Truth and Mystification in Legal Scholarship

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I am going to take advantage of having been scheduled late in the conference by offering comments that are cumulative. My views are directed primarily at the papers presented by Bob Gordon, Paul Brest, and Mark Tushnet, with all of whom I agree, and each of whom needs to be pushed a few steps further. The starting point, however, is something that came up yesterday. John Ely, in commenting on Paul Brest's paper, denounced "trashing" as a form of legal scholarship. I was simultaneously insulted and gratified by Ely's comment —insulted because I am a partisan and sometime practitioner of trashing, gratified because trashing has now been accorded formal status as a kind of legal scholarship. What I would like to offer is a defense of trashing, which I regard as the most valid form of legal scholarship available at the moment.

There is a strong tendency among scholars on the left, especially in the law school world, to stop short, to devote great efforts to exposing contradictions in mainstream thought or work, and then to go home. The tendency stems, I think, from a fear of being too closely associated with the Marxist tradition, a fear of being quickly categorized as a "vulgar" Marxist or naive reductionist, and thereby denounced, silenced, and denied academic credibility. I am going to take up the challenge of those fears this morning. Gordon, Brest, and Tushnet all made implicitly radical presentations. Each should be chided for not following through on the implications of his paper.

Gordon, for example, so wonderfully described the strategies employed by legal scholarship to avoid direct confrontation with history. He never explained, however, why those strategies are employed, suggesting only that they may be a result of a professional impulse to keep the enterprise going. I think Gordon's characterizations were accurate and will be quite useful in advancing the enterprise of trashing. He offered them in the specific context of avoiding historicity; they can easily be generalized as strategies for avoiding reality.

Brest, on the other hand, did a splendid job of exposing the recur-

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ring, deep, and intractable contradictions of constitutional scholarship. All of Ely's arguments against the others can be turned back on Ely, and all of them can be used against everybody else. That we learn from Brest. Suddenly, however, his talk ends, there is a quick stop, a discontinuity, and some wistful talk about utopian possibility. What is in the middle? Why all the contradiction? Is it just an accident, or is it perhaps a problem of logic, such that if we *really* turn our attention to the problem, we will sort out the contradictions, and build an enduring edifice of thought? Again, one wonders what is really going on.

The process repeated itself with Tushnet's paper this morning. His basic theme is legal scholarship's long-term strategy of avoiding Realism. We learn again that it is all contradictory, it is all a mess. There is a vague connection to professionalism and, perhaps, to the Idea of the Rule of Law. Toward the end, Tushnet throws in some oblique references to tenure policies at Yale some years ago, talks a little about social theory, and does, in that context, cite Marxism as generating "the central position to which all theories of knowledge respond."[1] Then things quickly come to a halt. The question raised by all three papers is what all this contradiction has to do with anything, and how one's answer to that question—even if tentative—might be the basis for a long-term project in legal scholarship.

Let me return to trashing, a fancier term for which might be "delegitimation" (another might be "demystification"). Why defend it? For one thing, trashing is fun. I love trashing, which perhaps suggests that there is a temperamental gap between people like Ely and me. More to the point, as even Ely conceded (although reluctantly), the content of the trashing may be true. That trashing may reveal truth seems significant if one's mission as a scholar is to tell the truth. If telling the truth requires one to engage in delegitimation, then that is what one ought to be doing. Trashing is also liberating. It is liberating in the same way that the best of Realism was; in fact, it is a continuation of the Realist project.

The goal of trashing, however, is not liberation into nihilist resignation. I am no nihilist. If anything, I might be more justly accused of having utopian tendencies. The point of delegitimation is to expose possibilities more truly expressing reality, possibilities of fashioning a future that might at least partially realize a substantive notion of justice instead of the abstract, rightsy, traditional, bourgeois notions of justice that generate so much of the contradictory scholar-

1. Tushnet, *Legal Scholarship: Its Causes and Cure*, 90 YALE L.J. 1205, 1220 (1981).

ship. One must start by knowing what is going on, by freeing oneself from the mystified delusions embedded in our consciousness by the liberal legal worldview. I am not defending a form of scholarship that simply offers another affirmative presentation; rather, I am advocating negative, critical activity as the only path that might lead to a liberated future.[2]

In pursuing the critical objective, one must confront three problems—the problem of contradiction, the problem of presupposition, and the problem of power. In the remaining time, I shall speak briefly about each. With respect to contradiction, I refer to the various categories that have been used to describe the bulk of legal scholarship: the "95%" referred to by Bob Gordon, the world of constitutional law scholarship depicted by Paul Brest, or the first two categories described by Mark Tushnet. There is a structure associated with this material, one fundamental to liberal legal scholarship, and one that may serve to highlight once again the problem of contradiction.

