

April 2012

Social Construction of False Necessities and the Material Basis of Socio-Legal Power: A Reply to Irrationalism in Critical Legal Studies Critiques Identifying Latent Social Violence as a Potential New Material Foundation for Systematic Socio-Legal Theory

Samantha Godwin
Georgetown University Law Center

Follow this and additional works at: <https://digitalcommons.pace.edu/plr>



Part of the [Law and Society Commons](#), and the [Legal History Commons](#)

Recommended Citation

Samantha Godwin, *Social Construction of False Necessities and the Material Basis of Socio-Legal Power: A Reply to Irrationalism in Critical Legal Studies Critiques Identifying Latent Social Violence as a Potential New Material Foundation for Systematic Socio-Legal Theory*, 32 Pace L. Rev. 362 (2012)

DOI: <https://doi.org/10.58948/2331-3528.1803>

Available at: <https://digitalcommons.pace.edu/plr/vol32/iss2/4>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

Social Construction of False Necessities and the Material Basis of Socio-Legal Power: A Reply to Irrationalism in Critical Legal Studies Critiques Identifying Latent Social Violence as a Potential New Material Foundation for Systematic Socio-Legal Theory*

Samantha Godwin**

Introduction

Critical Legal Theory (“CLS”) has been characterized by two broad schools of thought. The first, instrumentalism, holds that legal rules serve specific social purposes, generally the systematic and structural application of power, and that these power structures can in some way be rationally described.¹ The second, irrationalism, holds that law is too indeterminate to serve an instrumental function; that it is impossible to systematically account for social reality, because there is no social reality independent from socially constructed meaning.² Both the irrationalist

* Article presented at the Critical Legal Conference at the University of Utrecht, Sept 12, 2010 and the Conference on Critical Legal Studies at the University of Idaho, School of Law, October 22, 2011. I am grateful to Gary Peller and Louis Michael Seidman for their comments and advice on an earlier draft of this Article.

** Research Fellow, Georgetown University Law Center; J.D., Georgetown University Law Center; M.A., B.A., University College London, Department of Philosophy.

1. “[I]nstrumentalists see legal rules as covertly furthering the efforts of certain groups (e.g., capitalists, whites, males) to dominate others. Different hierarchical orders require differing legal orders, so that ‘particular rules are needed . . . in developing capitalism, other rules in monopoly capitalism and so on.’” Phillip E. Johnson, *Do You Sincerely Want to be Radical?*, 36 STAN. L. REV. 247, 286 n.103 (1984) (alteration in original) (quoting LIZARD (Peter Gabel ed.), Jan. 5, 1984, at 3.).

2. Irrationalism can be defined as the position that

legal rules[are] too indeterminate, incoherent, and marginal to qualify for an instrumentalist role. Law is “merely an instance

understanding of law and society that came to dominate CLS, and the Marxian-influenced³ instrumentalist approaches that proceeded it, suffer from major explanatory gaps. Specifically, Marxian, dominance feminist, and other instrumentalist theories are vulnerable to the claim that they posit a false objectivity.⁴ When providing explanations and descriptions for social structures and legal outcomes, instrumentalist theories fail to adequately account for their own subjectivity and the ways in which their descriptions rely on socially constructed and socially contingent assumptions and concepts. When offering predictions, political strategies, and causal explanations, Marxian or instrumentalist approaches tend to be over-determinate, and reality rarely conforms exactly to their expectations and predictions. The irrationalist approach, however, suffers from insufficient explanation. Indeterminacy and irrationalism make for unsatisfying end points when inquiring into a social world that appears to be in some ways, highly predictable and seemingly well ordered.⁵

In the American CLS movement, the recognition that social interests and legal questions are analytically indeterminate has led to the

of social mythologizing,” and “there is no ‘true’ analysis that comports with the way things really are, because there is no hard social reality separate from our social construction of meaning.”

Since there is no ultimately rational way to think about or organize the world, there is no ultimate irrationalist program, no attempt to substitute “truth” for “ideology.” Only the message that every structure is provisional and none is necessary.

Id. (internal citation omitted) (quoting LIZARD (Peter Gabel ed.), Jan. 5, 1984, at 4.).

3. Throughout this Article, I use the term “Marxian” to describe the broad social, historical, and economic perspective based on Marx’s historical materialist conception of society, but without the political, revolutionary, or social transformative implications of “Marxist”—which I shall use to describe the position that more narrowly and comprehensively adopts Marx’s political philosophy in addition to his social theory. For an example of this use of the terms “Marxian” and “Marxist”, see Douglas Kellner, *Preface to the 1998 Edition* of HERBERT MARCUSE, *EROS AND CIVILIZATION*, at xi, xiv, xviii (Routledge 1998).

4. See James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 724-25 (1985).

5. See Mark Tushnet, *Some Current Controversies in Critical Legal Studies*, 12 GERMAN L. J. 290, 291-92 (2011) [hereinafter Tushnet, *Controversies*] for a discussion of similar related criticisms of irrationalism as falling into complete subjectivity and lacking explanatory power.

apparent predominance of the irrationalist position advanced by Duncan Kennedy, Peter Gable, and others.⁶ This position offers highly persuasive critiques of Marxist, feminist, and law and economics approaches to social and legal theory by demonstrating how each view relies on unstable assumptions about the way the law interacts with society, how people exercise power, and whose interests the law advances.⁷ To use a simplified example, to the Marxist who argues that the interests of property owners determine the content of the law, the irrationalist may reply that property exists only insofar as the state allocates and enforces property rights, so the unidirectional model of the economic base determining the legal superstructure is incoherent. Moreover, if the law is analytically indeterminate,⁸ then law cannot be said to advance any

6. See Johnson, *supra* note 1, at 286 n.103.

7. See, e.g., Boyle, *supra* note 4; Johnson, *supra* note 1; Tushnet, *Controversies*, *supra* note 5.

8. The so-called “indeterminacy thesis” is one of the most significant insights of the legal realists; adopted and expanded by the CLS movement. While most authors refer simply to the “indeterminacy thesis,” it seems that the thesis actually has both a form specific to legal analysis and a form general to all types of discourse that intersect with the law, including rights discourse, social theory, class interests, ideology, policy, and more generally any systematic account of interpersonal interaction. Put simply, the legal indeterminacy thesis holds that the sources of formal law such as statutes, precedents and constitutions, do not in and of themselves analytically determine the outcome of legal disputes—even while adjudicators will inevitably reference bodies of laws while making legal decisions. This is possible because sources of law contain contradictions, ambiguities, and gaps, and legal discourse contains conflicting norms for applying and interpreting law, such that a credible and persuasive case can be made for either side of any legal dispute and there exists no independent standard for determining which case is more persuasive. See, e.g., James Boyle, *The Anatomy of a Torts Class*, 34 AM. U. L. REV. 1003 (1985); Duncan Kennedy, *The Structure of Blackstone’s Commentaries*, 28 BUFF. L. REV. 205 (1979); Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363 (1984) [hereinafter Tushnet, *Rights*]; Mark Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1525 (1991) [hereinafter Tushnet, *Studies*]; Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 QUINNIPIAC L. REV. 339 (1996) [hereinafter Tushnet, *Indeterminacy*]. More generally, however, once legal terms and concepts are destabilized, the conclusions of social theories that assume those terms as background conditions would also be indeterminate. For example, Tushnet argues

[c]lassical social theory had not paid much attention to questions of law, yet legal terms—in particular, “ownership of private property”—played a large role in the fundamental structure of Marxist and, to a lesser extent, Weberian social thought. If those terms were, as we believed them to be, indeterminate, the conclusions of classical social theory regarding the inevitable triumph of the working class or of the “iron cage” of bureaucratic society rested on sand. In short, the indeterminacy thesis threatened the social theory that legal realists had relied on to resolve the normative and descriptive difficulties

particular class interests because law would not, if indeterminate, determine legal outcomes at all.⁹ A traditional instrumentalist reply that external factors such as wealth and power condition judicial outcomes is also insufficient because political commitments, ideologies, and class interests may themselves be shown to be analytically indeterminate.¹⁰ Added to these issues, the irrationalists also apply post-structuralist critiques of meaning, suggesting that the concept of power in general is subjective,¹¹ and that society's hierarchies are not grounded in the

exposed by their analysis of law. Put a different way, the indeterminacy thesis, developed in the specific context of legal doctrine, created an atmosphere in which the deterministic leanings of classical social theory were suspect.

Tushnet, *Studies*, *supra*, at 1525.

9. See, e.g., Boyle, *supra* note 4, at 724 ("If our understanding of legal realism and of linguistic theory shows us that legal rules are wildly indefinite and incapable of precise application, how can the legal system be tilted (even to a relative extent) in favor of any group or form of economic organization?").

10. Duncan Kennedy makes this point with regard to ideologies:

The strategy seems to be one of exposing the indeterminacy of the surface level of discourse in order to get at the "real" level, which is ideology.

But the ideologies are themselves just "texts" that each individual judge will have to interpret before he or she can decide what is "required" by his or her presupposed political commitment. Saying that the judge is a liberal constrained activist doesn't tell us what liberalism "requires" in any particular case, because of the possibility of strategic behavior within the process of ideological interpretation.

DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION, 187-88 (1997).

11. See Boyle, *supra* note 4, at 724-25.

Instead of the vulgar Marxist picture that there is one layer of reality, the economy, that is the most real and the most determinative, [Robert Gordon] suggests that reality is socially constructed. "What we experience as 'social reality' is something that we ourselves are constantly constructing; and this is just as true for 'economic conditions' as it is for 'legal rules.'" The economy ceases to have the appearance of fateful objectivity that a Marxist theory attributes to it. History and world become the creation of social subjects acting collectively, rather than being the result of impersonal structural determinants.

