

Room for Manoeuvre: Toward a Theory of Practice in Critical Legal Studies

Rosemary J. Coombe

I. INTRODUCTION

Literature surveying the scholarly accomplishments of the critical legal studies (CLS) movement indicates a growing sense of its theoretical inadequacy. Several sympathetic commentators have suggested that critical legal studies has reached a relative impasse in theoretical terms, indicating that there is a growing interest in exploring theoretical alternatives which will provide a means of extricating critical legal thought from this dilemma.¹

A recurring theme throughout this literature is the failure of critical legal theory to effectively integrate the gains realized by an analysis of legal structure(s) with a felt sense of the importance of attending to subjective experience. James Boyle, for example, suggests that critical legal scholarship, rather than being structuralist in approach, is characterized by a

Rosemary J. Coombe is an assistant professor of law, University of Toronto. LL.B. 1984, University of Western Ontario; J.S.M. 1988, Stanford Law School.

The author would like to thank Bob Gordon, Tom Grey, and Mark Kelman for their comments on earlier drafts of this manuscript. Friends in the Department of Anthropology at Stanford University were extremely helpful in my endeavors to consider the ramifications of anthropological theory for a critical approach to law; Roger Rouse and Sylvia Yanagisako contributed insight, critical commentary, and ongoing support in this project. I would also like to thank Patrick Macklem and David Trubek for their contributions.

1. See, e.g., James Boyle, "The Politics of Reason: Critical Legal Studies Theory and Local Social Thought," 133 *U. Pa. L. Rev.* 685 (1985); Stephen Brainerd, "The Groundless Assault: A Wittgensteinian Look at Language, Structuralism, and Critical Legal Theory," 34 *Am. U.L. Rev.* 1231 (1985); Robert W. Gordon, "Critical Legal Histories," 36 *Stan. L. Rev.* 57 (1984); Thomas Heller, "Structuralism and Critique," 36 *Stan. L. Rev.* 127 (1984); Alan Hunt, "The Ideology of Law: Advances and Problems in Recent Applications of the Concept of Ideology to the Analysis of Law," 19 *Law & Soc'y Rev.* 11 (1984-85); Gary Peller, "The Metaphysics of American Law," 73 *Cal. L. Rev.* 1151 (1985).

"constitutive tension" between a subjectivist, personal, phenomenological "strand" and a structuralist, patterned, impersonal "strand," a tension whose recognizance forces us to confront some of the major difficulties in doing social theory.² He attempts to show that this tension characterizes all the dominant contributions to critical legal thought; that various devices have been developed by critical legal scholars to mediate it, but ultimately, the effect of such devices has been only to reproduce this tension, one which all social theory must acknowledge and confront.

This emphasis on the relationship between "structure" and "subjectivity" is well-founded. Scholars in many other disciplines have made this issue central to their inquiries. I will be concerned to demonstrate that to characterize structure and subjectivity as two poles of an ineluctable dichotomy is problematical and that as legal scholars we need to radically reconsider our understandings of structure and subjectivity if we are to appreciate the complexity of the relationship between the structures of socially constructed "languages" like liberal legal discourse and the subjective consciousness of social actors, and if we are to avoid reproducing the conceptual poles that characterize liberalism in our efforts to deconstruct it. Moreover, I want to suggest that attempts to separate or disentangle the structuralist and subjectivist "strands" in contributions to critical legal theory serve only to obscure the *redefinition* of structure and subjectivity which is nascent in these efforts, a redefinition that holds promising potential for the reformulation of a social theory that is no longer defined by these oppositions.

As recent developments in social theory suggest, the tension between subjectivist and structuralist strands is *not* one that all social theory must confront but is, rather, an oppositional structure that must be transcended.³ The impasse in critical legal studies embodies a central challenge to social theory generally; the need to conceptualize the social world in terms which acknowledge both structure and action, determinism and voluntarism, objectivity and subjectivity, but which avoid positing these as

2. Boyle, 133 *U. Pa. L. Rev.* at 688-89. Boyle is clearly influenced by Heller's emphasis on the need to transcend structuralist modes of analysis in critical legal thought. See Heller, 36 *Stan. L. Rev.*

3. See, e.g., Pierre Bourdieu, *Outline of a Theory of Practice*, trans. Richard Nice (Cambridge: Cambridge University Press, 1977); *id.*, "Symbolic Power," in Dennis Gleeson, ed., *Identity and Structure: Issues in the Sociology of Education* (Dimiffield, Eng.: Nefferton, 1977) ("Bourdieu, 'Symbolic Power'"); *id.*, "The Social Space and the Genesis of Groups," 14 *Theory & Society* 723 (1985) ("Bourdieu, 'Social Space'"); Anthony Giddens, *New Rules of Sociological Method* (London: Hutchinson, 1976) ("Giddens, *New Rules*"); *id.*, *Central Problems in Social Theory: Action, Structure and Contradiction in Social Analysis* (Berkeley: University of California Press, 1979) (Giddens, *Central Problems*"); *id.*, *The Constitution of Society: Outline of the Theory of Structuration* (Berkeley: University of California Press, 1984); Paul Smith, *Discerning the Subject* (Minneapolis: University of Minnesota Press, 1988) ("Smith, *Discerning the Subject*"); Alan Touraine, *The Self-Production of Society* (Berkeley: University of California Press, 1977); *id.*, *Return of the Actor: Social Theory in Postindustrial Society* (Minneapolis: University of Minnesota Press, 1988).

static dualisms of social life. Attempts to transcend these obdurate theoretical dualisms are emerging on many fronts: in anthropology, cultural studies, film theory, history, literary criticism, and sociology, for example. The movement toward which, for the sake of brevity, I will refer to as "practice theory," is an interdisciplinary one that reintroduces agency and practice into disciplines traditionally preoccupied with systems and structures, without abandoning a recognition of the shaping power of socially constructed structures or retreating to a methodological individualism.⁴ I shall argue that the central premises of practice theory are ones many critical legal theorists share, and that practice theory might provide critical legal theory with new conceptual resources with which to think about legal activity as the creative accomplishment of socially constituted agents acting in socially constructed worlds.

The method I have chosen is a critical review of the contributions to CLS which have, explicitly or implicitly, addressed the issue of the relationship between structure and subjectivity. I am most indebted to James Boyle⁵ for extracting from CLS scholarship those contributions that identify and attempt to mediate or resolve this relationship. To a large extent, I focus on scholarship he has isolated as significant to this issue. It will soon become clear, however, that I see these efforts less as attempts to mediate between two poles, oppositionally defined, but as providing important resources with which to transcend our understanding of structure and subjectivity as dichotomous. I will attempt to demonstrate how these conceptual resources may be clarified, understood, and elaborated by reference to developments in other disciplines (particularly cultural anthropology and sociology, although the same project could have been accomplished using cultural studies, film theory, and literary criticism as examples), which indicate new avenues of departure for a critical legal studies. Finally, I will propose that the radical reconceptualization of structure and subjectivity produced from this synthesis of ideas suggests new directions for critical legal scholarship, some of which are already being explored by those who embrace a "critical empiricism" in the law and society movement. The need for those in the law and society movement

4. Practice theory is not the monolithic theoretical construction of any particular author, nor is it confined to any one discipline, or even to the activities of scholars working in proximity to one another. It has been said that practice is neither a theory or method in itself but a "key symbol" in the name of which a variety of theories and methods are being developed; see Sherry Ortner, "Theory in Anthropology Since the Sixties," 26 *Comp. Stud. in Soc'y & Hist.* 126, 127 (1984). It could be defined as a growing body of theoretical contributions from scholars trained in a number of disciplines and speaking from within the context of different national traditions, which are characterized by a number of shared concerns and similar premises. These concerns and premises revolve around the concepts of structure and subjectivity and will be elaborated in my discussion of their reconceptualization.

5. Cited in note 1.

and those in the CLS movement to come to terms with each others efforts has never been so pressing.

II. CREATING ROOM . . . : RECONSTRUCTING SUBJECTIVITY

A. Definitions

Definitions of subjectivism and structuralism in CLS seem necessary as points of departure, but it is imperative to move fairly rapidly toward their destabilization as autonomous concerns. Subjectivism in CLS might be defined by the primacy it accords the individual's subjective personal experiences; a picture of the world is created by the theorist's construction of a phenomenological description of that experience.⁶ This theoretical project entails an implicit commitment to "personal liberation" as an expression and affirmation of personhood that involves bursting free of the constraints imposed by the reified structures of social life. "In one sense, the attraction of phenomenology is that it allows us to get at the momentary flashes of rage or denial that exist in the moment before our experience of a situation is reformulated into the "appropriate" way of thinking."⁷

Structuralism, on the other hand, focuses on clusters of beliefs, ideas, or economic forces that supposedly have their own internal logic and that organize, explain, or are reflected in subjective experiences. As Boyle explains:

Structuralism in CLS tries to expose the constraining quality of the structures of everyday life, which are embedded in legal decisions, standard arguments, or the unproblematic assumptions on which a discussion is based And this philosophical description of structure is only meaningful insofar as it manages to evoke the actual experience of constraint—the profane feeling of limitation by the illusion of necessity.⁸

B. Linking Structure and Consciousness

A typical "structuralist" enterprise, then, might involve an exploration of the connection between the idea of neutral law and the process of legitimation. Critical legal thought constructs from a mass of subjective

6. Boyle, 133 *U. Pa. L. Rev.* at 741.

7. *Id.* at 742.

8. *Id.* at 743.

experiences a structure of legitimating rhetoric and political theory that seems central to the liberal vision of law and society. By exposing the falsity of the premise of neutrality on which the structure is based, it can then be undermined.⁹ The undermining is accomplished by exploring in every realm of social life the structures behind the legitimating rhetorics that are offered for "why things have to be the way they are." The idea is that by making a belief structure visible one can destroy its power over the subjects concerned.

As a delegitimizing strategy the analyst must construct a structure of legitimating rhetoric and political theory in order to undermine it. It is often noted that this type of critique suffers from a (typical structuralist) failure to demonstrate any convincing link between structure, consciousness, and practice.¹⁰ As Boyle suggests, we need to demonstrate (for example) the ways in which the façade of neutrality in a particular doctrinal area legitimates concrete social practices; this in turn requires gaining some understanding of the relationship between the structure of doctrine and the actual subjective consciousness of social actors so as to avoid the risk of attributing too much general impact to the ideology of neutral law.¹¹ Such inquiries are theoretically requisite, but they are also necessarily empirical.¹²

Boyle, however, makes a further suggestion that it seems crucial to resist when he proposes that "if the ideology of neutral law is to be seen as important in diverse socio-legal interactions on a concrete level then people actually have to *know* what judges are doing (or what they *say* they are doing)."¹³ Nor does it seem to me necessary, for an understanding of the relation between structure and subjectivity, to determine whether anyone actually *had* a "subjective experience of mystification."¹⁴

Why not? Because, both lines of inquiry would seem to involve us in unnecessary retreats back into liberal rhetoric. The need to understand the relationship between the structure of liberal legal discourse and the subjective consciousness of social actors does not have to be fulfilled in a manner which postulates that all social actors are fully cognizant of the variety of forms in which the structure of this discourse finds articulation.

9. *Id.* at 747.

10. Heller, 36 *Stan. L. Rev.* (cited in note 1).

11. Boyle, 133 *U. Pa. L. Rev.* at 749-50.

12. "Empirical" in this context must be interpreted broadly. Many of us will want to examine historical materials to determine the subjective consciousness of social actors in other periods. Obviously the insights afforded by social science methods of questioning or anthropological methods of participant observation will not be available to us. Our inquiries are no less empirical by virtue of the fact that we might choose to examine diaries, correspondence, novels, recorded conversations, and records of business negotiations. More difficult questions are raised by the examination of trial records, witnesses' statements, and judges' notes.

13. Boyle, 133 *U. Pa. L. Rev.* at 750.

14. *Id.*

To the extent that we recognize that the structure of legitimating rhetoric and political theory is extracted from a mass of subjective experiences,¹⁵ and, further, that such structure(s) are meant to explain the construction of the subjective reality of (people's experiences within) the legal world,¹⁶ we are recognizing that "subjective realities" are themselves structurally constituted. Once we understand that structure (whether that of liberal legal discourse or any other social discourse) is constitutive of our subjective consciousness, we can no longer assert that unless we *recognize* structure, or are fully exposed to judicial voicings of it, it can have no force in our lives. Indeed, it is precisely its hegemonic presence as one variety of that common sense which seems unquestionable that makes it difficult to *recognize* at all, and it is its pervasiveness in all areas of social life (not just in judicial articulations of it) that gives it such force.¹⁷ Now obviously these things must be empirically demonstrated, but it seems clear that a convincing link between structure and subjective consciousness is going to be a little more complex than one of complete recognition or even full consciousness.

On similar grounds, it is difficult to support the proposition that unless we subjectively *experience* the force of structure in our lives as *mystification*, it cannot be distorting or limiting our visions of the social world and the possibilities for its transformation. Legitimation is not necessarily experienced subjectively as mystification or constraint. Even if we limit this discussion to liberal legal discourse and the consciousness of law students, lawyers, and judges, we have to acknowledge that to the extent that they absorb or internalize the structures of such discourse, they subjectively experience a sense of *enablement* in their everyday consciousness and everyday activities. The excitement that characterizes the conversations of law students when they suddenly realize that they can *use* these new-found symbolic resources to reconceptualize everything from their interactions with the local dry cleaning establishment (ah yes, BAILMENT!) to the intricacies of world politics, is no less exemplary of the "structuration" of subjective consciousness than the (arguably less frequent) sense of constraint.¹⁸

These kinds of arguments seem to suffer from a characteristic failure to understand the full implications of the recognition that subjective experience is culturally mediated by the structure(s) we socially create. The

15. *Id.* at 747.

16. *Id.* at 748-49.

17. Robert W. Gordon, "New Developments in Legal Theory," in David Kairys, ed., *The Politics of Law: A Progressive Critique* 281-93, at 286 (New York: Pantheon Books, 1982) ("Gordon, 'New Developments'").

18. If not all structure is experienced as constraint, it is also true that not all subjective desires are experienced as enabling. One can feel oppressed by one's freedoms, intentions, and choices. I am grateful to Sylvia Yanagisako for reminding me of this.

proposition that nothing can have an impact on our lives unless we are consciously aware of it, or that we cannot be restricted in our understandings of the world unless we are aware of being constrained, seems to be premised upon a notion of subjectivity that bears too close a resemblance to the concept of the naturally constituted individual, characterized by autonomy of consciousness, and transparent to itself, that dominates liberal discourse.¹⁹

C. Contextualizing Experience and Perception

Peter Gabel, for example, has attempted to explore the connection between particular structures of language and their internal differentiations, the particular visions of the world constructed by such differentiations, and the manner in which such visions become constraining through the processes of reification. Such processes of reification must be explored to see how they make the social world seem "closed" and limit or distort the possibilities of communication. Gabel also believes that any legal theory must contain a phenomenology, a set of accounts that describe the meaning of a situation in terms of how the subject experienced that situation. On the other hand, "the method must also be more than this; lest it fall back upon the illusions of a pure and ahistorical subjectivism."²⁰ Gabel then, tries to grasp both structures and the subjective experiences they shape.

