

University of Miami Law Review

Volume 47 | Number 1

Article 2

9-1-1992

Subject: Object

Jeanne L. Schroeder

Follow this and additional works at: <https://repository.law.miami.edu/umlr>



Part of the [Jurisprudence Commons](#)

Recommended Citation

Jeanne L. Schroeder, *Subject: Object*, 47 U. Miami L. Rev. 1 (1992)

Available at: <https://repository.law.miami.edu/umlr/vol47/iss1/2>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

University of Miami Law Review

VOLUME 47

SEPTEMBER 1992

NUMBER 1

Subject: Object

JEANNE L. SCHROEDER*

I. INTRODUCTION	2
II. DEFINITIONS	7
A. <i>Standardized Objectivity</i>	9
B. <i>Subjectivity/Objectivity Dyads</i>	14
1. METHODOLOGICAL AND EPISTEMOLOGICAL DYADS	17
a. Community Objectivity v. Individualistic Subjectivity	17
b. Algorithmic Objectivity v. Irrational Subjectivity	25
c. Argumentative Objectivity v. Idiosyncratic Subjectivity	28
d. Reasonable Person Objectivity v. Mental State Subjectivity	31
e. Observation Objectivity v. Psychological Subjectivity	33
2. CONCLUSORY OR HONORIFIC DEFINITIONS	38
a. Factual Objectivity v. Opinion Subjectivity	39
b. Fairness Objectivity v. Biased Subjectivity	40
c. Really, Really True Objectivity v. Wishy-Washy Subjectivity	42
C. <i>External Objectivity</i>	43
D. <i>Philosophical Objectivity</i>	50
E. <i>Objectivity and Determinacy</i>	53
III. APPLICATIONS	55
A. <i>Greenawalt</i>	55
1. DEFINITIONS	56
2. LAW AS BASKETBALL	59
3. THE FIRING LINE	70
B. <i>Fish v. Fiss</i>	74
1. FISSION	74
2. FISHING	80
C. <i>Singer</i>	83
1. DEFINITIONS	84
2. SUBSTANTIVE OBJECTIVITY	86
3. PROCEDURAL OBJECTIVITY	88
a. Rational Consensus	89
b. Commensuration	90
4. COME THE REVOLUTION	93
D. <i>MacKinnon</i>	100
1. DEFINITIONS	101

* Professor of Law, Benjamin N. Cardozo School of Law, Yeshiva University. I would like to thank Arthur Jacobson and Suzanne Last Stone for their helpful comments, and to thank David Gray Carlson as a general matter.

2. THE FLIGHT FROM OBJECTIVITY	104
3. THE RETURN TO OBJECTIVITY	107
4. THE RETURN TO SUBJECTIVITY	111
5. DOMINANCE THEORY	113

I. INTRODUCTION

The object has been the subject of considerable attention recently. Theorists identifying themselves as the Conference on Critical Legal Studies have announced that law is indeterminate. This is frequently taken to mean that law has no "objective" answers to legal questions. Legal theorists of different stripes rushed to join the assault on "objectivity," bludgeoning it with post-modern theories and techniques first developed in other disciplines. Literary-minded scholars attack "objective" interpretation using hermeneutics, deconstruction, and Continental psycho-linguistic vocabulary. Philosophically-inclined scholars challenge the very possibility of "objective" truth, citing Kuhn, Rorty, and Peirce. Feminists have indicted objectivity as the "holy grail" of masculinism, masking the reality of oppression.¹ From the other side, legal scholars in the classical liberal tradition, including those who embrace right-wing positions as well as "liberals" in the center, argue for the possibility of "objective" interpretations of law and the necessity of "objective" truth.

And yet, despite the morbid obsession with the status of the object, liberating the subject has been a primary object of most schools of contemporary jurisprudence.

Liberalism—in one form or another the dominant American political and legal philosophy—is centered on the autonomous indi-

1. CATHARINE A. MACKINNON, TOWARDS A FEMINIST THEORY OF THE STATE 107 (1989). Variations of MacKinnon's critique of objectivity have been adopted by several other feminists. See, e.g., Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3 (1988); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies and Legal Education or "The Fem-Crits Go To Law School,"* 38 J. LEGAL EDUC. 61 (1988); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373 (1986); and the discussion of feminist methodologies in Katherine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829 (1990). As in all other areas, self-identified feminists lack universal agreement on this issue. Ruth Colker has argued that feminists should not confuse the critique of the oppressive use of false claims to objectivity with a demonstration that there is no objective truth. Ruth Colker, *The Female Body and the Law: On Truth and Lies*, 99 YALE L.J. 1159, 1160 (1990). Drucilla Cornell, like Richard Bernstein, argues that we should get beyond the use of the terminology of "objectivity" because it is not useful in post-modern discourse. Yet she does argue for the possibility of a concept of justice and truth external to the taste of any individual subject which may fit into some definitions of "objectivity." Drucilla Cornell, *Taking Hegel Seriously: Reflections on Beyond Objectivism and Relativism*, 7 CARDOZO L. REV. 139 (1985); see also RICHARD J. BERNSTEIN, BEYOND OBJECTIVISM AND RELATIVISM: SCIENCE, HERMENEUTICS AND PRAXIS (1983).

vidual who seeks self-assertion through positive rights and negative freedoms. The good of the community is often reduced to the aggregate instrumental good of the individual subjects comprising the society.² If many on the left profess a more sympathetic attitude towards community than mere aggregation, American leftist visions of community are usually based on the liberation and self-actualization of the individual subject.³

For example, some feminists argue that masculinist society has turned women into objects; thus, these feminists seek to transform society so that women may become subjects.⁴ Neo-Hegelians seek to reconcile the individual subject with the object of community in a way that captures the moment of unity of the individual and the community without sacrificing the moment of autonomy of the individual.⁵

2. There are, of course, many different varieties of contemporary liberalism, not all of which embrace utilitarianism. Michel Rosenfeld identifies three other general categories of contemporary American liberalism: libertarianism, contractarianism and egalitarianism. MICHEL ROSENFELD, *AFFIRMATIVE ACTION AND JUSTICE: A PHILOSOPHICAL AND CONSTITUTIONAL INQUIRY* 52-132 (1991).