Id.; see, e.g., SAUL NEWMAN, POWER AND POLITICS IN POSTSTRUCTURALIST THOUGHT, NEW THEORIES OF THE POLITICAL, 51-53, 158 (2005).

material conditions of life, but in the ideologies of false necessity and self-repression—what Peter Gabel calls the pact of the withdrawn selves.¹²

Although the post-structuralist-influenced irrationalists provide good reasons for rejecting efforts to systematically account for legal and social phenomena, they invite the obvious question of “where do we go from here.” The problem with leaving social theory thoroughly deconstructed without offering a positive theory of law and society is that, while legal and social developments are far from mechanical or deterministic, they often appear predictable and, in a certain intuitive sense, “rational.” If legal and social questions are radically indeterminate and not merely indeterminate within the prevailing liberal discourse, then this appearance of predictability demands an explanation.

Rather than offering a defense of existing socio-legal theories or exploring how irrationalist theories could be made more satisfying, this Article largely accepts the irrationalists’ critiques and instead considers how one might go about coherently re-grounding systematic socio-legal theories consistent with the insights of CLS. Even if one is persuaded by radical social constructivist arguments that truth, power, and social identity are subjective social constructs,¹³ not everyone is able to contribute to these social constructs equally. To use an example from Foucault’s *Discipline and Punish*, hierarchical observation and normalizing judgments are made asymmetrically—the guard observes and judges the prisoner and the prisoner modifies his or her behavior and subjective understanding of themselves as a result, to a far greater degree than vice versa.¹⁴ It may be true that the state must rule more by consent than by force,¹⁵ but some people’s consent counts for far more than others.

Both self-repression¹⁶ and threats of physical violence¹⁷ represent

12. See Peter Gabel, *Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563 (1984).

13. Boyle, *supra* note 4, at 723-26.

14. See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH* 170-84 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

15. See Peter Fitzpatrick, *Law and Societies*, 22 OSGOODE HALL L.J. 128-30 (1984).

16. Gabel, *supra* note 12, at 1583 (describing self-repression as “treating existing reality as fixed and embracing this idea with passion.”).

17. Physical violence, as I use it in this Article, comes in two forms that have the same effect—imposing direct physical limitations on a person. This can be done either by applying physical force that they cannot physically overcome to restrict their movement, such as handcuffs or locking someone in a cell, or it can be done by inflicting physical

ways that social hierarchies enforce themselves and power is felt and exercised—but are they interchangeable? From a certain critical vantage point, it may seem that way. The use of organized, state-level coercive power seems to require self-repressive ideas on the part of the state’s agents, and the possibility for physical coercion gives rise to false necessity and self-repression in gross disproportion to the state’s actual enforcement capacities.

In this Article I argue that these two forms of power are not interchangeable, and that while they both condition and contribute to the other, they do so asymmetrically. Why people repress themselves in the way they do, and how they experience false necessities, has to do with how they experience threats of physical force, such as the state’s criminal legal system. In any given individual, the experience of latent threats of physical force thus acts to condition their self-repressive ideas, but not vice versa: self-repression is often predicated on some expectation of social repression. The effects of physical force can then be seen as analytically prior to the effects of self-repression. This is to say that we can explain why people act as they do in the face of physical force without understanding the nature or content of their self-repression, but we cannot explain their self-repression without understanding the threat of physical force that conditions it and conditions the social context in which they find themselves. The experience of false necessity and self-repression may be necessary to motivate the police, soldiers, and others to actually carry out physical state-coercion, so in this way self-

injury that compels certain behavior either through pain or through actual physical disability. The latter can either compel a narrow range of behavior, such as the muscular incapacitation of a taser or the loss of consciousness and eventual death from blood loss from a gunshot wound, or a relatively broad range of behavior, such as where someone runs, or perhaps fights back, when pepper is sprayed. In all cases, however, violence as I use the term imposes greater physical limitations on a person than they normally experience absent violence. Their physically possible choices are more constrained than they would be absent violence acting against them. Credible threats of violence can be similarly limiting because one’s choices are physically limited, only one step removed. Pointing a gun at someone and demanding compliance might not actually cause them to lose consciousness and die, but it still physically limits their options because of the known immediate potential for them to lose consciousness and die. Although one could ignore the orders of someone threatening them with a gun, she knows that she could not ignore the orders for very long. Violence is, in a physical way, something that cannot be ignored. It causes undeniable adverse physical affects in the persons to which it is directed. In contrast, I use the terms “self-restraint” or “self-repression” to describe when people feel that their apparent choices are limited, but the limits are not related to any physical restraint—when it remains physically possible for them to choose to do otherwise, and yet consistently do not.

repression could also be said to causally explain coercive force. However, because different people have radically differing degrees of access to organized physical coercion, those who can directly or indirectly wield physical coercion have a disproportional effect on the behavior and ideas of others, even if their own motivations arise from notions of false necessity.

In this way, despite the subjective and self-enforced aspects of power the irrationalists identified, power is not an incoherent or inexplicable force in society, but one that has an ascertainable “directionality” from the powerful to the powerless.

This Article will then argue that accepting this explanation of the relationship between the experience of threats of physical force and the experience of self-repression elucidates certain problems that have troubled critical legal theorists, such as why speech targeting certain groups is experienced as more oppressive than speech targeting other groups. Certain discursive formations carry more influence over people’s consciousness and behavior than others, based in part on how directly they evoke references and reminders to the latent threats of physical force that constrain our options.

After a brief discussion of Marxist thought and relevant reactions to it from various critical theorists, this Article takes the irrationalist conclusions on Marxism as a starting point and attempts to reconstruct sociological explanations from there. The Article proceeds by exploring what, on a basic level, it means to experience feelings of constraint, self-constraint, and the power of others acting on oneself. It arrives at the conclusion that there is a dialectical relationship between the recognition of latent or implied threats of coercive force, and the feeling of self-repression, or self-constraining ideas. In this relationship, latent violence is analytically prior to self-constraining ideas. This observation can then be used to make sense of a number of topics of interest in critical legal theory.

This Article is deliberately unconventional and exploratory. It begins by raising many conceptually problematic questions which cannot be answered simply or definitively. The point is not to provide any one right answer for these questions but to raise possible directions for new lines of inquiry rather than accepting the theoretical dead end that is irrationalism. I do not necessarily hope to offer a new systemizing theory that can withstand rigorous critique, but rather to show that such attempts remain possible and worthwhile even after the influence of post-modernism and the deconstruction of the most significant social theories.

I. MARXISM AND CRITICAL THEORIST REACTIONS

A. *Background on Critical Theory: Marx, Foucault, and Hale*

To appreciate the dilemmas posed by irrationalist, post-structuralist critical theory, some background on the instrumentalist views they were responding to is necessary. Broadly speaking, the two prevailing “modern” traditional explanations of the state and society were the Marxist perspective of leftist political thought and the liberal perspective of Classical legal thought.¹⁸

Marx’s views of the state, society, and law were complicated, varied tremendously throughout his productive life, and were riddled with apparent internal contradictions.¹⁹ Perhaps the most popular straightforward presentation of Marx’s views, however, is found in the 1859 Preface to *A Contribution to the Critique of Political Economy*.²⁰ To quote a relevant excerpt:

In the social production of their existence, men inevitably enter into *definite relations*, which are *independent of their will*, namely relations of production appropriate to a given stage in the development of their material forces of production. The totality of these relations of production constitutes the economic structure of society, *the real foundation, on which arises a legal and political superstructure* and to which correspond definite forms of social consciousness. *The mode of production of material life conditions the general process of social, political and intellectual life. It is not the consciousness of men that determines their existence, but their social existence that determines their consciousness.*²¹

18. See Donald F. Brosnan, *Serious But Not Critical*, 60 S. CAL. L. REV. 262, 270-74 (1987); see also Duncan Kennedy, *Toward An Historical Understanding of Legal Consciousness: The Case of Classical Legal Thought in America, 1850-1940*, 3 RES. L. & SOC. 3 (1980) (describing the details on the history of Classical legal thought.).

19. See RONALDO MUNCK, *MARX @ 2000: LATE MARXIST PERSPECTIVES* (St. Martin’s Press 2000).

20. See GERALD COHEN, *KARL MARX’S THEORY OF HISTORY: A DEFENCE*, 375 (Princeton Univ. Press 2000).

21. KARL MARX, *Preface to A CONTRIBUTION TO THE CRITIQUE OF POLITICAL*

The Marxist view of society, power, law, and the state, can be seen to have several components. First, it assumes that there are in fact “definite relations, which [exist] independent of [people’s] will[s].”²² These definite relations are the relations of material production which constitute a basic economic structure.²³ This basic economic structure functionally explains²⁴ the laws and politics of a society, which constitute a “superstructure” arising from and depending on the base structure. In this way, for Marx,²⁵ there is a casual relationship between the structural mode of production, what can be said to *really* exist, and the superstructural phenomena that constitutes people’s ideas, their consciousness, and their legal, political, and intellectual lives. This Marxist theory can be described as an “instrumentalist” view of law and ideology, in that legal and political thinking are instruments of the structurally-based ruling class: law serves the needs and interests of the people who own the means of production, because laws and political ideas are generated by the relations of production.

Parallel to this “bottom up” Marxist view of law and the state is a “top down” liberal or enlightenment conception of the state and society. In this view, power issues from some central governmental institution, such as the three branches of the American federal government, or a monarch or dictator; it is imposed on people externally by the state.²⁶ For the liberals, private markets and private families exist pre-politically, though the state may, rightly or wrongly, intervene into them.²⁷ Law is, in this model, instrumental in two senses. Law as interpreted by the judiciary acts to restrain state power against individuals and other

ECONOMY, 9, 11 (Int’l Library Publ’g Co., 1904) (1859) [hereinafter MARX PREFACE] (emphasis added).