Now a typical move, and one that Boyle makes, is to suggest that (although it may caricature Gabel's position to look at it this way) we must have some notion of undistorted communication before we can label something as "distorted" communication. In other words, we have to presuppose a notion of "genuine" subjectivity that is alienated from itself by the reified structures and collective myths of our society."²¹

This proposition has a compelling logic to it, and it has political appeal as well. As Boyle puts it, "the thing that makes political phenomenology so attractive is its insistence that the subjective, immediate moment contains within itself vast possibilities, which are no sooner experienced than they are covered over by the cloying film projected by a thingified' set of social roles."²² But as a proposition about the actual subjective experiences of human agents living in actual social worlds, the idea of a pure, unalienated subjectivity cannot be sustained. Gabel himself never posits

19. See Heller, 36 *Stan. L. Rev.* at 132, at 172-81 (cited in note 1), for a discussion of the constitution of the individual by liberal legal discourse.

20. Boyle, 133 *U. Pa. L. Rev.* at 719 (cited in note 1), quoting Peter Gabel, "Intention and Structure of Contractual Conditions: Outline of a Method for Critical Legal Theory," 61 *Minn. L. Rev.* 601 (1977).

21. *Id.* at 757 (emphasis mine).

22. *Id.* at 762.

"unalienated subjectivity" as having any historical existence, either in the sense of its having any existence in the varied historical or cultural "forms of life" that people have lived, or in the sense of its existence as a temporal prior moment of consciousness. He explicitly denies that "unalienated relatedness" has ever been realized and even admits that this "plenitude of connection" is "a utopian ideal, achievable within human history because of my extreme optimism, possibly distorted by my Pollyanna tendencies."²³ His discussion of reification in legal reasoning (despite confusing references to "felt realities," of which we are unaware and unconscious because they are denied by socially communicated realities through which experience is represented; how *felt*? how *realities*?) does not suggest that unalienated subjectivity is ever a state of being that characterizes human experience *before* it is imprisoned by the structures of the social realm, because experience and perception are always already constituted by the "common sense of the world as it is" which is the "socially communicated reality of advanced capitalism."²⁴

Gabel clearly recognizes the "structuration" of subjectivity and his theoretical contribution does not require a phenomenology positing the existence of a moment at which consciousness is free of the shaping forces of structure. Gabel asserts the necessary *dialectic* between personal phenomenologies and the structured nature of our social being, and seeks to create a synthesis to inform our understanding of social life that obviates the opposition between structure and subjectivity. An exploration of this dialectic might be extremely fruitful as a means to generate a social theory that avoids the endless alternation of subjectivist and structuralist discourses. As Heller argues,²⁵ we cannot cure the methodological defects of structuralism by resurrecting the liberal image of the subject and/or alternating structural and phenomenological arguments, because in the North American intellectual climate (where the lessons of structuralism have not been internalized) such an approach can only serve politically conservative interests.

Gabel's subjectivism is important "because of the need to root our theories in the experiences of subjects in the social world,"²⁶ but it is not at all clear that the need to root our theories in the experiences of subjects in the social world necessarily implies a vision of people as capable of existing in social worlds in an "unalienated state." Do we need to see people as experiencing some moment of unmediated consciousness, some moment which exists *before* or free from governing structures in order to find

23. Peter Gabel & Duncan Kennedy, "Roll Over Beethoven," 36 *Stan. L. Rev.* 1, at 19, 20 (1984).

24. Peter Gabel, "Reification in Legal Reasoning," 3 *Research in Law & Soc.* 25, 30-32 (1980).

25. Heller, 36 *Stan. L. Rev.* at 157.

26. Boyle, 133 *U. Pa. L. Rev.* at 767.

some potential for social change? Is this notion of pure subjectivity necessary in order to create theoretical space for human experience, creativity, and agency? Such a "moment," I would argue, is only necessary if we insist on seeing structure(s) as frozen, ahistorical, and determining. But if we see structure(s) as constantly reproduced, modified, and transformed in the everyday activities of human agents, who therefore shape structure(s) as well as being shaped by them, then perhaps we have some means of acknowledging the possibilities inherent in subjective experience without rejecting our understanding of the constraints intrinsic to social life.²⁷

Certainly the phenomenological presupposition that experience precedes conceptualization (which I will refer to as the proposition of the prestructural moment) seems to forebode a resurrection of the liberal image of the subject in its insistence on an individual consciousness or will unmediated by the structures of social life. As Heller convincingly argues, subjectivist categories are central to American liberal legal discourse, which is premised upon the existence of presocial or naturally given individuals;²⁸ liberalism denies its own character as a system of historically contingent, socially constructed classifications by gracing its genesis to the instrumental projects of naturally constituted subjects or individuals characterized by autonomy of consciousness.²⁹

The need to root our theory in the experiences of subjects in the social world cannot be met with any conception of experience, however momentary, that denies the nature of its social constitution. The very "thing that makes political phenomenology so attractive"³⁰ is, arguably, that toward which we should engage our fullest skepticism. If we find it compelling, this is very likely because it entertains, albeit in a politically progressive form, that vision of the autonomous subject with which dominant liberal ideology has made us so comfortably familiar.

Indeed, CLS scholars have increasingly embraced the proposition that we experience and interpret, or understand and categorize simultaneously and thus that all apprehension is mediated by the form of life in which we are situated.³¹ To imagine a language means to imagine a form

27. This understanding of structure is elaborated in Part III of this essay.

28. Heller, 36 *Stan. L. Rev.* at 173.

29. *Id.* at 132.

30. Boyle, 133 *U. Pa. L. Rev.* at 762.

31. See Brainerd, 34 *Am. U.L. Rev.* (cited in note 1). Similar points have been made by those scholars working within the law and interpretation or law and literature field. See, e.g., David Couzens Hoy, "Interpreting the Law: Hermeneutical and Poststructuralist Perspectives," 58 *S. Cal. L. Rev.* 135; Stanley Fish, "Fish v. Fiss," 36 *Stan. L. Rev.* 1325 (1984); Gerald Graff, "'Keep Off the Grass' 'Drop Dead' and Other Indeterminacies: A Response to Sanford Levinson," 60 *Tex. L. Rev.* 405 (1982). The conservative tone of much of this literature should serve as a reminder that acceptance of this proposition has no necessary political consequences. Modes of countering the conservative tendencies in Wittgensteinian approaches to judicial interpretation are explored in Rosemary J. Coombe, "Same as It Ever Was: The Interpretive Turn in Legal Scholarship," 34 *McGill L.J.* (forthcoming 1989).

of life and a given form of life and its respective frame of reference underlies all our perceptions and communications. This proposition would seem to share with structuralism an understanding that "the structure appearing in language constitutes the same type of system that organizes all our world experiences and discourse,"³² but whereas structuralists see the structures of assumption and belief which pervade all of our activities as primarily constraining, because (contrary to existentialist phenomenological premises) they are beyond the reach of personal choice, Wittgenstein's vision construes structure as the context within which "choice" is a possibility.

The existential/phenomenological individual described in subjectivist theories chooses how she will assert herself *despite* her own placement in the world. Wittgenstein's claim is somewhat different: we always speak from *within* a particular background of circumstances . . . throughout its duration, life is enmeshed with our own language game. Our choices, therefore, are not made from scratch. We already have a language in which values, meanings, and conceptions of the world are embodied. . . . Despite this structuralist posture, Wittgenstein would ultimately not deny the separate existence of a subject. First consider how he would distinguish between an individual and a system. An individualistic notion of language would suggest that words are always capable of projection into new contexts. On the other hand, a purely systemic or structural view of language would provide that all our concepts are directed from the same form of life and, therefore, can be used only within the context of the system. Wittgenstein seems to make both of these arguments at different times, because he would probably refuse to draw a definitive distinction between the two.³³

Amongst CLS scholars, Gary Peller has effectively deployed this Wittgensteinian perspective to deny that there is any validity to, or political potential residing in, the existential phenomenological premise of a prestructural moment.³⁴ Peller explains that there is nothing that can be expressed or delineated which is not already a re-presentation, an effect of differentiation within a socially created and contingent system of organiz-

32. Brainerd, 34 *Am. U.L. Rev.* at 1244.

33. *Id.* at 1259-60.

34. Peller, 73 *Cal. L. Rev.* (cited in note 1). In this sense, Peller's project bears some similarity to Foucault's intention "to dissolve the philosophical link—inherited by the Marxist tradition from German idealism, between consciousness, self-reflection and freedom, and to deny that there remains any progressive potential in the ideal of the autonomous subject." Peter Dews, "Power and Subjectivity in Foucault," 144 *New Left Rev.* 72, 87 (1984). As I shall attempt to make clear, however, a denial of the freely autonomous subject and acceptance of the post-structuralist claim that subjectivity is discursively constituted, does not necessarily imply a denial of human practice or agency as historical forces.

ing perception and communication³⁵ and that perception itself occurs through the medium of representational categories³⁶ because “our experience of the world is constructed through the adoption of particular metaphors and the exclusion of other metaphors for organizing perception and communication”: “any ‘present’ experience is always already an interpretive history of the present as it is mediated and interpreted according to a socially created metaphoric structure for attributing meaning to social events. In other words, our ‘direct’ experience of the world is a social construct.”³⁷

All consciousness, even self-consciousness, is inscribed with the categories of our public representational conventions. The prestructural moment, therefore, would seem to be an example of what Peller refers to as “a mythical moment of purity from the public world,”³⁸ a moment which existential phenomenology shares with liberal theory as embodying the potential for a politics of transcendence.

D. The Discursive Constitution of Subjectivity

The social constitution of experience, or the discursive mediation of subjectivity, is a complex process. Here I think it would be fruitful to consider an example. I will elaborate on Peller’s discussion of the legal representation of rape, supplementing his outline of the structure of liberal legal discourse with some reflections on the nature of a woman’s subjective experience in a situation of sexual coercion, in order to indicate the multiplicity of social meanings that impinge upon consciousness in such circumstances.

Peller examines the legal representation of rape as an example of the process of reification, asserting that “in legal discourse rape represents coercive sexuality—sexual intercourse that is not consensual.”³⁹ Consent and coercion are seen as positive entities, preexisting later legal determinations of their presence during the particular moment in issue. As Peller demonstrates, however, a determination of consent is made through an interpretation of “objective manifestations which are already inscribed with meaning in the public representational practice”⁴⁰ but are taken to re-present the woman’s self-present consciousness at the time.

Even the use by a woman of the words “yes” and “no” are by no means unproblematic: “to cite one egregious example, if the interpreter

35. Peller, 73 *Cal. L. Rev.* at 1169.

36. *Id.* at 1170.

37. *Id.* at 1175.

38. *Id.* at 1178.

39. *Id.* at 1187.

40. *Id.* at 1188.

holds the once-prevalent belief that women always say “no”, even if they mean “yes”, the signifying effect of the words will be different than if some other interpretive construct is held.”⁴¹ The presence of a gun or a knife suggest a situation of duress in which the objective manifestation of the utterance of assent will be interpreted contextually as having another meaning. This move to contextualization, however, has no logical (that is to say non-arbitrary) limits; economic dependence, cultural degradation, and psychological pressure, for example, could be considered in this calculation of coercion and consent if an interpretive construct other than the prevailing mind/body dichotomy were utilized. Peller’s point is that concepts of consent and coercion which are supposed to be the *source* of legal interpretation are actually *effects* of the structure of legal representation.⁴²

Furthermore, we cannot extricate ourselves from this dilemma by turning from structure to subjectivity, for the two are inextricably interrelated. As Peller notes, we cannot ground the source of differentiation between consent and coercion by reference to what the relevant woman believes—for a woman’s expressed consent is already invaded by social power and dominant notions of what consent and coercion mean in our society. Economic dependence or cultural degradation are contexts socially defined as consistent with free sexual consent and a woman’s actual agreement is constituted within this context—she is very likely to conceive of her sexual relations as consensual so long as there is no physical coercion: “if the relevant woman has internalized the once prevalent belief that being a ‘wife’ entails sex with the husband as a ‘wifely duty’, then her actual consent to sexual intercourse with her husband cannot be taken merely as *her* consent; it is also the expression of the social power reflected in the language of social roles.”⁴³

A woman’s subjectivity, moreover, is never constituted by (and certainly never determined by) any singular public representational system, but informed by a cacophony of contradictory social discourses which mediate her sense of her own volition in such circumstances. Drawing on my own experiences and those of other women I know, I will attempt to construct a (necessarily incomplete) microphenomenological account of the subtleties and complexities that imbue one’s sense of self in a situation of sexual coercion.

At such moments you are undoubtedly aware (with degrees of consciousness that vary from woman to woman and circumstance to circumstance) of your ability to say no; a liberal discourse of free will is a resource undoubtedly available to you, but one that is invariably complicated by other social discourses: for example, those that interpellate female sexual-

41. *Id.*

42. *Id.* at 1188–89 (my emphasis).

43. *Id.* at 1190.

ity with active passivity.⁴⁴ In other words, as a woman you have a sense that your body is in conflict with your speaking self. I think this is a consequence of living within a culture where the social reality of women's objectification coexists with a pervasive liberal ideology—you have a sense that by your very presence you are transmitting messages about your self that you are responsible for, even though you don't consciously will or generate them. Associated with this intersection of paradoxical feelings is a burden of guilt and self-blame; you must have *done* something to get yourself in this situation, there must have been some way you could have avoided this (and there always *was* if you look back far enough), and if you didn't avoid it, who's going to believe you didn't also accede, and have you already acceded just by getting yourself into this situation?

Your sense of your own credibility is compromised, both by your own guilt and by your confused anticipation of the presentation of self you will be capable of generating for others. This is exacerbated by your memories of a multiplicity of previous violations; these range from unwanted attention and street harassment, to silent violations of your personhood by men who choose to masturbate, using your body as the object of their desire (or hostility, you experience it the same way) in public places, and furtive physical assaults experienced in situations too numerous to elaborate. You endure these outrages daily, but you are continually silenced in your efforts to express their impact. Internally you are silenced by the difficulty you have in even *repeating* what was said or done to you, and in representing such occurrences as *injuries* experienced (the constraints imposed by discourses of propriety and those defining harm). Externally your outrage is silenced and your guilt exacerbated by the responses of well-meaning friends and relatives who don't want to believe that you can be harmed just going about your everyday life. They remind you that you could have taken a taxi, you should have left work earlier, *you could have done otherwise*. Moreover, there is often a sympathetic male lover, father, or brother, who decides he should have come with you (to the grocery store? to the laundromat?); you could have called for a ride, *he could have protected you* (if you weren't so damned independent). Both sets of responses presuppose that it is the mode in which *you* exercise *your* autonomy that constitutes the problem and thereby obscure the reality of the injury you've suffered. Moreover, you internalize these responses (even as you struggle to resist their implications) and thereby become complicitous with this process of obscuring your own injuries, and this internally corrosive act of evasion eventually becomes an inbuilt response to the infliction of harm.

If the above enumeration of factors seems a bit breathless, confusing, fragmentary, and not fully coherent, so be it, because so is your experience and your consciousness of them. These are only a few of what I suspect are

44. I discuss the concept of interpellation in note 173 below.

a much larger number of social discourses (I haven't even mentioned your relation with your aggressor, your class, your race, your ethnicity, or your sexual orientation), which converge in a situation of sexual coercion. Women themselves have various degrees of awareness of these and varying abilities to articulate them. What should be clear, however, is that it is impossible for a woman to have any unmediated access to consciousness (and thus any unmediated consciousness) in such a situation. Our subjectivities are constituted by numerous social realities of this kind.