3. That is not to say that all writers who identify with critical thought accept the concept of subjectivity. As I will discuss below in the text accompanying *infra* notes 219-23, Stanley Fish is well known for arguing that subjectivity is illusory. Pierre Schlag has written several articles deconstructing the concept of the subject. See, e.g., Pierre Schlag, *The Problem of the Subject*, 69 TEX. L. REV. 1627 (1991).

4. See JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* (1990).

But see, e.g., MACKINNON, *supra* note 1, at 116 (criticizing those feminists who purport to embrace subjectivity, because this assumes we already live in a world where women are free and, therefore, can now attain the subjectivity which is an attribute of masculinity. That is, subjectivity might be a goal of feminism, but not an existing attribute).

See also Luce Irigaray, *Any Theory of the "Subject" Has Always Been Appropriated by the "Masculine,"* in *SPECULUM OF THE OTHER WOMAN* 133 (Gillian C. Gill trans., 1985).

Many feminists, especially so-called "different voice" feminists, do not accept the liberal conception of the self as an autonomous individual as applicable for women (and perhaps not for men as well). Rather, they see the self in terms of characteristics which they tend to refer to as "relational" and having a morality centered on an "ethic of care." Consequently, the classical liberal and the different voice feminist might disagree as to how an individual would achieve subjectivity. See, e.g., Robin West, *Jurisprudence and Gender*, 55 U. CHI L. REV. 1, 28 (1988).

Other feminists, however, in their insistence that the goal of feminism is to enable woman to exercise the type of free choice which they recognize as enjoyed by men, seem to adopt and privilege the liberal ideal of freedom as autonomous individuality. See, e.g., Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990); Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803 (1990). In the companion piece to this article, I argue that despite MacKinnon's recognition of the necessary interrelationship of the intersubjective (or objective) as well as the subjective in her methodology, in her concentration on choice, and failure to speculate on what freedom would be after choice is achieved, she seems to reveal an essentialist liberal core at the heart of her theory. Jeanne L. Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109 (1991).

5. See, e.g., Alan Brudner, *The Ideality of Difference: Toward Objectivity in Legal*

The critical legal studies' identification of law with politics reflects a concern for individual freedom and the so-called fundamental contradiction between the desires for individuation (subjectivity) and community (objectivity).⁶

If almost all American theorists want to preserve subjectivity, why is there such a sharp dispute about objectivity?

In the dark woods of the jurisprudential literature on objectivity, one thing becomes clear: authors who wish to make a point about the subject assume they must likewise take a stand "fer" or "agin" objectivity. Unhappily, their usual procedure is to develop private definitions epiphenominally to justify their preconceived conclusions. Pursuant to this methodology, the word "objectivity" is given so many different and contradictory definitions, sometimes even by the same author in the same essay, that most discussions as to its possibility or desirability in law or philosophy are worthless.

Authors who are "agin" objectivity assign precarious definitions to it which reliably collapse at the appropriate moment in the argument. These definitions are nothing but stage props, like Klingsor's castle in *Parsifal*. Authors who are "fer" objectivity adopt soft and formless definitions which cannot break under the strongest blow. Under this strategy, objectivity merely slithers away and reconfigures itself like Jell-O. Yet this very plasticity makes objectivity too weak a foundation on which to build a jurisprudential theory.

The problem of private definitions is substantially exacerbated when authors fail to make their definitions express, when they forget their own definitions in the course of the same essay, or when they do not ascertain whether the works they criticize in fact use the same definition as they do.⁷ Furthermore, this dispute about objectivity has been masked by a tendency to associate sides with a left/right theoretical. The "left" generally, including many feminists, has assumed that

Interpretation, 11 CARDOZO L. REV. 1133 (1990). The Hegelian sees the individual subject as a legal creation, not as a presupposition, but that is not to imply that subjectivity is in some sense unreal.

6. Pierre Schlag has recently noted that it has become "conventional" for American legal scholars "to criticize any undesirable orthodoxy as shaped by an untenable objectivism." Schlag, *supra* note 3, at 1644.