22. *Id.*

23. *See id.*

24. *See* COHEN, *supra* note 20, at 247-97 (discussing “functional explanations” in Marxism in depth).

25. Or, perhaps more accurately, for Marxists who accept the 1859 Preface as a definitive explanation of Marx’s position, such as Gerald Cohen and the Analytic Marxists. There are many reasons to question whether the 1859 Preface was a very good summary of Marx’s theory of history at all, in that Marx allowed it to go out of print and many have argued it is incompatible with Marx’s historical writings. However, it is still massively influential on contemporary interpretations of Marx.

26. *See, e.g.,* JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (Cambridge Univ. Press, 2010) (1832) (presenting Austin’s “Command Theory” of the law).

27. *See generally* Frances E. Olsen, *The Myth of State Intervention in the Family* 18 U. MICH. J.L. REFORM 835 (1985) (discussing the liberal concept of state intervention into the private market, and for why this is incoherent).

branches of the state by limiting what the state can do. Laws as created and enforced by the legislatures and government executives are also instrumental in that they are the means by which the state pursues its goals and interests, such as the general welfare, security, and so on. In this way, the liberal conception of the state is almost the Marxist conception of the state on its head: the parts of society Marxists take to be superstructural are, for liberals, the prime movers of legal and political thought, and capable of changing the economy.²⁸

The Frankfurt School and New Left thinkers that emerged from a Marxist tradition considered the base/superstructure model inadequate to describe the way ideas and culture interact with power.²⁹ They recognized that supposedly superstructural phenomena like ideology and cultural ideas can have a power over people and society all their own.³⁰ Both the liberal model where power issues from the government, and the Marxist model where power issues from the economic base, appeared to be gross oversimplifications. The Italian Marxist Antonio Gramsci, for example, introduced the concept of hegemony, where the ideas of the ruling class are so thoroughly entrenched in society that they cannot be recognized as ruling class ideology, but instead become a universally accepted framework for social discourse.³¹ The Marxist division between real, material power exercised at the base, and mere superstructural influence, was thought to no longer describe the way power is wielded most pervasively. The most pervasive form of power to these critical Marxists was that which causes subordinated people to participate in their own repression.³²

These theoretical developments provided a background for post-structuralist thinkers such as Derrida to build upon. The post-structuralists challenged Marx's attempts to ground his theory in some sort of natural, fixed, material reality, like labor value, use value,

28. Of course this is also an oversimplification.

29. See ANDREW EDGAR & PETER SEDGWICK, *CULTURAL THEORY: THE KEY CONCEPTS* 25 (2d ed. Routledge 1999) (The Frankfurt School was itself a heavy influence on Critical Legal Studies methodology); see also David S. Caudill, *Disclosing Tilt: A Partial Defense of Critical Legal Studies and a Comparative Introduction to the Philosophy of the Law-Idea*, 72 IOWA L. REV. 287, 288 (1987).

30. See Brosnan, *supra* note 18, at 305-12; see also GÖRAN THERBORN, *THE IDEOLOGY OF POWER AND THE POWER OF IDEOLOGY* (4th ed. 1999).

31. See ANTONIO GRAMSCI, *SELECTIONS FROM THE PRISON NOTEBOOKS* (Geoffrey Nowell Smith & Quintin Hoare eds., 1971).

32. See *id.*; THERBORN, *supra* note 30; Brosnan, *supra* note 18, at 305-12.

commodities, or dialectical materialism.³³ What are labor, value, and power anyway, absent human interpretation of these qualities? Marx recognized that value is not an intrinsic quality of an object, but one grounded in human relations to that object—specifically the amount of socially necessary labor required to create or obtain it.³⁴ In this way, gold is more valuable than coal because it takes substantially more hours for a miner to locate and extract an ounce of gold than to locate and extract an ounce of coal—thus an ounce of gold represents a higher concentration of labor invested than an ounce of coal.³⁵ But why should hours of labor invested take on some special, privileged status for denoting the real value of an object, especially when this type of value has little to do with exchange value or use value?³⁶ Is this anything more than a subjective description of value, one informed not only by material reality but by the consciousness people develop within the social contexts they find themselves?

Power, to the post-structuralists, is not something that is exerted in a mono-directional way but rather distributed throughout society.³⁷ This provides the basis for a critique of Marx and the liberals based on social observation rather than analysis. In such a view, the Marxian base/superstructure model is incompatible with the way power seems to actually work in society. In *Discipline and Punish*, Foucault charted the development of the modern “disciplinary” society.³⁸ The development for Foucault did not issue from one source of power or base economic formation, but developed for a variety of contingent purposes and merely happened to come together into the modern state form.³⁹ Foucault understood the exercise of power itself as being more nuanced than the brute coercive power implicit in Marx’s work. In *Discipline and Punish* Foucault identified three principle techniques for social control: hierarchical observation,⁴⁰ normalizing judgment,⁴¹ and examination.⁴²

33. JACQUES DERRIDA, *SPECTERS OF MARX: THE STATE OF THE DEBT, THE WORK OF MOURNING, AND THE NEW INTERNATIONAL* 88 (Routledge 1994).

34. 1 KARL MARX, *CAPITAL: A CRITIQUE OF POLITICAL ECONOMY* 212-13 (Fredrick Engels ed., Samuel Moore & Edward Aveling trans., Random House 1906).

35. *Id.*

36. See J.L. Simich & Rick Tilman, *Critical Theory and Institutional Economics: Frankfurt’s Encounter with Veblen*, 14 J. ECON. ISSUES 631 (1990).

37. See SAUL NEWMAN, *POWER AND POLITICS IN POSTSTRUCTURALIST THOUGHT: NEW THEORIES OF THE POLITICAL* 53 (2005).

38. FOUCAULT, *supra* note 14.

39. *Id.*

40. *Id.* at 170.

Merely observing people exerts control over them, as they modify their behavior while under a superior's gaze. Normalizing judgments by a superior compel people to "reform" to the standards by which they are judged: discipline is not only comprised of punishment, but also of gratification from positive judgments.⁴³ In this way, when people are classified against norms it introduces a "value-giving measure" which "hierarchizes, homogenizes, and excludes"—people are incentivized to conform to the norms and standards which thereby exert control over them.⁴⁴ Examination combines these two techniques by observing from a position of superiority and judging against a norm, "establish[ing] over individuals a visibility through which one differentiates them and judges them."⁴⁵ The examined is a "case" that may be judged and compared with others—"an object for a branch of knowledge" as Foucault puts it⁴⁶—in this way examination elicits in the examined a notion of both *who* they are and *what* they ought to do. Foucault goes on to describe Jeremy Bentham's Panopticon, a prison designed so that the guards *could*, if they choose to, view any prisoner in any prison cell at any given time—because inmates do not know if they are being observed at any given moment, they always behave as if they were.⁴⁷

In this way, control is effectuated not by violence, or even by direct observation, but by the internal self-policing that each prisoner performs on themselves.⁴⁸ Thus, power does not simply act on individuals as objects, rather it plays a constitutive role in the formation of individual subjectivity—power functions not as an external force on an individual, but as an internal subjective experience. The experience of external constraint then, can be said to actually arise largely from within oneself. For Foucault, panopticism is a phenomena that affects not only people in prison, but people throughout society.⁴⁹

41. *See id.* at 177.

42. *See id.* at 184.

43. *See id.* at 180.

44. *See Id.* at 183.

45. *Id.* at 184.

46. *Id.* at 191.

47. *See id.* at 195-231.

48. *See id.* at 200-209.

49. *See id.* at 207.

B. *The Emergence of Irrationalism in Critical Theory*

These post-structuralist insights provide a backdrop to an anti-instrumentalist, or irrationalist, perspective on law and power. CLS scholars such as Duncan Kennedy, Robert Gordon, and Mark Tushnet convincingly argue that legal reasoning is analytically indeterminate.⁵⁰ This is to say that, for any given set of facts in a case, the adjudicated outcome cannot be dictated by the contents of the law itself.⁵¹ Precedent does not constrain outcome, because one can always distinguish or analogize any given case from any precedential case by emphasizing its similarities or differences from that earlier case.⁵² Legal doctrine does not determine outcome, because the application of any set of general principles to any group of specific facts will always be disputable—and disputable within the norms of legal argumentation.⁵³

For example, rules can be interpreted broadly or narrowly; one can argue that a firm, bright line rule is necessary to ensure order and predictability, or alternatively that a flexible standard is needed to provide meaningful justice in varying circumstances.⁵⁴ We can now see the possibility of a purely analytic⁵⁵ post-structuralist critique of Marxian and Liberal legal theory rather than the observational critique implied by Foucault. If the law is indeterminate, the irrationalist position would ask, how can it possibly act as an instrument of the interests of an economic ruling class? If the rules have no ability to dictate outcome, because legal decisions can come out however the adjudicator wants them to, then the law cannot really be said to advance *any* particular interests.

A Marxist may argue that apparent *under*-determinacy in the law serves to legitimate the ruling class: the law would lack a legitimating effect if the economic elites won every single case. Instead the ruling class must lose often enough to convince the rest of society that law

50. See, e.g., Boyle, *supra* note 8; Kennedy, *supra* note 8; Tushnet, *Rights*, *supra* note 8; Tushnet, *Indeterminacy*, *supra* note 8.