Imagine a circle. It may be bounded by a heavy dark line or by nothing more than the thinnest of dotted lines. That is the world of judicial decisionmaking, the world of legal autonomy, ranging from genuinely autonomous to hardly autonomous at all, depending on the solidity of the boundary line. Within the circle coexist the subjective and the objective. The subjective represents the decisionmakers, those who make the choices. The ultimate version of the subjective, the most extreme version of Realism, would collapse the decisionmaking process into radical subjectivity.[3] At that point, law becomes fully autonomous, flowing completely from the whims of decisionmakers, but it is no longer law.

The objective is the continuing heritage of formalism, constraining

2. On the critical enterprise, see M. HORKHEIMER, CRITICAL THEORY 10-46, 188-252 (M. O'Connell et al. trans. 1972); T. SCHROYER, THE CRITIQUE OF DOMINATION 15-43, 105-31 (1975).

For some examples in legal scholarship, see Gabel, *Reification in Legal Reasoning*, in 3 RESEARCH IN LAW & SOCIOLOGY 25 (S. Spitzer ed. 1980); Horwitz, *The Legacy of 1776 in Legal and Economic Thought*, 19 J. L. & ECON. 621 (1976); Katz, *Studies in Boundary Theory: Three Essays in Adjudication and Politics*, 28 BUFFALO L. REV. 383 (1979); Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFFALO L. REV. 205 (1979); Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978); Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 28; Tushnet, *Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 TEX. L. REV. 1307 (1979).

3. I am not implying the truth of the radically subjective model, which itself incorporates an asocial presupposition of individualism. The implication of the model is that judging is itself a social practice that, as such, must be rooted in actual relations of power. To say that such a social practice might even produce somewhat consistent results, however, in no way supports a formalist notion of the Rule of Law.

decisionmakers, yet claiming an autonomy that resides in a more or less sophisticated but nevertheless objective rule structure. Although all of us today reject the claims of a naive formalism, its heritage lives on—in the consciousness of law students, in the popular image of law, and in the continuing impulse to save the Idea of the Rule of Law, which must to some extent imagine Law as a "thing" with an objective referent structure. Even the "it's all bullshit" nihilist tacitly accepts the formalist paradigm by seeing in its demise the death of all criteria. The nihilist has a counterpart in those who reach the same dead end by rejecting positivism and continuing to apply its criteria to any other mode of comprehension.

Beyond the circle of autonomy lies the "out there." The out there takes many forms, which can be drawn from economics, philosophy, political science, or any other discipline. The ploy of appealing to the out there is to switch from seeing law as autonomous to seeing it as grounded in its social setting. Thus one can be a Realist about judicial decisionmaking, yet presuppose an ideal legislature without turning the Realist critique on the legislative process. The grounded approach can lead to explanatory models as divergent as conspiratorial Marxist instrumentalism and liberal pluralist instrumentalism. That approach seems to underestimate the importance of law and legal ideology, to reduce it to a reflexive fact of social life, to demean the human activity associated with legal consciousness, and, ultimately, to exert an insistent pressure for the emergence of some powerful explanatory "other." If one relies too heavily on the out there, eventually one will have created a sort of simple, reductive, cheap instrumentalism or functionalism that extinguishes law as an entity altogether. All of the problems that originally lead one to seek help outside the circle are replicated out there—the basic questions of subjectivity and formalism.

Given the three reference points—the subjective, the objective, and the out there—the characteristic mode of legal scholarship is to play them off against one another. If one builds a new formalism, then Paul Brest (or John Ely, in denouncing those he chooses to denounce) will demolish that formalism by appealing to the subjective, by demonstrating the arbitrariness of one's choices. If one overdoes it with the out there, one will be confronted by demands for causation and verifiability, and one must face both an eventual Realist critique of whichever discipline is chosen, and incoherence and conflict within that discipline, as Mark Tushnet noted in his paper. If one overdoes autonomy, one must reconfront the subjective-objective problem, and

face reverse demands for proof of independence and causation. Thus the process goes on. Within the world of liberal legal scholarship, every position is refutable, and the product taken as a whole is hopelessly contradictory.

Despite the problem of contradiction, the process goes on. People continue to turn out "scholarship," generating more and more refined forms that, I suggest, are most often just new attempts at formalism. As much as "we" believe that we are all realists, we are not. I am. Legal scholarship proceeds as if the Realist critique had never been made. We recognize the subjectivity of values within the liberal paradigm, yet that recognition extends only to substantive values, not "process values," which thereby have become objective. There is also the ploy of retreating into real formalism, in the guise of another discipline, such as "law and economics." What is one to say other than that it is all a contradictory mess? Should we just give up and go home, opting for a more concrete activity, such as raising goats?