7. One author has gone so far as to assert that the terms subjectivity and objectivity are so well understood that she does not need to give definitions. Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1000 (1985). I am, perhaps, being harsh. Dalton is specifically speaking about objectivity and subjectivity in the interpretation of contracts law. Arguably these terms have generally understood meanings when used in this very limited manner. Michel Rosenfeld argues, however, that the definitions of these terms even used in the limited area of contract interpretation are unworkable. Michel Rosenfeld, *Contract and Justice: The Relation Between Classical Contract Law and Social Contract Theory*, 70 IOWA L. REV. 769 (1985).

objectivity is an aspect of classical liberalism, generally, and masculinism, specifically, so that a critique of liberalism must, almost by definition, include a critique of objectivity. Theorists in the "center" or on the "right" have accepted this leftist characterization, thus they feel obliged to frame their defense of classical liberal theory in terms of a defense of objectivity against unbridled subjectivity and relativity.⁸

And yet very few, if any, contemporary liberal theorists accept the naive views of objectivity ascribed to them by the left.⁹ Very few, if any, leftists who state that they are denying objectivity are the unbridled, solipsistic subjectivists, amoral relativists, or destructive nihilists feared by liberals.¹⁰

Moreover, the leftist critique of objectivity leads to a paradox when the left simultaneously argues that the object of community can be reconciled with the emancipation of the individual subject.¹¹ Con-

8. James Boyle has previously made a similar observation. James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. PA. L. REV. 685, 703 (1985) [hereinafter Boyle, *The Politics of Reason*]. Very recently, a few scholars who might be characterized as being on the critical left have begun to recognize that the leftist critique of the 1980s concerning objectivity in the law has, to date, naively assumed that the correlative concepts of subjectivity are unproblematic. See, e.g., James Boyle, *Is Subjectivity Possible? The Post-Modern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991) [hereinafter Boyle, *Subjectivity*]; Schlag, *supra* note 3, at 1702; Steven L. Winter, *Foreword: On Building Houses*, 69 TEX. L. REV. 1595, 1597 (1991); Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive State of the Law*, 137 U. PA. L. REV. 1105, 1109 (1989) [hereinafter Winter, *Transcendental Nonsense*].

9. John Stick has made a similar criticism of Joseph Singer's rejection of rationalism and his ostensible espousal of nihilism as attacking a straw man. John Stick, *Can Nihilism Be Pragmatic?*, 100 HARV. L. REV. 332, 400 (1986). Drucilla Cornell makes a similar critique of MacKinnon's attack on liberalism. Cornell, who is not a classical liberal, shows how few, if any, contemporary liberal jurisprudential theorists espouse the concepts or neutrality which MacKinnon identifies as central to liberalism. Drucilla Cornell, *Sexual Difference, The Feminine, and Equivalency: A Critique of MacKinnon's Toward a Feminist Theory of the State*, 100 YALE L.J. 2247, 2258 (1991).

10. Indeed, many self-identified critics of objectivity or objectivism do not successfully avoid recourse to concepts which other theorists would define as objective. Robin West has argued that objectivism is far from being the norm in American legal scholarship, with the exception of certain schools of Constitutional law. Rather, the dominant attitude in all areas of legal scholarship, whether on the left, the right or the middle, is in fact relativism. Robin West, *Relativism, Objectivity, and Law*, 99 YALE L.J. 1473, 1487 (1990) (reviewing BARBARA H. SMITH, *CONTINGENCIES OF VALUE* (1988)). West also notes the tendency of those engaged in the objectivism/relativism debate to oversimplify their opponents' views. *Id.* at 1477. She specifically argues that if Smith complains that most objectivist critiques of relativist theories are based on crude caricatures of the relativist critique, Smith's critique of objectivism and defense of relativism is based in large part on a crude caricature of the objectivist position.

11. Schlag similarly criticizes the CLS movement.

With this account of the aims of critical legal thought, the symmetry disappears in favor of an asymmetrical convergence on a single goal to be attained by a single means. The single means is the intellectual and political empowerment of the individual subject. The single goal is the liberation of the individual subject from the constraint of oppressive reified structures.

versely, the liberal defense of objectivity contradicts liberalism's traditional concern for the freedom of the individual subject from oppression by the object of community.

Given the sorry state of jurisprudence on the question of subject and object, the goals of this article are modest. It is simply a plea for rigorous definition at this highest level of generality. It is a serious fault, Hegel warned, to presuppose that words have a certain determinate content.¹² Writers are using terms like "subject" and "object" as if everyone agreed with what these words mean. In fact, there is considerable disagreement about the definitions of these words, of which the writers who use these terms often seem unaware.

This Article proceeds as follows. First, I identify several possible frequently encountered definitions of "objectivity." Second, I compare these definitions to those used by a number of legal scholars who have chosen to critique or defend the concept of "objectivity in the law." I have appointed certain writers to serve, for the purposes of this article, as class representatives for their "schools:" liberalism: Kent Greenawalt and Owen Fiss; critical thought: Stanley Fish and Joseph Singer; and feminism: Catharine MacKinnon. Of course, you may disagree as to whether these authors epitomize their respective schools. My defense is that my choice of writers is "subjective," in one common usage of that term. By identifying and using consistent definitions, I will point out commonalities between ostensibly inconsistent theories, diversities among ostensibly consistent theories and, in some cases, intramural inconsistency within theories. In this article I will argue that there is no "real" disagreement among these scholars about the concept of objectivity nor argue that the debate is trivial. To the contrary, profound issues of ethics, politics and justice underlie this debate. I do believe, however, that choosing to characterize differences on this issue as a debate over a word as meaningless, or perhaps more accurately, as over-endowed with meaning, as objectivity has muddled, rather than clarified, discourse.

Specifically, two interrelated questions are presupposed and yet obscured by the debate on objectivity. First, "what constitutes a legal argument?" Second, proceeding from the first, "who may speak and be heard?" By defining the criterion for legal decision, one also delimits the domain of relevant or credible legal argument. By excluding certain forms of argument as not relevant or credible, one effectively, if inadvertently, silences those who make these arguments. That is, dissidents are permitted to speak in the sense of moving their lips or

Schlag, *supra* note 3, at 1685.

