ORGANIZATION LIFE AND CRITICAL LEGAL THOUGHT: A PSYCHOPOLITICAL INQUIRY AND ARGUMENT

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INTRODUCTION

What next for critical movements in legal academia? Is there currently an opportunity for such movements — including critical legal studies, which has never been identified with a broad political struggle in the way that critical race studies and feminist criticism have been — to supplement critical commentary on law, legalism, and liberalism with creative radical theorizing and with proposals for change in the practice of law and in society as a whole? In that connection, is there a viable response to the powerful concerns over macro-level legal and political radicalism: that moving the world, or even the legal profession, too far from where it is entails unacceptable collective coercion; that those in charge will justify and aggrandize themselves under any system; that the task of critical legal movements is always to remain in opposition to the self-justification and self-aggrandizement of powerholders?

The aim of this Article is to provide a response to these questions concerning legal oppositionism,[1] which have already occasioned a considerable reflective literature,[2] by relating them to another set of questions that may on

1. The term "legal oppositionism" is meant to embrace the collectivity of legal movements, including but not limited to critical legal studies, critical race studies, and feminist legal criticism, that take a critical and (in a broad sense) leftist stance in relation to mainstream legal and political movements. These oppositionist movements, while not in accord on all matters (critical legal studies has been associated with skepticism about the efficacy of legal rights claims and adherence to the position that law is indeterminate, both positions that critical race studies and feminist legal criticism have fruitfully queried), have been collectively characterized by questioning of hierarchies based on race, sex, class, and other factors and by insistence on the political nature of law. *See infra* notes 2, 48, 72-73 and text accompanying notes 138-44. The oppositionist movement that I identify with most closely is critical legal studies, and the argument of this Article is especially directed at and for this movement.

2. *See, e.g.*, Duncan Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205, 212 (1979) [hereinafter Kennedy, *Blackstone's Commentaries*].

> Through our existence as members of collectives we impose on others and have imposed on us hierarchical structures of power, welfare, and access to enlightenment that are illegitimate, whether based on birth into a particular social class or the accident of genetic endowment. The kicker is that the abolition of these illegitimate structures, the fashioning of an unalienated collective existence, appears to imply such a massive increase of collective control over our lives that it would defeat its purpose.

Id.; *see also* CATHARINE A. MACKINNON, FEMINISM UNMODIFIED 26 (1987) [hereinafter MACKINNON, FEMINISM UNMODIFIED] ("The feminist question for the future of women's rights is: if we acquire and use these forms of power, including economics (the modern

the surface appear unrelated. The second set of questions concerns life in organizations — law firms, banks, factories, universities, etc. How are troubling features of organization life,[3] such as hierarchical division and the identification of one's self as a whole with one's job role, understood and justified or at least excused by participants?[4] What determines the current balance in our

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equivalent of the hunt), the use of physical force (of which war is a form), and the tools of law (the secular religion), will we use them differently?"); 1 ROBERTO MANGABEIRA UNGER, POLITICS, A WORK IN CONSTRUCTIVE SOCIAL THEORY 9, 165-69 (1987) [hereinafter UNGER, POLITICS] (drawing a distinction between "super-theory" — the strain within critical oppositionism, represented by Unger himself in POLITICS, that advocates some form of macro-level social theory and social transformation — and "ultra-theory" — the strain within critical oppositionism that is opposed to broad theory, focused on local initiatives, and skeptical of macro-level transformative action). Other relevant discussions of legal oppositionism and its possibilities and prospects can be found in, *e.g.*, Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888 (1988); Guyora Binder, *On Critical Legal Studies as Guerrilla Warfare*, 76 GEO. L. J. 1 (1987); Guyora Binder, *What's Left*, 69 TEX. L. REV. 1985 (1991); David Cole, *Getting There: Reflections on Trashing from Feminist Jurisprudence and Critical Theory*, 8 HARV. WOMEN'S L.J. 59 (1985); Anthony E. Cook, *Beyond Critical Legal Studies: The Reconstructive Theology of Dr. Martin Luther King, Jr.*, 103 HARV. L. REV. 985 (1990); David Fraser, *If I Had a Rocket Launcher: Critical Legal Studies as Moral Terrorism*, 41 HASTINGS L.J. 777 (1990); Peter Gabel & Duncan Kennedy, *Roll Over Beethoven*, 36 STAN. L. REV. 1 (1984); Mark G. Kelman, *Trashing*, 36 STAN. L. REV. 293 (1984) [hereinafter Kelman, *Trashing*]; Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987); Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589 (1986); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984); Roberto Mangabeira Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563 (1983) [hereinafter Unger, *The CLS Movement*]; Robin West, *Feminism, Critical Social Theory and Law*, 1989 U. CHI. LEGAL F. 59; Patricia J. Williams, *Alchemical Notes: Restructuring Ideals from Deconstructed Rights*, 22 HARV. C.R.-C.L. L. REV. 401 (1987) [hereinafter Williams, *Alchemical Notes*].

3. Obviously, what is called "organization life" here and elsewhere in this Article could also be called "organizational life;" "organization life" is used here because of the analogy with Whyte's "organization man," *see* WILLIAM H. WHYTE, JR., THE ORGANIZATION MAN (1956) (describing middle-class American life as characterized by conformity to organizations, especially work organizations), as well as because of the preference of theorists of organization to label their field "organization theory" rather than "organizational theory." *See, e.g.*, LEX DONALDSON, IN DEFENCE OF ORGANIZATION THEORY (1985); Gareth Morgan, *Paradigms, Metaphors, and Puzzle Solving in Organization Theory*, 25 ADMIN. SCI. Q. 605 (1980).

4. The definition of "organization" assumed for purposes of this Article is that offered by Max Weber:

> A social relationship which is either closed or limits the admission of outsiders will be called an organization when its regulations are enforced by specific individuals: a chief and, possibly, an administrative staff, which normally also has representative powers .... [B]y no means every closed communal or associative relationship is an organization. For instance, this is not true of an erotic relationship or of a kinship group without a head.

MAX WEBER, ECONOMY AND SOCIETY 51-52 (Guenther Roth & Claus Wittich eds., 1968). There is an extensive scholarly and popular literature on organizations and organization theory, much though by no means all of which adopts a managerialist perspective. Works that have been helpful to me as background for this Article include: STEWART CLEGG & DAVID DUNKERLEY, ORGANIZATION, CLASS AND CONTROL (1980); ROBERT B. DENHARDT, IN THE SHADOW OF ORGANIZATION (1981); DONALDSON, *supra* note 3; ROSABETH MOSS KANTER, MEN AND WOMEN OF THE CORPORATION (1977); HOWARD S. SCHWARTZ, NARCISSISTIC PROCESS AND ORGANIZATIONAL DECAY (1990); HERBERT A. SIMON, ADMINISTRATIVE BEHAVIOR (3d ed. 1976); WEBER, *supra* this note; WHYTE, *supra* note 3; Morgan, *supra* note 3;

lives between the particular practices and values of organization life and other practices and values? Should the centrality of organization life in relation to our lives as a whole be changed?[5] By responding to these questions, we can, I will suggest, think about legal oppositionism and its possibilities in a different and fruitful way. In questioning the centrality of organization life, we can begin to envision a project of macro-level as well as micro-level social change that is closely connected to rather than discordant with legal oppositionist concerns.

In keeping with critical legal tradition, this Article is structured as an inquiry into consciousness. It consists of two parts that explore psychological politics or psychopolitics[6] in particular settings from a personal perspective,

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Talcott Parsons, *Suggestions for a Sociological Approach to the Theory of Organizations* (pts. 1 & 2), 1 ADM. SCI. Q. 63, 225 (1956); Michael Rosen, *Breakfast at Spiro's: Draumaturgy and Dominance*, 11 J. MGMT. 31 (1985); Herbert A. Simon, *Organization Man: Rational or Self-Actualizing?*, 33 PUB. ADMIN. REV. 346 (1973).

5. For works that focus on the issue of limiting work time from a historical perspective, see, e.g., BENJAMIN KLINE HUNNICUT, WORK WITHOUT END (1988); DAVID R. ROEDIGER & PHILIP S. FONER, OUR OWN TIME (1989); WORKTIME AND INDUSTRIALIZATION (Gary Cross ed., 1988). For a contemporary perspective on work hours, see JULIET B. SCHOR, THE OVERWORKED AMERICAN (1991). For an argument in favor of limiting time devoted to what he calls "heteronomous work," see ANDRE GORZ, PATHS TO PARADISE: ON THE LIBERATION FROM WORK (Malcolm Imrie trans., 1985).

6. "Psychopolitics" is a term that has been employed in the contexts of literary analysis, (*see* PAUL BRESLIN, THE PSYCHO-POLITICAL MUSE: AMERICAN POETRY SINCE THE FIFTIES (1987)) and critiques of psychiatry (*see* PETER SEDGWICK, PSYCHO POLITICS: LAING, FOUCAULT, GOFFMAN, SZASZ AND THE FUTURE OF MASS PSYCHIATRY (1982)). The analogous term "psychohistory" has been applied to efforts to explain political leaders' decisions and policies in terms of their psychological makeup. *See, e.g.*, BRUCE MAZLISH, IN SEARCH OF NIXON: A PSYCHOHISTORICAL INQUIRY (1972); *cf.* SIGMUND FREUD, THOMAS WOODROW WILSON (1937) (criticizing Wilson's messianism). Here, "psychopolitics" is used more broadly to refer to a dual process of understanding psychological phenomena in terms of sociopolitical phenomena and vice versa. The term "psychopolitical" is akin to "psychosocial," but is intended to suggest an element of collective choice not necessarily implied by the latter term. Works that employ elements of a psychopolitical approach, as the term is used in this Article, and that have, along with the works cited *infra* note 9, influenced my approach include Duncan Kennedy, *How the Law School Fails: A Polemic*, 1 YALE REV. L. & SOC. ACTION 71 (1970) [hereinafter Kennedy, *How the Law School Fails*] (introspective, quasi-anthropological examination of hostility and alienation at Yale Law School); Duncan Kennedy, *Psycho-Social CLS: A Comment on the Cardozo Symposium*, 6 CARDOZO L. REV. 1013 (1985) [hereinafter Kennedy, *Psycho-Social CLS*] (psychologically oriented discussion of hierarchy, mentoring, and gender within critical legal studies movement); and from outside the legal academy, GEORGE ORWELL, THE ROAD TO WIGAN PIER (1937) (combining social reportage with introspective, critical reflection on socialism); *cf.* David S. Caudill, *Freud and Critical Legal Studies: Contours of a Radical Socio-Legal Psychoanalysis*, 66 IND. L.J. 651 (1991) (examining the influence of Freud on critical legal theory); Peter Gabel, *The Phenomenology of Rights Consciousness — and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984) (psychologically oriented inquiry into legal rights and their relation to feelings of alienation). More generally, the method of this Article derives from the antiformalist tendency in critical legal studies (*see* Unger, *CLS Movement*, *supra* note 2, at 563 n.1) that has emphasized psychic constituents of law and that has generally predominated in critical legal writing from the time of *How the Law School Fails*, *supra* this note, in which Duncan Kennedy used as an epigraph John Lennon's line, "You tell me it's the institution . . . you'd better free your mind instead." THE BEATLES, *Revolution*, *on* THE WHITE ALBUM (APPLE RECORDS 1968).

along with a third more conventionally written part. Together, the three parts constitute an effort to connect critical legal thinking with felt experiences of working as a lawyer and living within organizations.

The first part examines daily life in a Wall Street law firm from an associate's perspective. The second part explores tensions and ambivalences within critical legal thought, focusing on the relationship between a critical stance and an affirmative politics, and considers the possibilities for an affirmative politics.[7] The third part, grounded in the preceding phenomenological inquiries into law firm life and critical legal thinking, argues that limiting the scope of organization life in favor of other ways of life should be a major focus for micro- and macro-level critical legal activity. In the past, critical legal theorists have been reluctant to adopt affirmative radical programs, such as those suggested by Marxism, Catharine MacKinnon's radical feminism, and Roberto Unger's constructive social theory. The third part will examine some of the objections raised to a pairing of critical legal perspectives and these radical programs. I will argue that a critique of life in organizations that focuses on issues of hierarchy, bureaucratic rhetoric, and the dominance of organization life over other forms of life provides a better "fit" with a critical legal perspective than other radical programs.

At a practical level, the argument of this Article for reducing the domain of organization life supports the idea of major reductions in job hours, both for lawyers and others.[8] In that connection, the discussions in this Article of life in a law firm and the practical political consequences of critical thinking are as much a part of the argument as the third part on social theory. In essence, the first two parts relate in the form of introspective narratives what the last part states in a more traditional argumentative fashion.

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7. The first part draws on my experience as an associate in a Wall Street law firm and that of others working at the firm. The second part also draws on my personal experience. In these two parts, I have chosen to write in the second person rather than the first or the third person; the aim is to convey a personal tone that seems appropriate for the material and that at the same time captures certain arguably shared or generic patterns of experience or consciousness in a manner appropriate for an academic piece. *Compare, e.g.*, MICHAEL LEWIS, LIAR'S POKER (1989) (popular account of author's experience at Soloman Brothers in the mid-1980s, narrated in the first person); SCOTT TUROW, ONE-L (1977) (popular account of author's first year at Harvard Law School, narrated in the first person); JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982) (academic analysis of the legal profession, written in the third person); ROBERT NELSON, PARTNERS WITH POWER: THE SOCIAL TRANSFORMATION OF THE LARGE LAW FIRM (1988) (same). Obviously, my own background — white, male, and lower upper-middle class (*see* ORWELL, *supra* note 6) — as well as my temperament and politics influence my accounts of firm life and critical thinking (not that they would not if the article were written in another manner) — caveat lector! *See infra* A Note on Rhetoric, notes 9-14 and accompanying text.

8. The argument is first and foremost a consciousness-raising one, rather than one focused on a toting up of the costs and benefits of a shorter work week. For a good recent historical and economic argument for shorter work hours that does not employ the idea of organization life or the personal, consciousness-raising perspective of this piece, see SCHOR, *supra* note 5.

A NOTE ON RHETORIC

This Article employs two styles of writing. One style, used in this section, the introduction, the footnotes, and the final part, is the style generally seen in law reviews. The focus is on normative argument, with the third person voice and a comparatively formal manner of presentation predominating. The second style, which characterizes the parts on Wall Street firm life and critical legal thinking, is less typical in the law review context. This style focuses on description of states of consciousness; the presentation is comparatively informal, and the normative arguments, when advanced, are presented in the context of a particular personal situation.

The use of introspective narrative in the Article is indebted to a diverse body of work in law reviews, largely written by those associated with critical legal movements, that has bent genre tradition through formal innovation and/or invocation of personal experience,[9] and to an additional body of work

9. *See, e.g.*, Marie Ashe, *Zig-Zag Stitching and the Seamless Web: Thoughts on "Reproduction" and the Law*, 13 NOVA L. REV. 355 (1989) (describing the births of the author's children); Derrick Bell, *Forward: The Civil Rights Chronicles*, 99 HARV. L. REV. 4 (1985) (presenting dialogues between author and fictional ex-colleague in the civil rights movement); James Boyle, *The Anatomy of a Torts Class*, 34 AMER. U. L. REV. 1003 (1985) (describing discussions in author's torts class); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1087-89 (1986) (describing author's rape); David Fraser, *What's Love Got to Do with It? Critical Legal Studies, Feminist Discourse and the Ethic of Solidarity*, 11 HARV. WOMEN'S L.J. 53, 76-77 (1988) (describing author's romantic involvement with a student); Jerry Frug, *Argument as Character*, 40 STAN. L. REV. 869, 921-27 (1988) (discussing rhetorical modes adopted by author in his article); Mary Joe Frug, *Re-Reading Contracts: A Feminist Analysis of a Contracts Casebook*, 34 AM. U. L. REV. 1065, 1070-74 (1985) (presenting fictionalized array of types of law students and professors); Gabel & Kennedy, *supra* note 2 (written as a conversation between the authors); Allan C. Hutchinson, *Part of an Essay on Power and Interpretation (With Suggestions on How To Make Bouillabaisse)*, 60 N.Y.U. L. REV. 850 (1985) (juxtaposing play-like dialogue with academic discussion); Kelman, *Trashing*, *supra* note 2, at 347-48 (referring to and quoting novel by author); David Kennedy, *Spring Break*, 63 TEX. L. REV. 1377 (1985) (describing author's human rights trip to Uruguay; considering the relation between account and indeterminacy critiques of law); Duncan Kennedy, *Freedom and Constraint in Adjudication: A Critical Phenomenology*, 36 J. LEGAL EDUC. 518 (1986) (imagining author's thought processes as a judge deciding a hypothetical case); Kennedy, *How the Law School Fails*, *supra* note 6; Martha R. Mahoney, *Legal Images of Battered Women: Redefining the Issue of Separation*, 90 MICH. L. REV. 1 (1991) (presenting accounts of abused women, including author); Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 38-39 (1984) [hereinafter Singer, *Nihilism and Legal Theory*] (discussing author's inability to persuade college friend to change point of view); Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 539-45 (1984) (describing author's membership in the Communist Party); Williams, *Alchemical Notes*, *supra* note 2, at 406-08 (1987) (describing author's experience renting an apartment); Patricia J. Williams, *Commercial Rights and Constitutional Wrongs*, 49 MD. L. REV. 293, 298-302 (1990) (discussing author's conversation with dean regarding student complaints about her teaching); Patricia Williams, *The Obliging Shell: An Informal Essay on Formal Equal Opportunity*, 87 MICH. L. REV. 2128 (1989) (humorous account of author as trial advocate; serious account of author's sense of feeling implicated by anti-Semitism expressed by store clerks); Patricia Williams, *Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism*, 42 U. MIAMI L. REV. 127-29 (1987) (describing author's being barred from a store on racial grounds).

that has made arguments for such genre bending.[10] Further, the approach of this Article goes along with the following claims, which I will not argue for here but will simply posit: the traditional rhetoric of social theory — universalizing, totalizing, impersonal — is moribund. Critical legal theoretical work will work better if it is written in a manner that openly connects theory to a particular personal situation, a particular psychology, and a particular interest, rather than representing theory as the disembodied voice of reason or the general will.[11]

I recognize that showing a connection between a normative claim and the particular situation, psychology, and interest of the claimant is ordinarily assumed to have the effect of undermining rather than supporting the claim. If that assumption prevails, the inquiries in the first two parts of the Article, which relate normative positions I advocate to particular aspects of my experience, will be seen as weakening these normative claims. As should be clear, my position is to the contrary. I believe that the Article's normative claims about "legal oppositionism" and "organization life" are supported and given an intelligibility and plausibility they would otherwise lack by the personally grounded accounts in the first two parts.

The reason for highlighting this issue here is a strategic one. At the level of professed belief, the case for contextual and fact-specific modes of argument prevails among modern-day lawyers.[12] The argument in favor of a rhetoric that assumes local, contextual, and personal modes of justification goes along

10. Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971 (1991) (considering personal narratives in feminist legal writings; arguing for combining storytelling with normative advocacy); Richard Delgado, *Storytelling for Oppositionists and Others: A Plea for Narrative*, 87 MICH. L. REV. 2411 (1989) (combining advocacy of storytelling with the presentation of stories about a law school's decision not to hire a black professor); Julius G. Getman, *Voices*, 66 TEX. L. REV. 577 (1988); David Luban, *Legal Modernism*, 84 MICH. L. REV. 1656, 1671-75 (drawing an analogy between *Roll Over Beethoven* (Gabel & Kennedy, *supra* note 2) and modern art; eventually extolling the former as a "successful modernist achievement"); Mari J. Matsuda, When the First Quail Calls: Multiple Consciousness as Jurisprudential Method, Address Before the Yale Law School Conference on Women of Color and the Law (Apr. 16, 1988), *in* 11 WOMEN'S RTS. L. REP. 7 (1989) (relating multiple voices to multiple experiences and identities in the legal system).

11. The point of such a rhetorical practice is not to devalue reason and objectivity; rather, the point is to support reason and objectivity, rightly understood, by bringing to the fore what the impersonal tone of conventionally written theoretical work represses — that one is never a disinterested observer and that a struggle for legal/political reform or transformation also needs to be a struggle to deal with one's own circumstances and with what lies within oneself.

> [T]here is the disparity between our intentions and the archaic social form that they assume: a joint endeavor undertaken by discontented, factious intellectuals in the high style of nineteenth century bourgeois radicalism. For all who participate in such an undertaking, the disharmony between intent and presence must be a cause of rage.

Cf. Unger, *CLS Movement*, *supra* note 2, at 674. A premise of this Article is that through exploring different ways of expressing our arguments we as critics can mitigate the disparity and disharmony between intention and practice to which Unger refers.

12. *See* Richard Rorty, *The Banality of Pragmatism and the Poetry of Justice*, 63 S. CAL. L. REV. 1811, 1813 (1990) (arguing that Unger, Dworkin, and Posner can all reasonably be called pragmatists). The self-identification of Richard Posner as a pragmatist is a particularly good example of the tendency of lawyers, including lawyers with a conservative and scientific

with the generally held contextualist, realist, pragmatic credo and the generally held legal academic notion that one should openly state the bases for one's positions.[13] In other words, the rhetorical heterodoxy of this Article involves taking prevailing realist, pragmatic assumptions about truth claims and prevailing moral assumptions about intellectual honesty seriously. Naturally, rhetorical heterodoxy may or may not be persuasive, but it needs to be understood not as a puzzling refusal to make appropriate arguments, but rather as an effort to make arguments that conform to prevailing beliefs in intellectual honesty and in a realist, pragmatic approach toward truth claims.[14]

I
FIRM LIFE

Several years ago, Robert Gordon remarked on the legal academy's neglect of the law firm as a subject of study:

> As far as I know, we have never produced . . . any good descriptions, much less scholarly analyses, of what it is that corporate lawyers spend most of their time doing. . . . At the moment, our understanding [of large law firms] looks like an ancient map. The shorelines are clearly outlined, and some of the major rivers. But the rest of the heartland is drawn as blank spaces, with the occasional mysterious notation, "Diamond Mines," or warning, "Here there be Tygers."[15]

While recent scholarly efforts have contributed to a better understanding of law firms from the perspectives afforded by economic analysis,[16] empirical social science (in some cases informed by feminist concerns),[17] ideal type, cate-

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bent, to profess pragmatism and scorn formalism. *See* Richard Posner, *The Jurisprudence of Skepticism*, 86 MICH. L. REV. 827 (1988).

13. For an interesting exception to the consensus for candor, see Scott Altman, *Beyond Candor*, 89 MICH. L. REV. 296 (1990) [hereinafter Altman, *Beyond Candor*].

14. For an interpretation of the indeterminancy critique (*see infra* note 107) as an argument for rhetorical change, see *infra* part III.A.

15. Gordon, *Introduction to Symposium on the Corporate Law Firm*, 37 STAN. L. REV. 271, 272, 276 (1985).

16. *See, e.g.*, Marc Galanter & Thomas M. Palay, *Why the Big Get Bigger: The Promotion-to-Partner Tournament and the Growth of Large Law Firms*, 76 VA. L. REV. 747 (1990) (explaining the growth of large firms as a consequence of maintaining a constant or increasing associate-to-partner ratio); Ronald J. Gilson & Robert H. Mnookin, *Coming of Age in a Corporate Law Firm: The Economics of Associate Career Patterns*, 41 STAN. L. REV. 567 (1989) [hereinafter Gilson & Mnookin, *Coming of Age*] (explaining the existence and erosion of the "up or out" system); Ronald J. Gilson & Robert H. Mnookin, *Sharing Among the Human Capitalists: An Economic Inquiry into the Corporate Law Firm and How Partners Split Profits*, 37 STAN. L. REV. 313 (1985) [hereinafter Gilson & Mnookin, *Sharing Among the Human Capitalists*] (contending that economic rationales can support the traditional division of the partnership pie by seniority instead of productivity).

17. *See, e.g.*, Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503 (1985); Project, *Gender, Legal Education, and the Legal Profession: An Empirical Study of Stanford Law Students and Graduates*, 40 STAN. L. REV. 1209 (1988).

gorizing social science,[18] and historically-grounded inquiry focusing on values of professionalism and independence,[19] Gordon's comments remain accurate. The particular aim of this section, in addition to its role in the Article's general argument about legal oppositionism and organization life, is to make a contribution to the cartography of the firm through an inquiry into the consciousness attending law firm practice among associates.[20] The section will focus on tensions or divisions within this consciousness and on what I view as the overriding issue of firm life: the amount of time devoted to the firm compared to other pursuits in one's life. The method I use is a somewhat deformalized version of the standard critical legal method of treating legal doctrine and scholarship as legal consciousness,[21] transposed to the circumstances of the law firm and professional-managerial work within the firm.