The selection of a woman's consciousness in a situation of male coercion to illustrate the social constitution of subjectivity is not serendipitous. One of the initial insights of the women's movement and one of the tenets of feminist discourse—that the personal is political—involves a recognition that there is a direct, albeit complex, relation between social life and subjectivity and between language and consciousness.⁴⁵ The relation of experience to discourse is central to the very definition of feminism.⁴⁶ The parameters of feminism correspond to certain subjective limits, limitations on possible subjectivities imposed by the constraints of language and socio-historical structures of meaning. Within this range of constraints, however, women find possibilities for new configurations of subjectivity: "patterns by which experiential and emotional contents, feelings, images, and memories are organized to form one's self-image, one's sense of self and others, and of our possibilities of existence."⁴⁷

This practice of self-consciousness, the reflexive and political awareness of the social constitution of one's self and one's experiences, is feminism's specific mode of knowledge and one that continues to be an essential component of feminism's political critique of society. Self-consciousness is a particular configuration of subjectivity that women create from available cultural resources; identity is "interpreted or reconstructed by each of us within the horizon of meanings and knowledges available in the culture at given historical moments Self and identity, in other words, are always grasped and understood within particular discursive configurations."⁴⁸ Thus, if we are subjects mediated by such discourses, we are also subjects who mediate ourselves *through* discourses in incredibly diverse and creative ways.⁴⁹ We are "subject in the two senses of the term: both

45. Teresa de Lauretis, "Feminist Studies/Critical Studies: Issues, Terms, and Contexts" ("De Lauretis, 'Feminist Studies'"), in De Lauretis, ed., *Feminist Studies/Critical Studies* 5 (Bloomington: Indiana University Press, 1986) ("De Lauretis, ed.").

46. *Id.*

47. *Id.*

48. *Id.* at 8.

49. "A *self* does not amount to much, but no self is an island; each exists in a fabric of relations that is now more complex and mobile than ever before. . . . [A] person is always located at "nodal points" of specific communication circuits, however tiny these may be. Or better: one is always located at a post through which various kinds of messages pass. [But] no one, not even the least privileged among us, is ever entirely powerless over the messages that traverse and position him at the post of sender, addressee, or referent." Jean-Francois

subject-ed to social constraint and yet subject in the active sense of maker as well as user of culture, intent on self-definition and self-determination."⁵⁰

Clearly the liberal image of the subject characterized by an unmediated individual consciousness or will cannot contain the complexities, ambiguities, and paradoxical realities of subjective experience, but neither can a poststructuralist image of subjectivity as merely the *locus* or *incident* at which a multiplicity of discourses intersect. For these discourses converge in heterogeneous ways and are (or are not) internally expressed and referred to, engaged, deployed, countered, or resisted in numerous and individually specific ways. Recognition of the social structuration of subjectivity, therefore, should not and need not entail losing sight of human reflexivity and interpretive activity.

E. Reconstituting Subjectivity

We are thus faced with the necessity of reconstituting subjectivity in a manner that recognizes the pervasive structurality of experience without denying human agency and creativity through resort to a structural determinism. As I have indicated, CLS scholars have taken some important steps in this direction.

Amongst practice theorists, this reconstitution of the subject is claimed by both the cultural studies theorist Paul Smith⁵¹ and by sociologist Anthony Giddens⁵² to be central to a critical sociology emphasizing human agency. Giddens, for example, acknowledges the importance of the structuralist claim that subjectivity is constituted in and through language and agrees that instead of taking consciousness as given we need an account of its production through signification. He rejects, however, any account of subjectivity that sees it merely as a series of moments brought about by the intersection of signifying structures; the reflexive, acting subject must be recovered.⁵³

Generally, in determining how structure constrains and enables practice, practice theorists have placed great emphasis on cultural and psychological mechanisms that contribute to the formation of consciousness.

[T]here seems to be general agreement that action is constrained most deeply and systematically by the ways in which culture controls the definitions of the world for actors, limits their conceptual tools, re-

Lyotard, *The Postmodern Condition: A Report on Knowledge* 15 (Minneapolis: University of Minnesota Press, 1984) (Lyotard, *The Postmodern Condition*”).

50. De Lauretis, “Feminist Studies” at 10 (cited in note 45).

51. See Smith, *Discerning the Subject* (cited in note 3).

52. See his works cited in note 3.

53. Giddens, *Central Problems* at 39 (cited in note 3).

stricts their emotional repertoires. Culture becomes part of the self . . . insofar as domination is . . . a matter of cultural and psychological processes, it operates by shaping actor's dispositions such that in the extreme case, "the agent's aspirations have the same limits as the objective conditions of which they are the product" . . . the extreme case [however] is never reached, and often never even approached. Thus, while accepting the view of culture as powerfully constraining, they argue that hegemony is always more fragile than it appears, and never as total as it would claim.⁵⁴

The reasons for this fragility, are, as we will explore, inherent in the nature of cultural discourses or significative systems themselves, and are reflected in the diverse modes through which structural change occurs. As we will see, the character of this change and the circumstances in which it is instigated are variously conceived by practice theorists, but none of these theories demands either the resurrection of the liberal subject or the denial of the reflexive, interested, knowledgeable social agent.

In this sense, the reconstitution of subjectivity in practice theory differs considerably from that proposed by poststructuralist theories. As Heller notes, in their attempts to come to terms with the numerous logical inconsistencies in structuralist social theory, especially in attempting to conceptualize the relationship between structure and practice and between structure and the agencies which mediate its reproduction, poststructuralist theorists have also been faced with the need to reintroduce subjectivity,⁵⁵ but they have done so in a radically different fashion.

Structuralist arguments are premised on descriptions of systems of differentiations constructed by the analyst, but the relationship between diverse systems of differentiations, operating at similar levels of abstraction from particular practices, is problematic; numerous structures of varying content appear to yield incredibly diverse practices. In structuralist linguistics, from which structuralist social theory derived, the creation of concrete linguistic practices was a mysterious process. If a sentence represented a transformation permitted by the rules or generative syntax postulated for the language, the structure could be said to have generated the sentence. But the production of particular practices at any given moment, in any particular circumstances, appeared to be seen as the consequence of some random process of selection.⁵⁶ The methodological inadequacy of this was particularly marked when structuralist analysis was extended to other social and cultural realms: "Unless one insists that the production of practice from structure is literally random, or alternatively asserts that each practice is internally and uniquely determined by the

54. Ortner, 26 *Comp. Stud. in Soc'y & Hist.* at 153–54 (cited in note 4).

55. Heller, 36 *Stan. L. Rev.* at 157–58 (cited in note 1).

56. *Id.* at 145.

transformational rules of the structure itself, one seems impelled to postulate either a deeper extrastructural cause or a phenomenological agent mediating between structure and practice."⁵⁷

However, the creation of a space for the mediating agency engendered conceptual difficulties given the general treatment of the subject in structuralist discourse.⁵⁸ Unless it was possible to view the production of practice as utterly random and consequently inexplicable, the generation of practice(s) by structure seemed to demand the resuscitation of an interpreting subject to fill this gap.⁵⁹ To do so, however, was seen to pose the danger of resurrecting the figure of the autonomous individual dominating phenomenological epistemology, a resurrection which would thoroughly negate structuralist achievements and defuse the critique of liberal ideology that it enabled.

Heller argues that the case for extending structuralism demands a redefinition of the concept of subjectivity that involves a deconstruction of the natural or existential subject and a transfiguration of the subject into the *locus* in which structure is instantiated or the *incident* through which systems become concrete.⁶⁰ This does not deny the experience of self-consciousness but reinterprets it as constituted by the mediation of social systems or structures which themselves *produce* the subject's experience of differentiated identity and of autonomy.⁶¹ As Heller himself acknowledges, this theory of the subject is riddled with difficulties; it does not solve the problem of the relation of structure to the determinate production of practices, the subject's self-consciousness is accounted for by competing theories and the reproduction of structure in the subject is explained in altogether too many conflicting ways.⁶²

Because critical legal thought has implicitly relied on structuralist methods to found its program, Heller believes it must now confront the problem of reconstituting social theory now that structuralism has been internalized and deconstructed.⁶³ Such a reconstitution, Heller declares, must incorporate structuralism's deconstruction of the phenomenological account of the subject and cannot be permitted to reintroduce a romanticized liberal politics;⁶⁴ poststructuralist social theory must avoid reconstituting the autonomous liberal subject and subjectivist images of experience,⁶⁵ it must incorporate the structuralist critique of subjective autonomy, and must not refer to personalized, autonomous decisionmaking

57. *Id.* at 146.

58. *Id.* at 147.

59. *Id.* at 158.

60. *Id.* at 147–48 (my emphasis).

61. *Id.* at 148 (my emphasis).

62. *Id.* at 151.

63. *Id.* at 133, 156.

64. *Id.* at 155.

65. *Id.* at 157.

in order to specify how legal practice emerges from abstract constitutions of alternative legal discourses.⁶⁶

Unfortunately, however, Heller's warnings about what poststructuralist theorists will need to avoid when reconsidering the subject are more lucid than his positive recommendations. Although poststructuralism⁶⁷ would seem to share with practice theory an emphasis on the multiplicity of social discourses (as opposed to singular structures) and the centrality of practices as the domains in which discursive systems and power relations are reproduced, the relationship between discourse and practice is conceptualized in significantly different terms. In the poststructuralist enterprise, "it is necessary to describe in detail the network of established practices within functioning legal institutions and to understand the reproduction of unanalyzed ways of going about the world. The logic (or analogic) of reproduction must take into account that existing practices may be continually reformed because they are constructed in systematic processes that may refer to multiple discursive representations of experience."⁶⁸

This construction of existing practices "in systematic processes that may refer to multiple discursive representations of experience" is a construction that somehow seems to proceed autonomously from the activity of social actors. Practices, too, are seen as *randomly* distributed in relation to the symbolic order that affords meaning, and such practices are contestable and indeterminate in the process of their reproduction but represent permutations of the information sets preceding their generation.⁶⁹ Discourses are viewed as elements of a self-referential system whose "essential attribute is its evolutionary history of continual internal differentiation of newly organized information out of its pre-existing states."⁷⁰ The genesis and maintenance of codes of symbolic order arise in the course of systemic reproduction and thus distinctions are artifacts of system differentiation that represent indeterminate outcomes of its evolutionary process.⁷¹

Practice theorists, on the other hand, see all of these activities as mediated through human agency—agency that is itself inevitably mediated by the discursive field. The "reproduction of unanalyzed ways of being in the world" is effected by the practical activity of agents who (with varying degrees of consciousness) make reference to "multiple discursive representa-

66. *Id.* at 183.

67. Poststructuralism is no more monolithic a theoretical orientation than practice theory. I rely heavily on Heller's formulations of poststructuralist theory in legal scholarship (36 *Stan. L. Rev.*; cited in note 1), but recognize that different formulations of poststructuralism reconstitute the subject and address the issue of agency in different ways and to different degrees. For one example of a feminist poststructuralist discussion of subjectivity that emphasizes women's agency see Nancy K. Miller, "Changing the Subject: Authorship, Writing and the Reader," in De Lauretis, ed. (cited in note 45).

68. Heller, 36 *Stan. L. Rev.* at 194.

69. *Id.* at 195.

70. *Id.*

71. *Id.* at 196.

tions of experience.” Similarly, a discursive system is not characterized as evolving historically in a process of “continual internal differentiation of newly organized information out of its pre-existing states”; such processes are understood to be carried out by interested social agents. It is *people* who effect such differentiation—by bringing received categories to bear in their everyday activities, by employing elements of these symbolic orders to deal with their diverse projects and the contingencies they encounter, and by transforming these orders through their ideological practices and rhetorical strategies. The genesis and maintenance of codes of symbolic order may arise in “the course of systemic reproduction” but such reproduction takes place through the social activity of situated actors. Distinctions may be the “artifacts of system differentiation that represent indeterminate outcomes of its evolutionary process,” but *systems* do not evolve or *produce* anything except through the social practices of human agents. To declare otherwise is to participate in the same processes of objectification and reification which critical legal theorists have seen as major obstacles to social transformation.

In describing the poststructuralist project, Heller demonstrates so great a concern to avoid reconstructing the liberal individual that he defines all practices, all reproductions of order, all transformations within discursive realms, as *systemic* processes that efface the interpreting actor: the intentional, interested, and socially situated agent, altogether. It is not necessary, however, to resurrect the autonomous liberal individual in order to acknowledge the role played by human agents in reproducing the social (discursive) world, nor to see the subject as merely a *locus* in which structure is instantiated or an *incident* through which systems become concrete, in order to be aware of the mediation of discursive systems in constituting the subject’s experience.

Giddens argues that it is a fallacy to assume that because the subject and self-consciousness are constituted through a process of development, and thus that the reflexive actor is not a “given” either to philosophy or social science—that they are therefore merely the epiphenomena of hidden structures: “The end of the individual, perhaps, signals the final passing of the age of bourgeois liberalism: not however as a fruitful historical transition, but rather *as swamped by a spreading totalitarianism*, a critical appraisal of such a phenomena is hardly possible if social theory succumbs to the very process which it should be concerned to comprehend.”⁷²

If the production of society is seen to be brought about by the active constituting skills of its members (even if it draws on structural resources and depends on structural conditions of which they are unaware or perceive only dimly), then it is necessary to attribute to social actors some degree of consciousness or knowledge about the social systems they consti-

72. Giddens, *Central Problems* at 45 (cited in note 3).

tute and reproduce in their activities. But such knowledge is necessarily incomplete, and there are various modes in which such knowledge may figure in practical social conduct. First and foremost, we have to consider the practical consciousness of actors in the everyday enactment of social life, which draws upon tacit knowledge that can only partially and imperfectly be expressed in discourse. Such knowledge is practical and contextual in character; it is "unconscious" insofar as social actors can normally only offer a fragmentary account of what they "know" if called on to do so (recall the difficulties faced by a woman in the context of sexual coercion), but they are not unconscious in the sense given that term by structuralist theorists.⁷³

We must also consider the discursive consciousness of social actors or the knowledge actors are able to express on the level of discourse. Giddens argues that all actors have some degree of discursive penetration of the social systems to whose constitution they contribute but that the scope and nature of this discursive penetration is limited (in particular by ideological activity and hegemonic processes), and is central to an understanding of the relationship between agency and power. Thus, Giddens argues, "power-relations are always two-way; that is to say, however subordinate an actor may be in a social relationship, the very fact of involvement in the relationship gives him or her a certain power over the other. Those in subordinate positions in social systems are frequently adept at converting whatever resources they possess into some degree of control over the conditions of reproduction of those social systems."⁷⁴ This will be demonstrated in the following discussion of the need to reconsider structure, in which we will foray into Southeast Asian religious systems, Spanish colonialism, Brazilian popular culture, American slavery, and Victorian gender relations to demonstrate the remarkable creativity dominated peoples have shown in challenging and transforming the ideological structures of their oppression.

III. . . . FOR MANOEUVRE: DECONSTRUCTING STRUCTURE

A. The Social Construction of Structure

If our understanding of subjectivity needs to be radically reformulated, so too does our understanding of social structures. Bob Gordon has made a significant contribution to this reformulation in this insistence that "what we experience as 'social reality' is something that we ourselves are

73. *Id.* at 40.