51. See Boyle, *supra* note 8; Kennedy, *supra* note 8; Tushnet, *Rights*, *supra* note 8; Tushnet, *Indeterminacy*, *supra* note 8.

52. See Boyle, *supra* note 8; Kennedy, *supra* note 8; Tushnet, *Rights*, *supra* note 8; Tushnet, *Indeterminacy*, *supra* note 8.

53. See Boyle, *supra* note 8; Kennedy, *supra* note 8; Tushnet, *Rights*, *supra* note 8; Tushnet, *Indeterminacy*, *supra* note 8.

54. See Boyle, *supra* note 8, for a fuller discussion.

55. By “analytic,” I simply mean proceeding via logical analysis of the entailments of Marx’s theoretical framework, rather than considering whether observationally the state of the social world appears to confirm Marx.

functions independently of their interests. A Marxist could then argue that the law remains “tilted” to favor the establishment—serving the interests of economic elite more successfully over time than a system that mechanically delivered judicial victories.⁵⁶

This argument, however, clearly fails in the face of the more radical indeterminacy critique. It is only possible for the law to have a “tilt” if the law can dictate outcomes *to a degree*, but if a valid legal argument can be made for either side of any case, then the law itself does not suggest any outcome at all; it remains for a judge to choose which legal argument he or she prefers.⁵⁷ An instrumentalist response might be that while the law itself does not determine judicial outcomes, *external* factors influence courts in such a way so that they have a tendency more often than not to come out on the side of the ruling class.

However, just as the law is indeterminate, Duncan Kennedy and other CLS scholars have effectively argued that the interests of any given class or entity are also indeterminate.⁵⁸ For example, is the minimum wage in the interests of the bourgeoisies or the proletariat? It could be argued that minimum wage serves the interests of the proletariat against the interests of the bourgeoisies, because it cuts into bourgeois profit margins and increases proletarian compensation, ending the race to the bottom in wages. Alternatively, a minimum wage might be in the interests of the bourgeoisies because collectively restricting the rate of exploitation prevents some of the self-destructive tendencies of the capitalist ruling class and staves off revolution amongst its workforce.⁵⁹ Both accounts seem plausible within a Marxian paradigm of class interests.

An even more devastating critique of Marxism is that Marx’s descriptions of the economic base appear to assume a contingent legal ideology. The Marxist theory that the owners of the means of production, which is to say, the ruling class, determine the laws of any given society, presupposes the legal concepts of “ownership” and “property” as if these

56. See, e.g., Jack M. Balkin, *Critical Legal Theory Today*, in ON PHILOSOPHY IN AMERICAN LAW 64 (Francis J. Mootz III ed., 2009); MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 290-95 (1987); Caudill, *supra* note 29.

57. See Boyle, *supra* note 4, at 724.

58. See KENNEDY, *supra* note 10, at 50-54.

59. See *id.* Duncan Kennedy similarly argued that ideologies were indeterminate in their specific application and one could argue that a particular outcome is either liberal or conservative. *Id.*

concepts were pre-political.⁶⁰ In *Coercion and Distribution in a Supposedly Non-Coercive State*, Robert Hale demonstrates that “property” exists only insofar as the state decides to assign a duty of non-interference on “non-owners” and the privilege to waive this duty on “owners.”⁶¹

A person the state classifies as a “non-owner” may not use an item or a parcel of land that is another’s “property” because the state will use coercive force against the non-owner if they do.⁶² A person the state classifies as an “owner,” however, may use her “property” and has the discretion to allow others to take or access her property.⁶³ This set of legal privileges gives “owners” great leverage over other people in a society where all the things needed for the basic necessities of life such as food, shelter, clothing, and so on are owned by someone.⁶⁴ In this way the categories of “owners” and “non-owners” depend only on who the state assigns these roles to—property as such does not exist independently of state enforcement of property rights and the state assignment of ownership.⁶⁵ Ownership of property is, in this way, not a relationship of people over objects, but people over other people mediated by the state.⁶⁶ It cannot be said that there is a pre-political private market into which the state “intervenes” when it regulates business practices, in that all property relies on state intervention.⁶⁷ To determine whether or not state action is present, one must only ask if the

60. A similar critique of Marx is offered by Duncan Kennedy:

It sounds as though Marx is treating legal concepts as determined by the economic system, as epiphenomenal in the orthodox marxist sense. But that isn't it at all. Quite the contrary, his whole definition of commodity production is in terms of and therefore presupposes the legal concepts of private property and contract. The legal categories are built into the definition of the “social formation” or “mode of production.”

Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 978 (1985).

61. Robert Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470, 470-79 (1923). C.f. Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L. Q. 8 (1927).

62. See Hale, *supra* note 61, at 471.

63. *Id.* at 471-72.

64. See *id.* at 472-74.

65. See *id.* at 471.

66. See *id.*

67. See *id.*

state would respond if self-help was attempted. Were the non-owners to attempt a self-help solution of expropriating the owners' property, the state's police and courts would intervene to enforce criminal laws against theft.⁶⁸ Because the state then is responsible for restraining people from taking self-help action, we can therefore see that state action is a prerequisite for property rights.

It should be clear how the Marxist model of the relationship between the ruling class and the state becomes unhinged at this point, but a more detailed explanation by way of an example will be useful for this Article. If a property owner ("Sally") calls the police to evict some peasant ("Martha"), who is working on Sally's farm without her permission, it seems the case that the police are serving the interests of Sally. From this one might be tempted to think that law is an institution commanded and likely formed by the property owning class, as the Marxists suggest. Expanding this perspective further, the state could be presumed to be *dependent* on the ruling class, since those who own the means of production are the ones with the resources to finance the police and armies who defend their property against the dispossessed.⁶⁹

But consider the ontological and epistemological dimension of Sally evicting Martha. How do we know the farm is Sally's and Martha is the trespasser rather than the other way around? Is Sally's ownership of the farm a characteristic of the farm itself, or is owning the farm something that Sally is doing with the farm?⁷⁰ On a functional level, it is Sally's farm simply because the police order Martha to leave at Sally's request—if they did the reverse, then functionally it would be Martha's farm and not Sally's. We know who owns the farm only by the state imposition of coercive force. The ontological reality of ownership and property consists of nothing deeper than the act and expectation of state enforcement. The earlier Marxian description of law and state action in the service of and dependent on the property owners is clearly incoherent. How can the property owners determine the law, when the law itself determines who the property owners are?

68. *See id.* at 471, 478.

69. In fact the state is often said to arise during the agricultural revolution when a sufficient amount of surplus grain was used to buy the services of non-farmers to act as guards of the owners remaining surplus.

70. Of course there are other theories of what *should be considered the basis of* property that hold that this is the case, such as the labor-based theory of property advanced by John Locke. This normative question is not, however, directly relevant to the positivistic question of what is *legal* property in fact.

C. *The Problems of CLS Irrationalism Identified*

At this point, we can identify several fundamental problems that post-structuralist critical theory poses to Marxian instrumentalism. Anywhere the Marxist might want to claim that one element of society has explanatory potential for another element of society, the post-structuralist critique exposes the relationship as indeterminate.

The first fundamental problem concerns the relationship between the economy and the law. Marxists assert that the relations of production causally explain legal and political superstructure.⁷¹ Hale, however, demonstrated that the law is needed to determine the relations of production by assigning property rights⁷²—the so-called superstructure appears to be functionally prior to the supposed base. Marx claimed that material existence determines consciousness and that consciousness does not determine material existence.⁷³ Hale showed that legal consciousness is necessary to determine the distribution of material goods in society.⁷⁴ So, the legal system cannot be grounded in the economy because the economy depends on the legal system—but then where does the legal system itself come from? An irrationalist need not provide any definite answers, but for anyone who wishes to ground a theory of social structure, law, and the state, this poses a devastating critique against any materialist explanation.

The second problem has to do with the nature of the law itself. Marx believed that the law and political structure is organized in such a way to advance the interests of the ruling class. The CLS scholars, however, seemingly demonstrated that the law is so thoroughly indeterminate that it cannot be said to advance anyone's interests by itself. Moreover, class interests are themselves indeterminate in critical legal theory.⁷⁵ This poses a problem for anyone who wants to identify a rational system or structure in the law.

The third problem concerns the relationships among people and between people and power. Marxism presumes that there are “definite relationships” among people and between people and the economy—

71. MARX PREFACE, *supra* note 21.

72. Hale, *supra* note 61, at 470-79.

73. MARX PREFACE, *supra* note 21.

74. See Hale, *supra* note 61, at 470-79.

75. See Guyora Binder, *Critical Legal Studies*, in A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 281 (Dennis Patterson ed., 1996).

material power relations that exist “independent of [one’s] will.”⁷⁶ Foucault and others have demonstrated that these power relations are not definite or concrete, they are instead subjective: the exercise of power depends on what each person in the relationship thinks is going on.⁷⁷ Moreover, power does not seem to meaningfully exist independent of one’s will; power consists primarily of self-repression.⁷⁸ Thus the notion of power relations between people is unstable and subjective, not determinate. This poses a fundamental problem for anyone who wants to ground any explanation of social power in a materialist basis.

In summary, the relation between the economy and the law, the nature of the law itself, and the nature of power relations in the economy and between people in general, all seem irrational and hopelessly ungrounded. Nothing seems determinate and every causal explanation proves to be circular.