For the consciousness critique of legal doctrine and scholarship to be compelling, a measure of imaginative identification of oneself and one's life with that doctrine or scholarship is important, which is presumably one reason for critical legal thinking's relatively strong pull within the legal academy and its relatively weak pull outside of it.[22] Similarly, if the present consciousness critique of law firm life is to work, a measure of identification on the reader's part with life in a firm, or at least more generally with work in an organizational context, is necessary. I ask readers to think about the diamond mines and the tigers in their workplaces while reading the mixture of casual empiricism and introspection that follows.

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18. *See, e.g.*, Robert A. Kagan & Robert Eli Rosen, *On the Social Significance of Large Firm Practice*, 37 STAN. L. REV. 399 (1985) (identifying roles for corporate lawyers as independent counselors, conduits, insurers, and manipulators; arguing that the social significance of corporate law has diminished).

19. *See, e.g.*, Bryant G. Garth, *Legal Education and Large Law Firms: Delivering Legality or Solving Problems*, 64 IND. L.J. 433 (1989); Robert W. Gordon, *The Independence of Lawyers*, 68 B.U. L. REV. 1 (1988) (discussing opportunities for promoting independence in the firm context); Robert W. Gordon, *Corporate Law Practice as a Public Calling*, 49 MD. L. REV. 255 (1990) (exploring the possibility of incorporating attorneys' public service commitments into firm practice); Alex M. Johnson, Jr., *Think like a Lawyer, Work like a Machine: The Dissonance between Law School and Law Practice*, 64 S. CAL. L. REV. 1231 (1991) (contending that firm practice is increasingly characterized by commercialism and unpleasant work conditions).

20. I acknowledge, of course, the individuality of such an inquiry and the trickiness of the notion of a shared consciousness.

21. For an exemplary illustration of this critical legal method, see Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685 (1976) [hereinafter Kennedy, *Form and Substance*]; *see also* sources cited *infra* note 48.

22. *Cf.* Alan Hyde, *The Concept of Legitimation in the Sociology of Law*, 1983 WIS. L. REV. 379, 408-11 (citing research suggesting low degree of public identification with law and legal arguments). *But cf.* MARY ANN GLENDON, RIGHTS TALK (1991) (contending that American popular consciousness is increasingly influenced by legal arguments, especially by rights arguments made in court decisions).

What It Was Like to Work in a Law Firm[23]

1

Before working at the firm you'd wondered how much the particular legal arguments you'd be expected to make as a Wall Street litigator would conflict with your political and moral beliefs. That turned out not to be the central issue, though. True, the work you did was undoubtedly greasing the wheels of the system — as you worked on a memo on why a multinational corporation should not be subject to Oklahoma jurisdiction, it was hardly plausible to see yourself as a tribune of progressive thinking. True, some of the clients you worked for belonged in jail, and most of them had far too much money for your taste. True, some of your assignments raised moral and political problems for you, for instance, a partner's request that you explore the possibilities for a corporate client under criminal investigation to avoid liability by dissolving. Overall then, the conservative tilt and the sometimes doubtful ethics of particular legal arguments you made at the firm as a litigator were problematic, just as you had suspected. But there were greater problems with your work at the firm, or at least problems that seemed more disturbing because you had a less clear line on them in advance.

2

The firm was open for work twenty-four hours a day, seven days a week. Sometimes the work felt interesting, sometimes it felt mind-numbingly dull. But in either case, you worked. You worked long days; you worked nights; you worked weekends. If you were in a period of leaving by eight or so and spending part of one weekend day at work, you felt lucky. If asked, you'd say that your hours had been pretty good recently, and perhaps cross your fingers or knock on wood for a continuation of your luck.[24]

23. The observations and conversations upon which this section is based took place at a large Manhattan law firm where I worked in the mid-1980s. While changing names and identifying characteristics, I have tried to remain true to that work experience. *See supra* note 7.

24. For summaries of studies on hours worked by lawyers, see, e.g., HEINZ & LAUMANN, *supra* note 7; Arthur F. Greenbaum, *Putting Your J.D. to Work: Advice for Students Seeking Law Firm Employment*, 47 OHIO ST. L.J. 697, 707 (1986) (citing a Price, Waterhouse study; associates in firms with 200-plus lawyers averaging 1,810 billable hours per year, partners 1,690); Marilyn Tucker, Laurie A. Albright & Patricia L. Busk, *Whatever Happened to the Class of 1983?*, 78 GEO. L.J. 153, 160-61 (1989) (stating that 41% of respondents reported being expected to work over 40 hours per week; authors indicating that they had thought the figure would be higher); Ronald L. Hirsch, *Are You on Target?*, 12 BARRISTER 17 (1985) (reporting that 44% of the lawyers sampled worked over 200 hours per month); Lauren R. Reskin, *Lawyers' Workweek Averages 50 Hours*, A.B.A.J., Oct. 1985, at 42; Lauren R. Reskin, *Average Lawyer Bills 41.6 Hours a Week*, A.B.A.J., Oct. 1984, at 48. For a general discussion of working hours in the United States focusing on what she calls in her subtitle, "the unexpected decline of leisure," see SCHOR, *supra* note 5, at 17-41.

3

You always knew that your time was not your own. At any moment you could receive a call from the assigning partner and be put on a matter that would consume most of the hours of the next weekend or the next week or the next month. You couldn't rely on being free for dinner, for the weekend, or for a vacation. It wasn't that you were precluded from going to the movies or going on vacation or spending time with your family or writing poetry — you were perfectly free to do any of these things (indeed, knowledge of the latest movies and the most fashionable vacation spots was useful social grace). But whatever you did, you had to accommodate it to your job.

4

Complaining about your hours (which associates did frequently) was, of course, an expression of dissatisfaction with the firm's work culture. But complaining about the hours was also, whether you liked it or not, a form of advertisement to your coworkers of how hard you were working.

5

Vladimir Luzhin was a familiar name at the firm. He was an extremely lucrative client. Indeed he was the firm's biggest client, and was generally referred to simply as "Vlad." Among associates, Vlad was discussed not so much as an individual (that came later, after the downfall that made him famous and gave him a chance for enduring dim notoriety as a finagling financier, a Samuel Insull for the 1980s) but in relation to the work he generated. Vlad was reputed to be a monomaniacal worker himself, and even by the firm's standards, "Vlad work," as it was called, was especially high-pressure. Everything, it seemed, had to be at Vlad's offices by the next morning. Billing practices were in contrast quite flexible — the word was that you could charge anything you wanted to Vlad.

6

The particular hours you arrived in the morning and left in the evening were flexible. But you had to account for your time in six-minute intervals in time records that were due at the end of the month. Of course, billing records were not necessarily accurate — you could account for your time well or poorly — but one way or another, you always had to account for it.[25]

7

Most of the attorneys at the firm, partners as well as associates, were Democrats and liberals. The firm's liberal reputation was one of the reasons

25. For a discussion of timekeeping by lawyers, see Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 705-20, 743-44, 750-52 (1990) (discussing deceptive practices and incentives for them in law firms; advocating a new disciplinary rule).

you'd chosen to work there. Devotion to liberal positions in the firm was considerably stronger on social than on economic issues. By and large, lawyers at the firm tended to have strongly liberal opinions on issues such as abortion and Central America, but were by no means similarly liberal on progressive tax rates or labor unions.[26]

8

One of the few avowed conservatives at the firm was David, a mid-level real estate associate who fancied himself a wit and liked to say things like, "Don't you agree that all the problems of this country exist because of slaves being brought over, women leaving the home, and gays coming out of the closet?" David disliked the firm. In particular he disliked Stein, the pompous and driven partner for whom he did much of his work. "The only homosexual acts I've done I've had to do for Stein" was one of David's lines. The way he expressed his right-wing politics reflected, among other things, his estrangement from the firm and what he saw as its liberalism.

9

The smooth functioning of the firm depended on a restriction of partnership ranks. The most painless way to achieve this result was for associates to winnow themselves out by choosing to leave the firm. The importance of restricting partnership ranks was a function of the basic economics of the firm's practice. Partners shared in profits; associates did not. Of course, associates most certainly played a role in generating these profits. As a mid-level associate, the firm billed your time to clients at $150 per hour. If you billed 2,000 hours per year (a roughly average level for associates, as far as you could tell, although you couldn't be sure since billing, salary, and profit figures were not released to associates), you brought in $300,000 for the firm. Your yearly salary and bonuses accounted for around $86,000 of that, and the headhunter's commission, your health and other benefits, the firm's overhead, and unpaid or partially paid client bills further reduced the amount available for the partnership pool. Still, a large amount of the $300,000 seemed to be left for that pool.[27]

26. For a description of the political views of corporate lawyers, see Nelson, *supra* note 17, at 511-25. Nelson compares his survey with others of business executives and suggests that the lawyers hold more liberal (or less conservative) views than the executives. *Id.* at 515.

27. For law and economics approaches to the subject of associates' work and the contribution of that work to the partnership's fortunes, see Galanter & Palay, *supra* note 16; Gilson & Mnookin, *Coming of Age*, *supra* note 16. For a negative evaluation of the current situation, see Johnson, *supra* note 19, at 1255 n.101, 1260 (noting the similarity between a corporate law firm and a Ponzi scheme; firms squeezing associates, resulting in disillusionment and despair). For statistics on reported law firm revenues, see yearly surveys in AMERICAN LAWYER. For an example of practitioner-directed literature encouraging partners to view associates as profit centers, see Joan H. Stern, *The Associate's Role in Producing Profit*, N.J. LAW., Jan./Feb. 1990, at 32.

10

There were about seventy partners in the firm's New York office, including five women and no blacks. The more partnership ranks were limited, the better the economic situation for each partner, since the higher the ratio of associates to partners — the more highly leveraged the firm was — the bigger the piece of the profit for each individual partner. Your firm, with about a two to one ratio, was less leveraged than many other Manhattan firms, where associate to partner ratios ran three to one or even four to one. But the partners at the firm had a sweet enough situation. The associate rumor was that the firm's senior partners, who billed out at $300 per hour, had a basic starting draw of $500,000 per year.[28]

11

Associates came up for partnership in the firm after seven years. Associate turnover was around 25% per year, judging by a check you did based on the phone directory you'd gotten when you started. This high turnover rate made it difficult to judge the probability of an associate's becoming a partner. Usually, under 10% of a first-year class eventually became partners at the firm. However, a particular associate hellbent on partnership could look at this low rate without becoming unduly discouraged, for most of the 90% plus who did not become partners left before their reviews for partnership. For the small minority of associates who stuck around to the point of decision, the percentage who became partners varied significantly from year to year. Nevertheless, that percentage was typically much closer to 50% than to 10%.[29]

12

By and large, the partners worked long hours. It wasn't as though they put in forty hour work weeks and made money just by siphoning off the fruits of the labor of underlings. To be sure, there were times you had to work at the firm over the weekend while the partner in charge was not in. Once while you were waiting for Spitz to come back into his office, you'd seen a timesheet with the partners' billable hours on his desk and it had seemed as though average billables among the partners were somewhat lower than among associates. The overall reality of firm work, though, was not one of relaxed partners

28. Law firm economics, management, and compensation policies have attracted an increasing amount of scholarly as well as popular attention. In addition to the sources cited *supra* note 16, see, *e.g.*, S. S. Samuelson, *The Organizational Structure of Law Firms: Lessons from Management Theory*, 42 OHIO ST. L.J. 645 (1990) (proposing a law firm structure with a CEO, department managers, and project leaders). For popular treatments, see publications such as ABA JOURNAL, AMERICAN LAYWER, LAW PRACTICE MANAGEMENT, LEGAL TIMES, and NATIONAL LAW JOURNAL.

29. *See* Galanter & Palay, *supra* note 16, at 753 n.27, 803 (citing a survey of 22 large New York City firms showing that 19% of associate classes of 1978, 1979, and 1980 had become partners by 1989; indicating that the percentage of associates becoming partners may be declining).

knocking off at 5 p.m. and spending their time in the Hamptons or on the slopes while associates worked like dogs — not at all. The reality of firm work, as far as you could tell, was that partners also worked like dogs.

13

In a way, the partners' long hours were to their credit — their hours certainly countered a simplistic view of them as idle exploiters. But for you as an associate, the spectacle of the toiling partners was demoralizing. It meant that you couldn't say to yourself that at least your present grind was only temporary, that if you just hung in and made partner you had a more balanced and pleasant life to look forward to. It meant that what you had to look forward to was a life of constant pressure to work and bill hours; the very presence of the timesheet on Spitz's desk was an indication that the partners were looking over one other's shoulders and monitoring one another's work levels.

14

As a litigator at the firm, you participated in pretrial proceedings and you generated and managed mounds of paper. But you did not try cases as you had at the D.A.'s office. Trials were not unheard of, but they were very rare events for most of the firm's litigators. Shortly after you started at the firm, you went to a lecture on trial practice (part of a series for new associates) that was given by one of the junior litigation partners, who'd been working at the firm for ten years. He regaled all of you with war stories about a trial he'd just concluded, somehow without mentioning the fact that it had been his first one.

15

The firm's work culture encouraged not only compulsive work but also compulsive pretending to work. At the firm, you not only worked, you also *presented* yourself as a worker. Some associates were disdained for being particularly devoted to such self-presentation; such "political" associates, as they were called, were renowned for their appearance of being constantly busy, their attentions to important partners, and their ability to slough off work on lower ranking associates and support staff. Discussion among associates about this sort of behavior was widespread, though different groups of associates naturally had different ideas about who personified it. This discussion was double-edged; it both criticized and upheld the firm's work culture. As an associate deprecating the pretenses of work at the firm, you expressed dissatisfaction with the firm, but you were also appealing to work as an ideal — and that ideal was precisely the credo of the firm.

16

Lawyers in the firm left their doors open and their lights on in their offices when they left work. You could explain the practice as the associate in

the next office did when you asked her about it during your first week at work: people liked to leave their lights on so that other people who had to work late at night wouldn't have to walk down dark empty corridors. It seemed more plausible, though, that the practice was followed because it made sense on a more self-interested basis. Leaving your door open and your lights on meant that it was not so easy for the people who were working later than you to tell that you had left work before them.

17

A few years ago, the firm had accommodated a promising litigation associate who'd had a baby by giving her permission to work part time for a year. There were no rules on reduced or flexible schedules one way or the other, but the sense you got was that you didn't go for that kind of arrangement unless you were willing to accept a marginal position in the firm. Now the associate was up for partnership and wanted to make it. Not too long ago she'd had a second child, but this time around she didn't ask for any reduction in hours — a part-time schedule wasn't the way to make partner.[30]

18

The firm had a shoe shine man, an Israeli, who walked through the halls with his rags and polish and stand and knocked on office doors. He shined men's shoes while they were being worn. Women handed him their shoes and he shined them in the corner of their offices.

19

The vast majority of the people on top at the firm were men. The accepted (if largely tacit) explanation of that uncomfortable fact was that a male attorney's life was a single project — his work. Work was primary, everything else was secondary. A female attorney's life, on the other hand, could not readily be characterized in such a unitary fashion. Her work might be divided between firm work and other types of work, such as emotional caretaking and child care. This difference, so the apology went, was by no means necessarily a bad thing for women, since having your identity totally fused with your

30. For studies of family/work issues for lawyers, see, *e.g.*, David Chambers, *Accommodation and Satisfaction: Women and Men Lawyers and the Balance of Work and Family*, 14 LAW & SOC. INQUIRY 251 (1989) (observing that women with children bear greater child care responsibilities than men but report greater career satisfaction than men or women without children); Project, *supra* note 17, at 1256-58 (women appeared to experience more stress); Project, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263 (1982) (family/work conflict in practice a "women's issue" that firms adapted to partially with more flexible work arrangements for women). For an overtly normative work, see Maureen E. Lally-Green, *Flexibility in the Legal Workplace: An Idea Whose Time Is Long Overdue*, 34 ST. LOUIS U. L.J. 643 (1990) (contending that flexibility is important for women, but is also a significant issue for men). For a general study of conflicts between commitment to a job and other commitments that focuses on couples and unequal burden-sharing between men and women, see ARLIE HOCHSCHILD, THE SECOND SHIFT (1989).

work at the firm was an equivocal blessing, if it was a blessing at all. The prevailing implicit apology for the domination of men in the firm was that that domination was a tradeoff, in which greater male power went along with greater male subordination to the job.[31]

20

A major characteristic of life at the firm was the sharp division between lawyers and non-lawyers — the "support staff." As a lawyer, you ranked above people on the support staff; to your secretary, you were her boss, whether you wanted to think of yourself that way or not. As a lawyer, you could be decent to secretaries and paralegals or you could be rude to them, but you were expected to command them one way or another. The primary justification for your authority and for the vastly higher salary you earned was the primacy of work in your life, especially burdensome and unpredictable work. The argument went that you were entitled to deference and a much higher salary because support staff workers, diligent as they might be, were wage workers who worked to live, while you were a responsible and heavily burdened professional who lived to work.

21

You assisted a junior partner at the firm in taking the deposition of a real estate magnate. The magnate's lawyer, a balding middle-aged partner at a large midtown law firm, yelled out frequent (and usually baseless) objections to the junior partner's questions, while the magnate (a notoriously sleazy operator) beamed cherubically and patted his lawyer on the back. Finally the magnate's lawyer uttered what sounded like "these asshole questions." The junior partner promptly said, "Let the record reflect that Mr. —— swore at me, saying (here she bent over and got confirmation from you of what the magnate's lawyer had said) 'these asshole questions'." The lawyer promptly yelled, "The record will reflect that Ms. —— is misrepresenting the record! My objection was to her calculated harassment of my client with patently improper questions!"[32]

22

Much more often than you witnessed or heard about expressions of lawy-

31. For other perspectives on the situation of women in law firms, see, *e.g.*, Ann J. Gellis, *Great Expectations: Women in the Law Profession, A Commentary on State Studies*, 66 IND. L.J. 941 (1991) (reviewing state gender bias studies, concluding that male domination is pervasive in the profession); Judith S. Kaye, *Women Lawyers in Big Firms: A Study in Progress Toward Gender Equality*, 57 FORDHAM L. REV. 111 (1988); *Symposium on Women in the Lawyering Workplace: Feminist Considerations and Practical Solutions*, 35 N.Y.L. SCH. L. REV. 293 (1990).

32. On the issue of indecorous conduct by lawyers, see, *e.g.*, Roger S. Haydock, *Civility in Practice: Attorney, Heal Thyself*, 16 WM. MITCHELL L. REV. 1239 (1990) (advocating courtesy).

erly hostility in which outsiders were involved, you experienced or heard about such behavior *within* the firm. The expression of anger by partners at associates and by lawyers at secretaries and paralegals was a routine (though also controversial) part of life within the firm. The ethos of the firm was one that permitted and condoned the expression of both outright anger and more diffuse hostility by superiors to subordinates. The expression of anger *toward* superiors, on the other hand, was clearly verboten. While many associates vented spleen and defiance at partners behind their backs, direct defiance was highly unusual. When it did occur, it was personal and quixotic, and the rebels tended to be status-conscious and to operate within the hierarchies of the firm.

23

An associate, unhappy with the less than choice assignments he was getting, instructed his secretary not to put through calls from a particular partner. Afterward, when he refused to apologize to the partner, he was fired summarily. In a less extreme case, a distraught secretary went into the office of an associate and began screaming at her. The screaming was inexplicable because the two hadn't been working together. In fact, they didn't know each other at all. The associate reported the problem to the head of secretarial services and a little later the now-contrite secretary was brought around to apologize. "It was pathetic," the associate said as she told the story. "She said that she wouldn't have done it if she'd known who I was. She thought I was a paralegal."[33]

24

Nasty behavior, ranging from roaring rages to "I told you I needed it *now*" by superiors to subordinates, was rationalized in a backhanded fashion, by reference to the primacy of work in firm life. People at the firm did not directly extol nastiness — rather, decency lost out because it was a secondary or strategic consideration, something viewed in terms of whether or not it promoted work. Did nasty behavior in fact make people do more work? No matter how you answered the question, you acknowledged the primacy of work, and even if you answered in the negative, you sensed something wishful in your insistence that bad conduct was counterproductive. After all, some forms of abuse, such as hazing associates by setting unnecessary deadlines that caused all-night work, did seem to get work done. While you could protest

33. It should be noted that the discharge of an attorney was extremely unusual at the firm at which I worked in the mid-80s, and that to the best of my knowledge this was also true at the time in other large Manhattan firms; however, the situation has apparently been changing. For an article describing large scale layoffs and terminations, see Sheryl Gross-Glaser, *Firing Trends: Laid-off New York Associates Keep Headhunters Busy*, A.B.A. J., Aug. 1990, at 23 (estimating that 750 to 1500 New York City associates have been recently fired). For one academic response to lawyer terminations, see Kenneth J. Wilbur, *Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility*, 92 DICK. L. REV. 777 (1988).

that such conduct didn't work in the long run, in spite of yourself you sensed a certain opposition (or at least tension) between decency and effectiveness.

25

Nastiness toward subordinates was rationalized not only by a hardheaded "this is what it takes to get the job done" logic, but also by a softer logic of empathy for the associate or partner. Under this logic, since the attorney was a victim of the burdens of work, lawyerly misconduct was explicable, even understandable. The partner who yelled at associates or pushed them to work without letup was under pressure which dwarfed that of the associates. Likewise, the logic went, the associate who mistreated a secretary bore a professional's burden of which the secretary could not conceive.

26

The consuming quality of work at the firm made a "there but for the grace of God go I" defense of poor conduct feel plausible. Even if you swore to yourself that you would never abuse anyone else, you could hardly deny the frustration and anger you sometimes felt during long days and nights of pressured work as you hurried to meet deadlines that seemed always approaching and yet never-ending. It could indeed be frustrating to be the victim of a partner's anger, to work through the night to meet a possibly phony deadline, to wait at the Xerox center or to try to get secretarial services to turn a document around. It was all too easy for you to understand how some associates lashed out at available targets in the Xerox center and the secretarial pool. More generally, it was all too easy for you to understand how the line that separated doing your job from abusing others was ambiguous and permeable.

27

A fair number of associates linked the firm and advancement within it to unacceptable personal behavior. Acquiescent as they generally appeared to be, these associates were engaged in a kind of rebellion against their lives at the firm, but it was a rebellion generally experienced in terms of personal rather than political dissatisfaction. As bad as your work might feel, you could not deny that you were privileged financially and in other ways. A conventional identification of oneself as a member of an oppressed class was more than a bit difficult when you made $70,000 as a new associate and nearly $90,000 as a midlevel one.[34]

34. For academic articles that touch on the issue of unhappiness within law firms, see, e.g., Maria L. Ciampi, *The I and Thou: A New Dialogue for the Law*, 58 U. CIN. L. REV. 881, 906 (1990) ("[T]he associate's value in a law firm is frequently measured by the number of hours the associate bills . . . In this type of law firm, the partner presents an ugly and cold vision of the legal world to the young attorney."); Johnson, *supra* note 19, at 1260. For popular discussions of lawyers' states of mind, see, e.g., *Are Lawyers Distressed? And How?!*, WASH. ST. B. NEWS, Feb. 1988, at 11; Steven Brill & Connie Bruck, *Whatever Happened to the Yale Class of 1959?*, AM. LAW., Oct. 1981, at 21 (interviews with Yale Law graduates); John S. Martel, *Lawyer*

28

On a personal level, it was both very straightforward and very tricky to explain to yourself your problems with work at the firm. It was straightforward, in that the faults of the work — its close connection to hostile personal behavior, its frequent tediousness, its political unpalatability, and especially its disproportion to the rest of one's life — were not difficult to see. But it was also tricky, because your sense of the work's evident flaws was itself not above suspicion. At a moment-to-moment level, resentment of the iniquities of work at the firm played a less prominent role when you were thoroughly immersed in that work. On the contrary, there was an exaltation that could overcome you at such moments. The joining of yourself with firm work, like the joining of yourself with other kinds of work, could engender powerful positive feelings. On the other hand, having a certain distance between yourself and the work allowed resentment to grow. In practical terms, that typically meant that you were unhappiest about your work at the firm when you were avoiding it, when you were having trouble doing it competently, or when you had relatively little to do.

