectical legal theory because without its elucidation, the juridical act (the judicial opinion, the statute, the constitution, etc.) remains an extemporized dropping of some isolated person or group that has reference only to other like acts, and with "changing mores" or something similar thrown in as the *deus ex machina*, the wind of change. Once the first phase is shown in its structural and ontological dimensions, however, the second or explicit phase comes more easily into view as a concrete, intelligible movement in the totality.

As a way of approaching the ontological and structural dimensions of the second phase, let us imagine that instead of producing an opinion after due deliberation, Cardozo and his colleagues on the court of appeals simply voted on the outcome of *Helgar* by secret ballot on the bench. No briefs, no oral argument, no conference; just "Judgment for the —" whispered to an official charged with seeing to the details of execution. The result would no doubt be the same, if not in this case then soon in a similar case, because the outcome of litigation must "contain" the form of the relations of production however the exigencies of interpretation are worked out. Yet this result would come into the world as an absurdity, a hemorrhage in the spectacle. From a phenomenological point of view, existential

58. The phrase "present-at-hand" describes the way that something appears phenomenologically to the natural-science outlook. Heidegger contrasts the "present-at-hand" with the "ready-to-hand," which describes the referential character of something as a sign. Thus a typically Heideggerian passage reads as follows:

What gets taken as a sign becomes accessible only through its readiness-to-hand. If, for instance, the south wind "is accepted" by the farmer as a sign of rain, then this "acceptance"—or the "value" with which the entity is "invested"—is not a sort of bonus over and above what is already present-at-hand in itself—viz, the flow of air in a definite geographical direction. The south wind may be meteorologically accessible as something which just occurs; but it is *never* present-at-hand *proximally* in such a way as this, only occasionally taking over the function of a warning signal. On the contrary, only by the circumspection with which one takes account of things in farming is the south wind discovered in its Being.

HEIDEGGER, *supra* note 4, at 111-12. See also J. GABEL, FALSE CONSCIOUSNESS: AN ESSAY IN REIFICATION 109-10 (1975), in which the author describes what I am calling explicit law as a spatialized, atemporal, and therefore non-dialectical thought (which he calls a species of "justificatory reasoning").

consciousness would have been deprived of its way of grasping the "what happened," and the disclosure permitted by such a break would show itself in the forms of outrage. The words "who do these guys think they are" would signify precisely that these other persons, suddenly decorated in rather odd robes of some sort and sitting at a rather peculiar and elevated distance from the rest, were not being *judges*.

What these judges would have done is to have abandoned the ideological form within which their real social activity is allowed to happen, and in a way that permits us to see the ideological form in some detail. As I have suggested, the economic structure in a certain sense dictates *what* they must say (the rules, principles, and so forth), but how it is to be said is worked through a living milieu. Here we find the trappings of a ritual, a due process of the sort that has always been required for the sanctification of signs, and each variation must weaken the uniquely legal hum of the ultimate verbal product, the opinion itself. "There will be no assumption of a purpose to visit venial faults with oppressive retribution,"⁵⁹ acquires a different ring if it falls from the mouth of a bystander. The ritual is therefore a central element of the law made explicit as law in that it gives to the sign its axiomatic valence. Alienated consciousness must know "that was the law" in precisely the same sense and with the same degree of awe as "that was the Lone Ranger."

This ritual is elaborated within the actual opinion where the law is made explicit as law by the device of doctrine and the inexorability of the reason which forms it. This is accomplished by a living judge engaged in the practical task of reestablishing (and, of course, struggling against) the alienated situation within which he finds himself, through a process of abstract systemization. If the judge is to make assertions about the world—here this relationship between Helgar and Warner—he must first represent the world to himself in a way that permits this to occur, since asserting is a mode of interpretation that requires its world to be given "objectively" as a reification. Systemization occurs therefore as an abstracting away in the imagination, calling forth "the parties" and so forth as particles within an imagined ontic-empirical entity, an entity that derives its shape from the tendency in the global economic structure given in everyday reflection as "common sense" (for example, in *Helgar*, unlike in

59. *Jacob & Youngs, Inc. v. Kent*, 230 N.Y. 239, 242, 129 N.E. 889, 891 (1921).

Norrington, a certain bonding between the parties will be given *a priori* in the intended image and will later be signified by the duty to act in good faith). The call of this entity upon the judge who has intentionally conceived it will be to identify certain "properties" and assert their presence or absence in legal language—contract or no contract, breach or no breach—but not as simple facts like the spots on a leopard, rather as facts asserted within the teleological directional provided by the prevailing form of reason itself. So the findings of "contract" and "minor breach" in *Helgar* are fore-ordained to be plucked from an intended image that holds particles bonded in "good faith."