74. *Id.* at 6.

constantly constructing."⁷⁵ This emphasis on human creativity, however, has too often been interpreted to imply that the thinglike, immovable quality of the social world must in the last instance stem from the actions of *individual* subjects and that history dissolves back into the beliefs and actions of *individual* people.⁷⁶ Again, the claim that reality is *subjectively* created is seen as a proposition that is contradicted by our awareness of the *objective* reality of structural constraints.⁷⁷

Here we see how, once again, the liberal vision of the ahistorical subject acting individually is implicitly evoked to account for any historical effectivity of human agency. Gordon clearly stresses the creative activity of *social* subjects, acting *collectively*, in *historical* contexts. The whole tenor of his critique denies any notion of the social actor as a freely autonomous individual and suggests instead that the consciousness and activity of social agents is constituted within complex codes or systems of meaning which they themselves are constantly creating. The assertion that people themselves collectively create (and modify and undermine) the structures through which they experience the world does not necessarily imply that they do so free of the constraints of convention and tradition. It is not necessary to see such structures as *determining* to be aware of the role such belief systems play as frameworks that limit and define people's experiences.

The claims that reality is subjectively created and that structural constraints have an objective reality are not contradictory. It is not necessary to view the social creativity involved in the intersubjective construction of realities as contradictory to an awareness of structural constraints. To see this as contradictory one has to maintain at once a prestructuralist understanding of subjectivity as consciousness unmediated by history and culture and a structuralist understanding of structure(s) as frozen and determining. Gordon's critique moves toward a theory of practice to the extent that he rejects both these understandings and in so doing eclipses the "tension" between structuralist and subjectivist approaches.

This is clearly expressed by considering the "theory of structuration" propounded by Giddens.⁷⁸ For Giddens, reconstructing social theory involves understanding the social world as the skilled accomplishment of active human subjects and involves an attempt to relate the actions of individual agents (not liberalism's "individuals") to the structural features of the societies of which they are a part.⁷⁹ The production of social life is fundamentally related to the social reproduction of structures.⁸⁰ By "struc-

75. Gordon, "New Developments" at 287 (cited in note 17).

76. Boyle, 133 U. Pa. L. Rev. at 725 (cited in note 1).

77. *Id.* at 764.

78. See works by Giddens cited in note 3.

79. Giddens, *New Rules* at 155 (cited in note 3).

80. *Id.* at 126-27.

tures" Giddens does not refer to the descriptive analysis of the relations of interactions that compose organizations or collectivities, but to systems of generative "rules and resources."⁸¹ Although structures are nontemporal and nonspatial and can be regarded as an impersonal virtual order of differences *for the purposes of analysis*, these orders are produced and reproduced in social interactions as both its medium and outcome;⁸² structures, in other words, are both the condition and the consequence of social practices. Giddens refers to this as the "duality of structure," a concept that replaces such dualisms as society and the individual,⁸³ object and subject, and theoretically serves to incorporate a recognition of the shaping power of social forces while according a prominent position to the agency and creativity of social actors in everyday practices. Structure exists only in its simultaneous creation and reproduction in the everyday practices of social actors who are constituted by structure as it constitutes the practices through which they reproduce it. This is not the static model that at first it seems, for the concept of reproduction has no more special connection to social stability than it has to social change. Every act that contributes to the reproduction of a structure (and for Giddens all social interactions contribute to some degree) is also an act of production, a novel enterprise which may initiate change by altering structure even as it reproduces it—as, for example, the meanings of words change in and through their use.⁸⁴

Conceived of in this fashion, structure can no longer be conceptualized as simply placing constraints upon human agency but as *both constraining and enabling*. The concept of duality of structure suggests that structures can be explained in terms of their structuration as a series of reproduced practices; "to enquire into the structuration of social practices is to seek to explain how it comes about that structures are constituted through action, and reciprocally how action is constituted structurally."⁸⁵ Every process of action is potentially a production of something new, but at the same time all action arises in continuity with the past that supplies the means of its initiation. Structure thus is not to be conceptualized as a barrier to action but as essentially involved in its inception, even in the most radical processes of social change.⁸⁶

81. *Id.* at 127.

82. Giddens, *Central Problems* at 3 (my emphasis).

83. Legal scholars in the field of constitutional law, for example, are at last recognizing that "individual" and "society" or "community" are not opposite poles but mutually constitutive. See, e.g., Patrick Macklem, "Constitutional Ideologies," 20 *Ottawa L. Rev.* 117 (1988).

84. Giddens, *New Rules* at 128.

85. *Id.* at 161.

86. Giddens, *Central Problems* at 70 (cited in note 3).

B. Cultural Creativity and Structural Transformation

The tendency to see socially constituted structure(s) as merely determining and constraining is also found in criticisms of the CLS stance on indeterminacy. How, it is asked, is it possible to maintain that "legal rules are too marginal in their effects and too indeterminate and incoherent in their content to be instrumentally necessary for any social formation"⁸⁷ and, at the same time, to argue that legal rationality is based "on underlying structures of meaning, the cultural codes of "common sense"⁸⁸ which limit our categories for perception and communication? If rationality refers to a felt necessity once particular structures for categorizing the world have become frozen, doesn't this picture of constraining metaphors in legal and social worlds contradict the idea that doctrine is marginal in effect and indeterminate in application?⁸⁹ "If the frozen metaphors truly do constrain our understanding of texts or our vision of political possibilities, how can doctrine be perceived as indeterminate?"⁹⁰

Again, I think this is only problematic if we insist on seeing systems of meaning as stable, immovable structures which act to *determine* our understandings. As cultural anthropologists demonstrate, all meaning, including legal meaning, draws on a larger reservoir of cultural significance that define us and the social realities we recognize. Legal reasoning is a process of analogy and metaphor in which the grounding or the basis comes from our pretheoretical and politically constraining conceptions of the social world. The play of analogy is *limited* by the boundaries and internal constitution of these structures, and legal reasoning is also *limited* to this extent. But even within such structures of meaning, the room for creativity is enormous. Metaphor is one way (and an incredibly powerful way) in which people socially create new meanings within restricted fields of representation (what Peller refers to as the "economy of difference within representational contexts"⁹¹).

Metaphoric activity is always potentially generative of new possibilities. Anthropologists suggest that the process of metaphorization is crucial in the innovation of cultural ideologies and the primary means through which they are challenged and transformed. In particular, Roy Wagner⁹² demonstrates that the construction of cultural meaning has its momentum

87. Gary Peller, "Debates About Theory Within Critical Legal Studies," 1 *Lizard* 4 (1984).

88. *Id.*

89. Boyle, 133 *U. Pa. L. Rev.* at 727 (cited in note 1).

90. *Id.*

91. Peller, 73 *Cal. L. Rev.* at 1167 (cited in note 1).

92. See Roy Wagner, *Habu: The Innovation of Meaning in Daribi Religion* (Chicago: University of Chicago Press, 1972); *id.*, *The Invention of Culture* (Chicago: University of Chicago Press, 1975) ("Wagner, *Invention*"); *id.*, *Symbols That Stand for Themselves* (Chicago: University of Chicago Press, 1986).

in creative activity involving the innovative extension of metaphors across conventional categories of signification. Interpretation, then, involves an understanding of transformative processes rather than stable structures.⁹³

These cultural categorical systems of meaning do constrain our "understandings of texts or our vision of political possibilities," but there is no need to equate *constraint* with *determinacy*. Although our conceptual maps of the world limit and restrict our visions, they also enable us. Within a restricted domain, numerous possibilities for the creation of meaning are available. Doctrine can still be perceived as indeterminate, even if we recognize that objectified categories of thought limit the boundaries of acceptable argument, because the symbolic constructs that constitute "structure(s)" are socially created and maintained, reproduced, modified, and sometimes even transformed, in the course of everyday life.

Only if we deny the creative activity of the interpreting social actor and insist on seeing structure as a static, monolithic straitjacket that, so to speak, descends from above is it necessary to see constraint as determinacy. People, whose very being is constituted by them, differentially employ these categorical systems (and not necessarily consciously) to deal with material and social realities (which are apprehended in terms of them) and, in so doing, they modify, expand, reformulate, and sometimes put the categories at risk. While incorporating experience into our conceptual maps we modify the map. Legal argument is but one form of social activity in which these categories are brought to bear, in which structure is employed to deal with event. Sometimes, perhaps even most of the time, the event is so easily conceptualized in terms of the prevailing categories—analogy seems so obvious—that the constitution of existing structures is merely maintained and reproduced. But occasionally a situation arises in which there is no easy fit, the activity of bringing structure to bear is a struggle,

93. Meaning is created by the formation of metaphors drawing on the formal elements of a culture, and the constancy of such activity ensures that significative systems are always in dynamic process. Such "signifiers" conventionally tied to a signified, are continually extended to signify new elements, thus creating (or mediating) a relation between the two signified elements that forms a metaphor.

Every such extension has transformative potential because "every use of a symbolic element is an innovative extension of the association it acquires through its conventional integrations into contexts." Wagner, *Invention* at 39. Extensions of symbols into new contexts can bring about rearrangements and often confusion among the relations within that context as well as the conventional contexts from which such symbols are drawn, triggering unpredictable reverberations.

But if metaphors, in their construction, have transformative capacities, people may ossify them in their constructed state. They may become forms of relationship that are taken for granted, like signifiers tied conventionally to signifieds. We may fail to utilize their symbolic potency, but the metaphor becomes part of the symbolic repertoire upon which further metaphoric activity may draw. In other words, as a social phenomenon a "frozen metaphor" may lose its character as a relation between things and become a unitary symbol that can be used to construct new metaphoric relations. The "frozen metaphor" then becomes *conventionally* contextualized into our systems of categorization.

and in the course of this struggle, received structures undergo modest but real transformations. The nature of these transformations is certainly circumscribed by the boundaries of the field in which the play of analogy takes place, but they are in no way predetermined.

These ideas have been developed and elaborated by anthropologist Marshall Sahlins in his ethnographic and historical studies of Pacific Island societies, where he expounds on the relationship between history and culture more generally.⁹⁴

History is culturally ordered, differently so in different societies, according to the meaningful scheme of things. The converse is also true: cultural schemes are historically ordered, since to a greater or lesser extent the meanings are revalued as they are practically enacted. The synthesis of these contraries unfolds in the creative action of the historic subjects, the people concerned. For on the one hand, people organize their projects and give a significance to their objects from the existing understandings of the cultural order. To that extent, culture is historically reproduced in action. . . . On the other hand, then, as the contingent circumstances of action need not conform to the significance some group might assign them, people are known to creatively reconsider their conventional schemes. And to that extent, the culture is historically altered in action. We can speak even of "structural transformation" since the alteration of some meanings changes the positional relations among the cultural categories, thus a "system-change."⁹⁵

Sahlins argues that differently situated social agents have different interests and seek to improve their relative social positions through traditionally understood means. "Change comes about when traditional strategies, which assume traditional patterns of relations, are deployed in relation to novel phenomena which do not respond to those strategies in traditional ways. This change of context, this refractoriness of the real world to traditional expectations, calls into question both the strategies of practice and the nature of the relationships which they presuppose."⁹⁶ Structure—"the symbolic relations of cultural order"⁹⁷—is never, then, a static closed system, but an open one, forever in transformational process.

94. Sahlins, *Historical Metaphors and Mythical Realities* (Ann Arbor: University of Michigan Press, 1981); *id.*, *Islands of History* (Chicago: University of Chicago Press, 1985) ("Sahlins, *Islands*).

95. Sahlins, *Islands* at vii.

96. Ortner, 26 *Comp. Stud. in Soc'y & Hist.* at 155–56 (cited in note 4).

97. Sahlins, *Islands* at vii.

C. Symbolic Improvisation and Resistance

In fact, it has been argued that transformations such as those Sahlins describes are the inevitable consequence of the deployment of structure in the practice of everyday life. Michel de Certeau,⁹⁸ for example has suggested that instead of focusing upon structures of representation themselves, we should examine the *use* to which elements of these structures are put by specific groups and individuals in society. De Certeau's central thesis in *The Practice of Everyday Life*⁹⁹ is that consumption is a form of production and that dominated groups make their own idiosyncratic use of the culture disseminated and imposed by elites; "the users of social codes turn them into metaphors and ellipses of their own quests. The ruling order serves as a support for innumerable productive activities. . . . Carried to its limit, this order would be the equivalent of the rules of meter and rhyme for poets of earlier times: a body of constraints stimulating new discoveries, a set of rules with which improvisation plays."¹⁰⁰

De Certeau sees all discourses as surrounded, penetrated, and finally carried away by common experience.¹⁰¹ They are thus marked by their uses, offering to analysis only "the *imprints of acts* or of processes of enunciation," signifying the operations whose object they have been; "more generally, they thus indicate a social *historicity* in which systems of representations or processes of fabrication no longer appear only as normative frameworks but also as *tools manipulated by users*."¹⁰²

Examples of such manipulation are legion. Social history continually discloses instances in which the dominated have used the symbolic structures of their oppression against their dominators, strategically seizing upon those ambiguities and contradictions inherent in any discourse of power. In Buddhist and Islamic regions of Southeast Asia, for example, peasant religious traditions (which have formed the ideological basis for countless rebellions) are characterized by a belief in a returning just king, demonstrating how an "erstwhile conservative myth of divine kingship can, in the hands of the peasantry, be turned into a revolutionary myth by a kind of symbolic jujitsu. While kingship per se is symbolically maintained, both the actual king and the social order he represents are negated," in favor of radical changes in the distribution of power, status, and

98. De Certeau is difficult to characterize in disciplinary terms because he has received advanced training in theology, history, the study of comparative religions, psychoanalysis, and anthropology and has taught in all these fields at universities in France and North and Central America. For an example of the range of his oeuvre, see *Heterologies: Discourse on the Other*, trans. Brian Massumi (Minneapolis: University of Minnesota Press, 1986).

99. Berkeley: University of California Press, 1984 ("De Certeau, *Practice*").

100. *Id.* at xxi-xxii.

101. *Id.* at 15.

102. *Id.* at 21.

wealth.¹⁰³

De Certeau himself emphasizes the “fundamental inversions” engendered by the practices of indigenous peoples in their “consumption” of the legal, religious, and cultural discourses supposedly successfully imposed by the Spanish colonizers in the New World:

[T]he spectacular victory of Spanish colonization over the indigenous Indian cultures was diverted from its intended aims by the use made of it: even when they were subjected, indeed even when they accepted their subjection, the Indian often used the laws, practices, and representations that were imposed on them by force or fascination to ends other than those of their conquerors; they made something else out of them; they subverted them from within—not by rejecting them or by transforming them (though that occurred as well), but by many different ways of using them in the service of rules, customs, or convictions foreign to the colonization they could not escape. They metamorphized the dominant order: they made it function in another register.¹⁰⁴

Similarly, the contemporary popular culture of peasants in northeastern Brazil draws on religious motifs to constitute a protest against the socioeconomic order and its presentation of itself as natural, subverting the fatality of the established order by reemploying the religion imposed by Christian missions, a religion which, far from being their own, has been constructed and propagated by others. Nonetheless, this reemployment modifies its functioning; “a way of speaking this received language transforms it into a song of resistance.”¹⁰⁵

More generally, *a way of using* imposed systems constitutes the resistance to the historical law of a state and its dogmatic legitimations. . . . Innumerable ways of playing and foiling the other’s game, that is, the space instituted by others, characterize the subtle, stubborn, resistant activity of groups, which, since they lack their own space, have to get

103. James C. Scott, *Weapons of the Weak: Everyday Forms of Peasant Resistance* 333 (New Haven, Conn.: Yale University Press, 1985).