29

Instead of or at least in addition to wondering whether something was wrong with the job, as a disaffected associate you wondered whether something was wrong with you. After all, at least some of the other associates didn't seem particularly questioning of life at the firm. Were you perhaps too inflexible or too emotional? Was your temperament too academic? Were you rationalizing doubts about your ability to do the work well? Was your sense of the firm as a place where bad behavior flourished a way of avoiding the plank in your own eye? Given that most of the partners in the firm were Jewish and you were not, might there be an element of anti-Semitism in your feelings? Or might your dislike of the way the firm worked be a displacement of excessive anger, or dislike of yourself, and thus an evasion of the real issue? Wasn't it possible that you had come to the firm wanting to dislike it? After all, you certainly had political problems with corporate law that preceded your working for the firm. Mightn't it be not only more prudent but also healthier and saner to accommodate yourself to, to believe in, your workplace and its norms? And so it went, on and on. Acquiescence in the order of things at the firm was upheld by your self-doubt, as well as by the cold hard cash you were paid. Perhaps that wasn't so much the case if the process of questioning was explicit and reflective, if you brought to the surface your real and valid

Burnout, TRIAL, Jul. 1988, at 62-67; *More Lawyers Would Rather Do Other Work*, THE CHARLOTTESVILLE DAILY PROGRESS, Oct. 12, 1989, at D6, col. 1; *Quality of Life and the Young Lawyer*, N.J. LAW., May-Jun. 1991, at 19. For a criticism of the increase in large firm associates' salaries, initiated in 1986 by Cravath, Swaine & Moore, as "one of the most anti-social acts of the bar in recent history," see Gordon, *supra* note 19, at 60; *see also* Tamar Lewin, *At Cravath, $65,000 to Start*, N.Y. TIMES, April 18, 1986, at D33.

questions about yourself and the firm. Perhaps one could then simultaneously realize both the need for change in oneself and the need for change in the firm. However, such a dual clarity of vision was elusive. In practice, it was easier not to go so deeply into the bases of your dissatisfaction with the firm, and instead to dismiss your negative feelings, to think of them as something temporary that you hopefully wouldn't be experiencing in a while or at least at your next job.

30

The firm was by no means an egalitarian place, but neither was it a place that relied on traditional aristocratic, theistic, or patriarchal moralities to justify inequality. At the firm, privilege was not justified by its possessor's hereditary or temperamental nobility; rather, it was excused by its possessor's work. As far as you could tell, faith in divine salvation was for the most part nonexistent among the attorneys. A secular faith of salvation through work was the reigning creed. And although men and women were by no means equal at the firm and though the rules and standards that applied to the sexes were not identical, the feminine mystique had been demystified; women attorneys at the firm were expected to join men in an identification of self with job.

31

The firm's work morality conflated life, work, and job, and valued people who held jobs as attorneys over people who held jobs as secretaries. But even as the firm thus ranked people, it held out a consolation to those it humbled. The prevailing wisdom at the firm held that although as a secretary you had little control over your work, you were at least allowed to put limits on it. Conversely, the prevailing wisdom held that although as an attorney you did intellectually meaningful work and had relatively great control over your work and that of others, you were also deprived of your ability to put limits on work — you bore the burden of constant involvement with work, of becoming your work. This ambivalent morality of work, with its nuanced view of higher status work as both meaningful and burdened, provided a more plausible apology for the sharp inequality of firm life than Reaganite free market ideology (or, though this was not much of an issue at the firm, revolutionary vanguard Leninist ideology). As an attorney, your everyday experience was not particularly conducive to rationalizing your superior position in relation to your secretary in terms of your superior marginal productivity (or your vanguardian enlightenment). Your experience, on the other hand, was extremely conducive to rationalizing your privilege in terms of the burdensomeness of your identification with your job. Similarly, as a secretary it presumably felt neither true nor satisfactory to understand the attorneys' privilege and your disadvantage in terms of the attorneys' superior productivity or enlightenment. It presumably felt more congenial — here of course your own lack of experience as a secretary made the point open to question — to think that your lower posi-

tion in the hierarchy was in a way okay because being a lawyer at the firm went along with being someone you didn't want to be. Or, as Leslie, a secretary in the cluster who sat behind Melissa, put it, "You attorneys are weird people."

32

Firm life did not enforce a universal worship of work. On the contrary, the old skeptical definition of work applied: work was what you had to do, as opposed to what you wanted to do. Opposition to work and attachment to leisure was anything but unheard of. The saying at the firm, as elsewhere, was "Thank God it's Friday," not "Thank God it's Monday." However, given the way the firm worked, the traditional saying had to be modified; instead of "Thank God it's Friday," it was "Thank God I don't have any assignments this weekend," and you said it with some trepidation, always aware of the possibility of a Friday afternoon surprise from the assignment partner.

33

Discontent flowered in the firm. It was easy and natural for you, for Melissa, and for others you knew to complain about the firm and to focus your yearnings on leisure — a Caribbean cruise, the Mets, going out to clubs, etc. But this discontented yearning for leisure was accompanied by difficulty imagining a true alternative to the work of the firm. As much as lying on a beach, cheering at Shea Stadium, and dancing appealed as enjoyable respites from your work, they lacked comparable appeal as replacements for work. As long as you identified the firm with the work of your life and the rest of your life with leisure, there was no real way for your problems with the firm to get beyond kvetching.

34

Many of the firm's partners, especially the more senior ones, were involved in lawyers' organizations such as the New York City Bar Association, the Federal Bar Council, or the International Lawyers' Committee on Human Rights. Much of the partners' involvement in such pro bono work was pro forma — a matter of dressing up in tuxedos, attending dinners that amounted to mass rituals of self-congratulation, and writing checks that represented a smaller proportion of their incomes than a few dollars on a Sunday collection plate represented for a working class family. However, not all the partners' activities could be so easily dismissed. Certainly Dan, who was actively involved with a number of liberal organizations, committed a large amount of time and effort to pro bono work.[35]

35. On firm pro bono activity, see, *e.g.*, JOEL F. HANDLER, ELLEN JANE HOLLINGSWORTH & HOWARD E. ERLANGER, LAWYERS AND THE PURSUIT OF LEGAL RIGHTS (1978); Steven Brill, *Big Business Gets Bigger in '87*, AM. LAW., July/Aug. 1988, Supp. at 20 (firms with highest revenue per lawyer rated lower in encouraging pro bono); Ronald J. Gilson, *The*

35

What was troubling about firm pro bono work wasn't so much the possible insincerity of partners or oneself, though that was indeed a valid issue; what was more disturbing was that firm pro bono, such as the capital punishment case you worked on, was an extension of standard firm work and its attitudes rather than an alternative to it. Partners of the firm did not shed their partnership selves when they engaged in liberal pro bono activity. On the contrary, such activity was an opportunity to affirm their status and identity as partners. Sometimes the connection between office business and pro bono activity was obvious, as in the dinners and committee meetings that were vehicles for making contacts and trading information. Sometimes, as in Dan's case, the continuity between office work and pro bono work was a subtler matter of how one's lawyerly self was in control in both settings. Dan was exceptional among the partners in his commitment of time and effort to liberal/left political causes, but he was typical in his equation of his partnership role with his role in "outside" activities. No matter where he was, he was a partner at ——, a prestigious Manhattan law firm. He did not brag about his status, but those he worked with and against were always aware of it, and he always acted in keeping with it. Even though his pro bono work was largely independent of the firm and was resented by some of his partners, he nevertheless commanded resources from the firm, often in the form of having an associate sit by his side and take notes. Dan took pro bono work entirely seriously, and you respected him for that. But among other things, that meant that he yelled as much at secretaries and associates on a pro bono case as he did when he had a paying client.

36

Around 8:00 p.m. on your second day at the firm, you got your introduction to expense account practice. You got a call about whether you wanted to join in an already ordered dinner of take-out sashimi. You accepted, and joined twelve other associates in a windowless conference room where you ate beautifully sliced fish with plastic chopsticks and drank Japanese beer. At the beginning of the meal, you engaged in the basic ritual, the "grace" of firm dining: providing client charge numbers, so that the associate who had charged the meal with her American Express card could submit an expense report to the firm breaking down all the clients who were going to pay for the

Devolution of the Legal Profession: A Demand Side Perspective, 49 MD. L. REV. 869, 887 n.39 (1990) (offering the perception that firm pro bono work is a less important concern than fifteen years ago; mentioning Morrison & Foerster as an example of a firm in which objections to pro bono have arisen); Joel F. Handler, Ellen Jane Hollingsworth & Howard E. Erlanger, *The Public Interest Activities of Private Practice Lawyers*, 61 A.B.A. J. 1388 (1975) (noting that the private bar's pro bono work is mainly done by sole practitioners, not large firms); Esther F. Lardent, *Mandatory Pro Bono in Civil Cases: The Wrong Answer to The Right Question*, 49 MD. L. REV. 78, 89 (1990) (arguing against mandatory pro bono partly on the basis that 1980s Legal Services cuts have revitalized voluntary pro bono).

meal. The bill came to $600, or just under $50 for each of you. After eating you threw away the paper plates and boxes you'd eaten from and then went back to work on the assignment Spitz had given you.

37

You were not exempt. You participated in the expense account culture soon enough not only through joining other people's dinners but also through organizing your own, asking people for client numbers, and charging meals eaten out at restaurants to the firm. Though the expense of the sashimi dinner had seemed bizarre to you, you soon enough submitted bills to the firm with per person charges not much less than that for the sashimi. The total costs were much less than $600 only because your bills were for smaller numbers of people. Dinners with a few associates you liked were much better for conversation; with a large group, as at the sashimi meal, associate discussions became almost as stilted and stylized as conversations when partners were present.

38

As you ate free meals at the firm and at restaurants in Manhattan and Hoboken, or sat in the firm's box seats at Shea or Yankee Stadium, you were not especially troubled by a sense of violating your political position against deducting pleasure as a business expense. In general, it didn't feel as though your life was pleasure, and in particular, it didn't feel as though you were writing anything off. Meals, etc. were paid for by the firm, either directly or through reimbursement, and the firm's decision to pay a given expense felt like its decision to treat the expense as deductible. The firm had its policies on paying expenses, and as flexible as these policies seemed to be, it felt as though the firm's payment of a given item meant that the moral decision about the deduction had been taken out of your hands. Of course, you also knew that the firm's decision to provide you with a benefit and (presumably) to write it off as an ordinary and necessary business expense did not mean the benefit was not taxable income for you. You could always decide to declare the value of a dinner or a ticket to a baseball game as income. And you certainly would not say that you believed in yielding your moral judgment to that of the firm. But your participation in expense account culture went along with removing responsibility from yourself and placing it with the firm. By seeing the firm as the actor and yourself as the acted upon, it was possible for you to feel that baseball tickets and dinners were more like nontaxable working condition benefits, such as having an able and pleasant secretary or an office with a view, and less like an earned and taxable paycheck. Not that you worked it out that elaborately or even worked it out consciously at all — indeed, rationalizing your life at the firm worked better when you didn't do it consciously.

39

You tried to think what the firm would be like if it were somehow impos-

sible to leave, so that you and all the other dissatisfied associates who left had to stay at the firm for the rest of your lives. You felt strongly that it would be a better place than it was now, or at least that your collective voices would have a real chance to change things for the better.[36] At the same time, you always assumed you would be leaving the firm pretty soon.

40

At the firm, a French restaurant was an extension of the office by other means. Far from being an occasion for taboo pleasure, a dinner at an expensive restaurant with a senior partner or corporate client was business, business lubricated by alcohol but business nonetheless, yet another opportunity to talk about what the bastards on the other side were doing and chat about new court decisions in the takeover area, with perhaps some stilted talk on the side about politics or sports or the arts. Such dinners were deeply disturbing, but not because they provoked in you a sense of guilt about participating in a pleasurable fraud against factory workers or secretaries unable to write off their meals; rather, what disturbed you was that such dinners really were another stop in the business day, almost regardless of whether the specific case that brought you together was discussed. The partners with whom you engaged in business entertainment had become socialized into the profession and its ways of being, and their socialization was as obvious at the restaurant as it was at the firm.[37]

41

Of course, it was possible that the stiffness of business entertainment events with senior lawyers was a function of having junior lawyers, especially women lawyers, present, and that in events with no juniors or women present, the deans of the firm let their hair down and had a sinfully good time. You could still hold on to the good old liberal/leftist vision of an inner circle of powerful men pissing on the redwoods at Bohemian Grove and writing off every last drop. And yet the vision of carousing exploiters lording it over the toiling masses missed the way in which the work of the firm limited the lives of those who were at or close to the top of the firm's hierarchy as well as those who occupied lower rungs in that hierarchy.

42

The commitment of the partners to being full-time lawyers was virtue of a sort, but it was virtue that chilled you with a sense of life limited. Not that the partners led lives devoid of passion — if anything, some of them startled you

36. *See* ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: REPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

37. For a different perspective on large firm partners, focusing on their roles as dealmakers and advocates, see JAMES STEWART, THE PARTNERS: INSIDE AMERICA'S MOST POWERFUL LAW FIRMS (1983).

with the vehemence of their feelings about the other side's strategy, the client's recapitalization plan, or Delaware Chancery's latest decision. Most of the partners seemed to have succeeded, more or less, in a total project of becoming a certain kind of person — a job-defined person — and it was that success that troubled you as you wondered what to make of your life. While the partners differed in their personal styles there was a common pattern of job-centeredness to which they were expected to conform, a pattern that defined their lives just as it defined yours.

43

There was a certain warmth and camaraderie that could flower because the work was bad. To be working dead tired in the middle of the night with someone you liked (and there were people at the firm you liked a lot) for a firm you both thought was full of shit could be a liberating, exhilarating experience. Solidarity arose not only from shared work but also from shared opposition, and the firm gave an abundance of both to its employees. In the end, this curious gift of the firm was not worth the candle, but there was no denying the existence of moments of shared good feeling that were heightened by a sense of shared opposition to the firm.

44

What was the point of all the time you spent at the firm? The obvious answer, which captured an important part of the truth, was that the time you spent was money to the partnership. But there was much more to the firm's work culture than maximizing profit for partners. Those who ran the firm were looking for commitment to a certain way of leading your life, and the time you spent at the firm was a proxy for that commitment. The stakes were psychic as well as monetary, and the point was not so much that your commitment fattened the partnership coffers, although that was no doubt important. The real personal question that the firm posed, which traditional left/liberal critiques of Wall Street tended to obscure rather than to clarify, was whether you would end up accepting the job-centered view of work and life that the firm was built on.

45

In principle, it was absolutely valid to consider the litigation lunches in which the firm's lawyers sat around a long conference room table and told stories about their latest triumphs in exactly the same anthropological spirit with which one considered the Bororo sitting in the men's longhouse and discussing the hunt. Similarly, it was absolutely valid to view associate folklore like the story of the enterprising associate who billed more than 24 hours in a single day (there was more than one explanation of how it was done — in one version, the associate flew west, giving him additional hours in the day; in another, the associate took advantage of the fact that the firm's minimum unit

for billing was six minutes, so that he could work on several client matters in that time and bill each one the full six minutes) with precisely the same spirit of amiable detachment with which you viewed a Bororo myth. But in practice, as an associate at the firm you could not be Levi-Strauss among the Bororo;[38] you were, like it or not, an insider, one who was formed by the firm's culture and its myths.

46

Even if you expected to work at the firm for a relatively short time, even if you did not believe in the firm's standards, even if you were committed to viewing your experience at the firm with anthropological detachment, you also believed in the messages that the firm transmitted to you. Certain messages hurt a lot — to be yelled at by a partner hurt, even when you thought his opinion was ill-informed and expressed in an infantile fashion. To do a bad job and feel like a failure hurt, no matter whether you told yourself that the firm's work was of dubious value. Other messages felt good — to sense that your competence and flair as a lawyer were respected felt good, no matter how disillusioned you were with lawyering or the firm's standards. More broadly, you believed in the job experience you were undergoing. You were depressed, frightened, exultant, angry, and so on in relation to that experience and the people sharing it with you. In a real sense, you *were* the time you spent at the firm, and the more time you spent there, the more that became true.

47

Established left/liberal channels for critical feeling didn't apply all that well to one's life at the firm. A basic left-wing critique of the firm as simply an embodiment of the pathologies and hypocrisies of capitalism didn't feel quite right. Similarly, there was at least something incomplete about a feminist critique of the firm as an embodiment of the pathologies and hypocrisies of patriarchy. While these critiques both captured important aspects of firm experience, they missed something that in your day to day existence as an associate felt like a much more basic reality of firm life. As an associate disaffected with the firm, you experienced the problems of firm life as an embodiment of the problems of a culture that overemphasized job work, a culture that you barely knew how to name or to resist, rather than as an embodiment of the more familiar and comprehensible left/liberal targets of capitalism and patriarchy.

48

Firm life was defined and meanings were given to you not so much by capitalism as by this broader culture of job work in which you were a partici-

38. CLAUDE LEVI-STRAUSS, THE RAW AND THE COOKED (John & Doreen Weightman trans., 1969); CLAUDE LEVI-STRAUSS, TRISTES TROPIQUES (John & Doreen Weightman trans. 1961).

pant. It was this culture more than capitalism that made you understand that the work in your life was your job at the firm; that made you understand that in a typical day you got up, went to work at the firm, came home from work and did whatever in the few hours left to you before going to sleep; that made you understand that what applied to a day also applied to a lifetime; that you had been schooled to work at a job and that job work would be the center of your life until its last years; that made you understand that parts of your past, present, and future life that did not consist of job work were defined by and subordinate to such work.

49

The work of the firm was profoundly social, and job-obsession was not an individual idiosyncrasy but a ruling ethos to which one was expected to conform, an ethos that seemed to work for some but left many people frustrated, unhappy, and subject to an ethos they experienced as destructive. The problem with the firm as you experienced it was not that it was devoted to an evil ideal, such as "exploitation of the workers," though exploitation was indeed a real issue. Nor was the problem that it was run by evil people. The problem of the firm was the problem of a valid ideal, devotion to work, run amok, warped into a culture of job obsession that held many people down and subjected everyone to an all-too-limited notion of the work of one's life.

50

The problem was not that the firm was a hell on earth; it wasn't. There were sensible arguments to be made that people, you included, needed and wanted to spend at least some time doing work in one sort of firm or another (yours, the D.A.'s office, a community organizing group, IBM, the ACLU, the Salvation Army, Yale, the corner hardware store, etc.). You sensed that in any plausible social arrangement the dance of order and resistance that characterized firm life would continue to exist, though perhaps, one might hope, in a very different form from what now prevailed. What at bottom was impossible to understand, though, was why the firm should consume as much of your life as it did. There were, after all, other things to do with your life than the work of the firm, and these included things that you should be doing as well as things that you wanted to do.

II
CRITICAL LEGAL THINKING

Once, critical legal scholarship was like law firm work: they were both things you did, not things you wrote about. That state of affairs has changed to some degree for law practice,[39] and it has changed radically for critical legal thought. In recent years, critical legal thought has become a major focus for

39. *See, e.g.*, sources cited *supra* notes 15-19.

academic scrutiny.[40] The aim of the present section with respect to the now substantial body of literature on critical legal thought is parallel to the objective of the last section in relation to the literature on law firms. This section provides a deformalized perspective on critical legal thinking by carrying out a personal, introspective, psychopolitical inquiry into critical legal consciousness, focusing on its tensions and divisions and on what I see as the basic issue of whether there is an affirmative aspect to radical critique.[41]

What Do You Want?[42]

1

There's a bind you find yourself in as a legal critic. Your legal oppositionism is not simply a matter of having a pure critical passion for exposing dubious claims of objectivity and determinacy. Your allegiance to criticism cannot really be detached from your feeling that the world, or at least the corner of it you've spent time in, could be a better place than it is now. It's hard for you to imagine not having that affirmative "things could be better" feeling. The bind comes in when you try to specify what the feeling means. What particular changes do you want, in your own life and more broadly?

40. For a discussion of the change among critics, see Kennedy, *Psycho-Social CLS*, *supra* note 6, at 1014-19 (discussing the focus of early critics on the legal mainstream and the later turn toward examination of the critical position). While the academic literature dealing with critical legal thought is diverse, certain recurring approaches can be identified, more than one of which may appear in a given article.

First, there is a "what should we be doing?" approach, in which critics examine the problems and opportunities of legal oppositionism. This Article is an example of that approach; for other examples of works by legal oppositionists that scrutinize oppositionism and/or oppositionist thought, see sources cited *supra* note 2. Second, there is a "reverse trashing" or "turning the critics' methods back on them" approach. *See, e.g.*, Daniel C. K. Chow, *Trashing Nihilism*, 65 TUL. L. REV. 221 (1990); Don Herzog, *As Many as Six Impossible Things Before Breakfast*, 75 CAL. L. REV. 609 (1987) (contending that critics have unwarrantedly abandoned their historicism by characterizing liberalism in an abstract, deprecatory fashion that neglects the role of liberal ideas in specific historical struggles); Philip Johnson, *Do You Sincerely Want To Be Radical?*, 36 STAN. L. REV. 247 (1984) (providing a psychologically oriented interpretation of critical legal studies as a movement of people who want to be radical but can not figure out how to do it). A third approach is centered around explanations of critical positions. *See, e.g.*, ANDREW ALTMAN, CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE (1990) [hereinafter ALTMAN, CLS]; MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES (1987) [hereinafter KELMAN, CRITICAL LEGAL STUDIES]; James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685 (1985). Yet another method is a "respond and defend" approach, in which a mainstream writer tries to uphold a practice subject to oppositionist critique. *See, e.g.*, ALTMAN, CLS, *supra* this note; Altman, *Beyond Candor*, *supra* note 13 (defending judicial reticence on political bases of decision making). For a related though somewhat different typology of literature on critical legal studies from which my typology is drawn, see Kennedy, *Psycho-Social CLS*, *supra* note 6, at 1015.

41. Acknowledging as before, of course, the situatedness of such an inquiry. *See supra* note 7.

42. This part derives from my intellectual experience as a believer in a critical legal position. As discussed *supra* notes 6 & 7, my aim is to communicate that experience in a language that reflects an intertwining of generic and idiosyncratic elements; on the method implicit in the choice of rhetoric, see *supra* A Note on Rhetoric and *infra* part III.A.

You want changes beyond what the 1964 and 1972 and 1992 Democratic platforms call for.[43] But what are these changes? On the face of it, it's not easy to say.

2

The legal culture that you inhabit presents you with an endless series of slogans, like those on an artwork by Barbara Kruger or Jenny Holzer: "institutional competence,"[44] "Miranda v. Arizona,"[45] "protection of individual liberties under the implied guarantees of the Ninth Amendment." As an untenured professor, you feel as though you're being asked to believe in at least some of these affirmative phrases, not just to accept their existence but to in some way be inspired by them. Such requests are not made directly, of course. On the surface everyone's tone is critical and detached, but it seems that there is a matter of underlying belief at stake. Time and again as you read a law review article, or try to write one, it feels as though you are being asked in effect to affirm a faith,[46] and time and again you are in the position of responding implicitly (but the issue of rudeness can hardly be avoided),[47] "I would

43. *See* MARK TUSHNET, RED, WHITE AND BLUE 3 (1988) (suggesting that mainstream liberal constitutional scholars advocate bringing the constitution into accord with the 1964 and 1972 Democratic platforms). Tushnet provides his own answer to what changes he wants, at least in general terms, in *The Dilemmas of Liberal Constitutionalism*, 42 OHIO ST. L.J. 411, 424 (1981), in which he indicates he would try to advance socialism as a judge. *See also* Mark Tushnet, *Dia-Tribe*, 78 MICH. L. REV. 694 (1980) (book review) (defining socialism and proposing argument for it as constitutionally required); Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1522 n.30 (1991) (indicating that some of the radical edge is gone from critical legal studies; acknowledging "some blurring of the edges" in his own work). In his direct if somewhat ambiguous expression of support for socialism, Tushnet is unusual among legal oppositionists; articulation of support by critics for a radical perspective associated with a macro-level programmatic agenda for social change has been limited. For one such articulation, see Unger, Politics, *supra* note 2. For a discussion of radical programmatic perspectives in relation to critical legal theory, see *infra* Part III.C.

44. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW (tentative ed., 1958).

45. 384 U.S. 436 (1966).

46. Compare Unger, *CLS Movement*, *supra* note 2, at 675. "When we came, they were like a priesthood that had lost their faith but kept their jobs." *Id.* In this passage, Unger implies a contrast between cynical mainstreamers and hopeful critics. At the level of underlying attitudes toward radical politics and social change, Unger's contrast makes sense. I would suggest, however, that the day-to-day experience of being a critic of mainstream legal culture typically puts the critic, not the mainstreamer, in the cynic's position.