Now for the next step. The task for the critical scholar beyond mere identification of contradiction is the identification of presuppositions. The characteristic mode of shoring up the world of liberal legal scholarship against the truth of contradiction is that of presupposition. I think Bob Gordon's paper did a wonderful job of describing that process in the context of resistance to history. I would like to offer some recurring examples that serve to protect and insulate the scholarly process. The basic goal is to expose the presuppositions that give meaning to legal doctrine and practice as depicted in the scholarship, to explore the implicit structure of legal discourse, and to present that structure as a worldview to be compared with concrete reality. The comparative mode leads to the exposure of dissonance, or gaps.

The most powerful presupposition, employed over and over again in the continuing quest for new formalisms, is that of shared values. Most legal scholarship rests on the presupposition that there exists a community with a harmony of interest sufficient to give rise to identifiable shared values. All one need do then is regard problems of doctrine as political-legal-ethical issues to be tested against some core of widely held or shared values reflected somewhere in the Constitution or elsewhere, and buttressed by the cherished, mutual, and evolving traditions of Our People.

The shared value approach permits the commentator to establish principles or concepts—for example, representative democracy, economic efficiency, reasonable expectations, equal concern and respect

—against which to test the validity of particular doctrines or decisions and find some of them wanting, while applauding the convergence of others with the identified underlying value. Great scholarly battles ensue. Has the norm been properly identified and described? Are newer norms doing battle with obsolete historical ones? Such an approach necessarily demands an assumption of unity, of harmony of interest, and of virtual classlessness. What happens if one simply unpresupposes the world of harmony and shared interest and replaces it with one of conflict, domination, and hierarchy? When shared values are offered by winners to rationalize the plight of perennial losers, their presuppositions offer little solace.

A related and more sophisticated presupposition, not contained within legal doctrine, but offered instead by commentators, is that of attainability of the norm. This presupposition would self-destruct if it regularly exchanged its pose of rectitude for one of apologetic fecklessness. The gap between practice and the norm is portrayed as an unfortunate consequence of an imperfect system. This approach must rely on some version of subjective autonomy or construct an "out there" sufficiently accommodating to incorporate attainability and lack of attainment. The strategy leads easily to faith in pluralism, gradualism, and optimism, along with a preoccupation with institutional arrangements. Because one must frequently rationalize the failure of institutions to reach across the gap, structures of explanation arise to explain why one institution is likely to be more responsive than another.

The attainability model incorporates the shared-value model more as a limit than as a present fact. (It may not be shared now, but it will be.) Its crucial flaw is its presupposition of linear progression toward the ideal, which must be asserted in the face of, and adapt to its ideological framework, massive amounts of contrary experience. My own study of antidiscrimination law, for example, suggests patterns of development that are cyclical and dialectical, and that ultimately rationalize, through the evolution of successive norms, the very conditions that were expected to change at the outset.[4] That ideological change should occur with little or no real change suggests that the movement within doctrine serves to sustain an illusion of

4. *See* Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978) [hereinafter cited as Freeman, *Legitimizing Racial Discrimination*]; Freeman, *School Desegregation: Promise, Contradiction, Rationalization*, in SHADES OF BROWN: NEW PERSPECTIVES ON SCHOOL DESEGREGATION (D. Bell ed. 1980); Freeman, *Race and Class: The Dilemmas of Liberal Reform* (forthcoming 90 YALE L.J. (1981)) (review of D. BELL, RACE, RACISM, AND AMERICAN LAW (2d ed. 1980)).

change, a myth of attainability, a myth that works if lived authentically by legal actors. The linear progression model must presuppose a correspondence between ideological and real change, and must also presuppose the lack of serious structural obstacles to the real change.

In concrete doctrinal areas, the presuppositions are more specific. I have written at length about antidiscrimination law, showing how its presuppositions may be captured by the notion of the "perpetrator perspective," which depicts racial discrimination as taking place in a virtually ahistorical realm where atomistic individuals "intentionally" "cause" harm to other individuals, in short, reducing the problem to one of tort.[5] The same world depends upon other presuppositions about equality of opportunity, promotion according to merit, objective criteria of ability, and the sanctity of vested rights. Other areas of doctrine await similar assaults that will expose their particular presuppositions.

The utlimate version of presupposition relates to what Bob Gordon referred to as the "Cartesian" strategy. That strategy self-consciously concedes that it is not presupposing anything about the real world, preferring instead to create a false one and talk about how nice life would be in the false one. The problem with creating the idyllic false world is that its realization has nothing to do with conditions in the existing world. Could it be that conditions in the existing one are so inconsistent with that realization that we ought to focus on transforming conditions rather than simply envisioning attractive utopias?