It should be noted that despite a shared concern with the everyday practices through which social agents divert elements of dominant discourses in their own projects, Scott and de Certeau have radically different understandings of the subject. In his desire to avoid the crude determinism implicit in notions of false consciousness, Scott fails to address the cultural and ideological construction of pragmatic interests. De Certeau, on the other hand, is emphatic that an investigation of everyday practices, ways of operating, of doing things, does not imply a return to individualism. Although he expressly adopts the poststructuralist position that each “individual is a locus in which an incoherent (and often contradictory) plurality of . . . relational determinations interact” (*Practice* at xi; cited in note 99), he vacillates between seeing persons or subjects as the *authors* or as the *vehicles* of the operations he examines, a distinction I argue is critical to maintain.

104. *Practice* at 31–32.

105. *Id.* at 17–18.

along in a network of already established forms and representations.¹⁰⁶

Closer to home, Genovese's analyses of slavery in the United States show that slaves translated paternalist ideology into a doctrine different from that of their masters, forging it into a weapon of resistance and a powerful defense against the dehumanization implicit in slavery. "Southern paternalism may have reinforced racism as well as class exploitation but it also unwittingly invited its victims to fashion their own interpretation of the social order it was intended to justify. And slaves, drawing upon a religion that was supposed to assure their compliance and docility, rejected the essence of slavery by projecting their own right and value as human beings."¹⁰⁷

Slaves simultaneously reproduced their oppression and manufactured their freedom in their readings of dominant discourses (paternalist ideology, legal codes, and Christianity), and *drawing from those ideologies themselves* they forged critiques of the social order. Similarly, middle-class women in 19th-century America turned the cult of true womanhood and the doctrine of separate spheres to their own ends. An undeniably oppressive ideology, which insisted that women must counter the debasing influences of a masculine life preoccupied with worldly ambitions by exercising moral influence in the home, it both increased woman's prestige in the home and rigidly confined her to this domain. Women were held to be uniquely suited to shoulder the heavy responsibilities of preserving the moral idealism and spiritual values that the commercial spirit of the public realm threatened to destroy. But, as feminist historians have shown, women used this characterization to assert the propriety of their activity in an ever increasing variety of public forums in which the necessity of moral influence could be asserted. As Suzanne Lebsock notes, "once the basic tenets of true womanhood were established, they could be, and were, used in diametrically opposed ways. The cult was invariably invoked by those who wished to repel some new female incursion on male prerogative. . . . At the same time, the true woman's claim to superior virtue and piety could be used to justify the creation of new spheres of female activity outside the home."¹⁰⁸

106. *Id.* at 18.

107. Eugene Genovese, *Roll Jordan Roll: The World the Slaves Made* 7 (New York: Pantheon Books, 1984).

108. *The Free Women of Petersburg: Status and Culture in a Southern Town, 1784-1860* at 233 (New York: Norton, 1984). The use of opportunities afforded by the potentialities inherent in the structures of discourse for unanticipated purposes and projects is, of course, not a practice limited to the disempowered (although such agents may well effect greater transformations—their projects and references being farther removed from the expectations of ideological producers than those of the socially powerful). For example, in *The Good Families of Barcelona: A Social History of Power in the Industrial Era* (Princeton, N.J.: Princeton

Because discourses, no matter how authoritative, by their very nature lack fixity, they invite such underminings. This is not to deny that authoritative discourses are maintained, supported, and enforced by nondiscursive practices, including the use of physical force; it is, however, to suggest that changes, even major transformations, may be generated by the rhetorical practices of social agents who penetrate, dissimulate, and reorder the structures of discursive space in their quotidian quests to construe the world in a manner that conforms to their perceived interests.¹⁰⁹

University Press, 1986), Gary W. McDonogh demonstrates that in the 19th century, newly emergent industrial elites in Barcelona developed potentials unspecified in but afforded by the 1829 Spanish commercial code to meet traditionally valued ends. The creation of the limited liability corporation as a vehicle to encourage economic exploitation by associations of private investors, which anticipated a separation of ownership and control, was seized by already existing family businesses in a manner that retained an identification of ownership and control in the figure of the founding patriarch, but took advantage of the protection afforded by limited liability to preserve family patrimonies. Legal practice, in this instance, served other ideologically salient discourses that embodied values and goals more conservative than those the law itself was intended to promote.

109. One argument made against practice theory is that it fails to distinguish between the types of discursive behavior or practice that are likely to effect major social transformations and those that merely reproduce the status quo or modify it in socially inconsequential ways. I would have to acknowledge this to be true. What practice theory suggests is that such determinations can never be made in advance; quotidian social practices may cumulatively produce unforeseen political consequences. Individual 19th-century women may have had no conscious intention of effecting major changes in gender relations (indeed, they might have been horrified by such a prospect) when they argued for the need for a female influence in discrete realms of endeavor on an issue-by-issue basis. The cumulative effect of these rhetorical strategies could not have been envisioned at the time. Only with hindsight is it possible to see this activity as *political* activity which was resistant to a particular form of oppression, even as it was complicit with some of its dominant cultural representations.

Practice theory, then, lays claim to no particular political program or agenda. It is not a prescription for politics but a description of the politics emergent in everyday life. It provides no schema with which to evaluate political arguments or judgments. Like the structures I've been discussing, practice theory doesn't *do* anything. Like all discourse it is a structure of opportunity, a body of conceptual resources that can be deployed for strategic purposes. As theory, it is not a totalizing vehicle but one that multiplies potentialities by compelling a reevaluation of conventional thought. How you use it has to do with your own perceived interests, your own experiences, and the other discursive configurations in which you find yourself. Practice theory does, however, provide rhetorical means with which to counter certain insidious forms of political argumentation, especially those which see all behavior as voluntaristically chosen (if you remain in an oppressive situation, you must want to be there) and all experience as fully transparent (I do not feel dominated in this situation, therefore it cannot be coercive). It also provides argumentative tools to counter suggestions that social groups and persons who have been oppressed and exploited lack the moral capacity to make judgments and exercise self-determination (. . . they have been oppressed by colonialism or apartheid for so long they cannot possibly be capable of self-government).

Although it is outside the scope of this essay to develop the idea, I do think that practice theory suggests a conception of politics we might encourage. The theory imagines politics as local practice involving the practical engagement of paradox, contradiction, and ambiguity both within discourses and between them. It is, therefore, an important political exercise to make such paradoxes, contradictions, and ambiguities visible and to articulate them forcefully. It is through such rhetorical practices that felt senses of fixity may be undermined and the inherent plasticity of discourses and institutions made more fully available for critical praxis. It is also an exercise in political empowerment to make more discourses, and hence more resources, available to more people in more contexts. This enables people

In many cases, the hegemonic discourse formulated by the dominant class to justify its own rule, provides, in its ambiguities and contradictions, much of the raw material from which the most effective critique of that rule can be derived and sustained.¹¹⁰ And given the discursive constitution of subjectivity, the most compelling and socially galvanizing of critiques are likely to be constructed from such materials. As literary theorist Paul Smith argues, ideology cannot be seen as

a purely dominating force into which the subject/individual is implicated to the exclusion of any possibility of resistance. On the other hand, it would of course be absurd to suggest that resistance, or human agency, has provenance in some putative space of the nonideological since . . . the ideological and the place of the subject/individual are both intimately tied into the symbolic realm. The symbolic realm, the *place* where we are in language and in social formations and which is also the *process* whereby we fit into them, *constructs* the ideological. In that sense, to regard resistance to ideology as anything but a *by-product* of the ideological itself must be to posit some kind of innate human capacity that could over-ride or transcend the very conditions of understanding and calculation. Resistance does take place, but it takes place only within a social context which has already construed subject-positions for the human agent. The place of that resistance has, then, to be glimpsed somewhere in the interstices of the subject-positions which are offered in any social formation.¹¹¹

This suggests (amongst other things) that legal academics should reformulate their inquiries into the relation between social agents and the

to "develop action, thought, and desires by proliferations, juxtaposition, and disjunction" through the encouragement of multiplicity (Sean Hand, "Translating Theory, or the Difference between Deleuze and Foucault," in Giles Deleuze, *Foucault* xlii (Minneapolis: University of Minnesota Press, 1988). Practice theory suggests that "political practice [serve] as an intensifier of thought, and [the intellectual's] analysis as a multiplier of the forms and domains for the intervention of political action. *Id.* at xliii. Cultivate heterogeneity. Increase sensitivity to differences. Tolerate the incommensurable. Let a thousand language games bloom. Lyotard, *The Postmodern Condition* (cited in note 49).

For another discussion of the inherent lack of fixity in discourse and the progressive political action this enables, see Ernesto Laclau & Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics* (London: Verso, 1985) ("Laclau & Mouffe, *Hegemony*").

110. Scott, *Weapons of the Weak* at 338–39 (New Haven, Conn.: Yale University Press, 1985).

111. Smith, *Discerning the Subject* at 25 (Minneapolis: University of Minnesota Press, 1988). Duncan Kennedy might be making a similar point (although deploring philosophical and theoretical formations of this nature) in his suggestion that we resist from "the interspace of . . . speeches and rhetoric . . . drama . . . soap opera, pop culture, [and I would venture to guess, all the symbolic forms which situate us as subjects]. [F]reedom exists in the interstices of structures and is a way of destroying them and transforming them but never being outside them, so that freedom is always interstitial . . . it's just things you can do in spite of the structured character of the situation." Gabel & Kennedy, 36 *Stan. L. Rev.* at 53–54 (cited in note 23).

law, recognizing the limitations of inquiries into compliance and noncompliance, or 'gaps' in legal effectivity. We must also contend with the possibility that the respect and legitimation accorded to law as an authoritative discourse may incorporate diverse interpretive and/or consumptive practices that fundamentally transform and potentially even undermine the goals of policy-makers and decision-makers. If we are even to begin to comprehend the pervasiveness of liberal legal discourse in the social fabric, we must increasingly attend to the deployment of legal discourse in the prosaic practices of those seemingly least involved in its institutional manifestations, who inevitably employ such discourse with respect to ends and references never contemplated by legal authorities. This should not divert our attention away from *alternative* discourses, but it does suggest that we acknowledge the possibility that liberal legal discourse itself may achieve an "otherness" in the hands of those who, at first glance, might seem to have least to benefit from its structures.

We can, like Peller, recognize the constitutive power of underlying structures of meaning (or the cultural codes of common sense) to constrain the range of legal argument, without seeing such structures as determining either of legal consciousness or of legal practices. Such systems of meaning

do not exist except as they manifest themselves in particular representational activities. But even that statement is misleading. There is no "system" as such. There are only particular representational activities carried out by particular people in the context of prior representational practice. And that context is never static; it is inscribed with negativity, pointing outward in traces to other contexts and other times. Representational conventions inevitably are transformed as they are used by various people in various social relations. While conventions are external to individuals in the sense that they exist before and outside of particular people, representative conventions are contingent not only in the sense that alternative ways to divide up the world are imaginable and exist in other communities, but also in the sense that they are social creations which continue to exist only if they are reproduced by people in daily life.¹¹²

Structure, in short, is not itself ever present; it is in indeterminate historical transformation at each instant.¹¹³ For Peller, the frozen nature of representational practice, as reflected in the identification of a positive content with representational terms, is only an *effect* of the institutionalization of a social power which is contestable and at *risk* in every realm of social life.¹¹⁴

112. Peller, 73 *Cal. L. Rev.* at 1178 (cited in note 1).

113. *Id.* at n. 45.

114. *Id.*

IV. SYMBOLIC PRACTICES AND POWER

A. Symbolic Violence

The institutionalization of social power through representational practice to which Peller draws our attention has been the specific focus of Pierre Bourdieu, a prolific scholar whose works range from ethnographic studies of Algerian kinship systems to sociological investigations of the French educational system and interventions in the debates about the bases and critical potential of social theory. Over the past 20 years, Bourdieu has been elaborating a "theory of practice" which attempts to demonstrate that significative systems are inextricably interrelated with power relations and that symbolic practices exercise their own type of violence, "a gentle, invisible form of violence" which is never recognized as such, or which is recognized only by concealing the mechanisms on which it depends.¹¹⁵

It is as structured and structuring instruments of communication and knowledge that symbolic systems' fulfil their political function as instruments of domination (or more accurately, for legitimating domination) which help to make possible the domination of one class over another (symbolic violence) by reinforcing with their own power the power relationships upon which they are based, and so contributing, as Weber puts it, to the 'domestication of the dominated.'¹¹⁶

But, as Bourdieu makes clear, "to insist that instruments of communication and knowledge [symbolic systems] are, as such, instruments of power, is to make the point that they are subordinated to practical functions and that the coherence which characterizes them is that of practical logic."¹¹⁷

Bourdieu has been concerned "to delineate the mechanisms of symbolic domination and control by which the existing social order is maintained in both pre-industrial and modern social systems," mechanisms that involve pervasive misrecognitions of power.¹¹⁸ Bourdieu examines these mechanisms in the fields of education, art, science, religion, and law, attempting to explicate the nature of the connections between culture, power, and social differentiation which respectively characterize them. Before turning to Bourdieu's particular discussion of the "juridical field,"¹¹⁹ we can better understand the means by which he avoids recourse

115. John B. Thompson, *Studies in the Theory of Ideology* 43 (Berkeley: University of California Press, 1984).

116. Bourdieu, "Symbolic Power" at 115 (cited in note 3).

117. *Id.* at 116.

118. Paul Di Maggio, "Review Essay on Pierre Bourdieu," 84 *Am. J. Soc.* 1460 (1979).

119. Pierre Bourdieu, "The Force of Law: Toward a Sociology of the Juridical Field," 38 *Hastings L.J.* 805 (1987).

to the concepts of structure and subjectivity, oppositionally defined, by considering his general comprehension of the social world.

Different classes and class factions are engaged in a specifically symbolic struggle to impose the definition of the social world most in conformity with their interests. The field of ideological positions reproduces in transfigured form the field of social positions. They may carry on this struggle either directly in the symbolic conflicts of everyday life or indirectly through the struggle waged by the specialists in symbolic production (full time producers), in which the object at stake is the monopoly of legitimate symbolic violence—that is to say, the power to impose (and indeed even to inculcate) instruments of knowledge and expression of social reality (taxonomies), which are arbitrary (but unrecognized as such).¹²⁰

As this passage indicates, Bourdieu takes as his subject precisely those attitudes, dispositions, and ways of perceiving reality that are taken for granted by members of a social class or a society. These unquestioned cultural arbitrarinesses are the underpinnings of any system of domination, of the hierarchies that characterize relations both among individuals and among social classes in society.¹²¹

Bourdieu makes his central area of inquiry, then, that domain which CLS scholars, especially Peller, Gordon, and Heller, have delineated as the most crucial realm for exploration. Moreover, Bourdieu's inquiry incorporates a theoretical perspective that rejects (and often constitutes a polemic against) both phenomenological approaches and structuralist or objectivist analyses.¹²²

Because Bourdieu's intent is to explore the means by which systems of domination persist and reproduce themselves without conscious recogni-

120. Bourdieu, "Symbolic Power" at 115 (cited in note 3).

121. Di Maggio, 84 *Am. J. Soc.* at 1461.

122. Bourdieu's scholarly achievements can be fruitfully understood in terms of the opposition between Sartre and Levi-Strauss in postwar French intellectual debates. For this reason, Bourdieu's work is of great interest to a critical legal inquiry attempting to come to terms with the inadequacies of both subjectivist and structuralist approaches. The context in which Bourdieu came of age was one characterized by the confrontation of:

two radically different approaches to the study of social life: Sartre's voluntarism and Levi-Strauss's structuralism. Sartre's emphasis on the creativity, freedom, and undetermined power of choice of the individual subject and Levi-Strauss's emphasis on the causal power of structures operating independently of the consciousness of agents came to be seen by Bourdieu as antithetical poles of a basic opposition between subjectivism and objectivism, an opposition discernable in different guises throughout the history of social thought and constituting in his view, the chief obstacle to the construction of an adequate theory of society. All of Bourdieu's work, seen in this light, represents an effort to "transcend the antagonism which sets these two modes of knowledge against each other and at the same time to preserve the insights gained by each position."