47. For a helpful discussion of manners and critical legal studies, see William W. Bratton, Jr., *Manners, Metaprinciples, Metapolitics, and Kennedy's Form and Substance*, 6 CARDOZO L. REV. 871, 883 (1985) (discussing Kennedy's piece as an example of courteous, nonhectoring critical writing). For an example of aggressive criticism by a critic, see Tushnet, *Dia-Tribe*, *supra* note 43, at 710 ("Under the circumstances, I take pleasure, not however unmixed with regret, in noting that the Framers would have understood the phenomenon that Professor Tribe's work represents: they called it corruption."). For an example of aggressive criticism by a noncritic, see Richard Posner, *The Present Situation in Legal Scholarship*, 90 YALE L.J. 1113, 1127 (1981) (characterizing Tushnet's criticism of Tribe as "unpardonable personal abuse"). For an example of a critic differentiating her psychopolitics from that of another critic in a way that simultaneously advocates the writer's position and shows respect for the other's position

prefer not to."

3

What is the point of your "I would prefer not to?" If you were truly Bartleby, you would remain silent. But you're not, and it seems that the only sensible answer to this question about your feelings is that you're a believer, too, but that you believe in something else. Other possible answers — that what you're being asked to believe in lacks coherence and determinacy;[48] that one must be wary of the dangers of a strong commitment to any particular legal or political agenda; that it's more fun to be a debunker than a believer[49] — don't seem like bad explanations, either, but without more these explanations deny the affirmative point of your oppositionism. When it comes down to it, it seems that being a radical goes along not with being a skeptic about everything,[50] but with a belief that there is at least a real possibility that through change, change that mainstream opinion now regards as misguided, you and other people can lead lives that are in some significant ways better than the lives you lead now. That of course leads back to the unavoidable and difficult question: what particular sorts of changes do you have in mind?

4

Do you support a given liberal law reform measure — say, empowering cities to run banks and insurance companies?[51] You do. You are a liberal, after all, no matter how much you are also a critic of liberalism.[52] You think

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and style, see Williams, *Alchemical Notes*, *supra* note 2, at 406-08 (comparing how the author (a black woman) and Peter Gabel (a white man) rented their apartments; discussing the relationship between one's situation, including one's race, and one's attitude toward legal agreements and rights).

48. For a discussion of the "indeterminacy critique," see *infra* Part III.A. Many critical works have questioned the coherence and determinacy of legal doctrine and of academic efforts to rationalize legal doctrine. Significant works in this diverse tradition include Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Jay M. Feinman, *Promissory Estoppel and Judicial Method*, 97 HARV. L. REV. 678 (1984); Gerald E. Frug, *The Ideology of Bureaucracy in American Law*, 97 HARV. L. REV. 1277 (1984); Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591 (1981); Kennedy, *Form and Substance*, *supra* note 21; Frances E. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983); Richard Parker, *The Past of Constitutional Theory — and its Future*, 42 OHIO ST. L.J. 223 (1981); Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151 (1985); Singer, *Nihilism and Legal Theory*, *supra* note 9; Mark Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781 (1983); Peter Gabel, Book Review, 91 HARV. L. REV. 302 (1977) (reviewing RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977)).

49. Alan Freeman, *Truth and Mystification in Legal Scholarship*, 90 YALE L.J. 1229, 1230 (1980) ("Trashing is fun . . . . "). For a good ambivalent defense of trashing as a critical legal strategy, see Kelman, *Trashing*, *supra* note 2.

50. *See infra* note 112.

51. The example of city-run businesses is drawn from Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1128, 1150 (1980) (supporting legal changes to allow such businesses) [hereinafter Frug, *The City as a Legal Concept*].

52. The critical legal work most identified with the critique of liberalism is ROBERTO UN-

that this reform measure might do some good for particular people; it might empower cities in a positive way and it might help people to question the standard divide between public and private spheres.[53] However, it doesn't seem that people in Wisconsin and North Dakota, where some such state enterprises operate,[54] are walking around that much closer to unalienated relatedness[55] — to put the point more seriously, it doesn't seem that city-run banks and insurance companies would make much of a difference in people's lives.

5

If your doubts about city-run companies and cognate reforms as means to make the world better were confined to questions about how efficacious such reforms are likely to be in effecting large-scale social change, the bind wouldn't be so bad. Then you could say to yourself that unalienated relatedness is hogwash,[56] that nothing brings the millennium, and that incremental change for the better here and there is what really matters. You could say to yourself that with enough small reform measures like city-run companies, real changes in people's circumstances and ways of thinking could indeed take place. But in truth, you have a more serious problem with a proposal like city-run companies, one that is far more debilitating than the fact that the proposal is not going to bring the millennium.

6

Your basic problem with the proposal for city-run companies — what makes you less than inspired by the proposal in spite of your support for it — is not easily reducible to particular arguments. After all, what is at issue is a sense of ambivalence, not a mathematical theorem. Your problem concerns the way the proposal relies on the idea of making things better for people through the organizing efforts of enlightened forces in workplaces and government. Leadership or management in general, and enlightened reformist lead-

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GER, KNOWLEDGE AND POLITICS (1975) [hereinafter UNGER, KNOWLEDGE AND POLITICS] (describing liberalism as a system of thought and identifying antinomies within that system; author not identifying self with liberal position). For a different perspective from the same writer, see Unger, *CLS Movement*, *supra* note 2, at 602 (describing the critical legal program he advocates as "superliberalism"); *see also* 2 UNGER, POLITICS, *supra* note 2, at 1, 10, 27, 598 (identifying liberals as participants in the radical project).

53. Critical work focusing on the public-private distinction includes Gerald E. Frug, *The City as a Legal Concept*, *supra* note 51; Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349 (1982); Karl Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358 (1982); Olsen, *supra* note 48.

54. Frug, *The City as a Legal Concept*, *supra* note 51, at 1150.

55. *See* Gabel & Kennedy, *supra* note 2, at 1-14 (dialogue on the value of the notion of unalienated relatedness, with Gabel pro ("The project is to realize the unalienated relatedness that is immanent within our alienated situation") and Kennedy con).

56. For an example of such an attitude, see Kelman, *Trashing*, *supra* note 2, at 343 ("The content of Peter Gabel's ideal is so elusive as to be nondiscernible. . . . I see too few concrete references to know if he is actually describing a blissful state of mind or a small household appliance.").

ership in particular, don't feel like bad things. But the underlying vision of leaders or managers making people's lives better doesn't especially excite you, even if the leaders or managers are left-of-center.

7

There's something Bickelian[57] or Wechslerian[58] in the dynamics of your critical feelings. They and their confreres were always getting hung up on the issue of whether courts could properly do the good liberal thing.[59] As a crit, you're not hung up on that issue, but there's a related one that does hang you up. Much as you personally favor various liberal legal policies and reform (promissory estoppel compared to Willistonian rigor for example), you feel that as a critic you should deny yourself the satisfaction of really feeling good about supporting or advocating them. There are always shadows.[60] There are always the problems posed by the rationalization of power through law and there are always the problems of complacency, of self-satisfaction at one's liberal enlightenment, and of a professorial tendency to overlook the workaday world in favor of an empyrean kingdom of word castles.[61]

8

Of course, your problem with the good old liberal legal line is a "left" problem, while the Wechsler-Hart-Bickel problem was a "center" problem. However, there is something oddly similar about your "yes but" reaction to liberal politics as a crit and the Wechsler-Hart-Bickel stance. It would be easier to dismiss the analogy if there were a plausible affirmative radical program beyond liberalism that you espoused — but there, of course, lies the bind.

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57. *See, e.g.*, ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH (1962) (discussing the prudential aspects of constitutional law).

58. *See* Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1 (1959) (arguing that decisions should be based on general principles rather than group interests; questioning the Supreme Court's logic in Brown v. Board of Educ., 347 U.S. 483 (1954)).

59. For a criticism of liberal "result-oriented" judging, couched as an inquiry into how the craftsmanship of Supreme Court opinions is imperiled by docket pressures, see Henry Hart, *The Time Chart of the Justices*, 73 HARV. L. REV. 84 (1959) (criticizing Justice Brennan's decision in Irvin v. Dowd, 359 U.S. 394 (1959)). For a legal realist's response to Hart, see Thurman Arnold, *Professor Hart's Theology*, 73 HARV. L. REV. 1298 (1960).

60. For an example of a critical work that expresses support for liberal judging along with reservations about its value, see Kennedy, *Form and Substance*, *supra* note 21, at 1777 ("How should a person committed to altruism in the contradictory fashion I have been describing assess the significance of informality in our actual law of contracts, for example? I have only a little confidence in my answer, which is that the case for standards is problematic but worth making."). For an example of a critical work that criticizes a (relatively) liberal legal doctrine and avoids an evaluation of the desirability of choices available to judges, see Feinman, *supra* note 48, at 718 n.160 (eschewing prescriptions as to promissory estoppel; offering self-critical conclusion on the failure of critical legal literature to propose superior doctrines and methods).

61. *See* Williams, *Alchemical Notes*, *supra* note 2, at 401-02.

9

There's a disharmony between your critical wariness of power and truth claims and a "we can organize a better world" attitude. It's not that there's a logically necessary tie between a non-critical "one can understand society through science" attitude and a "we can organize a better world" attitude. It's like the connections between rules and individualism, and standards and altruism,[62] which are hardly logically necessary but which make sense at an internal introspective level. There's a connection between a strongly felt critical stance and skepticism toward "we can organize a better world," just as there's a connection between a non-critical or scientistic stance and attraction toward "we can organize a better world."[63]

10

Traditional proposals that take a left/liberal stance on the proper scope of public versus private ownership or the state versus the market don't inspire you. Social democracy and the welfare state aren't bad from your point of view — on the contrary — but under the circumstances you're not especially excited by them. Those circumstances are not so much macropolitical history as your own micropolitical history, not so much the failed utopianism of Communism as the prosaic reality that you've experienced, the reality of living in organizations devoted to ordering and rationalizing people's lives.

11

You believe that American labor law is too weak and that employees and labor unions need more protection against employer power.[64] Yet it's hard for you to believe that working for changes that would restore the power balance between employers and unions that existed in 1945, or changes that would make the United States more of a social democratic polity like Sweden, is the way to revivify left/liberal politics in the U.S.A. Yes, it would be good for a change to have a president, NLRB members and federal court judges who believed in the egalitarian premises of the Wagner Act,[65] and yes, it would be good to have a more inclusive welfare state in the United States. But the Wagner Act and the welfare state were dreams of an earlier generation faced

62. *See* Kennedy, *Form and Substance*, *supra* note 21, at 1685, 1776; *see also* KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40, at 17, 61.

63. For a generally sympathetic discussion of a paradigmatic belief in a science of society that would better human conditions, see JOHN STUART MILL, AUGUSTE COMTE AND POSITIVISM (1961).

64. *See, e.g.*, THOMAS GEOGHEGAN, WHICH SIDE ARE YOU ON? (1990); PAUL WEILER, GOVERNING THE WORKPLACE (1990); Karl Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness 1937-1941*, 62 MINN. L. REV. 265 (1979); Katherine Van Wezel Stone, *The Post-War Paradigm in American Labor Law*, 90 YALE L.J. 1509 (1981); Paul Weiler, *Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA*, 96 HARV. L. REV. 1769 (1983).

65. National Labor Relations Act, Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-187 (1988)).

with different problems and different opportunities. A dream of left/liberal politicians, intellectuals, lawyers, and union officials acting in the public interest to afflict the comfortable and comfort the afflicted might have been a great vision for left/liberals in 1848 or 1892 or 1912 or 1932, but it doesn't feel especially compelling today.

12

The bind you're in is not limited to favoring various liberal reform measures with statist or bureaucratic components but feeling uninspired by them. Your sense of disillusionment is broader than that. The difficulty is that the very steps that one takes to make organized authority more just, more accountable, or more democratically exercised, also seem in a troubling way to rationalize that authority and justify its exercise. Sometimes the resulting problem is blatant, as in Napoleonic, Leninist, or Maoist systems in which the genuine anti-authoritarian impulse driving opposition to an ancien regime or capitalist ownership has wound up in a fatuous and sinister worship of violent authority. Often the problem is more subtle, but nonetheless real, as it is with city-run banks, *Goldberg v. Kelly*,[66] or Yugoslav self-management.[67]

13

The implicit message in proposals to make organized power better through due process, democracy, or participation is that if the proposal is successful, one should accept and obey organized power.[68] This message feels troubling, not because it's wrong *per se*; indeed, a majority's decision does seem to be more worthy of respect than an autocrat's. Nor is it troubling because organized power is generically a bad thing — that seems like a simplistic, even ridiculous, line to take — or because you oppose proposals for participation (on the contrary). But there is nonetheless an underlying problem.

14

The legal oppositionist project that you espouse is concerned with understanding and responding to power, hierarchy, domination, authority, etc. But it doesn't seem that oppositionists (the ones you like, anyway) are claiming that they have a way to divorce the positive from the negative aspects of power

66. 397 U.S. 254 (1970) (holding that a welfare recipient is entitled to a hearing before the termination of benefits). For an analysis of how the welfare system has moved toward a deskilling of caseworkers and increased requirements for paper production by recipients, see William Simon, *Legality, Bureaucracy, and Class in the Welfare System*, 92 YALE L.J. 1198 (1983).

67. *See* ALLEN TANNENBAUM ET AL., HIERARCHY IN ORGANIZATIONS 221-25 (1974) (describing workaday realities under the Yugoslav system of self-management).

68. *See, e.g.*, Gabel, *supra* note 48, at 307 (arguing that Ronald Dworkin's statement, "individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them," TAKING RIGHTS SERIOUSLY 180 (1977), should be interpreted as a way of legitimizing official behaviors).

relations to make them just and rational. Rather, the oppositionist message seems to be that there is a deep and persistent ambivalence in power relations such that one needs always to be wary of oneself as a powerholder who would make power just and rational, just as one needs to be wary of others.[69] After all, one's command of critical rhetoric is most definitely itself an instantiation of power, hierarchy, etc.[70]

15

The critical attitude that underlies legal oppositionism has a particular target, it seems. That target is the rationalization of power and hierarchy, and the task of legal oppositionists has been, and still is, to insist on the always questionable, always improvised, always political[71] nature of such rationalizations.

16

The magic words of liberalism — "justice," "rights," "law" — fill you with reservations. While neither you nor any critic has some fancy way to prove that all of these notions are reactionary bushwah, it does seem that all of these grand words are in practice implicated in a troubling way with the project of rationalizing power. Take rights, for example.[72] You can readily acknowledge that rights discourse is one of the genuine cultural accomplishments of your society.[73] On a practical level, you support particular arguments for the recognition of legal rights, both those on the broader liberal/left agenda and those that resonate mainly within the legal academic community. Yes, lesbians and gays should have a right not to be discriminated against; yes, employees should have a right not to be fired except for just cause;[74] yes, warranties of habitability should be implied in residential leases;[75] and so on. Yet the problem remains.

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69. For examples of critical self-questioning on power, see sources listed *supra* note 1.

70. *See, e.g.*, Williams, *Alchemical Notes*, *supra* note 2, at 401-02.

71. For an example of a critical work that affirms "law is politics" as the central point of critical legal studies, see John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 411 (1984).

72. Critical legal studies work that expresses skepticism about traditional left/liberal rights claims includes Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law*, 62 MINN. L. REV. 1079 (1978); Gabel, *supra* note 48; Karl Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 468-80 (1981); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984).

73. For an example of such an acknowledgement, see Duncan Kennedy, *Critical Labor Law: A Comment*, 4 INDUS. REL. L.J. 503, 506 (1981). For critical/feminist and critical race studies work questioning the critical legal studies critique of rights, see, e.g., Richard Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 HARV. C.R.-C.L. L. REV. 301 (1987); Schneider, *supra* note 2; Williams, *supra* note 2.

74. *See* Clyde Summers, *Individual Protection Against Unjust Dismissal: Time for a Statute*, 62 VA. L. REV. 481 (1976).

75. *See* Bruce Ackerman, *Regulating Slum Housing Markets on Behalf of the Poor: Of Housing Codes, Housing Subsidies and Income Redistribution*, 80 YALE L.J. 1093 (1971).

17

Real and problematic issues concerning power and the rationalization of power emerge when one appeals to law.[76] Law involves coercion.[77] Even if one wants to define coercion narrowly,[78] it's hard to deny the coercive aim of police, guns, sheriffs, and jails, or for that matter, of statutes and judicial opinions. Of course, legal coercion is by no means necessarily a bad thing; murderers, breachers of contracts, discriminators against gay people, and bosses who fire people unfairly should be subject to coercion in some form, and it seems important to understand the anti-authoritarian impulse behind striving for legal rights and the real value of those rights in opening up people's lives. But accompanying the rhetoric of legal rights and liberty under law is always the troubling issue of the compulsory power and violence that inheres in the legal process.

18

Given a skeptical attitude toward the rationalization of power, it doesn't seem that you can have a real faith in any particular way of organizing power so as to create justice. While you certainly have beliefs and proposals regarding who should rule and how rulers should be checked, it seems dubious to have too much faith in anything that you support as an incarnation of justice. To support any particular power arrangement as just seems at best to rationalize everyday meannesses and at worst to rationalize much more dismal wrongs.[79]

19

You can bring your problem down to earth by considering a particular issue related to organized power, affirmative action. You support affirmative action and you think that you have a critical perspective on the issue distinct from the centrist position.[80] While the centrist sees a need for affirmative ac-

76. Relevant here is Hohfeld's discussion of the correlative nature of legal rights and legal duties. *See* Wesley N. Hohfeld, *Fundamental Juridical Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

77. For a vivid discussion of the point, see Robert Cover, *The Violence of the Word*, 95 YALE L.J. 1601 (1986).

78. *See* KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40, at 22-23 (criticizing Robert Nozick's attempted narrow definition based on a distinction between noncoercive offers and coercive threats).

79. *Cf.* JOHN RAWLS, A THEORY OF JUSTICE (1971). Rawls avoids identifying his principles of distributive justice, including his difference principle (no changes should be made that are not to the benefit of the worst-off group), with any concrete institutional arrangements or outcomes. While Rawls appears to support welfare-state liberalism over laissez-faire or share-and-share-alike communalism, the practical indeterminacy of his principles of justice provides some protection against their being used to identify any particular existing system of power with justice.

80. For articles presenting critical perspectives on affirmative action and race, see Duncan Kennedy, *A Cultural Pluralist Case for Affirmative Action*, 1990 DUKE L.J. 705; Gary Peller, *Race Consciousness*, 1990 DUKE L.J. 758.

tion as a result of the lingering effects of historical inequities, you see an ongoing and flourishing practice of racism and sexism that inheres in the micropolitics of everyday encounters, including those in universities, a practice that inheres in different ways in your head, in the centrist's head and in everyone's heads, not just in the hooded heads of some demonized reactionary thugs. You question the possible system-maintenance function of affirmative action even as you support it: by focusing on the issue of equal access to the goodies by different groups and ignoring the issue of whether the overall distribution of the goodies should be different, does it wind up rationalizing and strengthening the existence of inequalities in power, wealth, and status? You question the nature of the debate, in which both sides argue that their position is the just one[81] — it seems that the real issue from a critical standpoint is not a just system of power but more provisional, less self-satisfied power arrangements.

20

As much as it feels as though you've got a distinctive critical take on the affirmative action issue and other issues of racial, gender, ethnic, and class power, it doesn't seem that you've got a distinctive radical affirmative program of turning around existing power arrangements to juxtapose against the liberal idea of affirmative action/proportional representation. Here again the bind comes in. . . .

21

You are perhaps bound to be a fellow traveler rather than one who can internalize the dilemmas of radical feminism. Yet the ambivalence toward power turnarounds that you sense in radical feminism is also something that you feel in your own distinct way.[82] It seems to you that there is in fact a

81. For works contending that a given position on affirmative action is indicated by principles of justice, as embodied in the Constitution, see, e.g., ROBERT K. FULLINWIDER, THE REVERSE DISCRIMINATION CONTROVERSY (1980); MICHAEL ROSENFELD, AFFIRMATIVE ACTION, JUSTICE AND EQUAL PROTECTION (1990); Kathleen Ann Darby, *Shouldn't the Constitution Be Color Blind?* Metro Broadcasting, Inc. v. FCC *Transmits a Surprising Message on Racial Preferences*, 40 CATH. U. L. REV. 403 (1991); Benjamin Hooks, *Affirmative Action: A Needed Remedy*, 21 GA. L. REV. 1043 (1987); William B. Reynolds, *The Reagan Administration and Civil Rights: Winning the War Against Discrimination*, 1986 U. ILL. L. REV. 1001.

82. For examples of such ambivalence in radical feminist works, see LUCE IRIGARAY, THIS SEX WHICH IS NOT ONE (Catherine Porter with Carolyn Burke trans., 1985); MACKINNON, FEMINISM UNMODIFIED, *supra* note 2; CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE (1989) [hereinafter MACKINNON, TOWARD A FEMINIST THEORY]. There is in some ways a close analogy between the kind of radical feminism exemplified by the writings of MacKinnon and Irigaray and a certain traditional brand of Marxism. Both share a sense of a total system of oppression, a moral anger against the oppressors, and a belief in a struggle to transcend the oppressive system. Yet there is a crucial difference between the old Marxist perspective and the new radical feminist perspective. The underlying (if not avowed) faith in making power just that lay behind Marx's and Engels' programmatic commitment to rule by the proletariat and to social control of the means of production is hardly to be found in contemporary feminist radicalism. MacKinnon and Irigaray do not propose that pa-

perfectly plausible argument for shifting to political and workplace rule by members of traditionally nondominant groups on the basis that such rule would be a way for governmental and workplace power to counterbalance underlying cultural power. Such a system would quite likely be to the present system, in which the governmental, workplace, and cultural power of white males all reinforce one another, roughly what a system of separated powers is to a system of united central power. And yet the original problem remains.

22

Imagine, for example, a United States in which blacks dominated in government and the workplace under a law mandating that for a certain period of time only blacks could be public officials, executives, professors, etc. Such a regime would on the face of it be clearly less just than the current system, with its theoretical commitment to equality of opportunity, or than a system of proportional representation. Yet it seems at least entirely possible that such an alternative "blacks rule" regime, if democratically chosen (which of course would in practice mean approval by at least a substantial proportion of whites) and subject to modification, would indicate a profound change for the better in people's attitudes toward power and race. It could also promote power sharing in a broad sense, and be conducive to more decent practices in regard to power and race than those currently prevailing.

23

So do you favor going beyond affirmative action/proportional representation and its compromises and evasions to a radical alternative, not necessarily a specific "blacks rule" proposal, but some kind of anti-hegemony law under which women or blacks or nondominant groups in general are empowered to be the rulers for a certain period in workplaces and in government? You feel a powerful ambivalence about the idea, an ambivalence that paralyzes you from being an enthusiastic supporter of enacting such a power switch. Though of course you can never be sure, this ambivalence does not seem to be simply a function of your own class, gender, and race.

24

It feels all too plausible that in defending the power switch idea, you and your critical peers would be drawn into arguing on the terrain of justice as the left has historically done by claiming that certain groups are somehow morally entitled to rule; that in the event of your winning your alternative "critical"

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triarchy be overthrown by excluding males from positions of power in workplaces, government, etc. For MacKinnon in particular, the actual political proposals advanced are well within the domain of the liberal-conservative spectrum. For a discussion of MacKinnon's writing and its relation to Marxism and critical legal theory, see *infra* parts III.C.2.b and III.C.3.a; *see also* IRIGARAY, *supra* this note, at 129 ("It clearly cannot be a matter of substituting feminine power for masculine power . . . there would be a phallic 'seizure of power'. ").

system of power would wind up recapitulating, or even intensifying, the equation of power and right that you want to challenge. What it comes down to is that you feel less than inspired by a policy of power turnaround, just as you are less than inspired by the basic liberal-centrist affirmative action policy. Both policies, though in rather different ways, are in practice all too likely to play out as means to rationalize organized power. What needs to be done, it feels like, is not to rationalize the power of workplace and state organizations but rather to open up more room away from that kind of organized power.

25

You can spin out things you're in favor of at the local level of the law school, such as Kennedy's proposals for no-hassle pass, lottery admissions, and law professors spending some part of the year working as janitors.[83] You also favor making changes at the law firm, such as imposing maximum billing hour limits, allowing no-hassle refusal of assignments, and having secretaries spend part of the year working as partners. You believe in these practices and you're willing to take a chance of being seen as a hypocritical fool or a proto-Pol Pot for favoring them,[84] though it would admittedly make things easier in that regard if you had tenure. There is a real difficulty, though, with what you want on the local level of the law school and the law firm, important as those levels seem. . . .