Yet the process goes on. There is a rich field ready for delegitimating scholarship, for exposure of presuppositions. I could stop here, having merely suggested an alternative intellectual enterprise. But there has obviously been an edge to my discussion of presupposition. The edge, I think, is that legal scholarship is not just turned out to satisfy the impulsive, whimsical desires of legal scholars. I would suggest (without, however, ascribing motives to individuals) that the production of liberal scholarship is really part of the process of fashioning a legitimating ideology that makes the world appear as if it were not the one we live in, that makes it seem legitimate, that holds out utopian promises while ensuring their nonattainment, that cuts off access to genuine possibilities of transformation. That leads into my third topic. What happens when one takes away the presuppositions?

By discarding the presuppositions of linear progression and those of either present or future sharedness, one confronts a world of legal ideology characterized by struggle, or conflict, between competing

5. *See* Freeman, *Legitimizing Racial Discrimination, supra* note 4.

worldviews. This world recognizes the possibility of permanent defeat. Because it accepts contradiction, and accepts the fundamental irreconcilability between the concrete expectations of losers and the myths that perpetuate the winners, it seems much closer to an accurate picture, free from distorting or dissonant presuppositions. The process of delegitimating scholarship eventually reveals a world that is characterized more by conflict than by harmony, and by patterns of illegitimate hierarchy. One can talk about those hierarchies in the context of race, sex, or class, but the basic problem is one of recurring illegitimate power relationships that seek to rationalize themselves through presuppositions.

Crucial to the critical enterprise is the recognition, drawn from the Marxist tradition, that knowledge and power are inseparable, that the production of knowledge is connected with and dependent on realities of power. I am not an Historical Materialist, at least not in the sense of perceiving a hidden, progressive, impersonal force that determines consciousness, structure, and human relations. Nor do I believe that a conspiratorial crew of evil capitalists manipulates every detail of social life to perpetuate their mode of domination. I do, however, subscribe eagerly to a critical method that is concerned with appearance as opposed to essence, that reduces abstract universals to concrete social settings, and that emphasizes how patterns of domination, exploitation, and oppression within those settings relate to the abstract universals used to rationalize what is and hence to promote complacency about or acceptance of those patterns and those settings. For me, the task of a scholar is thus to liberate people from their abstractions, to reduce abstractions to concrete historical settings, and, by so doing, to expose as ideology what appears to be positive fact or ethical norm.

The problem of power immediately implicates a problem of method. The critical enterprise must proceed without itself descending into the empiricist concepts of atomic fact or causality, which are themselves features of the world one is trying to unpresuppose. We must come to terms with the pervasive legacy of positivism.[6] I am frequently asked, for example, "How do you know it is a world of domination, subordination, and illegitimate hierarchy?" The easy answer is: "How do you know it is a world of shared values?" Within the positivist tradition, the best one can achieve is an empirical standoff and an endless debate about whether false consciousness exists or not.

6. *See, e.g.*, J. HABERMAS, KNOWLEDGE AND HUMAN INTERESTS (J. Shapiro trans. 1971).

The way out of the dilemma is to incorporate insights from other methods: structuralism,[7] phenomenology,[8] advanced Marxist thought,[9] radical empiricism,[10] and comparative methods.[11] One must step outside the liberal paradigm, into a realm where truth may be experiential, where knowledge resides in worldviews that are themselves situated in history, where power and ideas do not exist separately.

A final question is why law professors have anything to contribute to this enterprise. I believe that it is very easy to talk abstractly about the goals and procedures of delegitimating scholarship as I have been doing today. But one should not assume that the presuppositions will explode in the face of a generalized assault. The kind of scholarship I am talking about is very concrete, very detailed. There is much work to be done in focusing on concrete areas of law, unpacking them, and exposing their particular presuppositions. The kind of expertise gained through immersion in legal doctrine makes law professors peculiarly suited to the task of credibly deligitimating that doctrine. There is much legal scholarship to be done because there is much out there to be demolished.

7. *See, e.g.*, M. FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE (A. Smith trans. 1972); M. FOUCAULT, DISCIPLINE AND PUNISH (A. Sheridan trans. 1977).

8. *See, e.g.*, F. JAMESON, MARXISM AND FORM 206-305 (1971).

9. *See, e.g.*, M. POSTER, EXISTENTIAL MARXISM IN POSTWAR FRANCE (1975).

10. *See, e.g.*, E. P. THOMPSON, THE POVERTY OF THEORY AND OTHER ESSAYS 37-50 (1978).

11. *See, e.g.*, G. FREDERICKSON, WHITE SUPREMACY (1981); T. SKOCPOL, STATES AND SOCIAL REVOLUTIONS (1979).