Rogers Brubaker, "Rethinking Classical Theory: The Sociological Vision of Pierre Bourdieu," 14 *Theory & Soc'y* 745, 747 (1985), citing Bourdieu, *Le Sens Pratique* 43 (Paris: Editions de Minuit, 1980).

tion by a society's members, he rejects a social science based on the subjective perceptions of participants or on the common-sense classifications of social groups, because these may serve to reinforce and confirm the domination he regards as problematic [the danger of phenomenological, hermeneutic, or interpretive approaches]; yet explanations of social phenomena that posit the existence of unseen structures [structuralist approaches] are seen as providing mere models of reality and little more than attractive metaphors, unless one can explain how purposeful, reasoning, self-interested actors contribute, in pursuing their subjective ends, to the maintenance of these structures.¹²³ Bourdieu is suspicious of the tendency of objectivist models to devalue the significance of subjective self-consciousness and subjectively generated representations of the social, because it is through these subjective understandings that *misrecognition* (misrepresentations of social reality) exerts its influence on the reproduction of social inequalities by maintaining the power of dominant social groups.

Bourdieu shares with Gordon and Peller the conviction that social theory must take into account the contribution agents make in constructing the view of the social world (and thereby in constructing this world) by means of the representational activity that they constantly perform, for it is in such activity that power lies. Perception of the social world, however, is the product of social structuration, although such structuration is far from "determining" in any strict sense:

it is structured because the schemes of perception and appreciation available for use at the moment in question, especially those that are deposited in language, are the product of previous symbolic struggles and express the state of the symbolic power relations in a more or less transformed form. The objects of the social world can be perceived and uttered in different ways because, like objects in the natural world, they always include a degree of indeterminacy and fuzziness. . . . This element of play, of uncertainty, is what provides a basis for the plurality of worldviews, itself linked to the plurality of points of view, and to all the symbolic struggles for the power to produce and impose a legitimate worldview.¹²⁴

Like Peller, Bourdieu would emphatically reject the suggestion that the representational construction of the perception of the social world implies an intellectualist theory of knowledge because "the essential part of the experience of the social world and of the act of construction that it implies takes place in practice, [which may be] below the level of explicit representation and verbal expression."¹²⁵ Perception of the social world is

123. Di Maggio, 84 *Am. J. Soc.* at 1462 (cited in note 118).

124. Bourdieu, "Social Space" at 727-28 (cited in note 3).

125. *Id.* at 728.

developed in and through practice and effective being in the world involves the strategic utilization of these constructions—"practical mastery of the social structure as a whole that reveals itself through the sense of the position occupied in that structure; the categories of perception of the social world are, as regards their most essential features, the product of the internalization, the incorporation, of the objective structures of social space."¹²⁶

B. *Habitus*: Structurated Consciousness

The concept of *habitus*, which might be likened to a "class unconscious" or a person's sense of the position she occupies in social space, is employed to explain the relationship between external, constraining social facts (structures) and experiencing, apprehending, acting individuals, and the proclivity of purposeful, reasoning, self-interested actors to contribute to the maintenance of structures in pursuing their own subjective ends. "The *habitus* is defined abstractly as the system of internalized dispositions that mediates between social structures and practical activity, being shaped by the former and regulating the latter."¹²⁷ Use of this concept is intended to counter the objectivism of structuralist thought, which tends to reify conceptions of underlying generative structures:

To give primacy to the study of relations between objective relations rather than to the study of the relations between the agents and these relations, or to ignore the question of the relationship between these two types of relations, leads to the *realism of the structure* which . . . hypostatizes the systems of objective relations in already constructed totalities, outside . . . history. . . . Without falling back into a naive subjectivism or "personalism" one must remember that, ultimately, objective relations do not exist and do not really realize themselves except in and through the *system of dispositions* of agents, produced by the internalization of objective conditions. Between the system of objective regularities and the system of directly observable conducts a mediation always intervenes which is nothing else but the *habitus*, geometrical locus of determinisms and of an individual determination, of calculable probabilities and of lived-through hopes, of objective future and subjective plans. Thus the *habitus* of class as a system of organic and mental dispositions of unconscious schemes of thought, perception and action is what allows the generation, with the well-founded illusion of the creation of unforeseeable novelty or of free improvisation, of all thoughts, all perceptions and actions in conformity with objective realities, because it has itself been generated within

126. *Id.*

127. Brubaker, 14 *Theory & Soc'y* at 758 (cited in note 122).

and by conditions objectively defined by these regularities.¹²⁸

Habitus, however, should not be considered in a Durkheimian sense as the static inscription of social structure on consciousness (i.e., the structuring of consciousness along the same lines as the structuring of the social world). It is better comprehended as the link that mediates structure and individual activity—a system of lasting dispositions, a matrix of perceptions, appreciations, and of actions, that mediates between structures and practices, as a principle of a *structured* but not structural, *praxis* through which social structures are reproduced. In other words, the strategies and practices through which the social world is produced are not (as a purely subjectivist theory would suggest) a matter of pure calculation, but the principles from which such practices proceed are deeply embedded in consciousness, in a habitus that could be described as “a feel for or sense of the social game,” “a tendency to generate regulated behaviors apart from any reference to rules,” or “a practical sense of a particular sense of a particular social game” which enables strategies that are neither products of an unconscious program or of conscious, rational calculation.¹²⁹

Thus, the habitus of the legal practitioner (lawyer, judge, or legal theorist) might be described as the principle producing practices “strongly patterned by tradition, education and the daily experience of legal custom and professional usage.”¹³⁰ Sharing similar educational trajectories, and having undergone similar rites of passage, practitioners in this field share forms of habitus characterized by internal resemblance within the group: habitual, patterned ways of understanding, judging, and acting that arise from their position as members of a specific social field, playing a particular social game. These learned but deeply internalized structures of behavior tend to cause the group’s practices and its sense of identity to remain stable over time—the basis of its self-recognition and self-reproduction,¹³¹ even though dissensus and conflict are defining features of the social game itself.

It is through the mediation of habitus that the categories of perception of the social world “incline agents to accept the social world as it is, take it for granted, rather than rebel against it, to counterpose to it different, even antagonistic possibles.”¹³²

If objective power relations tend to produce themselves in views of

128. Pierre Bourdieu, “Structuralism and Theory of Social Knowledge,” 35 *Soc. Research* 681, 705–6 (1969).

129. For an elaboration of these notions of habitus see Stephen W. Foster, “Reading Pierre Bourdieu,” 1 *Cultural Anthropology* 103 (1986); and Pierre Lamaison, “From Rules to Strategies: An Interview with Pierre Bourdieu,” 1 *Cultural Anthropology* 110 (1986).

130. Richard Terdiman, Translator’s Introduction, 38 *Hastings L.J.* 805, 807 (1987).

131. *Id.* at 811–12.

132. Bourdieu, “Social Space” at 728 (cited in note 3).

the social world that contribute to the permanence of these relations, this is therefore because the structuring principles of a world view are rooted in the objective structures of the social world; power relations are also present in people's minds, in the form of perception of these relations. However, the degree of indeterminacy and fuzziness in the objects of the social world, together with the practical, pre-reflexive and implicit nature of the schemes of perception and appreciation that are applied to them, is the Archimedean leverage point that is objectively offered for political action proper.¹³³

C. Ideological Production

Bourdieu suggests that "[k]nowledge of the social world and, more precisely, the categories that make it possible, are the stakes, par excellence, of political struggle, the inextricably theoretical and practical struggle for the power to conserve or transform the social world by conserving or transforming the categories through which it is perceived."¹³⁴

It follows that the capacity to make entities exist in the explicit state, to publish, make public (render objectified, visible, and even official), represents a formidable social power. Although this work of categorization is carried on continuously, at every moment of daily life, in agents' struggles over the meaning of the social world and their place in it, in highly differentiated societies characterized by relatively autonomous fields, "the work of producing and imposing meaning is carried on in and through the struggles within fields of cultural production; it becomes the particular concern, the specific interest, of the professional producers of objectified representations of the social world."¹³⁵

Bourdieu conceives of society as a system of relatively autonomous but structurally homologous fields of cultural production founded on hierarchies that obey similar laws.¹³⁶ A field is a broadly inclusive term referring to the totality of actors, institutions, and characteristic activities in a

133. *Id.* at 729.

134. *Id.*

135. *Id.* at 730. Bourdieu suggests that "the trial represents a paradigmatic staging of the symbolic struggle inherent in the social world" (38 *Hastings L.J.* at 837; cited in note 119), a struggle in which antagonistic world views come into confrontation. Judicial power is the power to proclaim truth by acts of naming or instituting "for the state alone holds the monopoly of legitimized symbolic violence." *Id.* at 838. Through judgments, the law concludes or at least limits the everyday struggles and negotiations "concerning the qualities of individuals or groups, concerning the membership of individuals within groups, concerning the correct attribution of names and titles, concerning union or separation—in short concerning the entire practical activity of 'worldmaking' . . . law is the quintessential form of the symbolic power of naming that creates the things named. . . . It confers upon the reality which arises from its operations the maximum permanence that any social entity has the power to confer upon another, the permanence which we attribute to objects. *Id.*

136. Di Maggio, 84 *Am. J. Soc.* at 1462 (cited in note 118).

realm of cultural production and the structured, socially patterned practice of this production. Bourdieu has been particularly concerned with examining fields of ideological production in which symbolic systems are produced by corps of specialists within a relatively autonomous field of production and circulation which dispossesses the lay population of the instruments of symbolic production. His understanding of "relative autonomy" is particularly relevant for the consideration of legal practice and serves to avoid both a crude Marxist reductionism and a sterile structuralism:

Ideologies owe their structure and their most specific functions to the social conditions of their production and circulation—that is to say to the functions which they fulfil first of all for the specialists competing for the monopoly of the established competence in question (religious, artistic, etc.), and secondly and incidentally for non-specialists. To insist that ideologies are always *doubly determined*, that they owe their most specific characteristics not only to the classes or class factions which they express . . . but also to the specific logic of the field of production . . . is to provide a way of escape from the crude reduction of ideological products to the interests of the classes which they serve (a 'short circuit' effect frequently found in Marxist criticism) without succumbing to the idealist illusion that ideological productions are self-sufficient and self-engendered wholes susceptible to pure and purely internal analysis (semiology).¹³⁷

Bourdieu follows the same path as Gordon in rejecting a formalist jurisprudence which sees the law as an autonomous and closed system whose development can be understood solely in terms of its "internal dynamic" freed of any social determination,¹³⁸ and in refuting any form of systems theory that posits legal structures as self-referential and confuses the symbolic structure (law) with the social system that produces it. His approach differs from both Kennedy's (renounced) account of historical legal consciousness and Heller's poststructuralist rendering of legal practices because "although a symbolic order of norms and doctrines contains objective possibilities of development . . . it does not contain within itself the principles of its own dynamic."¹³⁹ The juridical field, "as a social space characterized by struggle over interpretation itself contains the principle of its own transformation in the struggles between the objective interests associated with these different perspectives."¹⁴⁰

Also rejected is an instrumentalism tending to conceive of law and jurisprudence as *direct reflections* of existing social power relations, in which

137. Bourdieu, "Symbolic Power" at 116 (cited in note 3).

138. Bourdieu, 38 *Hastings L.J.* at 814 (cited in note 119).

139. *Id.* at 816.

140. *Id.* at 816.

economic determinations and, in particular, the interests of dominant groups are expressed. Bourdieu is particularly critical of those structuralist Marxists who, paradoxically, "ignore the *structure* of symbolic systems and, in this particular case, the specific *form* of juridical discourse. Having ritually reaffirmed the "relative autonomy" of ideologies, these thinkers neglect the social basis of that autonomy—the historical conditions that emerge from struggles within the political field, the field of power—which must exist for an autonomous social (e.g., a legal) universe to emerge and, through the logic of its own specific functioning, to produce and reproduce a juridical corpus relatively independent of exterior constraint."¹⁴¹ Bourdieu also, however, criticizes Marxist humanists, like E. P. Thompson, who believe they are breaking from economism and accepting the law's historical efficacy by asserting that it is "deeply imbricated within the very basis of productive relations," because "this concern with situating law at a deep level of historical forces once again makes it impossible to conceive concretely the specific social universe in which law is produced and in which it exercises its power."¹⁴² Neither the formalist nor the instrumentalist position fully incorporates a recognition of the structure and practices that define that social space Bourdieu calls the juridical field.¹⁴³

D. The Juridical Field

Unfortunately, Bourdieu's general sociology suggests more potential than his specific discussion of the juridical field realizes. If Bourdieu provides any guidance for a critical sociology of law, it is in his insistence that we empirically examine the specific power struggles over interpretive competence that structure the field of legal practitioners (differential professional prestige and power attaching to places of practice, legal subspecialties, types of clientele, etc.) and endeavor to determine their impact on the production of authoritative representations of the social world. According to Bourdieu, the social struggles of practitioners to legitimize their self-conceptions, and further their interests as individual practitioners and as a group, have ideological effects which serve to reproduce important forms of domination.

More specifically, linguistic strategies central to legal practice, such as formalization, rationalization, neutralization, and universalization, serve legitimating functions. This insight is hardly novel, and has been ably theo-

141. *Id.* at 815.

142. *Id.*

143. Bourdieu is commenting primarily on the juridical field in France, but he makes extensive reference to Anglo-American legal practice and the level of generality of his discussion supports his translator's claim that "his perspective transcends the specificity of any individual legal system." Terdiman, 38 *Hastings L.J.* at 806 (cited in note 130).

rized by both CLS and law and society scholars. What is distinctive about Bourdieu's discussion of these practices is his insistence that such practices are *simultaneously* engendered by habitual types of attitude or disposition on the part of legal practitioners (embedded in *habitus*), produced by them in their struggles for authority and power within the profession itself, deployed by the legal profession in its justification of itself and its products to other social groups, as well as being essential to the achievement of the law's legitimation and the misrecognition of power relations on which this achievement depends.

The use of such linguistic strategies cannot be seen as the practice of legal professionals with conscious ideological intentions, for these strategies are constitutive of a continuing process of rationalization that serves to distinguish the professional from the layperson and the legal judgment from intuitions of fairness, distinctions that define the self-consciousness of the professional as well as making judicial norms "seem (both to those who impose them and even to those upon whom they are imposed) totally independent of the power relations which such a system sustains and legitimizes."¹⁴⁴ Through various procedures, juridical language achieves a sense of the impersonality of normative utterances (the neutralization effect) and an effect of universalization. Such procedures are never merely strategies autonomously selected by individuals to achieve predetermined effects, but part of an assumption of a pervasive attitude that defines professional subjectivities.