26

Some of your particular micro-level beliefs — like no-hassle pass or no-hassle refusal of assignments — are basically liberal reform proposals, not that that makes them bad ideas. Others — like job-switching — have a radical flavor to them, and it's these beliefs that present the interesting problem. Your local radicalism on job-switching hints at a macro-level radicalism that you find dubious because of the collective coercion it would seem to entail. Though you think it would be excellent for secretaries, partners, messengers, paralegals, associates, and janitors at a law firm to work out a job-switching plan, you're highly dubious that it would be a good idea for Congress, Gosplan, the National Board for Enhancing Negative Capability, etc., to do so.[85]

83. Gabel & Kennedy, *supra* note 2, at 1-14; DUNCAN KENNEDY, LEGAL EDUCATION AND THE REPRODUCTION OF HIERARCHY: A POLEMIC AGAINST THE SYSTEM 120-23 (1983) [hereinafter KENNEDY, LEGAL EDUCATION]; Duncan Kennedy, Utopian Proposal or Law School as a Counterhegemonic Enclave (Apr. 1, 1980) (unpublished manuscript, on file with the author) (arguing for action countering hegemony at local level of law school).

84. For an example of a psychologizing anti-critical legal studies piece that appears to perceive critics as poseurs or proto-totalitarians, see Johnson, *supra* note 40, at 249, 282 n.91 ("Critical legal writing provides a way of sounding like a radical when you don't know how to be one; . . . . There is no hint that police and mob terror will inevitably be the agents of transformation.").

85. *See* Kennedy, *Blackstone's Commentaries*, *supra* note 2; KENNEDY, LEGAL EDUCATION, *supra* note 83, at 756-57 (supporting affirmative action at law schools; expressing reservations about a centrally-mandated program).

But at the same time, your support for radical micro change — standing alone, devoid of any plausible advocacy for radical macro change — feels incomplete and in a way bootless.

27

From an internal point of view, the fact that other people may regard you and your beliefs as whimsical or bootless isn't that troublesome; whimsicality and bootlessness don't seem like such bad things compared to some of the other problems to which political programs are prey. Nor does it seem that denying an affirmative macropolitical commitment is inherently logically flawed. However, it does feel as though you need some kind of macropolitical commitment to link up with your micropolitical commitment, not so that you can plumb the ultimate nature of social reality but so that you can have a juicier, messier, more interesting way of responding to the world.

28

You have real reservations about a broad radical politics, and yet you want such a politics in some form or other. And in truth, it's not as rationalistic as the rhetoric of "you need macro to link up with micro" suggests. It's religious in a way, in that you want a kind of faith, not one that you just kowtow to or that controls everything else, but one that you can talk back to even as it allows you to criticize, to feel a sense of transcendence of the everyday routines of your life.

29

One thing you can do as a critic is to embrace the idea of radical transformation of society without being in any way specific to yourself or others about what it is that you mean. You can take the high road of philosophy and talk about the master-slave dialectic,[86] the fundamental dichotomies of liberalism,[87] and unalienated relatedness.[88] As consciousness-raising for yourself and other lawyers and as a reaction to the rather crude materialism of old style "means of production" radicalism, this sort of moral uplift radicalism seems worthwhile as far as it goes — but it doesn't feel like an effective way of getting out of the bind. It's too much like religion that just talks vaguely about the spirit and never commits itself to any substantive beliefs.

30

To change things for the better, it feels as though something more has to happen than external changes — changes need to take place as well within your mind, at the level of the way in which you and other people think about

86. GEORG W. F. HEGEL, THE PHENOMENOLOGY OF SPIRIT (A. Miller trans., 1977) (1807).

87. UNGER, KNOWLEDGE AND POLITICS, *supra* note 52, at 6-7, 133-37.

88. Gabel & Kennedy, *supra* note 2, at 1.

the world, not just at the level of institutional modifications. In its insistence on this point, moral uplift radicalism seems exactly right, but the idea of an overall social transformation of consciousness without changes in the external circumstances of people's lives sounds like mystical gibberish. To make your radicalism plausible to yourself as a politics — to make it something other than moralism — you need practical content.

31

But might it be the case that your legal oppositionism in the end boils down to a moral sentiment that's actually antipolitical? In that case, why not resolve the bind by deciding that you don't really believe in any large-scale political change?

32

Whatever else it may be it seems clear that your oppositionism is an attempt, successful or not, at self-criticism, a way of trying to deal with the problems that inhere in one way or another in yourself and your political/legal stances.[89] From the outside, the legal oppositionist critique of liberalism can be interpreted as just another variant on the traditional Marxist project of criticizing capitalism, with admixtures of the feminist project of criticizing patriarchy and the civil rights project of criticizing racial domination thrown in to keep the whole business up to date. But from the inside, that interpretation seems badly flawed. Internally, it feels as though the skeptical critique of liberalism works in large part as a criticism of yourself. Internally, the critique responds to a sense of dubiety not only about the social system that surrounds you and constitutes you but also about efforts by you as a leftist to label that system as wrong and unjust.

33

It seems that you need to connect your politics to something that you

89. If the critiques of liberals and liberalism in critical legal writing are viewed as self-dissections, the problem that critical legal movements have had with offering a transcendent alternative to liberalism at a philosophical level makes sense not only in terms of the psychological reality of the situation — i.e., that critics are by and large liberals themselves — but also in terms of the loss of self-critical focus that would attend advocacy of "organic community" or some such supposedly ethically superior alternative to "liberalism." The vision of ceaseless recombination and negative capability that Unger presents in POLITICS, *supra* note 2, has been attacked as implausible and as biased toward a particular type of haughty, combative temperament. *See* H. Jefferson Powell, *The Gospel According to Roberto: A Theological Polemic*, 1988 DUKE L.J. 1013; Bernard Yack, *Toward a Free Marketplace of Social Institutions: Roberto Unger's "Super-Liberal" Theory of Emancipation*, 101 HARV. L. REV. 1961 (1988). But it should be noted that in POLITICS, Unger implicitly shows considerable sensitivity to the problem of how espousing a particular social vision leaves one open to self-satisfaction and complacent moralism. Whether or not Unger's vision of struggle and transformation is appealing as a description of a society, the qualities that he emphasizes certainly seem to be important in trying to take a self-critical position. For a discussion of the relation of Unger's affirmative program in POLITICS to critical legal thought, see *infra* part III.C.3.b.

admit you want personally, not to take that bogus "as a left intellectual what I want is only the general interest — or the interest of the working class or the interest of the oppressed — not my own interest" stance that has plagued leftist politics for so long.

34

In yourself you have to acknowledge the existence of anger and the potential for its open or repressed expression in unpleasant forms of power-seeking and in plain old rage. You can deal with that anger through humor or in other ways, but there it is . . . your political beliefs — including your legal oppositionism — are not, either in their origins or in their current manifestations, unmixed with that anger.

35

You need to recognize that the anger present or latent in you isn't righteous anger, much as it also seems that there are indeed wrongs in the world and that it is right to resist these wrongs — it seems that the best you can do is to rationalize your anger in one sense, to avoid the idiocy of just expressing it in physical or verbal rage — but not to rationalize it in the sense of affirming it in your exercise of authority or in your resistance to authority — to hold on to a sense of it as personal, as troubling. It seems that you need to understand and defend your critical position not as an objectively valid response to wrong but as a particular psychic stance.

36

Yes . . . and at the same time it feels as though there's something false, something unsatisfactory, something scolding and prissy and smart-alecky, about an "always critical, always self-critical" moralistic stance, even if such a stance were somehow possible. It doesn't work to wish the "what do you want?" bind away by saying that you don't want to believe in anything. You can't live by critical moralism alone . . . and it feels as though supplementing it with reserved support for city-owned companies and like macro proposals, along with support for job-switching and other micro-level radicalisms, still doesn't do the trick, worthwhile as these positions seem by themselves.

37

So does it in the end come down to this? You're disillusioned, disillusioned, disillusioned . . . you support all kinds of things, but you're too wise or at least too worldly and too weary to be really excited about any of them . . . you'd be a tragic liberal of some kind,[90] only you're too disillusioned to fall

90. *See* Kelman, *Trashing*, *supra* note 2, at 346 (referring to Arthur Leff as a particularly cogent expositor of tragic rather than optimistic liberalism).

even for that . . . you've perceived the hollowness of instrumental reason,[91] drunk the cup of knowledge to the full and found only despair, unmasked even unmasking, seen the nothingness of everything. Well . . . no . . . that's not it, not even close. As a self-description, the "drunk the cup of knowledge to the dregs of despair" line doesn't work well at all. In truth, you've got a broad streak of enthusiasm in you, and that enthusiasm is at least as basic a part of your oppositionism as disillusionment. In truth, your having a problem with liberal legalism and its good gray dull rationalizations seems to have much more to do with your being an enthusiast than with having some sort of insight into the hollowness of everything.

38

So what is it that you want? What are you enthusiastic about politically? If you stop abstracting and turn back to the circumstances of your own life, the riddle is not an insoluble one or even a particularly difficult one. As a practicing lawyer and now as an academic, your life has centered around your job. One thing you really want, simply stated, is more time for other things in your life.

39

Although the jobs you've had came with different expectations, throughout there's been a common theme: the work of your job is the work that comes first in your life. While it was more extreme at the firm than in government or the university, since the firm was a kind of ideal type, an extreme to which the other workplaces only tended, the theme has remained the same. The problem is that there are lots of things, including other kinds of work, that you want to do beyond the work of your job. There's your family, there's art, there's non-workplace politics, there's friendship outside the workplace, there's the search for knowledge and enlightenment beyond your job . . . and you want more time for all of these.

40

It's not that your life with your wife, your baby, and the rest of your family is free from shadows, and it's not that the time you spend writing, reading novels, cooking, doing intellectual speculation, woolgathering, going to political meetings or demonstrations, talking to friends, etc. is lacking in shadows, either. But when it comes down to it, it does seem that most of what matters in your life inheres in this time, and that it would be a really good thing to have more of it, both because it's time that you enjoy and because it seems right to move away from defining your life in relation to the relatively

91. *See* JURGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (Jeremy J. Shapiro trans., 1971).

structured and quite narrow ideals of a job and toward defining it in more flexible and diverse ways.

41

It feels as though there's a natural connection between your legal oppositionism and a criticism of job life. It doesn't seem that the rationalizations of judges and law professors can sensibly be viewed as standing in a vacuum — they seem to be a part of a particular mode of white collar job life, different in some ways but generally similar to the rhetoric prevailing in other kinds of white collar jobs.

42

It seems right to view mandarin legal consciousness[92] not simply as an expression of fundamental human traits such as ambivalence[93] or a striving for power[94] but also as a way of thinking and feeling that makes sense in a particular social context. What needs does mandarin "voice of Oz/voice of authority" rhetoric respond to and what way of life does it serve? It's hardly plausible to say that that rhetoric is some kind of mass psychosis or conspiracy of the executive committee of the bourgeoisie, but it does make sense in relation to your experience in the firm and now in the university to say that that rhetoric responds to the circumstances of life in organizations, in particular to the legal/bureaucratic aspiration to have authority cleansed of personal elements.[95] There's a continuity between the impersonal, self-confident, authoritative tone expected in an administrative memo to faculty and staff, in a legal brief, in a law review piece, and in a judicial opinion. If you have a problem with the scope and the pretensions of that rhetoric, as you do, it makes sense that you also have a problem with the scope and pretensions of job life.

43

Obviously, no one is telling you that you have to work a set number of hours a week at a paying job. If you're convinced that the importance of activities outside your job is such that you really should only be working for pay twenty hours per week, you can find a job where you work only twenty hours a week. But there are some serious problems. In your current job, which you like, engaging in that reduction of hours doesn't seem available as

92. For a good discussion of the critical preoccupation with analyzing elite legal consciousness, see Robert Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 120-24 (1984) (by engaging doctrinalists on their own ground, CLS has succeeded in creating a "fabulous ruckus," while the nondoctrinal Law-and-Society message has been ignored).

93. *Cf.* Kennedy, *Blackstone's Commentaries*, *supra* note 2, at 211-13 (discussing people's ambivalent attraction to and repulsion from other people).

94. *Cf.* FRIEDRICH NIETZSCHE, BEYOND GOOD AND EVIL (1886), *reprinted in* BASIC WORKS OF NIETZSCHE 181, 211, 238 (Walter Kaufmann ed. & trans., 1968).

95. For the classic articulation of that position (presenting the aspiration as a characteristic of ideal type bureaucracy), see WEBER, *supra* note 4, at 217-23.

an option, except as a form of Bartlebyesque withdrawal from the job that is likely to be destructive to yourself and others. And the problem you face seems like a general one: It could work well if everyone cut back on hours, but doing so alone seems less likely to work well.

44

It may be possible to reduce job hours or institute reforms at the level of the individual workplace, and efforts to do so have real value. It does seem, though, that since expectations about the time you should spend at your job and your commitment to your job compared to your commitment to other forms of work and activity in your life are formed at a broad systemic level,[96] activism on a broader level is also important.

45

Even if as a tenured professor you could spend less time on journal writing and administrative work and more on other reading and writing, being with your family, or political activism without feeling like a drone, there's something that seems anomalous and unfair about that situation: you'd be a kind of aristocrat of labor while the rest of the crew in the junior faculty, the law firms, and elsewhere kept on toiling away in the salt mines. It feels a bit like having a million dollars a year: of course it'd be great for you, but what about everybody else — what about that good old Kantian issue of universalizability?[97]

46

In the end, the "what do you want" question doesn't seem impossible to answer. But your belief in cutting back on job work in favor of taking more responsibility for your work and your life doesn't mean much if it's just your idiosyncratic response. For all your sense of having gotten beyond the "what do you want" bind, in some sense you're still in it in a very real way if your affirmative line is just a private line. In the end, it don't mean a thing if it ain't got that intersubjective zing.[98]

47

What you want isn't completely irrelevant in contemporary liberal politics. Family leave and the difficulties of balancing job and family commit-

96. *See, e.g.*, Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1988) (establishing standard work week of forty hours; requiring payment of 50% overtime premium for work over forty hours; exempting managerial and professional work from requirement).

97. IMMANUEL KANT, GROUNDWORK OF THE METAPHYSICS OF MORALS 17-20 (Herbert J. Paton trans., 1964).

98. The correct phrase, of course, is "intersubjective zap," *see* Gabel & Kennedy, *supra* note 2, at 10-11, but nothing nice seems to rhyme with zap.

ments are current issues.[99] As usual with liberal politics though, there are problems with ignoring broader dimensions and with possibly reinforcing the status quo. The terms of the family leave debate fail to address the basic issue of job time commitments except in very limited contexts — congressional Democrats aren't going to start talking about the rationalization project of organization life. Further, while the liberal norm of formal equality requires that paternity leave be supported and that the issue of balancing job and other commitments not be seen as simply a traditional women's issue, in practice that seems to be exactly how the issue is coming across. If the conversation stays in the "we must respect the real differences between men and women in the workplace" rut, it hardly seems as though it's going to amount to more in the end than the early twentieth century protective legislation of the sort that the Supreme Court upheld in *Muller v. Oregon*.[100] A radical approach needs to be heard.

48

The basic dilemma for legal oppositionism — of being caught between desire to better your own and other people's conditions and fear of the coerciveness of that project in practice — does not, or at least need not, equally shadow all radical political/legal proposals. While that problem shadows the traditional leftist "public control of the means of production" proposal, it does not in the same sense shadow a proposal to cut back the scope of job life, or to open room for different ways of life by cutting back hours worked in law firms or in workplaces more generally, to say twenty hours a week. That does not resolve the merits of such a proposal — but it is crucial, it seems, to realize that the old and by now deadening grooves in which arguments for and against radical politics run ("Shame on you, you oppressor you! — Shame on you, you crypto-totalitarian you!" etc.) do not apply in the same way to radical proposals to cut back on the scope of job work.

49

Skepticism and advocacy can work together. There's an affinity between your critical attitude toward rationalizing power and your desire to cut back on job work. The two stances are in sync in a way that your critical attitude and your support for, say, national health insurance aren't. You can have enthusiasm for the idea of cutting back on the domain of job work in a way that you can't for the idea of government and workplace organizations planning people's lives better. Of course, that doesn't come close to ending the

99. *See, e.g.*, PATRICIA SCHROEDER, CHAMPION OF THE GREAT AMERICAN FAMILY (1990).

100. Muller v. Oregon, 208 U.S. 412 (1908) (upholding maximum working hour regulations for women). For discussions of the limitations of a "differences" approach to sex inequality, see, e.g., MACKINNON, FEMINISM UNMODIFIED, *supra* note 2, at 216-34; Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and Workplace Debate*, 86 COLUM. L. REV. 1118 (1986).

matter, since your inner enthusiasm is no guarantee of a given proposal's value, and enthusiasm can of course be dangerous. It is, nevertheless, a real start. The bind is not, after all, inescapable.

III

THE CONNECTION BETWEEN THE LEGAL OPPOSITIONIST CRITIQUE OF LAW AND LIBERALISM AND A CRITIQUE OF ORGANIZATION LIFE

Critical legal studies, feminist criticism, and critical race studies are radical movements. But what is the content of their radicalism? While many individual critics may be supportive of one radical political program or another,[101] there has been a reluctance in critical legal thinking to advocate Marxist or other radical programmatic perspectives in regard to large scale social change. This part of the Article is about that reluctance and how it might be overcome in one important though limited respect. In the main, the argument I will make is a formalization of the introspective point made in the last part of the Article[102] that there is a link between the oppositionist critique of law and of liberalism and a critical/affirmative program and theory[103] that focuses on reducing the domain of organization life and rationalized production.[104]

My argument takes a good deal for granted; in particular, it assumes the reader is familiar with, though not necessarily in agreement with, critical legal movements and their scholarship. Therefore, the arguments that follow do not make a case for legal oppositionism from the ground up; rather, they assume oppositionism as it has developed and consider what it suggests in terms of an affirmative program and theory. Consequently, the discussion to follow will have a relatively abstract quality compared to the first two parts of this Article or to works that directly argue for a critical legal stance,[105] and the reader is asked to bear in mind the earlier parts of this Article and other critical legal works[106] that ground the argument that follows.

In support of the overarching contention in this part — that there is a close tie between legal oppositionism as it now exists and an as yet undevel-

101. *See* KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40, at 1 (describing those sought out for the initial Conference on Critical Legal Studies in 1977: "[P]eople on the left at least relatively skeptical of the State Socialist regimes (although many were undoubtedly more or less sympathetic with revolutionaries arguably seeking to establish such regimes) . . .").

102. *See* especially ¶¶ 9, 10, 13, 14, 41, 42, 48 & 49.

103. By a "critical/affirmative program and theory," I mean a political perspective that combines a broad criticism of existing circumstances and habits of mind with support for particular, realizable change or changes in current conditions. *See infra* note 132.

104. This Article does not consider the feasibility of such a critical perspective, except by implication in discussing its relation to critical legal theory. *See infra* notes 207-09.

105. Most critical legal works, especially those that examine particular legal doctrines, can be so classified. *See, e.g.*, the works cited *supra* note 48. This Article is an example of second generation critical legal work, *see* Kennedy, *Psycho-Social CLS*, *supra* note 6, that assumes and works from the existence of a critical legal stance and critical legal scholarship, rather than making the initial case for such a stance. *See supra* note 40.

106. *See, e.g.*, the works cited *supra* note 48.

oped critique of organization life — I will advance three arguments. First, I will argue that the basic oppositionist "indeterminacy critique"[107] suggests an affirmative program. Specifically, I will propose that the indeterminacy critique, reasonably understood, entails an effort to change one's rhetorical practices to avoid implying that one is truly objective, above the fray, and free of conflicting commitments. Such an effort to change rhetorical practices goes along with an effort to change organization life and its position relative to other ways of life.

Second, I will argue that critical legal skepticism of attempts to rationalize hierarchy, power, and authority also has an affirmative implication. While critical skepticism of rationalized power has been interpreted by some as nihilism[108] and by others more sympathetically inclined as simply self-critical moralism,[109] a different reading of the critical position is available. If one accepts the premise that, under current social circumstances, hierarchy and other inequalities in power and authority are rationalized primarily as requisites of effective organizational functioning, one is led to the conclusion that deemphasizing organization life in favor of other ways of life in which rationalizations for hierarchy have a less secure purchase would be a promising strategy.

Finally, I will compare critical legal theory as it has developed to four critical/affirmative theoretical perspectives[110] — Marxism, radical feminism as represented by Catharine MacKinnon, the independent left perspective advocated by Roberto Unger,[111] and a nascent alternative perspective focusing

107. I use "indeterminacy critique" as a summary term for oppositionist criticisms of legal reasoning and discourse. "Critique" is arguably an excessively fancy term, but it evokes the intellectually focused and academic tone of the legal critics' work in a way that the more plain-spoken "criticism" does not. Nothing crucial depends on the term used; "indeterminacy critique" has been used here because of the widespread and somewhat distinctive use of the idea of law's indeterminacy in North American critical legal work. *See* CRITICAL LEGAL THOUGHT: AN AMERICAN-GERMAN DEBATE 3 (Christian Joerges & David M. Trubek eds., 1989) (indeterminacy is a key concept for American critics, but not for German critics). As a term, "indeterminacy critique" is used here in a broad sense, basically coextensive with "critical legal theory" as described in KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40. For further discussion of critical legal theory, see *infra* part III.C.1.

108. *See* Paul Carrington, *Of Law and the River*, 34 J. LEGAL EDUC. 222 (1984) for an unfortunate argument justifying exclusion of critical legal studies adherents from law schools based on their purported nihilism. *See also* Owen Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982); Sanford Levinson, *Escaping Liberalism: Easier Said Than Done*, 96 HARV. L. REV. 1466, 1470 n.3 (1983) (book review) (indicating that he does not fundamentally dispute Fiss's characterization of Levinson's approach to law as nihilistic).

109. For an example of a piece in which the writer suggests that his position may simply boil down to opposition to whatever is in power, see Tushnet, *supra* note 2, at 1394, 1398-1402.

110. For an explanation of what I mean by a critical/affirmative theoretical perspective, see *infra* note 132.

111. Obviously, Unger is himself a critical legal theorist whose work has been influential in the development of critical legal theory. The perspective discussed *infra* part III.C is not that of the first half of KNOWLEDGE AND POLITICS, *supra* note 52, or that of his other critical works, but that of his constructive social theory as delineated in POLITICS, *supra* note 2, and to a lesser degree in *CLS Movement*, *supra* note 2.

on organization life. The argument here begins with the point that Marx's, MacKinnon's, and Unger's theoretical perspectives are discordant in significant respects with critical legal theory. However, this discordance between a critical legal perspective and these major radical positions should not be generalized, as it often is, into an assumption that a critical legal perspective is incompatible with all radical programs for large-scale social change. A critical legal perspective fits closely, it will be contended, with a critical/affirmative perspective focusing on reducing the domain of organization life.[112]

A. Affirmative Implications of the Indeterminacy Critique

1. Rhetorical Change

Understanding the indeterminacy critique as a moral criticism of particular rhetorical practices that repress ambivalence, conflicting commitments, and political commitments[113] suggests an obvious practical consequence of that critique: efforts to change one's own rhetorical practices as a legal academic.[114] One can, no doubt within limits, change one's rhetoric. People across and within cultures employ a variety of rhetorics, differing substantially in levels of formality. "Ain't" works in some rhetorical contexts but not in others. The degree to which the temperament and particular circumstances of the rhetorician are expected to be displayed or suppressed also varies accord-

112. Certainly, it would be logically possible to make the argument for the close fit between a critical legal perspective and a critical perspective focusing on organization life without discussing Marx's, MacKinnon's, and Unger's works. But given what I take to be a prevailing mood of skepticism among legal oppositionists about radical affirmative programs such as Marx's, MacKinnon's, and Unger's, I think it is important to indicate how a program of reducing the domain of organization life differs from currently extant radical programs. For more on this point, see *infra* text accompanying notes 133-38.

113. The interpretation of the indeterminacy critique adopted here should be contrasted with an interpretation of the indeterminacy critique as an expression of an anti-foundationalist epistemology. That interpretation goes along with the claim that any connection between the indeterminacy critique as developed in critical legal writing and practical action is nonexistent or at best tenuous and nonrational. An active partisan of that interpretation and the associated claim is Stanley Fish. *See* STANLEY FISH, *Anti-Professionalism*, *in* DOING WHAT COMES NATURALLY: CHANGE, RHETORIC, AND THE PRACTICE OF THEORY IN LITERARY AND LEGAL STUDIES 215 (1989).