D. *How to Proceed After the Irrationalist Critique*

Having arrived at this thoroughly deconstructed, apparently irrationalist starting point of accepting the critiques advanced by the post-structuralists, where do we go from here? One response is to follow the example of Mark Tushnet and Peter Gabel and optimistically think that, without structure delineating narrow parameters for social revolution, there are radical possibilities for change.⁷⁹ If collective *self-*

76. MARX PREFACE, *supra* note 21.

77. FOUCAULT, *supra* note 14.

78. *See id.*

79. Tushnet, *Rights*, *supra* note 8, at 1402-03. The hope and optimism of this revelation can be felt in the following passage from Tushnet:

It is of course difficult to live one's life believing that the social world is entirely constructed. Every time one thinks about it, the social world dissolves into a set of choices that one has made. (What is the meaning of writing this article?) Every decision becomes political. One asks oneself, do I think that this rather than that is, as far as I can tell now, more likely to advance the cause of the party of humanity?

But that question is itself tremendously liberating. It rests on an understanding of the social world that tells me that nothing is necessary, that everything is contingent, that I need not resign myself to how things are or to supporting those modest changes that are possible given the constraints placed on social life by a relatively unchanging human nature or by the demands of some technical

repression is what enables the powerful to wield power, then deconstruction in and of itself may operate as a liberating political position.⁸⁰ People can think themselves out of the false necessities of which power convinces them—the false belief that we must behave in a rigid social hierarchy where our choices feel externally dictated. The revelation that the only thing that is holding us back is ourselves has an explosive potential for liberation and social transformation.

While the irrationalists are highly persuasive in critique of instrumentalist positions, there are aspects of this model that are deeply unsatisfying. If society and the law are really truly irrational and indeterminate, why do they appear to be so well ordered and so predictable? Not completely ordered or completely predictable of course, not deterministic, or mechanical—but highly predictable within certain parameters. To use a simplistic example, elections are often possible to predict with high degrees of certainty even though doing so relies on forecasting what millions of people will do, on their own, with no one supervising them. The notion that the law is “tilted” towards the wealthy *is absolutely incoherent analytically*, and yet, anyone conducting case research in an area of the law, like employment law, where courts have to decide between litigants who are owners or corporations and litigants who are poor people, will quickly arrive at the conclusion that *it*

apparatus. That view of the social world does not ground the choice to join the party of humanity. What does ground the choice is the sure and certain knowledge that things can be better than they are.

Id.

Echoing Tushent’s optimism, Gabel goes on to say that

[W]hen a movement manages to ricochet [sic] into existence through an unpredictable convergence of “igniting” material and cultural circumstances combined with an irreducible element of free commitment by those who take the risk of reciprocation, it produces a disalienating energy that wants to challenge everything that is (capitalism, patriarchy, hierarchy, “the system”) and a set of specific demands for change that derive from the movement’s particular origins and that are inspired, consciously or unconsciously, by its vision of the larger end.

Gabel, *supra* note 12, at 1587-88.

80. See, e.g., KELMAN, *supra* note 56, at 269-79 (expressing the related view that the prevailing liberal legal ideology legitimizes existing power relations—so revealing the contradictions within that ideology helps people to see the potential for their own liberation).

certainly looks that way.

If there is some semblance of predictability, even a mere tendency, such a tendency strongly implies that the way society is arranged is not random. If it is not random, then there must be some structure, even if it is a very loose structure that is unlike the satisfyingly elegant structure that Marx offered. The post-modern rejection of any effort to systematically explain society as merely exercises in grand narrative is itself a positive claim. It is a claim that society either has no structure, or has a structure that is absolutely impenetrable to human investigation and explanation. Having exposed Marxism, Christianity, the free market, nuclear family, scientific progress,⁸¹ and so on as conceptually flawed, some “incredulity towards metanarratives”⁸² by the post-structuralists is understandable. However, even though many attempts to ground social analysis in something material, or otherwise more than merely subjective, have been rightly deconstructed—simply being able to deconstruct many attempts at grounding social analysis is hardly a demonstration that social analysis cannot be grounded, or that a structure does not exist.

II. IRRATIONALIST RECONSTRUCTION: DISCUSSION

A. *Beginning a “Reconstructive” Project*

In this Section, taking up this irrationalist starting point, I will explore what can be plausibly grounded in a non-circular explanation that is less vulnerable to the critiques earlier outlined. Property, power, and social identity do seem to be socially constructed. They do not seem to have a meaning outside of the social context that gives them one. These are not phenomena that seem to exist in the world naturally, outside of or beyond the human understanding and discourse about them. More generally, anything that exists in the world requires a human observer to endow it with meaning and significance.⁸³

81. JAMES HEARTFIELD, *The “DEATH OF THE SUBJECT” EXPLAINED* 16 (2002).

82. 10 JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE*, xxiv (Geoff Bennington & Brian Massumi trans., Univ. of Minn. Press 1984) (1979).

83. See LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe et al. trans., P.M.S. Hacker & Joachim Schulte eds., Wiley-Blackwell, rev. 4th ed. 2009) (1953). For what is perhaps the original source of this idea, Wittgenstein explains in *Philosophical Investigations*, that meaning is just use, which is to say that

The meaning that society gives these things, however, is not random or coincidental. As the post-structuralists acknowledge, the meaning an observer grants to something depends on the observer's past social experience. That experience comes from somewhere. Maybe the experience is nothing more than other discursive formations—other irrational, socially constructed meanings—in which case this line of thinking provides no progress to any deeper meaning or explanation.

If, however, all meaning is socially constructed, do all people necessarily construct meaning equally? It would seem not. To use Foucault's example in *Discipline and Punish*, teachers examining students affect those students' subjective understandings of themselves, but students do not affect teachers to the same extent.⁸⁴ The teacher is able to make "normalizing judgments," whereas the student is not.⁸⁵ Why is that? If people are oppressed by discourse in general, but only *some* people can effectively use discourse to oppress others, then discourse is asymmetrically oppressive. This asymmetry alone implies the existence of some structure that is more foundational than the discursive formations to which people respond. If ideas have power, why do some people's ideas have more power than others?

B. *Towards a Coherent Account of Power*

If ideas have power but some people's ideas have more power than others, then maybe what we call "power" is not coherent partially because it refers to more than one phenomena. It seems that the word is used in three similar ways, depending on the "direction" that power is experienced. To experience the "power" of another is to experience constraint—it is to feel that your options are curtailed compared to what your options would be absent the other's power. To exercise power, on the other hand, is the ability to do something without constraint. Finally, to have power over another is never to control their behavior in an absolute sense, but to modify their behavior by constraining their options—for example, the power of legal property in the criminal code

even basic words cannot be defined according to the things to which they refer, because the object a word refers to cannot give the word meaning. For example, there is no physical distinction between pointing to an apple to indicate its shape, its color, the general category of thing it belongs to, and so on—the meaning of these properties must be ascribed to it by a human observer.

84. See FOUCAULT, *supra* note 14.

85. *Id.* at 180.

does not prevent people from choosing whether or not they acknowledge objects, land, and ideas as others' property— rather they are presented with the choice of either acknowledging another's "property rights" or risking jail.

One paradigmatic experience of another's power is being physically detained. In a (purely theoretical) Hobbesian state of nature,⁸⁶ this type of power—the raw physical constraint of another—might be the only type of power people experience. Most of us, however, feel constrained in our everyday lives without the threat of impending arrest—we feel constrained by social convention, by other's expectations, by other's opinions of us, and so on. As Peter Gabel observed in *Phenomenology of Rights Consciousness and the Pact of the Withdrawn Selves*, we deny ourselves all the time through withdrawn, performative, and alienated behavioral patterns, even though no one in particular locks us into them.⁸⁷ We are constrained in fact because we are constrained by our own minds, even absent any physical constraints.

But is the constraint we place on ourselves ontologically the same as the *physical* constraint others can place on us? If someone wants to apply power to another, it would seem that either physically overpowering the other, or inducing self-repressive thoughts could have the same effect: the other's options are constrained and her behavior altered according to the wishes of the person exercising power.

One way we might try to disentangle these two types of "power"—the internal experience of self-constraint, and the external experience of physical constraint—is to consider whether they are functionally equivalent and how they might differ. To use Gabel's example, if you find yourself withdrawn and alienated when speaking to a bank teller,⁸⁸ feeling constrained from initiating any genuine personal interaction, that feeling of constraint might be as effectively restricting as if you feared for your safety were you to speak genuinely. It would be at least hypothetically possible however, to think yourself out of this feeling of constraint. Liberating ideas could counter self-repressive ideas.

In contrast, if one wants to make an "unauthorized withdrawal" from a bank and then realizes that, were they to do so, the armed bank guard would threaten them with violence and apprehend them, no

86. See THOMAS HOBBS, *LEVIATHAN* 81-86 (A.R. Waller ed., Cambridge Univ. Press 1904) (1651).

87. See Gabel, *supra* note 12, at 1567-71.

88. *Id.* at 1567-68.

amount of liberating thought will free someone from that constraint.⁸⁹ In this case, it is actually the individual's own thought that restrains her from trying to expropriate money from the bank, but her thoughts are in direct reference to a physical threat that would in fact prevent her from carrying out the attempt. People cannot think themselves out of handcuffs or away from guns pointed at them. The power of physical violence creates *fixed* self-restricting ideas in a way that vaguer cultural or social conventions create *mutable* self-restricting ideas.

This represents a fundamental difference between the ways the power of self-repression and the power of direct physical violence operate: the former is internal and contingent only on one's own mind; the latter is additionally contingent on the physical facts of material reality.

This distinction seems clear, substantial, and not entirely subjective on the individual level of one person physically coercing another or experiencing internal constraint. The equation is somewhat different, however, on an institutional level. Armies and police might physically coerce people, threaten violence, and so on, but guards, soldiers, and police officers seem primarily to follow orders not out of fear of their colleagues, but because they believe in the legitimate authority of their superior officers. Orders are followed by police and soldiers because of what those orders subjectively mean to the police and soldiers. Though some soldiers (and to a far lesser extent police) may fear violence from their colleagues so that their obedience is mutually reinforced by how they expect the others to act, this explanation becomes increasingly less plausible the higher up the chain of command one goes.