12. HEGEL, SCIENCE OF LOGIC 43, 624 (A. Miller trans., 1967).

producing sounds, but the sounds will not have the status of legal speech, i.e., the words can not be spoken in a court of law. From a legal and political standpoint, such talk is considered no more speech than the barking of dogs.¹³ It is heard, but not listened to.¹⁴

I. DEFINITIONS

Post-modern interpretative theory gives pause to those who would draft definitions. From that perspective, the task seems foolhardy, rather than audacious. Nevertheless, abstraction and categorization are necessary modes of procedure. I cannot avoid this task, even if I am predestined to failure. My only alternative would be to pretend to deny that I am doing so.

For identification purposes, I have invented names for the definitions which are intentionally novel and awkward. This will help isolate characteristics which illuminate the task at hand. This does not mean that current definitions and my alternate definitions mutually exclude each other. One could reformulate molecular definitions which include several of the atomic definitional components I will identify. Indeed, some (or perhaps most) of the atomic definitions offered may (or perhaps must) occur in molecular form.

In many cases, the lines between certain of my definitions (particularly those analyzed as subjectivity/objectivity dyads) will blur. In some cases it might be useful to analogize them to points on a continuous spectrum. On this spectrum, there is no line that uncontroversially divides subject from object, or any two definitions of objectivity,

13. The status of the barking of dogs was a central concern of medieval linguistic theorists. Although the sounds are not produced by a human, they have meaning in that humans interpret them (e.g., a bark at night can be interpreted as the presence of an intruder), and may even have interspecific meaning (e.g., dogs seem to understand barks and growls of aggression from other dogs). If we do not consider the bark of the dog to be speech, the characteristics it lacks must be a defining characteristics of speech.

Relevant to my concern is that the answer to this question may also serve to define certain human activity as non-speech. For example, to the medieval linguist, the cry of the afflicted was frequently considered to fall in the same category of "non-speech," which nevertheless, conveys some meaning, not unlike the bark of the dog and the crow of the cock. UMBERTO ECO, *THE LIMITS OF INTERPRETATION* 111-22 (1990). Eco ends his essay with the suggestion that the very examples used in these dry academic discussions implicitly reveal the reality of the Middle Ages as being filled with suffering people whose groans were defined away so as to be more bearable. The hearer was no longer a listener.

14. I am not suggesting that *all* uses of the terms subjectivity and objectivity should be avoided in all contexts. Perhaps because of the ambiguities and inferences resulting from the plethora of potential definitions, "casual" uses of these terms in context can express concepts which are otherwise difficult to express in English. As Richard Rorty has said concerning two different competing definitions of objectivity which frequently are conflated, the two uses "are largely coextensive, and for non-philosophical purposes no trouble arises from running them together." RICHARD RORTY, *PHILOSOPHY AND THE MIRROR OF NATURE* 334 (1980).

just as there is no "line" where green becomes blue. In our society it is conventional, and therefore useful, to distinguish conceptually between the colors green and blue, even though we recognize that many of us would disagree as to whether a particular shade of aqua should be characterized as green or blue (or even the notorious "grue" which haunts the pages of analytic philosophy articles).¹⁵ I have tried to identify certain points on this definitional spectrum for illustrative purposes, fully recognizing that such identification is ultimately arbitrary and culture-specific and that others might find other points more useful.

My dictionary is not intended to be exhaustive. My aspirations are limited to covering a wide-enough portion of the universe of objectivities to enable me both to illustrate my point as to the superabundance of meaning and to analyze the specific writers chosen. I have organized the definitions into four rough groups: i) standardized objectivity; ii) two series of subjectivity/objectivity dyads, in which objectivity is defined in opposition to its negative "subjectivity." The first series of these dyads defines objectivity as a methodological or epistemological category and the second uses objectivity as an honorific to express a normative judgment on a theory or method. Next comes iii) external objectivity, or that which is opposed to "relativity"; and, finally iv) the term as it is encountered in neo-Hegelian and other forms of post-modern philosophy and psycho-linguistics.

15. However, I have been told by certain of my Japanese clients that it is not customary in Japan to distinguish between what American English speakers call green and blue; they are usually considered shades of the same color. I am not a linguist and have no firsthand knowledge of whether this is "true." However, more than one native Japanese speaker has asserted this to me on more than one occasion.

Color perception may be a bad example for my point. Steven Winter has argued that some studies of color perception support the opposite conclusion. He suggests that there is remarkable cross-cultural consistency in the identification of primary colors. This may reflect the anatomy of the human eye. Winter, *Transcendental Nonsense*, *supra* note 8, at 1136-42.

Winter takes analogies to biological science to an extreme in suggesting that human anatomy may result in universal, cross-culturally recognized "true" metaphors. For example, he suggests that metaphors which associate "up" with good, and "down" with bad are universal in all languages because they reflect humankind's upright stance. Dennis Patterson has criticized Winter's speculations that understanding is based on the structures of the human mind as dabbling in science fiction. Dennis Patterson, *Law's Pragmatism: Law as Practice & Narrative*, 76 VA. L. REV. 937, 967 n.114 (1990). I must admit that, while I do not reject out-of-hand the possibility of some degree of biological determinism (or at least biological limitation), I find much of Winter's assumptions about universality to be amusing examples of the status quo viewing itself as the norm. One does not have to be Sigmund Freud (or, more appropriately, Luce Irigaray) to suggest another reason why it is common for language (which is deemed by psychoanalytic theory to be masculine) to judge erect things to be good and flaccid ones to be disappointing, and to question whether this is universal to all human persons (at least, if we consider women as belonging in this group).