A response to Fish's interpretation of the indeterminacy critique is not necessary for the limited purposes of the argument here and is beyond the scope of this paper. I would suggest though that works such as Mark Kelman's *Interpretive Construction in the Substantive Criminal Law*, *supra* note 48, and Duncan Kennedy's *Form and Substance*, *supra* note 21, are better interpreted as criticisms of legal rhetoric along the lines suggested in the text than as assertions of Fishian anti-foundationalism. For critical responses to Fish on different grounds, see, *e.g.*, Drucilla Cornell, *"Convention" and Critique*, 7 CARDOZO L. REV. 679 (1986); Hutchinson, *supra* note 9; Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987); Pierre Schlag, *Theories and the Uses of Dennis Martinez*, 76 GEO. L.J. 53 (1987); Steven Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990).

114. There is a parallel between the proposal here for rhetorical change and Richard Rorty's notion of philosophy as conversation, which implies moving away from coercive analytical forms toward less formal, more overtly personal forms of discourse. *See* RICHARD RORTY, PHILOSOPHY AND THE MIRROR OF NATURE 360, 394 (1979) [hereinafter RORTY, MIRROR OF NATURE].

ing to context. "I feel" is privileged in some rhetorics, unexceptionable in others, disdained in yet others. Broad, impersonally couched claims (assertions about, say, the future of promissory estoppel or the implications of indeterminacy) are plausible in certain contexts but laughable in others. To make this common sense point succinctly: the language of a judicial opinion is different from the language of a conversation between friends.[115] One can express oneself in different ways.

Though it is a tricky and personal project, changing rhetorical practices in a way that reduces the authoritarianism of legal rhetoric and its pretensions to objectivity and determinacy is possible. Academics identified with critical legal movements have successfully employed fictionalization, references to the rhetorician's own experiences and feelings, and juxtapositions of mandarin rhetoric with the vernacular. The implications of a rhetorically-oriented approach to the indeterminacy critique have been explored in the most thoroughgoing way by critical race studies scholars such as Derrick Bell and Patricia Williams, whose articles have challenged assumptions as to how legal academics should express themselves.[116] Given the variety of ways in which law review articles, judicial opinions and classroom presentations are now articulated we might well question the assertion that present rhetorical practices in law are cast in stone, and can hardly deny that major changes in these practices may well occur.

2. *Reducing the Domain of Legal/Bureaucratic Rhetoric*

The connection between characteristic rhetorical practices in law and the exercise of legal/bureaucratic authority may be grasped intuitively through experiencing a connection between bureaucratic work settings and a guarded, "objective," "impersonal," and unself-critical style of rhetoric and behavior.[117] Alternatively, the point can be made more formally through reference to the familiar Weberian typology of authority into traditional, charismatic, and legal/rational forms.[118] Weber contends that the exercise of authority can be regarded as legitimate because one believes in the rationality of that authority. In Weber's typology, legal/rational authority operates according to impersonal, abstract rules that are enforced by individuals who are entitled to issue commands pursuant to these rules and who are themselves subject to the rules.[119] Critical legal work of course attacks the notion that the exercise of

115. For discussions of different modes of rhetoric, see ARISTOTLE, RHETORIC AND POLITICS (W. Rhys Roberts trans., 1954); JAMES BOYD WHITE, HERACLES' BOW (1985); CHAIM PERELMAN, THE NEW RHETORIC (1969).

116. *See, e.g.*, Bell, *supra* note 9; Williams, *Alchemical Notes*, *supra* note 2; *see also* sources cited *supra* note 9. Obviously, this Article is indebted to the work of Bell, Williams, and to the articles cited in note 9.

117. For a description of a work social event that deals with the issue of how work settings structure rhetoric and behavior, see KENNEDY, LEGAL EDUCATION, *supra* note 83, at 67-68.

118. WEBER, *supra* note 4, at 215.

119. *Id.* at 215, 217-18. Alternatively, one can regard authority as legitimate because of belief in ancient tradition or the status of the holder of authority, or because of belief in the

legal/bureaucratic authority should in fact be regarded as rational in Weber's terms. The critique, however, endorses the notion that those who exercise legal/bureaucratic authority engage in a rhetorical practice that presents their actions as rational in the Weberian sense: determined by abstract rules, impersonal, neutral.[120] For present purposes, the crucial point is that there is a connection between the exercise of legal/bureaucratic authority and this particular sort of rhetorical practice: a judicial decision presented as impersonal and compelled by abstract general rules provides a quintessential example.

We can now relate the argument about the indeterminacy critique as a manifestation of discomfort with prevailing legal rhetoric to the issue of the scope of organization life, the part of our lives in which legal/bureaucratic authority is exercised by ourselves and others under a mantle of rationality.[121] If one is dissatisfied with prevailing legal/bureaucratic rhetoric, one sensible response is to try to alter one's own rhetorical practices in law journals and elsewhere, as previously discussed. Another sensible response is to try to change the material circumstances in one's life that privilege legal/bureaucratic rhetoric over other rhetorical practices that one regards as at least equally valuable. That project does not entail a belief in the abolition of human divisions, legal/bureaucratic institutions, or legal/bureaucratic rhetoric. One may reasonably feel that such rhetoric is going to be, even should be, in some respects characterized by a formality and a psychopolitical opacity that differentiate it from a dialogue of friends. To note that the idea of impersonal authority is in some sense a sham does not entail enthusiasm for the overt personalization of authority or for an effort to adopt a rhetoric of authority that falsely implies friendly equality. However, one conclusion surely does follow from dissatisfaction with the preponderance of legal/bureaucratic rhetoric over other kinds of rhetoric in one's life: one can and should, all things equal, support efforts to change one's life so that there will be more room in it for rhetorics other than legal/bureaucratic rhetoric.[122] One should make an effort to reduce the amount of one's life devoted to the production of legally/bureaucratically appropriate rhetoric.[123]

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extraordinary character of a particular individual and the normative order she advocates. *Id.* at 215, 226, 241.

120. Indeed, a central aim of critical legal work is to demonstrate the disparity between powerholders' implied claims to a determinate, impersonal, and neutral (Weberian) rationality and indeterminate, personal, and political elements in the exercise of legal authority. *See, e.g.*, sources cited *supra* note 48. The interest of many critics in legitimation, see, e.g., KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40, at 269-95, is worth noting here as an indication of how critical legal theory ties into Weber's analysis of authority.

121. For works treating organization life from different perspectives, see sources cited *supra* note 4; in particular, for a clear exposition of a mainstream perspective that asserts the centrality of rationality in organizations, see SIMON, *supra* note 4.

122. While it may seem paradoxical to conclude that one should seek changes in the material circumstances of one's life in order to talk and write differently, such a conclusion is very much in the spirit of legal oppositionism's focus on consciousness raising. How we talk and how we write are not secondary matters of form: our rhetoric is, in large part, who we are.

123. In that connection, there is of course an issue as to whether the abstract, theoretical

B. *The Affirmative Program Implicit in Critical Legal Skepticism of Hierarchy and Rationalized Power*

The skeptical or downbeat attitude toward hierarchy and rationalized power that one can discern in much critical legal writing[124] might be taken as an expression of a skeptical or downbeat attitude toward human behavior in general. Taken that way, a critical position on hierarchy and rationalized power would not entail any particular programmatic agenda.[125] That interpretation of the critical position is not logically fallacious; it does not seem like an especially plausible interpretation of what critics have in mind, though. It is reasonable to interpret the critical stance as one that asserts that hierarchy and rationalized power are pervasive in human life, so that no matter what one does one is in some way instantiating hierarchy and rationalizing power.[126] It hardly seems, though, that critics are asserting that nothing should be done about existing hierarchies and rationalizations of power because all conceivable hierarchies and rationalizations of power are equally troubling. It makes more sense to read critical skepticism about hierarchy and

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cast of this section, and of this final part of the paper in general, is appropriate, given the point of view that is being advanced. After all, to the extent one is wary of standard legal rhetoric because of a sense that it is coercive and makes undue assertions of objectivity one should also be wary of theoretical approaches that share these qualities. Indeed, to the extent that the notion of "theory" itself seems redolent with these qualities, one is properly suspicious of that notion and of its purported liberatory potential. *See* Duncan Kennedy, *Radical Intellectuals in American Culture and Politics, or My Talk at the Gramsci Institute*, 3 RETHINKING MARXISM 100 (1988) (criticizing the idea that theory should guide practice and suggesting that this viewpoint is more pervasive among European intellectuals than among intellectuals in the United States). Nevertheless, if one is careful about what one is doing and aware of the need to debunk the pretensions of theorizing, including one's own, I would suggest that it can be worthwhile to attempt to situate one's particular position in a broader context (just as it is worthwhile to situate broad contexts in relation to particular positions); it seems that intellectual life in general and critical legal movements in particular would hardly survive without this penchant for moving from the particular to the general (and back again). *Cf.* UNGER, KNOWLEDGE AND POLITICS, *supra* note 52, at 133-37 (1975) (exploring the fundamental nature of the problem of the relationship between the particular and the general). (Even those who are dubious about the philosophical claims in KNOWLEDGE AND POLITICS or about Unger's highly abstract rhetoric can acknowledge, I trust, the real consciousness-raising function that this particular theoretical work has had for many legal oppositionists, as well as the more general consciousness raising role that theorizing can serve.) The point is not to extirpate theory talk; a combination or juxtaposition of mandarin theory talk with more down-to-earth rhetoric strikes me as having greater potential than either sort of rhetoric on its own.

124. For examples of that attitude in one form or another, see sources cited *supra* note 2.

125. A generally jaundiced view of human behavior is in that sense analogous to an anti-foundationalist epistemological stance; in neither case does the general stance logically entail particular moral or political positions, although there may be psychological connections between attraction to the stance and attraction to certain political/moral positions. In this regard, I believe Stanley Fish and Richard Rorty are correct. *See* FISH, *supra* note 113; RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 165-66 (1982); RICHARD RORTY, CONTINGENCY, IRONY, AND SOLIDARITY 83 (1989) [hereinafter RORTY, CONTINGENCY]; RORTY, MIRROR OF NATURE, *supra* note 114, at 392-93.

126. This self-critical strain in critical legal thinking is exemplified in the methodological preface to Duncan Kennedy's *Blackstone's Commentaries*, *supra* note 2, at 210-13.

rationalized power as a manifestation of a hopeful attitude that current patterns can be changed for the better.

So far the argument has gotten us to a common sense point about critical legal thinking: whether or not one is sympathetic to critical legal studies, critical race studies, and feminist criticism, one is likely to agree that the ethos of these movements is, broadly speaking, egalitarian, dubious of hierarchy, and concerned about the role of law and legal reasoning in justifying and upholding hierarchy. Similarly, oppositionist adherents of these movements are at least in many cases, certainly by comparison with conservatives, centrists, or centrist liberals, hopeful about the possibility of making substantial changes in existing hierarchies. Where the argument gets beyond the conventional picture of the critical situation is in the next stage, where we analyze what sort of affirmative political strategy could accompany a critical legal skepticism of hierarchy and rationalized power.

1. Organizational Effectiveness as a Central Rationale for Hierarchy

How is hierarchy rationalized in the contemporary United States and similar societies? Explicit, formal hierarchies of men over women, whites over other races, and well-born people over the masses are disfavored in the prevailing contemporary ideology of the U.S. and similar societies, despite the fact that hierarchies continue to exist along gender, race, and class lines.[127] However, one form of explicit hierarchy is widely defended and advocated: hierarchy in organization life. It is widely assumed that, to make organizations work, some must lead and others must follow. Some must have authority and others must obey. There must be managers as well as employees, appellate courts as well as trial courts, professors as well as students. In organization life, hierarchy is not simply a subtle, informal system of taken for granted relations — though it is of course that, as well.[128] Hierarchy is a formal system, an openly promulgated order of rank seen as basic to the rational functioning of organizations.[129]

For present purposes, the issue is not whether the general perception that organizations need hierarchies of various kinds, including formal ones, to function effectively is correct or not.[130] What is central is the realization that

127. For a contention that American ideology has historically been liberal and hostile to rationalizations of hierarchy based on social class, see LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955).

128. For treatments of the informal element of organization and hierarchy in organizations, see, e.g., FRITZ ROETHLISBERGER, MANAGEMENT AND MORALE (1941); FRITZ ROETHLISBERGER, MAN-IN-ORGANIZATION (1968).

129. The centrality of hierarchy in organization life is suggested in Weber's definition of organization, quoted *supra* note 4.

130. My sense is that a much greater variety of hierarchical arrangements, including arrangements with limited or no formal hierarchy, is compatible with organizational "success" than is usually assumed. I would acknowledge skepticism, though, about assertions by certain management writers that hierarchy can be eliminated. *See, e.g.*, FREDERICK THAYER, AN END TO HIERARCHY! AN END TO COMPETITION! (1973). Such assertions in popular management

organization life is currently the great arena for the justification of hierarchy as a positive good.[131]

2. *Implications*

While a simplistic deprecation of hierarchy does not characterize legal oppositionism, a questioning of hierarchy does. Assuming that a belief in hierarchy as a positive good is closely connected, under current sociopolitical conditions, to the circumstances of organization life, and given the critical legal aim of undermining a complacent faith in hierarchy, it makes particular sense for legal oppositionists to give critical attention to the practices and ideology of organization life. Logically, such critical attention should focus not only on the possibility of mitigating hierarchy within organization life by empowering employees, but also on the possibility of lessening the preponderance of a way of life in which hierarchy is central and accepted as fundamental in favor of different ways of life in which the role of hierarchy is more tenuous and disputed. Cutting back on the scope of organization life in favor of other ways of life in which hierarchy is less acceptable is a sensible political strategy for critics skeptical of hierarchy.

C. *The Fit Between Legal Oppositionism and Critical/Affirmative Theoretical Perspectives*[132]

In this section, critical legal theory will be compared to four critical/

literature rely on unduly restrictive conceptions of hierarchy and wind up (presumably contrary to their advocates' intentions) upholding hierarchy by repackaging it as, e.g., "participation through quality circles."

131. For a good and politically candid statement of what I take to be the mainstream pro-organizational hierarchy position, see SIMON, *supra* note 4, at 350. *See also* Peter Frost, *Toward a Radical Framework for Practicing Organization Science*, 5 ACAD. MGMT. REV. 501 (1980) (criticizing the pro-hierarchy stance taken by organization scientists).

132. By a critical/affirmative theoretical perspective, I mean one that both takes an attitude broadly critical of present conditions and that advocates broad change to achieve better conditions. Such a theoretical perspective rationalizes a sense of dissatisfaction with existing circumstances. One key step in this process of rationalization is putting a general and at least partly deprecatory label on these circumstances, such as capitalism, patriarchy, or legal liberalism. Additionally, such a theoretical perspective rationalizes a hope for moral and practical improvement from present circumstances by identifying or suggesting a more desirable situation (e.g., socialism or empowered democracy) to or toward which it is possible to move collectively. Finally, such a theoretical perspective further rationalizes the hope for improvement by setting out, at least to some degree, a way to achieve at least some elements of the improved situation. See, e.g., the ten point program in *The Communist Manifesto*. KARL MARX & FRIEDRICH ENGELS, MANIFESTO OF THE COMMUNIST PARTY (1848), *reprinted in* MARX AND ENGELS 28-29 (Lewis S. Feuer ed., 1959) [hereinafter MARX & ENGELS, MANIFESTO]. For a less programmatic but nonetheless affirmative critical legal approach toward achieving a better society, see the conclusion of Olsen, *supra* note 48, at 1567-78 (envisioning the transformation of polar notions of masculinity and femininity).

The use of "rationalize" in defining critical/affirmative theory should not be taken as pejorative. Rather, the term should be taken to embody a pragmatic, psychologically oriented approach toward theory that regards theory not as a reflection of a fundamental reality but as a device for moral uplift, couched in general terms but responding to particular circumstances in people's lives. In this perspective, a theory is to be evaluated according to its contextual and

affirmative theoretical perspectives — Marxism, the feminist perspective advanced by Catharine MacKinnon,[133] the independent radical perspective advanced by Roberto Unger,[134] and a nascent radical perspective focusing on organization life.[135] In order to make the similarities and contrasts among perspectives clearer, legal oppositionism and each of the four perspectives will be summarized; I will contend that a radical perspective focused on organization life is closely congruent with legal oppositionism and that the other three radical perspectives are not.

The reason for making the extended comparative argument in this section can be stated as follows: Partisans of contemporary critical movements in legal academia, especially critical legal studies, have been reluctant to embrace broad radical proposals for social change. This reluctance or lack of enthusiasm stems in part from a critical realization that such broad radical proposals, no matter how egalitarian and democratic in their motivations and their aims, tend to be connected in a troubling way with a project of managing and administering society that entails hierarchy and the rationalization of power. However, the reluctance is much less warranted for certain kinds of radical perspectives and proposals than others. A critical perspective on organization life with a practical program of reducing work hours is consistent with a critical insight into the difficulties of proposals to manage and rationalize society in a way that certain other critical perspectives are not.

It would be possible simply to argue that a critical/affirmative perspective on organization life is compatible with critical legal theory and leave it at that. But to make that point effectively, I believe it is also important to consider other critical/affirmative perspectives. My sense is that the reluctance among partisans of critical legal movements to support broad proposals for radical change is not something that exists in the abstract, but rather is related to having reactions of dubiety to certain elements of particular prominent radical perspectives, such as those associated with Marx, MacKinnon, and Unger. If that is right, addressing these perspectives in order to consider how they differ from critical legal theory and a critical/affirmative perspective focused on organization life is called for. If that comparison is not made, the legal oppositionist who is reluctant to support macro-level radicalism has not had the basis of her reluctance addressed.[136]

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contingent psychic constituents as well as on consequentialist grounds in which the theory is viewed as a part of a broader array of practices and rationalizations. For another view of critical theory which also stresses its transformative aims but eschews the psychologically oriented interpretation of it adopted here, see UNGER, POLITICS, *supra* note 2. *See also* RAYMOND GEUSS, THE IDEA OF A CRITICAL THEORY (1981); KARL MANNHEIM, IDEOLOGY AND UTOPIA (1936).

133. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 82.

134. UNGER, POLITICS, *supra* note 2.

135. The works of Andre Gorz, *see supra* note 5, and Jurgen Habermas, *see infra* note 175, contain elements of such a perspective. *See infra* note 175.

136. It should be stressed that the argument here about the particular compatibility of a critical legal perspective and a critical perspective focused on organizational life is not an argu-

While the summaries of the critical legal, Marxist, radical feminist (per MacKinnon), and empowered democracy (per Unger) positions may be read relatively briskly by readers familiar with these positions, even those readers will, I hope, find the summaries useful in relation to the argument here about how the perspectives relate to one another.[137] I begin with a summary of what I take to be a standard or preponderant critical legal perspective, acknowledging that that brief summary necessarily fails to capture much of the heterogeneity and complexity of critical legal thinking, and that through what it includes and excludes elevates certain aspects of critical legal work and fails to address others.[138]

1. Legal Oppositionism

Legal doctrine pretends to an objectivity and a determinacy that it does not possess. Not only in areas such as labor law, which mainstreamers would likely concede are political, but also in areas such as contract law, for which no such concession is typically forthcoming, one can trace out both the privileging of certain value positions — e.g., individualism — over contrary heterodox positions — e.g., altruism — and the persistence of orthodox and heterodox strains in doctrine.[139] The existence of privileged positions with a political tilt confutes the centrist claim of a law worked pure of politics; the reality of internal contradictions within law that reflect and foster internal divisions within ourselves confutes the traditional leftist claim that law is sim-

ment against the value of the critical perspectives associated with Marx, MacKinnon, and Unger. Different political perspectives have different objectives and different values in different contexts: one could accept the argument about the particular compatibility of critical legal theory as defined here and a critical perspective focused on organizational life but conclude that Marx's, MacKinnon's, or Unger's perspectives are more valuable.

137. It should be noted that a summary of a critical theoretical perspective inevitably loses much of the distinctive quality that inheres in an actual presentation of the critical position. Rhetorical features of these writers, such as Marx's sarcasm, formalized economic arguments, and erudite historical references; MacKinnon's use of an "I am speaking to you" voice (*see* MACKINNON, FEMINISM UNMODIFIED, *supra* note 2) and her mix of high culture and popular culture sources; and Unger's heroic abstraction, which are by no means incidental to their respective positions, can be evoked in only an imperfect way in what follows. Similarly, significant complexities and ambivalences — including, centrally, ambivalence over the notion of "theory" and its value and over the writer's status as a "theorist" — that make the actual expositions of these and other theoretical positions intriguing can barely be captured in the summaries. Nevertheless, the summaries are, I believe, a useful background for the discussion that will follow about the relationships between a critical legal perspective that is reluctant to advocate large scale programmatic change and critical/affirmative perspectives that support such change.

138. Obviously, different critics view critical legal thought differently, and some of those differences have become institutionalized in the form of different, though in many respects, allied critical race studies, fem-crit, and critical legal studies movements. The summary here reflects, among other things, my temperament and my situation as a liberal white male who is supportive of critical legal studies. While I believe it is a fair summary of a critical legal studies position, one that is consistent with other summaries (especially that of KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40) and also one that is broadly consistent with critical race theory and feminist critical theory, I do not claim that it covers all aspects of critical legal thought.

139. KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40, at 3-4, 290-94.

ply an epiphenomenon of economic structure.[140]

Law is politics — or ideology — not only because it embodies political value tilts and conflicting political commitments but also because law is about the rationalization of power and hierarchy.[141] There is no external non-political foundation upon which this project of rationalization can proceed, no non-political criterion to determine the meaning of desiderata such as "justice," "freedom," and "happiness," no non-political way to justify the particular practices of rationalizing power that law engages in.[142] The rationalization of power through law is a tricky and troubling business, prone to subtle and sometimes blatant meannesses and to a phony identification of all too particular, all too human perspectives — especially those of privileged white males[143] — with universal reason: the liberal separation of law and politics is a dangerous one, for it encourages us to blind ourselves to the reality that we are rationalizing power.

The point of a critical attitude toward law and the broader liberal system that both constitutes and is constituted by law is for us to see how the particular value choices that now predominate in our lives are anything but impersonal dictates of a neutral rationality, how we can counter the shadows cast by rationalizations for power, how we might open ourselves to the multi-hued possibilities of our lives[144] rather than remain in thrall to the dull sobrieties and polarities of liberal legalism. And, of course, the point is also for us to remain ever watchful, ever critical, of the project of justifying power, of the stupidities and cruelties to which plans to manage and rationalize — including our own — are all too prone.

2. *Four Critical/Affirmative Theoretical Perspectives*

(a) The Marxist Critique of Capitalism

Some — the bourgeoisie, or whatever other more contemporary-sounding term one substitutes — possess capital, while others possess only labor power, which they must place at the disposal of owners of capital.[145] The work of this laboring class — the proletariat, or whatever other term one prefers — is not its own. Although in the end only labor is of value, part of the value of labor

140. *Id.* at 4-5, 10, 17, 253-54.

141. *See* Gabel, *supra* note 48, at 306-09.

142. *See* KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40, at 16, 150-51; *see also* Kennedy, *Form and Substance*, *supra* note 21, at 1685.

143. KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40, at 14 (citing Paul Brest); *see also* Williams, *Alchemical Notes*, *supra* note 2.

144. Olsen, *supra* note 48, at 584.

145. 3 KARL MARX, CAPITAL 167-69 (Friedrich Engels ed., International Publishers 1967) (1867). The approach of this summary is to focus centrally on Marx's (and Engels') particular programmatic claims and arguments rather than to treat "Marxism" as a phenomenon abstracted from the particularities of its progenitors; the latter approach too easily leads to a loose treatment of "Marxism" as coextensive with critical leftism in general. At the same time, an effort has been made to express the Marxist affirmative critique as a living body of thought, worthy of contemporary consideration, rather than as a stuffed specimen.

is extracted from the laborer by the employer.[146] This is exploitation, which can be understood not simply in moral terms but as an objective phenomenon in which value created by the work of many is expropriated for the benefit of a few.[147]

As a social system, capitalism is fabulously productive but also deeply destructive. Even as it creates with a prodigal energy that dwarfs the efforts of earlier systems, it generates horrendous misery and overturns what is most settled and valuable in people's lives through its ceaseless logic of production and commodification, combination and exchange, boom and crash.[148] And capitalism is profoundly hypocritical. The respectable bourgeoisie — or the multinational corporation — pose as the upholders of traditional values, but the essence of capitalism is the ceaseless selling of the new, the alienation of worker from work, the uprooting of values, the melting of all that is solid into air.[149]

The rational response to the evils and the failings of capitalism is not to engage in a nostalgic pining for an arcadian past. Even if it were somehow possible to do so, the real social system that preceded capitalism, feudalism, is hardly worth recreating. Rather, the key to moving forward lies with recognizing the potential for harnessing the tremendous productivity of capitalism while at the same time mitigating its meanness and destructiveness. While the measures called for will be different at different times and stages of development,[150] control of the government by workers' parties, worker participation in enterprise management, public ownership of the means of production or at least of key sectors of the economy, trade unionism, redistributive taxation, public education, income security programs, and confiscation of estates and other excessive concentrations of wealth[151] are all valid vehicles for moving toward a socialist polity that could offer us material abundance and also the freedom and equality that capitalism advertises and yet denies in practice. While the ethical desideratum of "from each according to his ability, to each according to his need" is not about to be achieved in the immediate future, we can plan for and create a better world, a more sensible world, than the exploitative, irrational capitalist one that we now live in.