While the previous example in the bank showed that the material power of implied threats of violence can cause self-restraining ideas, here we can see that self-restraining ideas about obedience to legitimate authority also translates into material power of organized violence. If this is the case, then it would seem that the two "types" of power have not really been disentangled at all, because they remain interchangeable.

An alternative description of the relationship between the two types of power is possible. Though the implied threat of violence creates self-repressing beliefs, and these self-repressing beliefs can create organized violence, the relationship between them is not symmetrical. Once the

89. Perhaps someone could theoretically persuade the guard to join a revolutionary expropriation or some such thing, but unlike in the former example offered by Gabel, the fact of the constraint depends not only on *one's own* thoughts and inhibitions, but on the material threat posed by the guard.

choice to introduce the threat of organized violence, such as police enforcement of the criminal law, is made, new beliefs among those *not* wielding organized violence are insufficient to change the parameters of constraint. Generals can disobey orders from their civilian leaders when the power of beliefs and culture is sufficiently persuasive to override the ideological authority of an established chain of command, but unarmed protesters cannot effectively resist riot cops when ordered to disperse; they can refuse to comply with police orders, but the protesters can still be physically moved or arrested regardless if faced with overwhelming force. In this way, while the constraining power of beliefs can causally explain physical force, and physical force can causally explain the constraining power of beliefs, physical force takes precedence.

To generalize this observation, one might say that, in a system where both violence and self-restraint are present, the implied threat of violence is analytically prior to self-restraint, even while each could contribute to the other. This is to say that it is possible to investigate and analyze the effect of the threat of physical force on someone without having to proceed via an investigation of the self-restraining ideas that exist independently of that physical force, but it is not possible to adequately and completely analyze the self-restraining beliefs without examining the physical force that conditions them.⁹⁰ This analytic priority does not, however, actually extend to the people who threaten physical force themselves—understanding *why* the police decide to beat up protestors requires an understanding of the false necessities and self-repressive beliefs the police officers hold and experience. For protestors facing charging riot police, however, understanding all of their loosely associated self-repressive beliefs is unnecessary to explain why they flee—their dispersal in the face of physical violence can be explained by the threat of physical violence alone.

The self-restricting belief that restrains one from expropriating money from a bank has its referent in the threat of violence from the bank guard—or the latent threat of violence from the state. The belief cannot be understood without considering the latent threat of violence in criminal law—in other words, self-repression requires the threat of physical repression to condition it, even if this threat is far from the forefront of an individual's mind at any given point. On the other hand,

90. This model of an analytically-prior relationship is a modified version of an explanation found in *THE BLACKWELL COMPANION TO PHILOSOPHY* 96 (Nicholas Bunnin & E.P. Tsui-James eds., 2d ed. 2003).

the physical reality of a bank guard arresting a bank robber can be understood absent an analysis of the self-restraining beliefs of a potential bank robber.

A significant challenge to the Marxist economics-based theory of alienation and oppression has come from those who would attribute explanatory power to beliefs instead of economic structure. Habermas, for instance, argues that oppression and liberation were contingent more on language and communication between people than on anything intrinsic to the economy.⁹¹ The perception of physical coercive power, however, underlies the language and communication between people and effects the transmission and reproduction of self-restraining beliefs. Moreover, as will be discussed in greater detail below, violence is in significant ways “pre-linguistic,” in that language is not needed to understand pain and physical constraint.

In this way, we can answer the question earlier posed of why some people’s beliefs and ideas have more power than those of other people. Beliefs are most constraining when they have their referent in threatened or latently threatened force. The referent may be quite direct, as in the case of the prospective bank robber, or the referent may be several steps removed, such as a student who wants to meet a teacher’s standard on an examination so that they will be physically able to go to college. On an even more indirect level, this may help to explain why some political ideas—like voting Democrat or Republican—are entertained widely no matter how much they differ from individuals’ actual policy preferences, while other political ideas—like socialism and anarchy—are beyond the realm of consideration (except in those places where socialist revolutionaries have violently seized power in the past). The latent threat of state violence in defense of the current economic system limits and constrains the realm of the possible. Ideas with the most traction are also often those that are supported by force—they seem inevitable, not simply out of “false necessity,” but because they cannot be overcome by reason alone.

C. *How Clarifying the Nature of Power Resolves Dilemmas in CLS*

For an example of how this thinking could clarify other problems in critical theory, consider the debates over pornography. Catherine

91. See 2 JÜRGEN HABERMAS, *THEORY OF COMMUNICATIVE ACTION: LIFEWORLD AND SYSTEM* (Thomas McCarthy trans., Beacon Press 1987) (1981).

MacKinnon argues that pornography is oppressive to women, but does not similarly argue that pornography is oppressive to men.⁹² How could an image of a naked woman be “oppressive” when an image of a naked man is not? If we consider the images as signifying nothing beyond themselves, then analytically this makes no sense—the two types of images have no ontological differences. Despite this, pornography is much more likely to cause some women to feel shame, discomfort, embarrassment, and anxiety. Relatedly, many women may avoid entire red light districts so as to avoid the thoughts evoked by the visible presence of pornography and sex work,⁹³ whereas it is much more rare for men to react this way.⁹⁴ The difference between the apparent power of the two sets of images cannot be internal to the images—analyzing the images alone cannot explain why porn featuring females is more constraining or “oppressive” than porn featuring males. One way to explain the difference in people’s reaction is that one has the threat of violence against women as its perceived referent; the other does not evoke any allusion to references to material force. One evokes a reminder in women that they could be in physical jeopardy from male sexual interest—the other evokes no such reminder because men do not typically feel similarly vulnerable.

Another example is the difference between the power the “n-word” has to influence, enrage, and frighten people, with the absence of such power in racial slurs directed at white people. Racial epithets for white people have relatively little emotional impact because there is no sense of physical vulnerability from being white. No one has ever gotten kicked out of a neighborhood, lunch counter, bus seat, swimming pool, country club, or rail car because they are white. White people do not feel physically excluded or under suspicion from others due to their race. Racism against black people, however, has provided the ideological context of slavery, lynching in the South, frequent harassment, terry stops, and arrests by the police.⁹⁵ The “n-word” reminds people of the threat of violent coercion that existed and, to a large extent, still exists in

92. See Catherine A. MacKinnon, *Pornography, Civil Rights, and Speech*, 20 HARV. C.R.-C.L. L. REV. 1 (1985).

93. For a discussion of possible harms of pornography denied legal recognition see *id.*

94. Anecdotal, but convincing, evidence of this is the complete absence of any men’s movement to censure the use of men in pornography—whereas many women’s groups have made pornography a central issue for political agitation.

95. For a brief historical account of racism in the United States see GEORGE M. FREDRICKSON, *RACISM: A SHORT HISTORY* (2002).

society, as well as reminding people of the physical exclusion of black people from racist institutions. Epithets for white people, however, have no such sting because they do not evoke reminders of anything like that.

And yet, neither viewing pornography nor hearing the “n-word” amount to actual physical violence in that, while they remind *many* observers of structural inequality and physical risk, this is not a necessary relationship. It is possible to think oneself out of being constrained by pornography or racial epithets against people of color. A redescription or reinterpretation of pornography or racial epithets can provide them a new narrative decoupled from the implied threat of violence so that the ideas evoked by them are no longer constraining. But when they do prove constraining, the asymmetry in the constraint can only be explained by analyzing something physical beyond the ideas themselves.

Another way to explain the power of ideas along these lines is that, while the presence of physical coercion gives rise to self-constraining ideas in reference to that physical threat, it is the self-constraining ideologies that transmit coercive power, making physical force effective beyond all proportion to its actual threat. Lenin supposedly said that “one man with a gun can control [one hundred] without one”—presumably without having one hundred bullets.⁹⁶ The threat of violence in this way carries vastly more power than could be exercised by actual violence, because it causes people to police themselves—but they only police themselves in reference to the potential for a violent response if they chose to do otherwise.

The subjectivity of power and construction of identity described by Foucault could also be informed by the observation that latent material power is analytically prior to self-constraining beliefs when both are present. The perception of who is materially powerful affects the construction of identity, in that the judgments of those with physical power affect our subjective experiences of ourselves to a far greater extent than the judgments of those without power. A vivid example of this is the way people will often think nothing of walking straight past homeless people without so much as acknowledging their existence, even when the homeless person tries to talk to them. The homeless person’s judgment has little or no effect, can bring no shame, and can modify no behavior, because they are so marginal that their feelings about who someone else is are unlikely to be internalized. Compare this with how

96. *Quotes* by Vladimir Ilyich Lenin, GOODREADS, <http://www.goodreads.com/quotes/show/34739> (last visited Jan. 9, 2012).

the praise or displeasure of our parents when we are young can radically affect the way we think about ourselves. Parents' relationship to young children is one in which they have almost absolute physical power, and a child is completely dependent on parents for her necessities of life. Without considering the relative *material* power of the homeless person or the parent, it is not obvious why one wields so much power over beliefs, while the other wields so little.⁹⁷

Once beliefs supported by physical force are in place, they can cause people to act or refrain from acting absent any genuine threat of violence (as noted in the racial epithet and pornography examples). In this way, the two types of power—the physical power of the latent threat of violence and the power of self-constraining ideas—both act as constraints, but there is a path-dependent relationship between them.