A. *Standardized Objectivity*

I start with "Standardized Objectivity"—an objectivity of mundane conversation, as opposed to philosophical discourse.

By Standardized Objectivity, I mean those external criteria for decisions that by convention are considered sufficiently "clear" such that one can predict that a sufficient percentage of the community will agree that a decision represents an application of the standard. For this definition, the "objective" standard is "authoritative" only in the weak sense that the relative community agrees that it is the standard being applied. The standard need not be "authoritative" in the stronger senses of "just" or "true," or logically or even rationally derivable or justifiable. It need only be recognized by a sufficient percentage of the relevant community as to be usable as the standard to be applied to a certain category of situations. Probably the most familiar example of the use of this term is when a professor describes the multiple choice portion of an examination as the "objective" portion, and the essay portion as the "subjective" portion.¹⁶ The professor means that the objective test will be graded by *external* criteria, easily verifiable by other persons.¹⁷ The subjective portion of the test is graded by the professor's *internal* criteria, not so easily verified.

Standardized Objectivity is far from trivial. Every day, we make important decisions based on objective standards—indeed we literally bet our lives on them. Yet neither is this use non-trivial in the sense of implying concepts of external universal truths or value-free, neutral decisionmaking. Many theorists who use the standardized definition also imply transcendental definitions and see the two definitions as inextricably linked.¹⁸ Later, I will question whether this linkage is

16. The multiple choice examination is commonly given as the epitome of objectivity. "Objectivity is often used to mean contextually correct or authoritatively established, as when a multiple choice examination is described as an 'objective' test because each question has one 'correct' answer." Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 447 (1984).

17. As Thomas Nagel has stated in a recent book review "[o]bjectivity in any area of thought requires some method of confirming or disconfirming the observation or judgments of one individual by reference to those of others." Thomas Nagel, *What We Have in Mind When We Say We're Thinking*, WALL ST. J., Nov. 7, 1991, at A12. By trying to locate a common characteristic of objectivity in different fields, Nagel is implicitly noting that there can be, and are, different definitions of objectivity. The requirement for external confirmation is a characteristic of my Standardized Objectivity. As will become clear, however, the standard of external confirmation in Standardized Objectivity is often supplied by combining it with another of my definitions, such as Community Objectivity, Observation Objectivity or External Objectivity, to form a molecular objectivity.

18. See my discussion of Kent Greenawalt's theory of objectivity, *infra* text accompanying notes 146-97.

required.¹⁹

Standardized Objectivity is also frequently, but wrongly, identified with "neutrality." Neutrality is a normative judgment I will include within the general category of objectivity as an honorific, and more specifically, within the sub-category of Fairness Objectivity.²⁰ Once again, this linkage is unnecessary. You can follow a non-neutral standard. For instance, a standard could be avowedly racist, such as the standards under the Jim Crow laws of this country's past. Or a standard could be expressly related to morality, such as the community standards test of obscenity.²¹ These standards are not objective in the honorific sense. Yet some concept of neutrality *in application* is a necessary component of Standardized Objectivity. Once the standard is formulated, the very notion of applying the standard presupposes that the relevant community also agrees upon what constitutes consistency between the standard and the decision. Otherwise, it is not the standard, but some other decision process, that governs the judgment.

To illustrate the idea of objective or neutral application of a non-neutral standard, suppose one of my students were to complain that a I "subjectively" graded an "objective" multiple choice test. He probably means that I did not strictly apply the answer key used to grade other students' exams. For example the student can verify that he answered 80% of the questions correctly (as measured by the key) and received a B, whereas one of his classmates did the same and

19. For example, insofar as I will link "Standardized Objectivity" to standards recognized by a community, this use has similarities to another form of objectivity I will identify: "Community Objectivity." Many writers, however, use the standardized sense casually without accepting the implicit normative judgments of community objectivity or implying any stand on issues of determinacy, neutrality, or universality. One could argue that their use of the word "objectivity" is unfortunate because of these other common normative connotations. I would argue, on the contrary, that the casual "standardized" use of the word "objectivity" in context to express a simple concept not easily expressed in any other English phrase is much more defensible than the careless jurisprudential uses I will discuss in this article.

20. See *infra* text accompanying notes 108-11.

21. Cass Sunstein argues that the community standard test of obscenity is frequently considered "neutral," but one may alternately view it as an imposition of the majority's moral judgments against dissident individuals who have another moral stance. Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion and Surrogacy)*, 92 COLUM. L. REV. 1 (1992). In my terminology, a community standard of obscenity might be considered "objective" under my definitions of Standardized or Community Objectivity. But these forms of objectivity are not necessarily characterized by value neutrality—indeed, as I will argue, Community Objectivity is always explicitly value-laden. Other forms of objectivity, such as Observation Objectivity and External Objectivity might be said to be characterized by claims to neutrality. The use of the same adjective "objective" to describe these very different concepts confuses the analysis because one is tempted to assume that the same characteristic (in this case neutrality) which describes one form of objectivity automatically describes other, very different, forms.

received an A-. (I might, of course, defend this accusation of unfair subjectivity by reference to some other standard, such as adding a class participation grade to the final grade). This aggrieved student is not *necessarily* accusing me of incorrectly choosing choice C of question 6, when choice A was the one true answer (although he may *also* press this accusation). If the student combines both accusations in the single charge of "subjective grading" then the student combines Standardized Objectivity with another atomic definition of objectivity such as External Objectivity, Community Objectivity, Algorithmic Objectivity, or Argumentative Objectivity.