(b) MacKinnon's Radical Feminist Critique of Male Dominance

Some dominate, while others are subordinated; some fuck others, while others get fucked.[152] For both feminism and Marxism, this disparity is the central political issue. For Marxism, the central fact is that owners have power and workers do not; for feminism, the central fact is that men have

146. *Id.* at 176, 195, 212, 220, 312, 315, 636, 645, 761.
147. *Id.*
148. MARX & ENGELS, MANIFESTO, *supra* note 132, at 9-10, 13.
149. *Id.* at 9-10, 22-23, 24-25.
150. *Id.* at 28.
151. *Id.* at 28-29.
152. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 82, at 3.

power and women do not.[153] Sexuality is taken away from women and controlled by men; heterosexuality is the vehicle through which sexuality is regulated; gender and family are congealed forms through which the regime of male dominance operates.[154] To ask whether sexuality or work, gender or class, is more constitutive of social reality — is it a wave? is it a particle?[155] — is a diversion; feminism must be understood as a theory that presents an account of power and domination grounded in a consciousness raising method that is not derivative of or subordinate to Marxism's objectivist method.[156]

The corruption of our present regime of male power permeates what is denominated private as well as what is denominated public. Erotic life under a regime of male domination is constituted by and cannot be detached from the eroticization of male power and female powerlessness.[157] The point is not difference, not that women speak in a different voice — the point is rather power, and the question is how a woman's voice would sound without a foot planted on her neck.[158]

We need to recognize the fundamental nature of sex inequality in our patriarchal system and act on the recognition that practices such as pornography, sexual harassment, abortion prohibitions, and rape are all means of ratifying and enforcing sex inequality.[159] Viewing all these practices as one, as both determining and determined by a basic regime of sex inequality, rather than in the jumble of separate categories — privacy, consent, freedom of speech, etc. — in which they are placed by liberal jurisprudence,[160] allows us to move toward a feminist jurisprudence. Practically, such a jurisprudence would entail recognition of gay and lesbian rights and expanded civil remedies for women in areas such as pornography, prostitution, and surrogate motherhood.[161] Such a jurisprudence would also reject the objectification that characterizes both liberal abstract rights and Marxist materialism in favor of what is presently denied in male projections of reality: real equality, substantive rights for women.[162]

(c) Unger's Critique of False Necessity/Social Democracy

The great political question is whether we can do better than social democracy.[163] In wealthy liberal/social democratic countries, a relentless and hectic search for personal transformation coexists with a skeptical, even de-

153. *Id.*
154. *Id.* at 1-2.
155. *Id.* at x, xi.
156. *Id.* at 12, 84-85, 98-99, 107-08, 125.
157. *Id.* at 136-37, 142-44.
158. *Id.* at 51, 220, 224-25, 234; MACKINNON, FEMINISM UNMODIFIED, *supra* note 2, at 45.
159. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 82, at 241-42, 245-47.
160. *Id.* at 245-47.
161. *Id.* at 248, 320 n.14.
162. *Id.* at 248-49.
163. 2 UNGER, POLITICS, *supra* note 2, at 25.

spairing, attitude toward the possibility of fundamental political change.[164] Politics have been reduced to tinkering at the margins as proponents of reform and retrenchment alternate in a futile cycle.[165] In less wealthy countries such as Brazil a more hopeful political attitude can be discerned,[166] but here, as in other wealthy nations, the leftist lingua franca is an unconvincing Marxism.[167] This Marxism is flawed in its insistence on the existence of deep structure stages — e.g. "feudalism," "capitalism," "socialism" — that hang together as a whole and must be taken as a single package.[168]

The key to the development of better social theory is to abandon deep structure assumptions by extending to the ultimate degree the critical and modernist insights that our social arrangements are factitious, pasted together, and always subject to revision.[169] Such an improved theory can and must avoid both the deep structure fallacies of Marxism and the glorification of context-smashing for the sake of context-smashing,[170] which ignores the possibility of challenging the rigid distinction between context-dependence and context-transcendence, between "cold" and "hot" moments of social life,[171] between routine and revolution.

The programmatic element of a radical, empowered democracy would center around the avoidance of fixed hierarchies, of domination of society's resources by any class or faction, through a development of disentrenchment and destabilization as principles of social life.[172] One worthwhile programmatic vehicle for avoiding the fixed hierarchies associated both with absolutist notions of private property and with centralized command and control systems would be the establishment of a rotating capital fund to be administered with popular participation and safeguards against bureacratic control and ossification.[173] Empowered democracy would allow us to go beyond the uninspiring alternatives of resignation to the existing social order and escapism. By enhancing negative capability (disentrenching and destabilizing rigidities in existing forms of social life and association) we can create a society that is finer than social democracy, that offers us an opportunity to be both great and sweet.[174]

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164. *Id.* at 604.

165. *Id.* at 44-47.

166. *Id.* at 604.

167. *Id.* at 604-05.

168. UNGER, POLITICS, *supra* note 2, at 96-117.

169. *Id.* at 1.

170. *Id.* at 168-69. Unger identifies this glorification of context-smashing as a goal in itself with existentialism. *Id.*

171. *Id.* at 204, 218. Unger is concerned here with avoiding the tendency in some social theories that advocate revolutionary change to end up justifying stability and routine except during isolated "hot" revolutionary periods. *Id.*

172. 2 UNGER, POLITICS, *supra* note 2, at 35-36, 277-312, 530-35.

173. *Id.* at 23, 491-502.

174. *Id.* at 585-86, 595.

(d) A Critique of Organization Life

In our present social system, organization life is central. A particular and limited view of work prevails. We understand that "work" and "job" are synonyms, and that "What do you do?" is a question about our jobs. Our social system is dominated by organization life, both at the level of practice (we are expected to spend a large proportion of our waking hours at our jobs) and ideologically (we are expected to acquiesce in a vision of our lives as primarily defined by our jobs).

The priority of organization life over other ways of life is troubling from a number of perspectives. First, it is troubling given a concern with hierarchy. While traditional theological, aristocratic, and patriarchal justifications for inequality have weakened, the economic efficiency justification for hierarchy remains strong. Organization life is the great contemporary vehicle for rationalizing and perpetuating hierarchy. Second, the priority of organization life is troubling in light of the environmental mess associated with current ideals of increased efficiency in production. The prospects for a purely technological solution to the environmental troubles that we have created with technology appear dim. What is necessary, instead, is a change in the way we live, a cutting back on the ethos of production that characterizes organization life. Third, and crucially, the priority of organization life is troubling given a concern with human self-realization and enlightenment. There is rewarding work in our lives other than job work, yet current arrangements foster and reward a narrowing of ourselves and the work of our lives to the work of our jobs. We need less organization life and more family life, public life, artistic life, erotic life, and spiritual life.

The point is not that we need to overturn a malignant system — organization life is not an evil — but that we can and should move away from a way of life dominated by a single-minded commitment to organization life and by a privileging of job work and instrumental rationality over all else. The shift I advocate is toward a way of life that respects and fosters diverse commitments to different forms of work, activity, thinking, and feeling. We can move toward such diverse commitments by cutting hours worked at jobs in favor of other activities — a twenty hour work week would be a worthwhile initiative — and by engaging in a self-critical project of scrutinizing and changing our lives. A social system of diverse commitment would not be a utopia, of course, but it would enhance choice and responsibility for our lives and would represent a real and significant advance from the present dominance of organization life.[175]

175. As previously stated, there is no developed critique of organization life that is comparable to Marx's critique of capitalism, MacKinnon's critique of male dominance, or Unger's critique of false necessity/social democracy. The argument above suggests lines that such a critique could take. Further exposition of a critique and consideration of related issues (e.g., whether theoretical discourse of the kind that characterizes CAPITAL, TOWARD A FEMINIST THEORY OF THE STATE, and POLITICS is a fruitful way to expound such a critique, and, if not, whether there are fruitful alternative discourses available) are beyond the scope of this Article.

3. *Comparing the Psychopolitics of Legal Oppositionism and Critical/ Affirmative Theoretical Perspectives*

Different approaches toward the psychopolitical problem of joining critical and affirmative sentiments can be discerned not only in individuals but at the broader level of radical schools or movements.[176] Some such movements

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The work of which I am aware that most closely parallels the argument above is ANDRE GORZ, FAREWELL TO THE WORKING CLASS (1982); *see also* GORZ, *supra* note 5. Gorz argues that the left needs to move away from a traditional Marxist focus on economic production and toward a focus on reducing time spent on economic production in favor of other types of work. Although Gorz' claim that the "micro-electronic revolution" is incompatible with capitalism and will lead to major reductions in work hours, GORZ, *supra* note 5, at 29-34, is questionable, his work is one potentially significant basis for a critique of organization life.

Recent work by Jurgen Habermas stressing the distinction between "system" and "lifeworld" also in certain respects makes the arguments outlined here. *See* 1 JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY (Thomas McCarthy trans., 1984); 2 JURGEN HABERMAS, THE THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM (Thomas McCarthy trans., 1987). For Habermas, the "lifeworld" is the domain of communicative action aimed at attaining reflective agreement, while the "system" is the domain of strategic action in which no reflective agreement is sought. Law, the market, and bureaucracy are central aspects of the system, while language, culture, and tradition, including the family, are central aspects of the lifeworld. Habermas argues that in modern Western society, system increasingly dominates or "colonizes" the lifeworld; he cites the increasing legalization of family relations as an example. Habermas is critical of the trend toward expansion of the system at the expense of the lifeworld, arguing that it entails a loss of meaning and purpose in contemporary society. *See* Lawrence B. Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54 (1988); STEPHEN K. WHITE, THE RECENT WORK OF JURGEN HABERMAS (1988). There is a clear parallel between Habermas's notion of the colonizing system and the critical notion of organization life sketched here; however, Habermas's argument differs from the position described here in its programmatic focus. While the implication of Habermas's position would be to support the delegalization of family relations, no such position is advocated here. Habermas does not emphasize the idea of changes in job work hours as a way of limiting the scope of the "system," which is advocated here. In addition, Habermas presents his ideas of system and lifeworld in the context of discussing human communication and its relation to an ideal speech situation; that theory of communication is not assumed in the outline here.

New left and environmentalist works contain arguments that can be linked to a critique of organization life. *See, e.g.*, IVAN ILLICH, TOOLS FOR CONVIVIALITY (1973); HERBERT MARCUSE, AN ESSAY ON LIBERATION (1969); ERNST FRIEDRICH SCHUMACHER, SMALL IS BEAUTIFUL (1973). Critical theory that focuses on instrumental reason, such as early works by Habermas, is another potentially fruitful source. *See, e.g.*, HABERMAS, *supra* note 91. For explorations of organization life that could also serve as groundings for critical affirmative theory and proposals for change, see, e.g., DENHARDT, *supra* note 4; JOSEPH HELLER, SOMETHING HAPPENED (1974); KANTER, *supra* note 4; SCHWARTZ, *supra* note 4; WHYTE, *supra* note 3; Kagan & Rosen, *supra* note 18. Also, for a self-consciously off-the-wall case for abolishing work that negates itself as a serious argument through its overstatement, see BOB BLACK, THE ABOLITION OF WORK (n.d.). Through such overstatement, Black evokes the frustration with impersonal, deadened writing and speech that I would contend is one important element of a critique of organization life. *See supra* parts II, III.A.

176. Of course, caution must be exercised in generalizing about approaches taken by crits, Marxists, radical feminists, and other supporters of critical/affirmative movements; people who are sympathetic to a movement by no means share a single group mind about which one can blithely generalize. But there are, it would seem, certain patterns and regularities of thought and feeling associated with political positions that are worth considering, at least if one remains keenly aware of one's own situation and interest as well as of the large degree of variation among partisans of movements and the susceptibility of these patterns to change over time.

rely on a characterization of the existing social reality against which the movement reacts as essentially negative, while other movements characterize that reality in ambivalent terms. Some movements attempt to ground their critical attitude toward existing social patterns in a social scientific theory; other movements are highly suspicious of efforts to ground a critical politics in science. Some movements are optimistic about the prospects for a social system in which power is exercised rationally and according to the dictates of justice; other movements are skeptical about the prospects for any such system. Some movements are inclined to view human conflicts and divisions as basically determined by external social circumstances; other movements are inclined to view conflicts as internal and to see persistent divisions in consciousness. Some movements perceive the social reality of which the movement is critical as marred by insufficient attention to management and rational planning; other movements see that social reality as marred by excessive preoccupation with the techniques of managerial rationalization and control. Finally, some movements advocate programmatic changes aimed at rationalizing the exercise of power; other movements are skeptical of such proposals and favor consciousness raising and changes aimed at loosening the hold of rationalized power.[177]

Marxian socialism in its traditional incarnation tilts in every case toward the first of the alternative approaches, toward external critique: social reality (capitalism) is negative, scientifically apprehended, and determined by material relations; the oppressiveness and irrationality of capitalism can be tran-

177. The summary of differences here should not be taken as a denial of the real similarities between critical perspectives. One important similarity is the way in which all of the perspectives considered here can serve to criticize the others and their blind spots, as well as nonradical positions. This function seems to me extremely valuable, and warrants taking an eclectic rather than an exclusionist approach toward these critical perspectives. The "critique of organization life" perspective is offered not from the premise that it is a superior critique that should replace others, but because it can usefully supplement and be supplemented by others. Consider for example, FEAR OF FALLING, Barbara Ehrenreich's excellent popular study of defensive and cramped political attitudes among the American middle class. *See* BARBARA EHRENREICH, FEAR OF FALLING: THE INNER LIFE OF THE MIDDLE CLASS (1989). Ehrenreich concludes FEAR OF FALLING with an invocation of a possible future in which stimulating professional or managerial work is available to everyone, and is not just the jealously guarded prerogative of a minority. Ehrenreich's book is informed throughout, including in her conclusion, by her familiarity with and critical appreciation of Marxist and feminist perspectives. But her conclusion shows no signs of grappling with a critical perspective focusing on organization life, including the very professional and managerial work that the conclusion exalts. This is not surprising, since no such critical perspective has the currency of Marxism or feminism. If such a perspective had greater currency, it would aid Ehrenreich and her readers to focus more closely on issues such as whether elevating job work over other forms of work and other ways to lead our lives is desirable, and whether a left perspective that elevates professional-managerial work has a deficiency in its critical edge. My point here is not that Ehrenreich's politics are different from mine, though I assume that they are in some ways, much as I find both her writing and her politics extremely congenial. Rather, the point is that her conclusion to FEAR OF FALLING serves as an example of how a well-stated and appealing contemporary leftist political position could benefit from a critical perspective on organization life and the questions it suggests. A critical perspective on organization life could broaden the scope of critical dialogue in a fruitful way.

scended through rational collective action in a socialist system. Critical legal theory, on the other hand, in its dominant form, tilts in every case toward the second of the alternative approaches, toward an internal, psychopolitical critique: social reality (liberalism) is ambivalent, and its tensions and contradictions parallel those within ourselves; reflection and local action aimed at empowering subordinated groups are valuable, but we should resist any temptation to believe that we will achieve or are achieving a rational and just order of power.[178]

The relationships between the psychopolitics of legal oppositionism and those of MacKinnon's radical feminism and Unger's theory of empowered democracy are much less clear than the negative relationship between mainstream Marxian socialism and critical legal theory; it is to these ambiguous relationships that we turn next.

(a) The Relationship of MacKinnon's Critical Theory to Marxism and Critical Legal Theory

While there is a straightforward analogy between the negative Marxist view of capitalism and MacKinnon's negative view of male dominance, MacKinnon does not attempt to buttress or take the edge off her moral judgment with a scientific theory of male dominance parallel to Marx's theory of capitalism. The analogy between Marxism and MacKinnon's radical feminism as totalizing critiques also breaks down at the level of programmatic action. While MacKinnon favors an end to male dominance, just as Marx favored an end to capitalism, the grand and implausible sweep of Marx's claims for the proletariat as a class that will abolish classes and class power[179] is not paralleled in MacKinnon's writings on women and power. MacKinnon's focus on the invidiousness and the pervasiveness of relations of domination makes it difficult for her to advocate a broad "women should rule" power switch proposal similar to "rule of the proletariat" socialism, and she does not do so. She is wary of making a claim that women would exercise power in a way more virtuous and more responsible than men.[180] Her broad and passion-

178. The argument is not that the temperamental constituents of traditional Marxism and critical legal theory are diametrically opposed; there are obviously kinships between these critical social theories and their proponents. The point is that given the commonalities of critical social theories, critical legal theory, and traditional Marxism occupy quite different psychopolitical positions.

179. MARX & ENGELS, MANIFESTO, *supra* note 132, at 29.

180. The comparative structure of TOWARD A FEMINIST THEORY OF THE STATE implies, though MacKinnon does not directly state, that the disturbing aspects of power relations are not limited to either the man-woman or the owner-worker dimension. *See* MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 82, at 4 ("What if the claims of each theory are taken equally seriously, each on its own terms? Can two social processes be basic at once?"); *see also* MACKINNON, FEMINISM UNMODIFIED, *supra* note 2, at 2 ("I am thinking all the time about power . . ."); *id.* at 23 ("We do not seek dominance over men. To us it is a male notion that power means someone must dominate. We seek a transformation in the terms and conditions of power itself."); *id.* at 26 (raising the question about whether women in power will use power differently); *id.* at 52 (referring to her position as speaker as a social exercise of male power).

ate Marxian-style critique is not paralleled by similarly broad Marxian-style proposals for change to a new system. What distinguishes her particular programmatic proposals in areas such as sexual harassment and pornography from liberal reform proposals such as the Equal Rights Amendment is that her proposals draw creatively from conservative as well as liberal sources in support of a political struggle for sex equality.[181]

While the psychopolitics of MacKinnon's radical feminism cannot be equated with the self-confident scientism of Marxian socialism, neither can MacKinnon's ethos be equated with the self-critical and ambivalent attitude of critical legal theory. The consciousness raising MacKinnon describes and advocates[182] is not, it seems, aimed at self-criticism. Rather, the object is to develop women's understanding of their subordination, to expose the range of violence directed at women, and to demonstrate that men as a group benefit from the arrangements by which women are deprived.[183] MacKinnon's practical reform agenda, while sensitive to problems associated with the rationalization of power (e.g., her proposed anti-pornography legislation[184] avoids the creation of a central censoring authority), in the end boils down to proposals for enhanced legal control and management of sex inequality. This agenda places a certain faith in legalism, and displays impatience with the self-critical attitude toward the legal project and its authority that characterizes critical legal theory.[185]

(b) The Relationship Between Unger's Politics *and Critical Legal Theory*

Unger, unlike MacKinnon, is an adherent of the critical legal studies

181. MacKinnon is of course a radical feminist, not a conservative. *See, e.g.*, MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 82, at 117. Her ability to provoke people by crossing conventionally defined ideological lines is analogous, on a larger political scale, to what critical legal studies has done within the legal academy through its critique of liberal legal doctrine. *See* Gordon, *supra* note 92, at 120-24.

182. MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 82, at 84-105.

183. *Id.* at 7-8, 89, 93-94. One might argue that MacKinnon is in fact sensitive to a need for self-criticism but chooses not to stress that need in her writing based on a sincere political judgment about what sort of rhetoric will be most effective in changing the current order of male dominance. Perhaps this is true. I do believe that it is unfair to criticize MacKinnon alone for an unself-critical stance, given the lack of self-criticism in most legal writing. For a discussion of problematic elements in MacKinnon's rhetoric, see Ruth Colker, *Feminist Consciousness and the State: A Basis for Cautious Optimism*, 90 COLUM. L. REV. 1146, 1157 n.28, 1169 (1990) (book review). If one construes MacKinnon's writing as produced by a member of an actual or potential ruling class and as guidance for that class, its rationalization of anger is troubling. However, I think MacKinnon's charged rhetoric can have other, more fruitful uses for other audiences.

184. ANDREA DWORKIN & CATHARINE MACKINNON, PORNOGRAPHY AND CIVIL RIGHTS (1988).

185. For MacKinnon's critical reaction to critical legal studies, see MACKINNON, TOWARD A FEMINIST THEORY, *supra* note 82, at 290 n.18. ("The lack of centrality of a critique of gender to this group's [CLS] critique of law and society (indeed its lack of encounter with the real world in general) makes this school less useful to theory than it might otherwise be.").

movement,[186] and the constructive theory of radical democracy that he advances in *Politics* is very similar in some respects to the critical legal approach to liberalism and rationalized power. By focusing on the issue of an alternative to social democracy, Unger extends the critical legal project of portraying existing social reality in ambivalent rather than condemnatory terms. While the ambiguity in the United States in the meaning of "liberal" and "liberalism" allows critiques of "liberalism" to be directed at left/liberal and conservative politics simultaneously, the lack of similar ambiguity in "social democracy" makes Unger's target an identifiably left/liberal and hardly demonic one. On this point, Unger is much closer to critical legal theory's vision of an ambiguous existing social reality than to Marx's and MacKinnon's vision of a fundamentally negative one. Unger is concerned with chains, just as Marx was, but for Unger the manacles are mind-forged; losing one's chains has quite a different meaning in *Knowledge and Politics*[187] than it does in the *Communist Manifesto*.[188]

Unger writes at length in *Politics* on the flaws of social theories that postulate law-like or scientistic "top-down" explanations for social phenomena.[189] While one might argue that Unger's explanation of why top-down explanations do not work is itself top-down,[190] Unger is clearly on the legal oppositionist/consciousness critique side of the fence rather than the Marxist-scientistic critique side. Similarly, Unger's preoccupation with the problem of formative contexts and the malleability of such contexts is consistent with the critical legal concern with the rationalization of power; his lengthy discussion of these themes in *Politics* is perhaps the most thorough treatment of how power is rationalized and routinized in critical legal literature.[191]

Unger's significant divergences from standard legal oppositionism are in his constructive program. His central affirmative proposal in *Politics*, a rotating capital fund,[192] no matter how broadly and abstractly stated and qualified with references to disentrenchment, popular participation, and resistance to bureaucracy, seeks to manage society more rationally in the Marxist tradition. As a result, readers who identify with the prevalent critical legal stance —

186. *See* Unger, *CLS Movement*, *supra* note 2, at 564 n.1 ("Though the view of critical legal studies presented here cannot be reconciled with much in the way these and other tendencies in the movement understand their own critical practice, I hope it remains faithful to a shared intention and direction.").

187. UNGER, KNOWLEDGE AND POLITICS, *supra* note 52, at 1 ("By an irresistible movement, which imitates the attraction death exercises over life, thought again and again uses the instruments of its own freedom to bind itself in chains. But whenever the mind breaks its chains, the liberty it wins is greater than the one it lost . . . .").

188. MARX & ENGELS, MANIFESTO, *supra* note 132, at 41 ("The proletarians have nothing to lose but their chains. They have a world to win.").

189. 1 UNGER, POLITICS, *supra* note 2, at 1, 87-139.

190. *Cf.* Gabel & Kennedy, *supra* note 2, at 50 (arguing that Marx and Nancy Chodorow (*see* THE REPRODUCTION OF MOTHERING (1978)) operate at too high a level of abstraction and generality).

191. 2 UNGER, POLITICS, *supra* note 2, at 1-40, 69-78, 172-221, 277-312, 407-40, 508-38.

192. *Id.* at 23, 491-502.

wariness of rationalizing power — are likely to find themselves more wary of than inspired by Unger's proposal.