D. *Might Violence Be Nothing More than a Subjective Construct As Well?*

This Article has previously referred to the notion that violence, pain, and physical constraint may be phenomena that can ground explanations of social and individual behavior without succumbing to the radical subjectivity found in most systemic explanations, because these phenomena are in some ways “pre-linguistic.” Much more work must be done, however, to make this claim credible.

What is really distinct about violence? *Slavoj Žižek*, in his book *Violence*, described how actions by the police are often felt to be part of the normal state of existence, whereas similar actions by criminals or those considered “terrorists” are felt to be really violent.⁹⁸ For example, a radically post-modernist stance might lead someone to argue that violence is not pre-linguistic, in that to even understand a police officer striking a protestor with a baton as an act of “violence,” one must understand what swinging a baton against another signifies. In a world without human subjective experience to endow it with meaning, there is nothing particularly special about that type of action as compared to any other action. Many more might similarly argue in all seriousness that police handcuffing a suspect is not an act of violence, while smashing the

97. Adjusting for familiarity and length of exposure—to just say that parents are socially influential and homeless people are not is of course to beg the question of why that is the case.

98. This is a significant simplification. See SLAVOJ ŽIŽEK, *VIOLENCE: SIX SIDEWAYS REFLECTIONS* (2008).

inanimate and unfeeling windows of a bank is an act of violence.

First, it is necessary to disentangle this problem. That people dispute what is and is not violence, often for obvious reasons of political sympathy, does in fact mean that the word itself, as used, is not entirely stable. Violence is an emotionally charged concept, and for good reason. People may be reluctant to recognize violence as such, in part because it often means extending empathy to those on the receiving end of violence. Empathy is almost necessarily extended when we think of an interaction as violence against a person, because we all recognize violence against ourselves as an unpleasant thing. However, people typically fail to extend that recognition to all third parties. For example, to some a mugger seizing someone to steal their wallet may, despite lack of bodily injury, be considered “violent,” while a police officer seizing someone to search them for drugs may not be considered “violent.” With a more precise definition of violence, however, it will become apparent that this is not a real distinction, and thus it does not undermine this Article’s thesis.

To *say* that one person coerces another person requires a narrative structure to describe what exactly is going on. When one *hears* of one person coercing another, knowing what this signifies further requires an understanding of how to interpret that narrative. But to experience acts of physical coercion against one’s self is to experience the limitations of one’s body as it exists in the material world. This experience is still subjective, but because humans are not immaterial abstract narrators, but physically embodied beings, we have a degree of uniformity in the limits we experience in the material world.

We can call oxygen and water whatever we want, but regardless of what we call them and what meaning, properties, or categories we ascribe to them, they are not ignorable given the nature of the human body. Without oxygen for a couple of minutes our physical systems and mind stops functioning. Likewise, without water for a couple of days our bodies, and eventually our minds, start to shut down. One of the parameters of behaviors and thought is the type of being doing the behaviors or thinking, and human beings have specific boundary conditions.

Physical coercion or violence similarly brings our attention to human boundary conditions. Enough pain will absorb all or most of one’s thoughts and attention; it is not ignorable—not something that can

be avoided with redescription.⁹⁹ When someone is put in a room behind a locked door, she cannot think herself out; she is confronted with the material reality that her movements are restricted to within that room—she cannot will it another way with any amount of self-liberating ideas.

Of course, the experience of violence is still subjective, and people can have different thoughts about it. People can sustain getting beaten up, or decide to sacrifice themselves for some greater purpose. But even in these instances violence and physical coercion constrain their options and demand their attention. Moreover, while some may attempt to sustain violent attacks against their person, there are real physical limits to how much violence they can sustain, and most people react similarly—not for entirely socially constructed reasons, but for reasons having to do with the limits of their anatomy.

An arguably even more radical challenge to this line of thinking is the argument that the individual as an entity is itself a social invention. Foucault argued that the body only became a unit of analysis in the eighteenth century, and prior to this individual bodies were dissociable into the collective population.¹⁰⁰ For Foucault, the individual is itself a social construct which does not have a prediscursive meaning.¹⁰¹ Feminist legal theorist Robin West argues that the distinctness and separateness of individuals, and the assumption that “the word ‘individual’ has an uncontested biological meaning” is contestable.¹⁰² West argues that this view of individuals amounts to a “separation thesis” that is only “trivially true of men,” and “patently untrue of women.”¹⁰³ West goes on to write that:

Women are not essentially, necessarily, inevitably, invariably, always, and forever separate from other human beings: women, distinctively, are quite clearly “connected” to another human life when pregnant. In fact, women are in some sense “connected” to life and to other human beings during at least four recurrent and critical material experiences: the experience of pregnancy itself; the invasive and “connecting”

99. See ELAINE SCARRY, *THE BODY IN PAIN: THE MAKING AND UNMAKING OF THE WORLD* 51 (1987).

100. See MICHEL FOUCAULT, *THE ORDER OF THINGS* 336 (Vintage 1994) (1970).

101. *Id.*

102. Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 2 (1988).

103. *Id.* (internal quotation marks omitted).

experience of heterosexual penetration, which may lead to pregnancy; the monthly experience of menstruation, which represents the potential for pregnancy; and the post-pregnancy experience of breast-feeding.¹⁰⁴

Both Foucault and West, however, have merely offered alternative definitions or ways to think about and talk about the term “individual”—they have not really destabilized the actual meaning with regard to the human experience of psychological individuality. True, the meaning of the *word* is contingent, but the *ontological fact* of certain differences between the experience one has of herself and the experience one has of anything else is unchanged. In fact, contrary to West’s account, the “subjective awareness of separation” does in certain ways “define consciousness.”¹⁰⁵ Even if on some *essentially metaphorical* level women are “connected” to others during those four sets of experiences,¹⁰⁶ women (and men) retain distinct mental states. We cannot experience another’s mind, or her thought processes or mental states, in the direct way that we do our own—our unmediated mental life is confined to ourselves.¹⁰⁷ To the extent that West describes two bodies intermixing physically, while we might *describe* the two as being connected, they remain *experientially* distinct in significant ways—one does not have the same ability to feel all the sensations going through the nervous system of a fetus, a sex partner, or a baby, no matter how physically close or even physically inseparable they are.¹⁰⁸ The distinctiveness of the individual mind and individual nervous system remains despite West’s redescription, and women are as “essentially” distinct from other people in these ways as men.

Likewise, for Foucault, while sovereigns may have related to

104. *Id.* at 2-3.

105. *Id.* at 1 (quoting ROBERTO MANGABEIRA UNGER, KNOWLEDGE AND POLITICS 200 (1975)) (internal quotation marks omitted).

106. Which actually seems to be a completely subjective, and in some ways arbitrary, valuation of certain types of connectivity compared to others. Why is sex more connecting than a hand shake, but for the social meaning attached to it?

107. Notwithstanding our ability to express in a highly mediated way the contents of our mental life to others through language and emotional expression, such expressions only indirectly convey information about our mental states. Such information is necessarily mediated by another’s ability to interpret it. Regardless of how empathetic or well attuned they may be, the nature of the experience of hearing and seeing someone express the contents of her mental states, and experiencing a mental state for oneself directly, remain hugely different and distinct.

108. See West, *supra* note 102, at 2-3.

subjects as populations rather than as individuals prior to the eighteenth century (from a descriptive historical perspective), changing the mode of discourse from descriptions of populations to descriptions of individuals did not change the ontological qualities of the experience of being.¹⁰⁹ We are aware of our own minds and bodies in a way that we are not aware of other's minds or bodies—this was as true both before and after the change in public discourse about individuals that Foucault describes. In this way, Foucault may have attributed a false primacy to discursive formations concerning people, presuming that these discourses constitute the meaning or essence of personal experience. This may be true with the way our narrative structures about our experience work, but the narrative structures are still *about something*: the content of the material world; and some of that underlying material reality is not simply constructed by our narrative structures, but is the basis for those structures.

The word “I” may only have a meaning in the context of a human language with an idea of self-identity, but the ontological facts, such as that each person can see through her own eyes only, and not through other people's eyes or random points in space, and that each individual can only feel a keyboard under a set of hands connected by nerves to her particular brain, and not those keyboards under other sets of hands—do not depend on what meaning we attribute to our *descriptions* about them. It is of course possible to add another layer of confusion by deconstructing the meaning of the words “see” and “feel” and asking what these really mean but for the significance people in society attribute to them. Raising such questions, however, does little to erase the material fact that we experience the phenomena of feeling and seeing objects in space. Even if we had no words for these phenomena, we would still experience them. Likewise, we would still experience the bodily limitations imposed on us by acts of violence.

Another line of critique against the thesis advanced in this Article is that the examples given (of pornography and racial epithets) are just too convenient to ground the experience of social self-repression in general.¹¹⁰ The prior examples have some proximity to violence that becomes clear with an explanation. More difficult examples are those that deal with experiences that feel in some way coercive, but do not feel coercive because of any credible or even historical threat of violence.

109. FOUCAULT, *supra* note 100, at 335-41.

110. This criticism was offered by Gary Peller, Professor of Law at Georgetown University Law Center, on an early draft of this Article.