Thus, one may objectively apply non-neutral standards. When I refer to a multiple choice test as an objective test, I am not necessarily taking the naive view that there is no possible ambiguity as to the "correct" answers or that the "correct" answers correspond to some universal truth. I am merely saying that a sufficient number of the students taking the examination would agree that the answer key was, in fact, applied. Hopefully, *all* participants will agree to *all* applications, but I would probably be satisfied if a sufficiently low number of students denied that the answer key was uniformly applied. If the number of students is low enough, I can ignore these students as delusional or hallucinatory; their protests can be reduced to the barking of dogs. I note the noise, and wait for it to stop.

One might prefer the Standardized Objective to be authoritative in some stronger sense: true, or just, or established by legitimate political procedures, or logically or rationally derivable, or established by reference to some other standard external to the whim of the decision maker. But such strong concepts of authoritativeness are excluded from my definition at this point. It may seem unrealistic for a professor to give an "objective" test where the professor arbitrarily formulated model answers which were not intended to meet some other standard of truth, such as correspondence with statements pronounced in class. But this only says that an "objective" test usually has a molecular structure of objectivity—it combines the Standardized Objective with other objectivities having content.

Pure atomic Standardized Objectivity, however, is not unrealistic in other areas where the concern is not so much that any particular standard is chosen, but that *a* standard is chosen and that the standard chosen is consistently applied. An example of relatively pure Standardized Objectivity might be the coloration and configuration of traffic lights. In the United States, the convention is that red means stop, green means go, and amber signals the ambivalent transition between green and red. The choice of the three colors perhaps was

largely random. I doubt if many people would have cared if different colors had been chosen.²² Once these colors are chosen, though, I suspect that most people *do* care that the same color standard would be applied on all street corners against substantially all drivers.

This is hardly a "trivial" example when the potential effect is taken into account. One risks life and limb every time one passes through an intersection, trusting that other members of the community will recognize and apply the standard. Most people in our society would probably agree that if I ran a red light, in most cases I "objectively" violated the standard.²³

In summary, Standardized Objectivity means that an external standard is considered "authoritative" in the weak sense that it is actually applied as the standard in a specific case. The standard could also, but need not, be "authoritative" in the stronger sense that the standard itself is considered legitimate by reference to some other external standard—whether external "truth" or a standard established by a legitimate political procedure, for example.²⁴ The multiple choice test could be weakly Standardized Objective—idiosyncratic to

22. I say perhaps largely random because one could conceive of certain standards which might seem appropriate in choosing colors on purely practical grounds. For example, one would probably want the colors to be sufficiently separated on the spectrum so that a very large percentage of the population could distinguish them: my earlier example suggests to me that aqua blue for "stop" and teal green for "go" might be a poor choice, whereas red, amber and green approximately correspond to the three primary colors of light. One would also want the colors chosen to be within the humanly visible spectrum: infrared for "stop" and radio waves for "go" also seems a poor choice.

I would also note that on these criteria the red/green choice is questionable given that red/green color blindness is not uncommon among biologically male humans.

Furthermore, there might also have been technological reasons for the choice. Perhaps at the time stop lights were first proposed, red, green and amber glass were easier to make than other colors.

23. This is not the same thing as saying this result is determinate. Any of us can easily imagine hypothetical fact situations in which arguments could be formulated so that this result would not be appropriate. For example: the stoplight was broken and stuck on red; the driver was transporting a pregnant passenger in labor on the way to the hospital; the car's brakes failed; the driver had to go through the light to make way for an oncoming fire truck or to avoid being hit by another driver; the incident occurred on a deserted street corner in the middle of the night with no witnesses other than the driver herself.

24. Bennett identifies the concept of interpretation (with specific references to interpretation of the United States Constitution) with what he calls "strong" and "weak" senses of [Standardized] Objectivity. He describes the "weaker" sense of objectivity as "the use of sources for decisionmaking external to the decider's own (or 'subjective') standards of values, without necessarily insisting that those external sources be authoritative." Bennett, *supra* note 16, at 447. Insofar as Bennett's "weak" sense requires a standard external to the interpreting subject—such as convention of intersubjective agreement with at least one other subject—and insofar as Bennett's "strong" sense relates to political legitimacy (authoritativeness), no bright line exists between his weak and strong concepts. The more legitimate the standard (or the political procedure creating the standard), the "stronger" the sense of objectivity; the less legitimate and more arbitrary, the "weaker" the sense.

the grading professor.²⁵

Another example of this bifurcation is Thomas Kuhn's concept of scientific paradigms. Kuhn, following Popper, argues that objectivity should be seen in terms of standards adopted within a community (Community Objectivity). That is, objectivity is an appropriate concept within a paradigm of normal science. Kuhn questions, however, whether there could be any external standard of objective truth so that we could "objectively" choose between two different paradigms.²⁶