As in the situation of the parties at the bargaining table during the implicit phase, however, the judge's activity is not that of a neon sign plugged into a hyperorganic materialism. For as Cardozo bends over his manuscript (or that of his clerk), as he abstracts away, as he intones his "new test" from the bench, and as he retires to chambers—in short as he undertakes all of the movements that are the trappings of his situation—*he knows himself as a judge*, reproducing the alienation of being-judge within the social conditions by which his role derives its collective significance. As the language structure makes visible the economic structure, so the assertive mode of its utterance reveals to phenomenology the ontological foundation of its appearance. It is within the objective difficulty of lived judgeness, and the objective linguistic forms at his disposal, that he must struggle to be. When Cardozo hands down *Helgar Corp. v. Warner's Features, Inc.*, he performs a judicial function as a situated man, a function that no doubt eludes his understanding in its structural significance, but of which he has concealed understanding ontologically. It is in this ontological sense that legal realism retains some validity; it is Cardozo who makes the doctrine of material breach even if the words he speaks are not strictly speaking his own.

In both the implicit and explicit phases, therefore, the use of legal interpretation is a form of social action to which consciousness turns as a way of reestablishing a socially alienated role with an economic referent. Like the relation of the ego to the id in psychoanalytic thought, the fact-interpretation keeps what Heidegger calls "understanding" unconscious. Yet like the relation of the id to the ego, understanding struggles against the reified sign-system imposed by its conditioning. This conflict is synthesized in the intended word.

V. CONCLUSION

Can we say anything, then, about the two phases taken together? Even if instrumentalism places a mistaken emphasis on the objective importance of the legal outcome, attributing a sort of substance to what is never more than interpretive activity, can we at least say that the explicit opinion has some impact on the implicit legal discourse at the bargaining table, or in "society at large?" To the extent that we think of these questions in causal terms, expecting the judicial opinion to exercise some moral sway over what people do, how they perceive their situation, and so forth, I believe that the answer is no. To think otherwise is to return to a kind of idealism, to "intend" the world as a kind of mechanical object and then to breathe life into it. The explicit and the implicit move as one within the collectivity of a social consciousness cut off from itself, and requiring for its "fallenness" or concealment a structured discourse that provides the abstract reference point for its modeling of immediate existence. The explicit opinion, statute, whatever, serves only to make possible this modelling or ordering of daily life in the implicit mode, not according to the *content* of what is presented explicitly (for example, the legal characterization of "the contract," or the law of conditions), but by virtue of its very existence irrespective of its content as a sort of pseudo-substantiality "out there." This is what is meant by describing the totality of legal-interpretive activity, both implicit and explicit at once, as "living form," of which each phase or valence is a constituent.

The only objective impact of the opinion's language is precisely in the realm of language itself, the only realm in which the opinion actually has an objective existence as an historical product. Here the opinion, produced as praxis, turns back in time as an inert process, as its signs are instantly surpassed by the dialectical movement of the structure itself—that is, by the temporal transformation of the relations of production and the straining praxis by which this relation is lived as socially meaningful. It is only in this sense that the language of the opinion comes back as objectivity, as an objective resistance that serves as the problematic ground against which the struggle to keep up the facade is waged. This is to say that the alienated interpreting we call "law" is situated within the structurally shaped life-in-death, death-in-life crust of its past. In this final sense law totalizes a collective struggle at the level of interpretation, a

struggle between accumulated labor as structured process and the laboring activity of human praxis.

So if we return to the movement from *Norrington* to *Helgar*, we can now outline a method to guide our interpretation. First we must sketch out the organizing principles of the economic structure (atomic-substitutional → cluster-cooperative), which permits us to observe the transforming significations in legal discourse (failure of condition, or "no duty to act in good faith" at the level of law itself; positivism, logical reason, separation of law and morals at the level of jurisprudence → material breach, or "duty to act in good faith" at the level of law itself; natural law, normative reason, reconvergence of law and morals at the level of jurisprudence). This much gives an analytical intelligibility to the objective legal situation. Second, we must move inward to grasp the intentions of the legal actors as they invigorate the situation with its social meaning—that is, with what they actually experience while sipping coffee in a restaurant, or bending over a fat book, or "sitting on the Supreme Court." Each movement in thought works toward the reconstruction of an ordinary moment of human experience at odds with itself.