Similarly, Unger's discussion of the connection between more fluid work organizations (with permeable boundaries between task-definition and task-execution) and political and military success, in which he cites various military organizations as examples of successful fluidity,[193] is alienating from an oppositionist perspective of wariness over rationalizing power. One might explain this division as a matter of differing *national* focus: Unger's rotating capital fund proposal and his arguments on the conditions of military and economic success both suggest a powerful concern with raising the standard of living, in economic terms, in a nation. Obviously, this concern is in harmony both with a traditional Marxist emphasis on increased economic production and with mainstream politics in the United States and elsewhere. It is out of sync, however, with the predominant oppositionist belief that enhancing economic production, as measured by GNP, is not a basic priority for contemporary radical politics, at least in the United States.[194]

Finally, Unger's concept of destabilization rights,[195] despite being couched as a way to counter ossified authority and undermine hierarchical power, is not entirely inspiring to those critically concerned with the rationalization of power. The "Who-whom?" question is all too applicable.[196] Who's disentrenching whom? — Who's zoomin who?[197] No matter how fluid, open to revision, criticism, etc., the institutions that administer the deviationist doctrine of disentrenchment may be, someone will have and exercise power over others, including coercive power as in our present legal system. This is not meant to negate Unger's proposal; the point should not be equated with a

193. 3 UNGER, POLITICS, *supra* note 2, at 153-212.

194. For an example of this attitude, see Mark Kelman's comment on John Rawls' argument in A THEORY OF JUSTICE (1971) that inequalities should be regarded as just, if and only if, they benefit the worst off in a community:

> Rawls undoubtedly believes that he derived the difference principle by reflecting about the conclusions those committed to acceptably abstract moral reasoning would come to; to the extent that it is sensible, I am quite sure that it was derived from observation of the inanity of concerning oneself a great deal with altering the economic lot of America's nonpoor.

KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40, at 350, n.12. One might reasonably explain the gap here between Unger's constructive theory and Kelman's mainstream critical legal position by reference to Kelman's North American origins and concerns and Unger's Brazilian origins and concerns. It seems likely that Kelman and Unger might disagree relatively little or not at all on the issue of how important economic growth is if the national context were specified.

195. While Unger's use of "destabilization rights" allows a broad scope of interpretation as to what these rights might mean in practice, he appears to envision enforceable rights to disentrench certain rigid power arrangements. 2 UNGER, POLITICS, *supra* note 2, at 530-35.

196. "Who-whom?" is a question attributed to Lenin for which I have not located a source; despite the history of phony Lenin quotations of the "we will overthrow you by debasing your currency and debauching your women" variety, "who-whom?" sounds plausible to me. In any case, it makes a good point.

197. The Aretha Franklin version of Lenin's question. ARETHA FRANKLIN, *Who's Zoomin Who, on* WHO'S ZOOMIN WHO (Arista Records 1985).

rightist picture of an existing regime of liberty threatened by a descent into Ungerian totalitarianism.[198] Given a critical perspective on the rationalization of power, some kind of legal recognition of destabilization rights may be worth trying, just as one might find the establishment of a rotating capital fund worth trying. However, given such a critical perspective, the power shift proposals of *Politics* are less than inspiring, at least when taken by themselves.

(c) The Relationship Between a Critical Approach to Organization Life and Critical Legal Theory

The psychopolitics of critical legal theory run counter to those of traditional Marxism, have an uncomfortable relationship to those of MacKinnon's critique of male dominance, and differ significantly from those of Unger's affirmative "plasticity into power" program. What I will suggest next is that this divergence does not obtain with respect to critical legal theory and a nascent critical perspective that has as its subject the preponderance of organization life over other ways of life, and proposes cutting back on organization life. To the contrary, such a critical/affirmative position is latent within (though not required by) the background assumptions and ways of thinking and feeling that characterize critical legal theory.

(1) Common Assumptions

Critical legal theory and a potential critical theory focusing on the privileging of the ideology and practices of organization life over other ways of life share a number of significant features. Both theories view the socially constructed reality against which they are reacting in ambivalent rather than negative terms. Both are skeptical rather than optimistic about the prospects for a rational and/or just social order. Both are inclined to view tensions and conflicts as internal to consciousness rather than simply as determined by external factors. Both view the particular aspect of social reality against which they react as characterized by excessive rather than insufficient attention to rationalist techniques of administration and control. Finally, both resist an affirmative program of rationalizing power.[199]

(2) Liberalism and Organization Life

Critical legal theory sees liberalism as simultaneously privileging certain politically significant polar positions while at the same time recognizing and

198. For that picture, see generally Johnson, *supra* note 40.

199. *See supra* text accompanying notes 176-79. Obviously, if opposition to political/legal change at the macro level is defined as a tenet of critical legal theory, one arrives at a divergence between legal oppositionism and a critical theory focused on organization life (as well as a divergence between legal oppositionism and the social theoretical perspectives of Marx, MacKinnon, and Unger). The claim here is that a critical legal perspective does not entail such opposition, even though it does entail wariness about the processes of rationalization and power assertion typically associated with such changes.

relying on opposite, heterodox poles.[200] This critical view is ambivalent, and suggests not an overturning of liberalism in favor of a just order, but rather a more open acknowledgement of and reliance upon heterodox positions and a corresponding decentering of privileged positions. Similarly, a critical theory focusing on organization life views organization life as a privileged pole within liberalism, while at the same time believing that liberalism relies upon, while subordinating, other ways of life, including family life, public life, independent intellectual life, artistic life, erotic life, and spiritual life. A critical program focusing on organization life likewise implies not transcendence, but a decentering of the privileged pole of organization life in favor of other ways of life.

(3) Justice

Critical legal theory is highly sensitive to the problems associated with justifying power. The largest difficulty with Marx's, MacKinnon's, and Unger's programs from a critical legal perspective is that in practice they seem to be oriented toward trying to achieve justice through better management of society. A distinguishing virtue of a nascent critical theory of organization life from a critical legal perspective is that the program of cutting back on organization life implied by such a theory is anything but a proposal for managing society better. A program of cutting back on organization life, unlike programs for state-owned companies, jury trials for pornographers, or a rotating capital fund, is consistent with the spirit of the critical legal project of challenging the practices and the rhetoric of rationalized power.

(4) The Persistence of Tension

A program that reduces the sway of organization life over other forms of life cannot realistically be represented as leading to a transcendence of conflict and tension in human life. Having less of one's time subject to the characteristic practices and rationality of organization life is hardly a description of heaven on earth. From the viewpoint of salvationist religion or of comparably inclined political faith, the critique of organization life fails by comparison with a critique, such as Marx's, that allies its program with an implicit vision of humanity purified and freed of division and tension.[201] From a critical legal perspective of skepticism about legal and political efforts to deny contradiction and tension, the denial of transcendence in a critique of organization life is another sign of the kindred nature of the two critical perspectives.

200. Rules, individualism, the separation between objective facts and subjective values, intentionalism, and antipaternalism are Kelman's candidates for liberalism's privileged poles. KELMAN, CRITICAL LEGAL STUDIES, *supra* note 40, at 3-4.

201. Obviously, most modern-day Marxists do not present themselves as possessing salvationist programs such as that suggested by Marx's and Engels' "class that will end all classes" rhetoric. However, to a greater degree than the critique of organization life, Marxism aims at a transformed order that is just, and in so doing appeals to the salvationist hope for transcendence of ambivalence and conflict.

(5) General Compatibility

The legal rhetoric to which critical legal theory has directed its attention is not produced in a vacuum. Rather, it is produced by people in social settings (courts, law firms, universities, etc.) that make such rhetoric appear plausible and even necessary. Generically, one may call such social settings organization life. What is important from a critical viewpoint is that one devote attention to such social settings and the people in them.

A critique of organization life is, in essence, a form of the oppositionist critique of liberal legalism. The characteristics of liberal legalism upon which legal oppositionists have focused are also characteristics of organization life. Indeed, as Weber's definition of bureaucracy suggests,[202] organization life and liberal legalism are intertwined concepts. The point is not that organization life is a derivative of liberal legalism or that liberal legalism is a derivative of organization life, but that the concepts are tightly connected. While liberal legalism implies a focus on intellectual rationales and organization life implies a focus on material arrangements, both concepts refer to the same domain in our lives.

A critique of organization life connects the critique of liberal legalism to the concrete realities of working within organizations; equally important, the critique of liberal legalism connects a critique of organization life to the intellectual processes by which power is rationalized. Together the critiques can accomplish more than either can separately: a critique of liberal legalism alone risks neglecting the practical conditions of daily life in law firms, universities, and elsewhere that accompany the rationalization of power, and a critique of organization life alone risks undue preoccupation with material changes and a neglect of consciousness raising. Taken together, however, each critique supports the other's weakness and is supported by the other's strength.[203]

(6) Reservations and Responses

The critical focus on organization life advocated here is subject to criticism as well as support from a critical legal perspective. Such criticism could be summarized as follows: A proposal to reduce the scope of organization life by reducing job hours idealizes a private sphere of family and personal relations and deprecates a public sphere of market and corporate relations. As such, the proposal relies on a public/private dichotomy that has been effectively criticized in critical legal literature.[204] These critics posit that the "two spheres" are in actuality interdependent rather than radically divided, and that both need to be understood as arenas in which undesirable or troubling

202. *See* WEBER, *supra* note 4, at 217-26.

203. Contrast the focus on institutional change that characterizes Marxism, which does not complement the consciousness raising focus of critical legal theory well because of the conflicting positions taken by Marxism and critical legal theory. *See supra* text accompanying notes 176-79.

204. *See* Olsen, *supra* note 48; sources cited *supra* note 53.

phenomena such as aggression and male domination of women occur. In practical terms, the critic suggests, a reduction of time devoted to organization life may lead to the strengthening of patriarchy, with men spending less time at their jobs and more time exerting authority over women and children. Wouldn't it be preferable to devote critical energies to improving job work rather than reducing work hours in favor of family life or other, ill-specified, ways of life?

This criticism makes powerful but not unanswerable points. The criticism is absolutely right in pointing out the contingent quality of a political strategy like reducing the domain of job work. Rather than pretending that a critique of organization life can by itself guarantee desirable results and obviate undesirable ones, it is important to recognize a need for different and sometimes conflicting strains of critique. An active and contentious feminist movement is highly important as a check against potentially deleterious consequences of reducing work hours.[205] At the same time, there is good reason to support a critique of organization life from a feminist perspective, since the challenge to male-dominated hierarchical work organizations can certainly complement a challenge to the domination of men over women.

The suggestion that we should work to reshape job work is also valid on its own terms. Trying to enhance organization life, whether through traditional strategies such as unionism or through less traditional ones such as supporting play and critical oppositionism in the workplace,[206] is crucially important. However, without abandoning job work and the struggle to improve it, there is great value in seeing how the traditional leftist belief in reshaping job work so as to minimize or eliminate alienation and exploitation has a troubling kinship to managerialism. This managerialism can be tempered in a desirable way by support for reducing time devoted to job work. The critic correctly points out that there are no guarantees as to how reducing organization life would work out in practice. But that is generally true; political life does not offer guarantees.[207] I have a certain liberal optimism on the issue of consequences, which I believe (but cannot prove) is warranted.[208] In addition, there seems to be a persuasive moral argument for having people

205. As is an active and contentious labor movement.

206. In referring to supporting play in the workplace, I am thinking of movements such as the situationist wing of anarchism and critical legal studies, which have relied on humor as part of their approach.

207. For an expression of this point that seems to me admirable, despite its association with less admirable ideas about charismatic leadership, duty, and violence, see MAX WEBER, *On Politics as a Vocation*, *in* FROM MAX WEBER: ESSAYS IN SOCIOLOGY (H. H. Gerth & C. Wright Mills eds. & trans., 1956).

208. Justifying that optimism and examining the possible contours of a society in which job work is a less central aspect of people's lives are projects beyond the scope of this paper. I would suggest, though, that in such a society people would, by and large, do interesting things rather than sit around twiddling their thumbs or watching TV, and that such a society would be less hierarchical than ours. The reference to "liberal optimism" suggests an analogy with the effort to relax feudal, mercantilist, and theological constraints, in which liberals had a faith in the ability of sustaining social practices to arise without central, "visible hand" control.

take more responsibility for the shaping of their lives.[209]

The theoretical criticism that reducing organization life relies unduly on indeterminate and ambiguous dichotomies strikes me as salutary in one respect and wrongheaded in another. The point is on target to the extent that it is a self-critical or chastening one. Political positions, including one supporting a reduction in organization life, are profoundly prone to simultaneously elevating certain mixed states of affairs or hypothetical states ("the United States," "socialism," "pro-life," etc.) and lowering others ("the U.S.S.R.," "late capitalism," "pro-abortion," etc.). While this reliance on morally-charged oppositions can inspire, help channel aggression in desirable ways, and contribute to human betterment, it can also lead to self-righteousness and even sickening misconduct. Criticism that helps illuminate that point is entirely worthwhile. A critique of organization life can indeed be (mis)understood (though less readily I think than Marxism and other current proposals for major social change)[210] as implausibly demonizing existing circumstances and idealizing a hypothetical species-being within us that is waiting to be set free. In that connection, a critique of organization life carries within it the potential for overreach, unattractive moralism, and totalitarianism, which should be pointed out by its supporters as emphatically as by its opponents.

However, to the extent an effort is made from a critical perspective (whether Derridean, Foucauldian, Rortyan, or other) to show that a critique of organization life is wrong because it relies on a flawed or naive epistemol-

209. While a delineation of that argument and objections to it is also a project beyond the scope of this paper, the argument can be sketched as follows: it is morally preferable for people to do the right thing by choice, rather than by the compulsion of force or social pressure, see KANT, *supra* note 97; it is therefore better that people work because they choose to do so rather than because of the spurs of desperation or social compulsion. Reducing organization life, with its structures of compelled work, is morally desirable as a way to create conditions for people to take more responsibility for the work of their lives, and for choosing the right and the good.

The argument as sketched here is subject to critiques based on its implicit individualism (who is the "moral subject"?), see CRAWFORD MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE (1962); its potential for an implausible absolutism (if the dictates of morality are so clear, why not, in the spirit of Kant's "all lying is wrong" approach, condemn wage work out of hand?); and its assumptions about choice and virtue (might not virtue inhere in giving people better ideas about what's good and worse?). *See* JOHN STUART MILL, *On Liberty*, *in* 18 COLLECTED WORKS OF JOHN STUART MILL (J.M. Robson ed., 1977); ROBERT P. WOLFF, BARRINGTON MOORE, JR. & HERBERT MARCUSE, A CRITIQUE OF PURE TOLERANCE (1965). Nonetheless, I think the liberal argument has value when appropriately qualified. Giving people more opportunity and responsibility to shape their lives is a good project, despite its profoundly ambiguous and problematic qualities, not so much because of the economist's notion that utility is thereby maximized because people know what's good for them, but because virtue depends on people having that opportunity and responsibility. *Cf.* ALASDAIR MACINTYRE, AFTER VIRTUE (1981) (Liberalism has, regrettably, destroyed Aristotelian virtue-based ethics).

210. *See supra* note 199 and accompanying text. Again, the point of a critique of organization life is a limited one. It is not to wipe out a way of life or replace the reign of evil with the reign of virtue, but to reduce the domain of one way of life so that conditions may be more favorable for the cultivation of other ways of life.

ogy, that effort seems misplaced. To claim, for example, that "organization life" is a reification of a far more complex set of relations is legitimate as long as the criticism is morally-based and associated with substantive political or ethical claims. But the criticism strays if it claims that the critique of organization life is conceptually flawed because it assumes an epistemological foundation that does not in fact exist. The position argued in this article is a political/moral stance, not an epistemology or an ontology. While it can of course be interpreted that way, such an interpretation is less fruitful than viewing the argument in political and moral terms.[211]

The criticism of a political stance critical of organization life on the basis that it relies on a public/private distinction that has proved unfruitful in certain other contexts needs to grapple with this particular political stance. Relying on a general opposition to dichotomizing or to the public/private distinction is, in itself, inadequate. To dichotomize — to elevate certain approaches to life over others — is exactly what political and moral thinking and feeling involves. Legal, moral, and political use of concepts such as the public/private distinction is not sensibly embraced or rejected in toto.

Critical legal questioning of the private/public dichotomy does not and cannot "disprove" the dichotomy. What it has done, as in Fran Olsen's examination of legal reform,[212] is to show how a focus on that dichotomy in certain circumstances has played into troubling social practices and beliefs. Sensibly interpreted, critical legal arguments against dichotomies are local critiques, aimed at particular deployments of dichotomies that appear unfruitful or destructive. They are not generalized critiques assuming or demonstrating the error of dichotomies across the board. The significance of dichotomies or oppositions such as individualism/altruism, right/left, and good/bad in critical legal thought belies an implausible idea of the critical position as one that consistently deprecates and shuns the use of dichotomies. Olsen's article, for example, deprecates the deployment of certain dichotomies (e.g., private vs. public, family vs. market, feminine vs. masculine) because of the deleterious qualities such deployment possesses in particular contexts, rather than because of a more general concpetual flaw with dichotomies. Indeed, her argument relies on its own dichotomies (e.g., androgyny vs. gender division, fulfillment vs. deadness). My point is that critical legal thought needs to avoid epistemology, both of a structuralist "dichotomies are real and irrefragable" variety[213] and of an anti-foundationalist[214] "dichotomies are contingent" variety, in favor of moral and political arguments that focus on the effectiveness of partic-

211. In other words, I trust that the arguments made in this Article are not taken for covert leftist essentialism of the sort that Stanley Fish, *see* FISH, *supra* note 113, finds everywhere. To the extent there are unduly sweeping claims in this Article's rhetoric, consider them in a moral and political context rather than as instantiations of essentialism.

212. *See* Olsen, *supra* note 48.

213. A position that some have wrongly taken to be the structuralist basis of Duncan Kennedy's argument in *Form and Substance, supra* note 21.

214. *See* FISH, *supra* note 113.

ular oppositions relied upon in a particular context. Unpacking and criticizing binary oppositions in specific situations is a worthwhile critical project (as is unpacking and criticizing the repression or denial of such oppositions).[215] However, imagining that one has a critical technique that refutes particular substantive political stances, such as the one advocated here, on the grounds that they rely on elevating one pole of an opposition over another is to believe that critical philosophy, as distinct from morality and politics, can do more than it is fit to do.[216]

I agree with Olsen and other critics[217] that valorizing a "feminine," "private" realm of care and concern can serve to maintain unfortunate social patterns as much as to change them. However, I see a leftist challenge to the primacy of organization life as being quite different and more promising in that regard than, say, a proposal to delegalize relations within the family.[218] While one could certainly see a kinship between the stance sketched in this paper and a stance that upholds "the private" against "the public," there is also a significant difference. Acknowledging the ambiguity of how a stance plays out in practice, I would assert for the critique of organization life a position similar to Olsen's concluding invocation of a future of androgynous diversity rather than rigid femininity and masculinity.[219] A critique of organization life is not a valorizing of the "private" over the "public." Rather, it is a gesture toward a future in which "private" and "public" activities lack the sharp-edged differentiation associated with the current juxtaposition of time-consuming job work with family life. In such a future, people would engage in more social activities that fuse the emotional expressiveness associated with "the private" and the passion for reason associated with "the public." Such a fusion could challenge and alter the public/private distinction as we know it.[220]

215. Olsen's *The Family and the Market*, *supra* note 48, is a good example of unpacking oppositions, while Kennedy's *Form and Substance*, *supra* note 21, is good example of unpacking the denial of oppositions.

216. The point here tracks the anti-epistemological argument made by Richard Rorty. *See* RORTY, MIRROR OF NATURE, *supra* note 114.

217. *See* Isabel Marcus, Paul J. Spiegelman — Moderators; Ellen C. Dubois, Mary C. Dunlap, Carol J. Gilligan, Catharine A. MacKinnon, Carrie J. Menkel Meadow — Conversants, *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFF. L. REV. 11 (1985).

218. *Cf.* HABERMAS, *supra* note 175. While the consequences are indeterminate, delegalization would seem to play into a traditional notion of family altruism that in practice can facilitate patriarchy. Reducing time devoted to job work, on the other hand, on its face lacks the connection to traditional inegalitarian ideas about men and women that the delegalization proposal possesses.

219. Olsen, *supra* note 48, at 1578.

220. Compare Rorty's argument in CONTINGENCY, IRONY, AND SOLIDARITY, *supra* note 125, which relies upon the public/private distinction in basically unchallenged form. Rorty advocates a Nietzschean project of undermining widely-held values in the private sphere, but not in the public sphere, where a forthright liberal morality such as Orwell's should prevail. The position argued in this paper is "radical," in comparison to Rorty's "liberal" one, in its dissatisfaction with the existing character of the public/private split in the U.S. and similar countries and in its hope for recharacterizations (but not abolition) of that split. *See* Allan C.

CONCLUSION

A turn in critical legal thought toward advocacy of reducing the scope of organization life would be a surprise, given that it would counter the established sense of legal oppositionism as a movement whose radicalism is detached from advocacy of large scale radical proposals. Such a shift makes sense, however, given the theory of legal oppositionism and its psychopolitics. A disharmony exists between critical legal thought and proposals for enhanced social rationalization and control of the kind that radical movements have often generated. There is, on the other hand, a strong positive connection between critical legal thought and a proposal for reducing the domain of organization life.

A turn toward criticizing organization life should be good for critical legal scholarship and for legal oppositionism as a movement. What legal oppositionists do in criticizing mandarin legal rhetoric is itself a kind of critique of organization life. Connecting that project with a project of criticizing the practical circumstances of life in organizations would help create conditions for traditional critical scrutiny of legal rhetoric, as well as new and more personal forms of critical rhetoric, to flourish.[221]

Support for reducing the domain of organization life is conducive to activism at the personal level of the way one thinks, talks, writes, and deals with the different commitments of one's life, as well as to activism at the intermediate level of one's organization and the larger level of the legal profession. For lawyers, reducing the sway of the overbearing workplaces described in the first part of this paper is a cause of real importance. While a traditional leftist "we can manage the world more rationally" stance all too easily contributes to passivity, a critical stance on organization life encourages people to act in their own lives and workplaces. A critical stance on organization life is in that sense analogous to feminism: both advocate large-scale social change and can simultaneously be tremendously conducive to personal, small-scale activism.[222]

Like relationships and sharks,[223] movements need to keep moving. For legal critics, there are undoubtedly risks in movement.[224] But there are also

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Hutchinson, *The Three 'Rs': Reading/Rorty/Radically*, 103 HARV. L. REV. 555 (1990) (book review); Singer, *Nihilism and Legal Theory*, *supra* note 9; Joseph W. Singer, *Should Lawyers Care About Philosophy?*, 1989 DUKE L.J. 1752 (book review).

221. In essence the argument here is that rhetorically-oriented critical work would gain persuasiveness if it were associated with rather than divorced from a radical program for social and legal change.

222. My hope is that after reading parts I and II, the reader will be better prepared to understand the personal correlates of the advocacy here and to reflect on her own situation and personal politics than would be the case if the article ignored the psychopolitical issue of the relationship between one's situation and one's political/legal stance.

223. *See* ANNIE HALL (Orion Pictures 1977).

224. One possible objection to a legal oppositionist turn toward criticizing organization life draws on an analogy to legal realism and its decline as a movement. The objection would be that just as legal realism lost critical intensity as realists turned their energies toward staffing

risks in trying to maintain a critical path that seemed right in 1976 or 1984, or in turning a past tactical stance against large scale political and legal proposals into a rigid rule. There is a real opportunity, and with it a real responsibility, for a critical leftist position now. The statist leftist position against which critical oppositionism originally defined itself has become intellectually and practically moribund. Liberals remain, but the statist leftist vision of a better-managed society no longer credibly serves the role either of inspiring them[225] or of goading them toward change for the better. That role is a valuable one that needs to be filled. Under the circumstances, it makes sense for critics in law to emerge as advocates.[226] It makes sense for us to work to reduce the domain of organization life through broad social changes, such as major reductions in job hours, through changes within particular workplaces such as law firms, and through changes in our personal lives.

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and justifying the New Deal and the administrative state, so too would contemporary legal oppositionism if there were oppositionist support for reducing the domain of organization life. The two situations are radically dissimilar, though, given the difference between the cause of the administrative state and the cause of reducing the scope of organization life. It indeed was difficult for legal realists in the 1930s and 1940s to maintain a strong critical focus on the rationalization of power through law while simultaneously focusing on better ways to manage problems of labor relations, retirement income, securities markets, etc., so much so that the combination proved untenable to maintain at the level of a legal movement. On the other hand, for contemporary critics to maintain a strong critical focus on the rationalization of power while also focusing critically on organization life as an arena of rationalized power would be an entirely compatible combination, both for individual critics and for a movement, as each stance supports the other in a way that the realists' oppositionism and their administrative preoccupations did not.

225. Us!

226. Naturally, we need to try to be acutely aware of the dangers of grandiosity and loss of a sense of humor involved in taking on the advocate's role.