Of course people might disagree as to what constitutes a sufficient consensus of the community or what constitutes a sufficient degree of predictability for a standard to be objective.²⁷ Indeed the "standardized" definition may better be described as a comparative, rather than an absolute, standard. One tends to use this term as shorthand to indicate a standard that is comparatively more conventionally accepted and predictably applied than some often unstated alternative. The same standard, labelled objective in one context, might be considered relatively non-objective in another.²⁸ Decisions as to whether standards seem sufficiently more predictable than the norm as to warrant the label "objective" are usually made on an ad hoc or "practical" basis, rather than any absolute or acontextual basis.²⁹

25. Robin West has made a similar point on the various uses of objectivism. She points out that logical objectivism and political objectivism are very different concepts that do not necessarily presuppose each other. See, e.g., West, *supra* note 10, at 1476-77. For example, one may believe that there is such a thing as ultimate truth, and yet believe that all attempts at formulating objective standards within a political system inevitably degenerate into the dominance/oppression cycle of false universals. Or one may be a relativist who does not believe in any ultimate cross-cultural truth, and yet believe that there may be "objective" standards of the good within a society. West specifically critiques Barbara Herrnstein Smith, whose economic efficiency theory falls within the latter category of universal relativism. West argues that Smith incorrectly assumes that adopting a theory of logical objectivism necessarily requires the adoption of political objectivism so that a critique of political objectivism is also necessarily a critique of logical objectivism.

26. THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* (1978).

27. For example, in parts of New York City, one could argue whether or not the spotlight standard is still objective even in my trivial sense. It is a familiar "witticism" among New Yorkers (who pride themselves on studied cynicism) that it has become conventional to consider the beginning and end of the period in which a traffic light is red as merely a suggestion that the driver consider the prudence of stopping. Because I do not recall ever seeing a traffic cop pull over any of the scores of vehicles I have seen run red lights in New York, it is not clear to me whether the police department even recognizes the standard consistently enough for the test to be considered standardized objective in even the weakest and most trivial manner.

28. See David G. Carlson, *Contradiction and Critical Legal Studies*, 10 CARDOZO L. REV. 1833, 1838 (1989) (attacking the "standard-in-itself").

29. Umberto Eco gives another example of what I am calling a standardized objective standard. In his discussion of the meaning of "forgeries," "fakes," and proof of

B. *Subjectivity/Objectivity Dyads*

The following is a series of definitions in which objectivity is defined by what it negates. These definitions are necessarily bound to their corresponding definitions of subjectivity. The first group seeks to identify valid methodology or epistemology. The second group uses "objectivity" as a complement. While the definitions found in the first group arguably serve useful analytical functions, the definitions in the second group tend to be colloquially convenient but analytically sterile.

One might initially object that all definitions of "objectivity" are negatives of "subjectivity." In fact, this is not the case. There are also definitions in which the opposite of objectivity is not subjectivity, but relativity.³⁰ Although one might recombine my definitional atoms into molecular definitions in which objectivity is the negative of both subjectivity and relativity, this is not required. In these cases it might be more accurate to say that subjectivity and relativity are separate negative moments of objectivity. Each reacts to a different property of objectivity.

One could also object that Standardized Objectivity was nothing but half of a dyad—the negation of Non-standardized Subjectivity. To some extent this is correct. I decided not to dualize Standardized Objectivity because I was emphasizing a distinction based on degree. Again, it is more common to recognize objectivity and subjectivity in the "standardized" sense as comparatives similar to the way one uses

"authenticity," he states that, today, using "recognized physical or chemical techniques for determining the age and the nature of a medium (parchment, paper, linen, wood, and so on)" would be "considered fairly 'objective'" tests to determine whether a purported autographic writing is in fact authentic. Eco, *supra* note 13, at 193. His use of the term "objective" does not imply that the criteria is totally determinative or "right" in some sort of acultural way. Eco very carefully refers to the fact that the tests are "recognized" "[n]owadays." He points out that in different cultures different criteria would be used, including some that we would consider bizarre (as an example, Eco notes the evidentiary rules of medieval Europe when "fame" and notoriety were not merely considered relevant evidence, but were considered so controlling that physical evidence would not be consulted). *Id.* at 187. Consequently, what we moderns might call an outrageous forgery, such as the Donation of Constantine, medievals might have considered an appropriate copy of a lost original which must have once existed. Note that, insofar as Eco is discussing standards adopted by different communities, the standards might also be deemed Community Objectivity within my definitional schema. Note also his comparative use of the term. Eco asserts that the criteria are "fairly" objective and the context indicates that these criteria are only being characterized as "objective" as compared to other criteria he discusses.

30. To make this distinction clear, some writers adopt a variation on the term objectivity by referring to objectivism versus relativism. For example, Richard Bernstein has chosen to critique the usual assumption of philosophers (which he terms "Cartesian anxiety") that objectivism and relativism are mutually exclusive, either/or categories that one must choose between. BERNSTEIN, *supra* note 1, at 2-3, 30; see also Cornell, *supra* note 1, at 158-60.

"taller" and "shorter." As such, objective and subjective are not negatives of each other, but are self-serving qualities related to each other according to some implicit quantitative criterion.

In contrast, the definitions identified in this section tend to be expressed as rigid oppositions rather than comparatives—something is either objective or subjective. These oppositions, though, are not immune from the gradualness of Standardized Objectivity, but such an introduction of quantitative gradualness tends to result from its use in a molecular definition—a combination of a rigid opposition with the conventional qualities of Standardized Objectivity.