Nancy Henley, in her book *Body Politic*, noticed how, when among strangers, women tend to look at men when they are not themselves being watched, but when a man looks back at them, most women will tend to avert their gaze.¹¹¹ In this way, the subtle power of one stranger over another is experienced even with no present or historical threat of violence or any overt attempt to exercise power. Hierarchical observation in Foucault's prison guard example is obviously tied to violence, but here, and in most of life, the connection is not so clear.¹¹²

One might argue, however, that the connection still exists; it is simply several steps more removed. A prisoner may alter her behavior under the gaze of the guard out of fear that the guard will beat her up or lock her in solitary confinement if she does not behave according to the guard's wishes. However, someone who averts her gaze to avoid meeting the eyes of a stranger still acts out of a feeling of physical vulnerability, of apprehension about her own body in relation to the stranger. She does not, for example, similarly avoid eye contact with animals, nor does she avoid eye contact with photos of people looking into the camera lens. When a woman averts her eyes to avoid the gaze of a man in an elevator, it is because, were she to maintain eye contact, conversation and interaction would be unavoidable—she would be confronted with the physical reality of having to deal with someone she apparently does not want to deal with. Physicality, even here, modifies behavior. A person late for work might similarly avoid the gaze of her supervisor while shuffling in to her cubicle. In both instances the gaze draws her attention to the more socially powerful person's judgment of her, and makes it similarly difficult to ignore.

Being judged poorly by people who are felt to be more socially powerful might be a long way away from a prisoner being judged poorly by a prison guard, but this does not mean that it is devoid of connection to latent social violence, only that it is many more steps removed. If one falls out of favor with one's peers and social superiors, than one can be overtly and subtly cut off from the material and social goods that she wants to have access to, because social superiors, backed by the force of the state, can restrict access. The most obvious example is that if one does not please her social superiors, she might fail to get a job or promotion and will have less access to money; she cannot adjust the

111. NANCY M. HENLEY, *BODY POLITICS: POWER, SEX AND NONVERBAL COMMUNICATION* 164 (1986). Of course, this observation may be anachronistic.

112. See FOUCAULT, *supra* note 14.

situation with a “self-help solution” because access to the job and money are controlled by social superiors who can call on the state to enforce their wishes with physical force.

More subtly, being subjected to negative judgment from one’s peers and friends can lead to barriers being erected to one’s access to social goods—whether those barriers are explicitly recognized or not—and they may be enforced by the state. If someone is judged in such a way that leads to others refusing to associate with her, or declining to invite her to their parties, or even just subtly reducing their level of voluntary association, then that person’s options have still been materially limited in a way that she cannot simply think herself out of. If she tries a “self-help” solution of stalking or trespassing, the people who have judged her can also call on the coercive apparatus of the state to protect their freedom to refuse to associate. Moreover, any attempt to solve interpersonal problems by *ignoring* the way another person has judged someone will only result in a greater degree of judgment and loss of social status, which is, again, ultimately backed up by physical constraints.

III. CONCLUSIONS: CONSEQUENCES FOR QUESTIONS IN LEGAL THEORY

In this concluding Section, I will consider several ways this thesis—that latent social violence is analytically prior to self-restraining ideas—can help to resolve significant questions in legal and social theory. First, we can use it to reconsider the problem Hale poses for Marxists on how the ruling class can determine the law when the law determines the ruling class. Earlier in this Article, the question was posed: how does one know that Sally is the owner of the farm and Marsha is the trespasser? The initial conclusion is that the only way to know is when the police evict Marsha—had the court decided that Marsha had a privilege to be on the farm and Sally had a duty of non-interference to Marsha, then Sally could not be considered the owner.

But the courts and police do not decide the distribution of property rights in some ad hoc or random way. They instead allocate them by recognizing property rights and extending state enforcement, to people whom other prior state institutions similarly recognized. State enforcement agents approach cases in which individuals dispute ownership—such as theft and trespassing cases—with a preconception of who owns what, and that preconception is in reference to the past use of

force to back up property claims made over that parcel of land or item in the past. They look to whom the state recognized as the owner in the past and how the state recognized lawful transmission of ownership in the past.

The self-constraining ideas about property that lead judges and police to act in coercive and distributive ways are therefore themselves conditioned by, and in reference to, the prior use of force by others and the expectation of how force would be used. In this way, the post-structuralists are correct that all components of society influence each other and no one is actually in control as a prime mover. But this is only one part of the story and only really true at a single point in time—not over the course of history. Previous use of force exerts a unidirectional influence on subsequent use of force, because it establishes an expectation for how force will be used that leads people to constrain themselves in line with these expectations.

This Article also illustrates that the CLS notion that there is no pre-political market or power dynamics for the state to intervene into, because all power dynamics come from the state's decisions to grant or withhold enforcement to different property or other rights claims, is an only true to a certain extent. It is true that, absent the threat of violence from the state, a hundred factory workers could easily expropriate a factory from a single factory owner, offering a "self-help" solution to a dispute over how much they ought to be paid. However, there are limits to "self-help" because there are limits, absent the state, to how much an individual or a group can physically accomplish. A "no trespassing sign" requires a threat of state enforcement to actually prevent trespassing. However, a tall solid wall will deter someone from crossing into a certain parcel of land absent state enforcement.

Similarly, to say that laws permitting pornography privileges the pornographers to "injure" women who feel offended and objectified by pornography is only part of the story.¹¹³ The other part is that, absent that supposed state privilege, it is not entirely clear that radical feminists could adopt a self-help solution and physically compel people to stop making and viewing porn. There are practical limitations to how much power can be applied, as evidenced for instance by the fact that, despite strict laws against drugs, drugs remain readily available virtually everywhere to anyone who invests time in obtaining them.

Another interesting consequence of this thesis is that it helps to

113. See MacKinnon, *supra* note 92.

clarify the difficulty people have in accepting anti-essentialist group definitions, such as Judith Butler's deconstruction of gender¹¹⁴ and Richard Ford's deconstruction of race.¹¹⁵ Gender might have a physical corollary in anatomical and chromosomal sex, but the so-called performance of gender is social and one might choose to perform in different and possibly subversive ways. Likewise, although race has certain corollaries in physical appearance, it is merely a social concept in that race only exists insofar as people attribute significance to those physical characteristics. In both gender and race, the physical characteristics do not determine the social performance or the social meaning—people could choose to attribute different meanings and perform differently.

Does this mean that people can redefine themselves and transcend race and gender? Unfortunately not, perhaps, because while the categories of race and gender may be social constructs, they are social constructs that in practical reality have been crystallized by way of physical force. The notion of a "black race" or "white race" were no more real or biologically based in the American South in the 1950s than they are today, but if a "black" person decided to redefine themselves as beyond race and sit down at the wrong lunch counter prior to the civil rights movement, they could be arrested. Today, when police officers stop young black male drivers, essentially for "driving while black," the driver's idea of his own race is irrelevant to the physical confrontation that might unfold.¹¹⁶

Yet, by more clearly delineating the difference between power that cannot be overcome by one's own liberating thoughts (repression by threats of physical violence) and power that depends on one's own notion of false necessity (self-repression), we can also see where Mark Tushnet and Peter Gabel's self-liberating aspirations apply.¹¹⁷ The notion that we can essentially think ourselves into a revolution against the state, against the private capitalist economy, is wrong because, while the state and capitalism do depend on self-repressive ideas, it is not our self-repressive ideas that ultimately enforce them, but those of the police and

114. See JUDITH BUTLER, *GENDER TROUBLE* (1990).

115. See Richard Thompson Ford, *The Boundaries of Race: Political Geography in Legal Analysis*, 107 HARV. L. REV. 1841 (1994).

116. For a discussion of this phenomenon and its consequences, see David A. Harris, *The Stories, the Statistics, and the Law: Why "Driving While Black" Matters*, 84 MINN. L. REV. 265 (1999).

117. See Gabel, *supra* note 12; Tushnet, *Rights*, *supra* note 8.

soldiers who, through threats of violence, dictate the parameters for personal emancipation with or without the consent of any individual.

However, there are also numerous other institutions that have profound power over people's daily lives and that *can* be defied simply by refusing to buy into the sway they have over most of us by way of our own self-repressive ideas. These institutions can be defied precisely because they can be potentially ignored, because there is no (or minimal) organized violence to back them up and so they rely wholly on individual consent for their power. Many people unquestioningly obey "doctor's orders" despite real physical and financial risks of overtreatment, over-screening, iatrogenic injury, and death.¹¹⁸ Many others unquestioningly change their behavior to avoid committing "sins" according to the prescripts of organized religion. Still others modify their behavior to avoid the bad feelings caused by various forms of social judgment and expression, including those that have a subjective *referent* in violence but no *actual* credible threat of violence to back them up, such as pornography. In each of these cases (doctors, religions, and pornography), while the messages conveyed may feel repressive, the feeling of compulsion is truly a false necessity, because, unlike the implied threat of the criminal law, nothing physically compelling gives them force. These are precisely the situations in which self-liberation as Gabel and Tushnet described really can "work"—and work sometimes with immense social consequences.¹¹⁹

The thesis advanced in this Article and the conclusions briefly described in this final Section are not meant to be a final, definitive statement on how material power relates to self-constraining ideas, or how the legal system relates to the economy and social power. Instead, this Article is meant to serve as a starting point exploring how one might try to move beyond irrationalism, while remaining cognizant of the critiques advanced by the post-structuralists on prior attempts to systematically explain society. At best, the theory advanced in this Article—that the power of latent social violence is analytically prior to the power of self-repressive ideas—should be a way of restarting the conversation on how we can account for social structure and social change. The point is to show that having such a conversation after post-

118. For an exploration of the assumption of obedience to physicians see Gerry V. Stimson, *Obeying Doctor's Orders: A View from the Other Side*, 8 SOC. SCI. & MED. 97 (1974).

119. See Tushnet, *Rights*, *supra* note 8, at 1402-03; see also Gabel, *supra* note 12, at 1587-88.

2012] *SOCIAL CONSTRUCTION OF FALSE NECESSITIES* 399

structuralism remains possible, worthwhile, and necessary if we want to gain a better understanding of law and society.