E. Legal Consciousness

A particular kind of legal practice, then, can be understood not in essentially structuralist or subjectivist terms but as socially or structurally constitutive of the organization of a domain of social space and constitutive of the subjectivities of those who occupy that space; a representational practice that reproduces an ideological structure of signification and one that reinforces the legitimization of that ideology as it permeates the consciousness of those who perpetuate it. Much CLS scholarship, for example, has attempted to demonstrate how it is that despite law's inherent indeterminacy, socially constructed realities have limited the possibilities of interpretation and produced an experience of felt necessity amongst legal practitioners, in which doctrine appears determinate and meanings self-evident.¹⁴⁵ The particular conventions of a historically specific interpreting community are considered as patterns of historical legal consciousness, that freeze interpretive possibilities.

144. *Id.* at 817.

145. Boyle, 133 *U. Pa. L. Rev.* at 728–29 (cited in note 1).

It is often difficult to see precisely how Bourdieu's use of habitus differs from the project of using legal consciousness to explain the sense of doctrinal determinacy experienced by legal decisionmakers. Indeed, Bourdieu goes as far as to say that the predictability and calculability imputed to law

arises more than anything else from the consistency and homogeneity of the legal habitus. Shaped through legal studies and the practice of the legal profession on the basis of a common familial experience, the prevalent dispositions of the legal habitus operate like categories of perception and judgment that structure the perception and judgment of ordinary conflicts, and orient the work which converts them into juridical confrontations.¹⁴⁶

As Boyle argues, analyses that employ the concept of legal consciousness to explain a felt sense of doctrinal determinacy risk essentialism in their efforts to produce a deep structure of legal thought.¹⁴⁷ Insofar as he focuses on Kennedy's work on the historical understanding of classical legal consciousness,¹⁴⁸ Boyle's fear that such studies inevitably privilege structure at the expense of subjective experience seems well-founded. His assertion that "the analysis of historical legal consciousness gives us . . . a frozen cross-section of legal ideology at one particular time"¹⁴⁹ does capture the tone of Kennedy's piece, despite Kennedy's declaration that he is not interested in static analyses of states of a system frozen at particular moments:

My purpose, however, is to describe a particular historical process: the emergence, flourishing, and decay of a particular integrating subsystem (Classicism) within a particular historical consciousness (that of the American legal elite between 1850 and 1940). For this purpose, the image of the grid or network of forces is inadequate. The importance of the materials for us is much better conveyed by the image of the microscopic organism that takes to itself and transforms the biologically distinct organisms around it; *finds itself transformed by the very process of assimilating those foreign bodies*; and finally falls apart into a set of pieces which bear no more than an indirect and subtle resemblance either to their integrating predecessor or the various weaker organisms the predecessor fed on.¹⁵⁰

146. Bourdieu, 38 *Hastings L.J.* at 833 (cited in note 119).

147. Boyle, 133 *U. Pa. L. Rev.* at 729.

148. Duncan Kennedy, "Toward an Historical Understanding of Legal Consciousness: The Case of Critical Legal Thought in America, 1850-1940," 3 *Research in L. & Soc.* 3 (1980).

149. Boyle, 133 *U. Pa. L. Rev.* at 765.

150. Kennedy, *Research in L. & Soc.* at 22 (my emphasis).

What appears most problematic in this sort of approach to legal consciousness is its premise that the processes of transformation are inherent properties of the operation of the subsystem itself, which functions independently of the interpretive activity of the legal actors through which it finds a medium. Kennedy realizes that any attempt to construct a picture of legal constraints must come to terms with the inevitability of the ongoing transformation of such conventions. This could be better done, however, by addressing interpretive activity as social practice, rather than through recourse to speculative postulations about "systems" which advance by their own internal dynamic independent of human agency.¹⁵¹

The risk of essentialism in describing historical legal consciousness is certainly posed, but its realization is far from inevitable. Constant vigilance against the danger of conflating the distinction between structuralist *method* and structuralist *theory* is needed. While it may be useful to describe legal consciousness as patterned in particular ways, it is not necessary to argue that the structure so outlined *produces* anything at all. The structure is merely a means of rendering intelligible how a particular group of actors think about their experiences as lawyers and judges and how they thereby act in the world. The "illusion of certainty" is not produced by any structure, which is, after all, only the construction of an outside analyst, but through the experiences and practices of the social actors concerned, experiences and practices that both constitute a particular way of seeing things and are constituted by it. The heuristic need to posit a frozen structure is, as Unger argued, only methodologically necessary as "a crutch to be cast off as soon as we learn to walk."¹⁵² We may need the frozen structure to provide a point of entry from which we can venture into the unfamiliar territory of the understandings of others, but we do not need to cripple *them* with the encumbrances of *our* own inability to ambulate!

Bourdieu's notion of habitus would seem to be valuable here because it enables us to understand legal consciousness not as a structure of cognitive categories but as a socialized disposition, distinctive by virtue of its social and historical referents.¹⁵³ The conventions and dispositions shared by legal practitioners are seen to be the product of continuous *struggles* by members of the field and represent the prevailing state of power relations within that field. Conventions, or authoritative forms of practice, are

151. Kennedy's own recanting of legal consciousness, albeit for political reasons, suggests a distaste for the abstract and structuralist nature of this approach. Gabel & Kennedy, 36 *Stan. L. Rev.* at 15-16 (cited in note 23).

152. Boyle, 133 *U. Pa. L. Rev.* at 714, citing Roberto Unger, *Knowledge and Politics* 15 (New York: Free Press, 1975).

153. Arguably the habitus of the legal practitioner trained in an elite law school in the 1950s varies considerably from that of the lawyer who emerges from a law school where critical legal studies, feminist legal scholarship, and clinical practice empowering disadvantaged social groups have become entrenched.

themselves never fixed (although given a lengthy and stable period of domination by particular groups within the juridical field, they may achieve a certain hegemony associated with a degree of homogeneity of disposition or consciousness) and may be contested in struggles in the field that often reflect political struggles within the wider society.

Our task, I would venture, is to illustrate how particular ways of seeing the world come to be constituted, how they achieve hegemony through particular practices and discourses, what institutional conditions and social forces serve to maintain such discourses as authoritative, and how people cope with and represent to themselves their ongoing *struggle* to make the world conform to their conventional understandings and expectations of it. The process, then, is one in which the frozen structures we posit for our own purposes are deconstructed as *determining* forces in the lives of the people we are describing, through accounts that attempt to convey the patterning of consciousness as ongoing social *activity* carried out in everyday *practices*.¹⁵⁴ A focus on the realm of subjective experience and political struggle is not, therefore, necessarily alien to the analysis of structures of historical legal consciousness, but is crucial to its success.

In general, however, Bourdieu's broader speculations about the relationship between structure and subjectivity, practice, power, and ideology have greater implications for our understanding of legal practice as ideological production than his attenuated discussion of the juridical field would suggest.

V. TOWARD A THEORY OF PRACTICE

A. Summary of Theoretical Advances

The idea that social theory must inevitably oscillate between emphases on structure and subjectivity, conceptualized as poles of an ineluctable opposition, is fundamentally misconceived. This oppositional structure or theoretical dichotomy must be transcended. As we have seen, recent developments in social theory illustrate that there is no need to conceive of the social world in terms of such dichotomies; therefore the endless alternation of phenomenological and structuralist arguments (and the liberal and totalitarian political visions they evoke) can be avoided. It should also be clear that the central premises of practice theory are not alien constructs we must borrow from other traditions and graft onto critical legal

154. Gordon's study of legal consciousness and legal practice amongst late 19th-century American lawyers is one such account ("Legal Thought and Legal Practice in the Age of American Enterprise, 1870-1920," in Gerald Geison, ed., *Professions and Professional Ideologies in America* (Chapel Hill: University of North Carolina, 1984) ("Gordon, 'Legal Thought'"). I discuss it in more detail in the conclusion to this essay.

theory, but premises that while central to the work of many in the CLS tradition, continue to be obscured by attempts to find dichotomous structures within critical legal scholarship that are antipathetic to the goals and sensibilities of its practitioners.

The concepts of structure and subjectivity have been redefined by a number of CLS scholars in ways which imply a rejection of the polarization of these concepts as two halves of an oppositional dichotomy. Concern with socially constructed structures and their influence in social activity and emphasis on the subjective experience of social agents cannot be analytically separated in studies of social life. We must fully confront the complexities of the dialectic between structure and agency as they are played out in ordinary social activity if we are to develop a critical social theory of legal practice that resists the temptations of recourse to exhausted liberal dichotomies while rejecting the antihumanism of poststructuralist alternatives.

The separation of these concerns must also be resisted because it partakes of an essentialism that all scholars responding to the excesses of structuralism have attempted to abandon, and it restricts us to an endless alternation of discourses that cannot serve progressive political interests. Moreover, the imposition of such a separation subtly but surely situates critical legal theory within (or perhaps just in too close a proximity to) the liberal discourse with which we are taking issue, by constituting social theory in terms of conceptual poles that find their correspondences within that discourse itself. The latter is particularly problematic given the desire to avoid developing constructions that can be taken over, subverted, or "turned into a cluster of pods."¹⁵⁵

Despite his belief that the dichotomy between subjectivism and structuralism is helpful, and an issue that all social theory must inevitably confront, Boyle makes several astute observations on the nature of social life that transcend the very opposition he regards as central. Discussing the merits of immanent critique, Boyle suggests that those who deny the existence of the belief structures at issue (or claim that they are too rare to be of any use as social theory) attribute too grandiose a purpose to the critical legal project, which cannot be defended as deconstructing and thereby liberating people from the grips of *the* dominant belief system in Western liberal societies.¹⁵⁶ Such a defense

implies a vision of subjects and of ideological structures that is, quite simply, false. The modernist picture of personality shows us that our beliefs and ideals are not a unified Cartesian system of interlocking and consistent rational arguments. We believe different things at dif-

155. Gabel & Kennedy, 36 *Stan. L. Rev.* 8-17 (cited in note 23).

156. Boyle, 133 *U. Pa. L. Rev.* at 769-71 (cited in note 1).

ferent times; we inhabit multiple discourses, each of which has its own mini-constellation of obligatory beliefs. . . . The mistake of the large-scale social theories, which is replicated by the mediating devices of immanent critique and *Verfremdung*, is to confuse the coherent structure of formal reasoning in the abstract version of the situation for the reality of myriad, overlapping clusters of belief.¹⁵⁷

In different social contexts, and when we occupy different social roles, for example, different and often arbitrarily contradictory beliefs seem compelling.

[I]t is a mistake to confuse the neat Spinozan lattice of an argument about legitimation with the dense tangle of our actual experience of social life. It is ridiculous to believe that one could disrupt the massively entrenched set of power relations and collective fantasies that "constitutes" repression in our society simply by attacking one of the more formalized and abstract fantasies and claiming that the rest are "dependent" on it.¹⁵⁸

However, it is liberating to attack the logic and structure of such fantasies when one is in a context characterized by a social discourse where the highly formalized picture of liberalism defines the ground rules of discussion: "it is important to do analyses of 'the juridical deradicalization of the Wagner Act' *even if* the only people whose belief structures are shaken up are lawyers, law students, and judges. It is important because these people are social actors too, and because a local critique couched in terms of their professional discourse may affect them more profoundly than a general social history of labor law."¹⁵⁹ The successful theory is likely to be a *local* critique, because the greater the claims that we make for our belief structure, the wider its supposed application, the more we will have to privilege or armor it against countervailing subjective beliefs, and the more we privilege it, the more ossified it becomes.¹⁶⁰

Conceptual resources developed by CLS scholars to transcend the structuralist/subjectivist dichotomy (or mediate it, in Boyle's terms) are useful for the task of local critique, whether in the form of critiques of particular localities and their associated discourses, or as more all-encompassing critiques of more comprehensive discourses; but we must be cognizant of the limited arenas in which such discourse prevails and the restrictions within which such theory operates. Those contributions to critical legal thought that make totalizing claims can be viewed as local critiques if we rid ourselves of the fantasy that the limited structure of

157. *Id.* at 771.

158. *Id.* at 772.

159. *Id.* at 773.

160. *Id.*

reason completely encloses our subjective experiences of the social world.¹⁶¹ Similarly, theoretical contributions that appear to emphasize local critique because of their alleged basis in subjective experience will fail as local critique if they privilege the primal subject:

For if there has been one dominant strain in recent philosophical thought, it is that the "subject" is by no means as natural, as obvious, or as basic a term as it appears. The subject can appear merely to be the crossroads of time and culture. The "self" can appear to be the artificial construct necessitated by a particular way of viewing the world. We cannot merely sink back into the "residual" category of subjectivity and claim that this view allows us to base our theories on something uncontentious, if limited.¹⁶²

It seems that in making these concluding observations on structure and subjectivity in the social world, Boyle himself has made two argumentative moves that tend toward a reconceptualization of these two poles which belies the oppositional relationship he has posed for them. First, he has implicitly acknowledged that ideological structures are not singular, determining systems of constraint that operate from some external point to bind individuals, but multiple discourses that differentially constrain us in various social situations to the degree that they seem compelling. Connected to this is a recognition that the theoretical construction of any given structure of discourse cannot be confused with any social positivity or with the actuality of social experience shaped by such belief structures. Second, in his prescriptions, Boyle has reconstrued the concept of the subject to incorporate an understanding of the historical and cultural forces at work in shaping selves and subjectivities. Both of these moves, I submit, involve understandings of structure and subjectivity and their relationship that are fundamentally different from those with which Boyle has conducted his archaeology of critical legal thought. Indeed, Boyle himself has provided us with contributions toward that necessary "mode of thinking about the power of knowledge that avoids the bleak determinism of external structures or the romantic exaltation of the passionate (but isolated) individual, the Faustian, history-creating subject,"¹⁶³ which demonstrates not that the tension between the two is inescapable but rather that it is untenable.

161. *Id.* at 776.

162. *Id.* at 776.

163. *Id.* at 779.

B. New Directions for a Critical Study of Law

1. *The Heterogeneity of the Social Field*

If we are to gain a more comprehensive understanding of the nature and scope of the social and ideological effects of liberal legal discourse, it seems clear that we must look beyond conventionally defined legal forums and into a more heterogeneous field of social practices. Now that we are considering legal liberalism as a particular form of cultural discourse, shaping of consciousness as well as practices that contribute to the reproduction of social relations of inequality, we would have much to gain by extending the range of our scrutiny beyond the domains occupied by legal decision-makers. Bourdieu's work, for example, leads us to explore the ways in which liberal legal discourse resonates with other forms of authoritative discourse in our society, to determine what, if any similarities of structure characterize them and how types of discourse contribute to the constitution of hegemony in any particular place and time.

Law and society research on disputing at the lower levels of the adjudicative hierarchy has yielded fruitful insights into the ways in which legal discourse comes into contact with other systems of value, alternative criteria of judgment, and narratives constructed from community meanings, and shows that transformations in the legal system and the community may be engendered by this encounter.¹⁶⁴

We also need to determine and to demonstrate whether liberal legal discourse is reproduced, legitimized, and possibly reconfigured in behaviors and interpretations not typically considered legal practices. In how diverse and how extensive a range of situations do we encounter the structure and forms of liberal legal discourse? In political argument certainly, but also, I would speculate, in readings of popular films, discussions of celebrities, disputes in the workplace, children's squabbles, and social encounters between strangers in public domains. Such investigations may well compel us to refine and modify our definition of liberal legal discourse, or at least force us to determine what is distinctively legal about the forms of argumentation we are examining.

Mapping out such forms of argumentation in a multiplicity of practices and a diversity of forums will also enable us to explore the ways in which the structures, rhetorical forms, imagery, and key symbols of liberal legal discourse are used in the quotidian practices of various social agents (individual and collective) with manifold agendas. We are likely to find that the relationship between authoritative discourse and its use is not merely one of reproduction and that the structure of liberal legal discourse

164. David Trubek & John Esser, "'Critical Empiricism' in American Legal Studies: Paradox, Program, or Pandora's Box?" 14 *Law & Soc. Inquiry* 1 (1989).

is implicitly challenged, covertly modified, and subtly undermined in interpretive practices in all walks of life. As law and society scholars demonstrate, by going "to the periphery—to small towns, to rural places, to working class neighborhoods . . . [we find that] people in these places come to terms with and often resist the penetration of official norms as they construct their own local universe of legal values and behavior."¹⁶⁵ The long-term social consequences of such activities may be disputed, but if the successful exercise of power is local in imposition, so is likely to be the resistance it engenders.

Calls to expand the scope of sociolegal inquiry have also been voiced by scholars in the law and society movement who seek to make "critical empiricism" central to a reconstruction of law and society research.¹⁶⁶ The efforts of the Amherst Seminar on Legal Process and Legal Ideology "suggest that it may be time to move our activity into places and spaces in the social environment we have not previously considered in order to reconceive the relationship between law and society."¹⁶⁷ Moreover, this appeal is made within the law and society movement for precisely the same reasons a practice theory approach would enjoin it. It is born out of a renewed recognition of legal efficacy: the "overwhelming reality of lawfulness, of law's contribution to the reproduction and maintenance of existing social relations and practices."¹⁶⁸ Legal ideologies contribute to the construction of social relations:

[T]hese legal ideologies operate most clearly in the core regions of legal doctrine and legal institutions, but may be present in social practices anywhere. If these practices are not included within the domain of socio-legal research, something essential will be omitted. By limiting its conception of "law" to doctrine and legal institutions, Silbey argues, the Law and Society movement has missed a key feature of how law participates in the social construction of reality.¹⁶⁹

This appeal to look outside traditional domains is also engendered by an increased sensitivity to the differential presence that law has in the lives of those differentially situated in social space and the differential legal realities experienced across time and space, class and race, age and gender. There are multiple systems of legal meaning, including everyday understandings of law, Hollywood portrayals of it, the landlord's sense of obliga-

165. Susan Silbey & Austin Sarat, "Critical Traditions in Law and Society Research," 21 *Law & Soc'y Rev.* 165, 173 (1987).

166. An elaboration of "critical empiricism" and its implications for the law and society tradition is found in Trubek & Esser, 14 *Law & Soc. Inquiry*.

167. Silbey & Sarat, 21 *Law & Soc'y Rev.* at 166.

168. Susan Silbey, "Ideal and Practices in the Study of the Law," 9 *Legal Stud. F.* 7, 20 (1985).

169. Trubek & Esser, 14 *Law & Soc. Inquiry* at 19 (cited in note 164).

tion and constraint, the pragmatic sense of the entrepreneur, the practitioner's cautionary sense of law, and the judge's relation to doctrine.

All these reasons for extending the realm of sociolegal inquiry are also reasons to focus on practices,¹⁷⁰ in order to consider the multiplicity of means by which hegemony is both maintained and contested by social agents in their everyday consumption or use of legal ideologies, norms, values, and forms of argumentation. It is through practice that transformations of legal structure and social structure are effected. Such an inquiry is necessarily an inquiry into the relationship between structures of representation and of inequality and hence an investigation into the dynamics of power in culture and society.

2. *Constitutions of Subjectivity*

One of the most promising areas of research suggested by a practice theory approach is the consideration of the ways in which legal discourse and practice actively participate in the making of human subjects, and thus reproduce social relations of power. In a panel on "Legal Consciousness and Consciousness of Self" at the Law and Society Association Annual Meetings in 1988, two papers were presented which examined this process in specific contexts. Both Yngvesson¹⁷¹ and I¹⁷² draw on the insights of Bourdieu and Foucault to explore the means by which representations of self are defined and limited by legal processes. Yngvesson focuses on exchanges between local citizens and court officials in criminal complaint hearings in contemporary Massachusetts to show how identities are symbolically constructed and challenged in exchanges before a county clerk, whose own identity is forged by these encounters. I study archival records of 19th-century Ontario defamation trials to show how different forms of subjectivity were ascribed to working-class men, men of property, and bourgeois women in the adjudication process. Both papers draw attention to the resistance of social agents to their constitution as legal subjects, indicating that ideological interpellation¹⁷³ is never total nor complete.

170. By now it should be clear that the term "practice" encompasses a broad scope of possible activities, behaviors, and interpretations. In principle a practice could be almost anything a person or group of people *do*. The emphasis here is on signifying activity that has political implications. Almost any kind of activity can have this potential for bearing meaning and effecting social transformation. For a discussion of the concept of practice in practice theory see Ortner, 26 *Comp. Stud. in Soc'y & Hist.* at 149–50 (cited in note 4).

171. Barbara Yngvesson, "Negotiating Identities: Discourses of Self and Legal Consciousness in Court" (paper presented at Law and Society Association Annual Meetings, June 9–12, 1988).

172. Rosemary J. Coombe, "Contesting the Self: Negotiating Subjectivities in Nineteenth Century Ontario Defamation Trials" (paper presented at Law and Society Association Annual Meetings, June 9–12, 1988).

173. *Interpellation* is the process by which discourse permits certain identities or calls specific subject positions into being. For example, one could not have an *identity* as a homo-

A less optimistic study of interpellation is provided by Jonathan Simon¹⁷⁴ in his study of the ideological effects of actuarial practices. Actuarial representations, which treat individuals as locations in a distribution of variables, create subjects who have no depth or interiority (who are in effect, without subjectivity) and communities with no traditions or shared discourses, and thus no capacity for group identity and political empowerment. To the extent that actuarial practices become increasingly significant in determining important life opportunities, they will also gain significance in inscribing our consciousness of our selves. Resistance to these practices is legion, but, as Simon persuasively argues, prevailing structures of legal rationality limit its effectiveness.

The myriad ways in which legal discourse and practice constitutes subjects, represents selves, and shapes consciousness is still largely uncharted terrain, and empirical scholarship in this area holds great promise for a critical legal studies concerned with power, ideology, practice, and resistance.¹⁷⁵

sexual prior to the 19th century (although one could engage in what we would call homosexual sexual activities). The subject position "homosexual" was called into being by discursive and disciplinary practices that instantiated particular configurations of power. See Michel Foucault, *The History of Sexuality* (New York: Vintage Books, 1980). The juridic subject is constructed through representational practices such as the construction of the judicable fact situation, the development of legal fictions (the "reasonable man"), evidentiary rules, and adversarial tactics, for example. The concept of interpellation was developed by Louis Althusser in "Ideology and Ideological State Apparatuses" in *Lenin and Philosophy* (London: Monthly Review Press, 1971) and has quite appropriately been criticized for being overly deterministic and positing the individual merely as a functional support of structures. Paul Smith, *Discerning the Subject* (cited in note 3), however, has developed the notion of interpellation in a manner congruent with or at least complimentary to the reconceptualization of subjectivity and agency and the possibilities for resistance I have discussed. For a further discussion of interpellation in juridical domains see Dragan Milovanovic, "Re-Thinking Subjectivity in Law and Ideology: A Semiotic Perspective" in D. Currie & B. MacLean, eds., *Struggle for Equality: Rethinking the Administration of Justice* (Toronto: Garamon Press, 1989).

174. Jonathan Simon, "The Ideological Effects of Actuarial Practices" 22 *Law & Soc'y Rev.* 771 (1988).

175. Similar projects are well under way in other disciplines. In cultural anthropology, for example, Emily Martin has examined the cultural and ideological representations that pervade a purportedly "objective" medical-scientific discourse about physiological processes. She also shows how these dominant images and metaphors shape women's experiences of their own bodily functions and inscribe themselves in consciousness. See *The Woman in the Body: A Cultural Analysis of Reproduction* (Boston: Beacon Press, 1987). The question of the place of the individual in relation to interpellative mechanisms has also been theorized extensively with respect to the ideological efficacy of literature, film, and television. For a brief discussion of this work, see Smith, *Discerning the Subject* at 24-40 (cited in note 3). Work in the humanities that has explored the connection between discursive practices and historical subjectivities remains an untapped resource of potentially great significance to the development of a critical legal studies.

3. *The Production of Discourse and the Reproduction of Power*

The focus on practice also suggests a transformation of our approach to those practices of world making traditionally considered legal ones. In our studies of legal practice, we must reinforce our archaeological analyses of discourse with genealogical accounts of the local productions of such discourse, accounts that examine the specific social and historical conditions enabling the creation and maintenance of authority and legitimacy crucial to discursive reproduction. These inquiries demand sociological and ethnographic investigations into the cultures and social structures of lawmaking and the relationships that prevail both within these sites of production and between these fields and the society as a whole. Moreover, we need to consider the dynamics of legal change in a manner that avoids positing crude causal relationships between "law" and "society," or finds within the significative system of legal discourse itself the *deus ex machina* of its transformation. More promise is offered by historically specific studies that attend to the particularities of political struggles (both within and outside of the juridical field itself), the consciousness of those engaged in such struggles, and the particular rhetorical uses made by such agents of the contradictions, ambiguities, schisms, and traces found within prevailing discursive orders.

Something of this nature has been accomplished by Gordon in his attempts to relate the actual practices of late-19th-century American lawyers to prevailing legal doctrine and legal theory. Looking at what lawyers do as, among other things, the production of ideology, Gordon contends that "every legal practice—from drafting a complaint for simple debt to writing a constitution—makes a contribution to building a general ideological scheme"¹⁷⁶ and demonstrates that the consciousness or *habitus*—"the same basic way of thinking about law"¹⁷⁷—of the leading academic and practicing lawyers in this period can be detected in activities as diverse as academic writing, public service work, and day-to-day practice. Gordon shows how the attributes of liberal legal thought legitimated and justified newly emergent forms of domination by (paradoxically) making illegitimate forms of domination seem to disappear—by making all coercion seem to be the result of either consent or natural necessity.¹⁷⁸ Moreover, he relates changes in legal consciousness and practices to specific social struggles, and legal professional discourses to prevailing political ones. In so doing, he avoids both structuralist essentialism and subjectivism, while maintaining

176. "Legal Thought" at 72 (cited in note 154).

177. *Id.*

178. *Id.* at 93.

an emphasis on the creative agency and historical effectivity of particular (socially structured) legal practitioners.

Neo-Marxists in the Law and Society movement also tend toward a theory of practice to the extent that they urge an empirical establishment of the production, transmission, and effect of legal ideology by examining its operation in institutional and economic contexts.¹⁷⁹ While this involves a welcome departure from structuralism in the Marxist sense of a deep structure of economic relations or unalterable social laws, unfortunately it seems to remain wedded to a material determinism based in social and institutional relations.¹⁸⁰ It would seem that a simple economic base has been replaced with a more complex institutional one, but the base-superstructure dichotomy remains intact. A theory of practice, however, must be predicated on the dismantling of such structures.¹⁸¹ Such deconstructions have yielded substantial new insights into the social role of law in the hands of the Marxist humanists E. P. Thompson¹⁸² and Douglas Hay,¹⁸³ and the Cultural Studies scholars who brought similar Gramscian perspectives to their richly contextualized study of the construction of "mugging" in contemporary British society.¹⁸⁴ The empirical detail and the attention given to multiple discourses, the shaping of consciousness, minority voices, and practices of resistance make *Policing the Crisis: Mugging, the State, and Law and Order* a particularly suggestive example of the possibilities of a practice theory approach.

Before concluding, however, I think it is important to sound a few warnings. A focus on everyday practices and their reproduction and transformation of structures of meaning and relations of power is not without

179. See Hunt, 19 *Law & Soc'y Rev.* (cited in note 1).

180. For example, John Brigham states that "doctrine as ideology can be understood through the social and institutional relations that determine its impact." "Judicial Impact upon Social Problems: A Perspective on Ideology," 9 *Legal Stud. F.* 47, 49 (1985).

181. Jane Collier & Sylvia Yanagisako, "Theory in Anthropology Since Feminist Practice" (paper presented at American Anthropological Association Annual Meetings, Nov. 18-22, 1987) ("Collier & Yanagisako, 'Theory in Anthropology'").

A cogent case for such a deconstruction is made by Raymond Williams, *Marxism and Literature* (Oxford: Oxford University Press, 1977). Other neo-Marxist ("post-Marxist" is the nomenclature claimed by its practitioners) scholarship abandoning the base/superstructure, and, indeed, the material/ideal dichotomy, which offers promise for legal scholars interested in social movements and minority resistance is being produced by Ernesto Laclau and Chantal Mouffe. See Ernesto Laclau, "'Socialism,' the 'People,' 'Democracy': The Transformation of Hegemonic Logic," 7 *Social Text* 115 (1983); Ernesto Laclau & Chantal Mouffe, *Hegemony* (cited in note 109); Ernesto Laclau & Chantal Mouffe, "Postmarxism Without Apologies," 166 *New Left Rev.* 79 (1987); and Chantal Mouffe, "Hegemony and the Integral State in Gramsci: Towards a New Concept of Politics," in G. Bridges & R. Brunt, eds., *Silver Linings: Some Strategies for the Eighties* (London, 1981). For a critical comment see Micos Mouzelis, "Marxism or Post-Marxism?" 167 *New Left Rev.* 107 (1988).

182. E. P. Thompson, *Whigs and Hunters* (London: Allen Lane, 1975).

183. Douglas Hay et al., *Albion's Fatal Tree: Crime and Society in Eighteenth Century England* (London: Allen Lane, 1975).

184. Stuart Hall et al., *Policing the Crisis: Mugging, the State and Law and Order* (New York: Holmes & Meier, 1978).

its dangers. Indeed, if we don't exercise great diligence and care, such approaches are liable to lead us back to old theoretical impasses. Two critical dangers are articulated by anthropologists Jane Collier and Sylvia Yanagisako. As they point out, practice theory explores the ways in which practices reproduce and change symbolic systems of power and domination and how these same systems construct the agents who realize and transform them. However, we must be aware that an emphasis on agency, strategy, and the interests of individuals can far too easily become a subjectivism that overlooks the fact that people's practical concerns and strategies are culturally constructed.¹⁸⁵ An emphasis on interests poses its own pitfalls. We cannot assume that all individual interests are self-interested or self-oriented; "the projects individuals pursue are as often motivated by ideological models of collectivities as by ideological models of self-interest."¹⁸⁶ This is especially true, I would imagine, of the interests of judicial and political decision makers. Second, we must remember that even those selfish desires and interests that motivate individuals are also ideological constructions offered by the systems of inequality in which they live. "A good sense reading of practice theory would . . . analyze the symbolically-mediated processes through which all interests are constituted by people living in specific historical circumstances and shaped by particular ideological systems."¹⁸⁷

All human practices, then, are the creation of people who are themselves shaped by historically specific structures of meaning that both constrain and enable practice. Abandonment of sterile dichotomies that posit structural constraint and subjective experience as mutually exclusive or analytically separable concerns is clearly only a small step toward the construction of a comprehensive critical theory of legal practices. It is, however, an absolutely crucial one if we are to give ourselves the theoretical room for manoeuvre necessary to develop a politically progressive and socially sensitive critical legal scholarship.

185. Collier & Yanagisako at 3 (cited in note 181).

186. *Id.* at 6.

187. *Id.* at 7.