Writers who adopt a subjectivity/objectivity opposition tend to privilege one pole over the other. Although this point is perhaps obvious in those definitions which use objectivity as an honorific, it is also true when objectivity is used to describe a methodology. I would even go so far as to suggest that one primary reason writers identify subjectivity/objectivity oppositions is to create an analytical tool by which ideas can be privileged over their opponents and, therefore, to determine what forms of speech and what speakers will be incorporated into legal discourse.

Isolating the negativity in oppositional definitions avoids a common logical error that occurs when definitions are conflated. As I have previously noted, most writers use molecular definitions of objectivity/subjectivity. For example, a writer might adopt *AB* subjectivity, a combination of *A* subjectivity and *B* subjectivity. The corresponding negative definitions of objectivity would be non-*A* and non-*B* objectivity, respectively. The writer argues that *A* subjectivity is unacceptable and then concludes that this necessarily constitutes an argument in favor of non-*B* objectivity.³¹ This does not follow *unless* the writer establishes a link between non-*A* and non-*B* objectivity (and/or between *A* and *B* subjectivity), such that an argument in favor of non-*A* objectivity also constitutes an argument in favor of non-*B* objectivity. Or, to put it another way, an argument against *A* subjectivity must also constitute an argument against *B* subjectivity, which, in turn, supports a finding of non-*B* objectivity. Frequently, the writer does not attempt to establish this link. I suspect that this is because the writer has unconsciously conflated the different elements in their definition.³² Alternatively, the writer might have surrendered

31. See *infra* note 32.

32. The tendency to make this error previously has been pointed out by Thomas Kuhn in defense of the "subjective" aspect of his theory of scientific revolutions. THOMAS S. KUHN, *ESSENTIAL TENSION* 336 (1977). Kuhn accuses some of his critics of conflating two definitions of subjectivity. One is the sense that a position is judgmental, based on personal taste, emotion, fantasy, or irrelevant considerations (i.e., similar to what I will refer to as

to what Wesley Hohfeld referred to as the "principle of linguistic contamination," the unwarranted conclusion that two concepts are necessarily connected merely from the fact that the same word is used for both.³³

Another reason for grouping definitions of objectivity into dyads is to emphasize that, insofar as these concepts are defined negatively, the dyads are mutually constituted. Consequently, although one may privilege or deprivilege a pole of the dyad, any argument against the possibility or potentiality of the deprivileged pole also inevitably threatens the privileged pole. In other words, if subjectivity and objectivity mutually constitute each other and also simply negate each other, the moment of privilege must be supplied from an external source; this external origin of privilege turns back to destabilize the privileged pole as well as the unprivileged pole.

Irrational or Idiosyncratic Subjectivity). The other is the negative of objective truth (what I will call External Objectivity). In other words, these critics are said to conflate subjectivity with relativity. Because the first definition of subjectivity is scientifically unacceptable, they assume that relativity is also unacceptable. Therefore, these critics believe they are forced to accept External Objectivity. Kuhn notes that External Objectivity is not the negative of Idiosyncratic Subjectivity; an argument against Idiosyncratic Subjectivity does not establish the possibility of External Objectivity.

Drucilla Cornell makes a similar critique of Stanley Fish's rejection of objectivity in interpretation. According to Cornell, Fish starts by assuming, without argument, that the only definition of objectivity is what I would call an Algorithmic/External Objectivity molecule. He tries to demonstrate that the concept of rationality implicit in Algorithmic Objectivity is unworkable. He assumes that by doing this he also demonstrates the incoherence of External and, what I will call, Philosophical Objectivity. This leads, in turn, to a concept of unrestricted relativity, or the solipsism of a molecule of Idiosyncratic/Individual and Philosophical Subjectivity. As Cornell explains, Fish does not end his argument with the rejection of External Objectivity. Fish moves from the post-modern insight that our selves are social constructs to what Cornell condemns as "the myth of the framework" which totally constrains subjectivity. That is, our sense of unrestrained Philosophical Subjectivity is illusory. Cornell, *supra* note 1, at 140-41, 152; see also Drucilla L. Cornell, *Institutionalization of Meaning, Recollective Imagination and the Potential for Transformative Legal Interpretation*, 136 U. PA. L. REV. 1135, 1139 (1988). Once again, this argument depends on a synchronization of the various atoms in his molecular definition which, Cornell implicitly suggests, is not forthcoming in Fish's work. The myth of the framework told by Fish serves to function as a post-modern version of External Objectivity.

John Stick critiques Joseph Singer on this ground as part of his broader critique of Singer's private definition of rationality. Unlike Fish, Singer takes subjectivity to almost a libertarian extreme of autonomy. Stick, *supra* note 9, at 377. I make a similar, but more detailed, critique of Singer's use of objectivity. See *infra* text accompanying notes 228-94.

33. Hohfeld notes the "psychological and linguistic principle" that "the identity of terms seems irresistibly to suggest an identity between the ideas which are expressed by them." WESLEY N. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* 70 (Walter W. Cook trans., 1919).

1. METHODOLOGICAL AND EPISTEMOLOGICAL DYADS

a. Community Objectivity v. Individualistic Subjectivity

The first dyadic definition I offer identifies "subjectivity" with the knowledge or beliefs attributable to a unique *individual subject*. "Objectivity," therefore, is simply the negative of this. This negativity, though, has a communitarian spin. Modern and post-modern thought have rendered problematic the proposition that we can have reliable knowledge of "truth" outside of human convention. To navigate between the Scylla of individualistic solipsism and the Charybdis of false universals, objectivity is defined as the Odysseus of intersubjective agreement. The intersubjective agreement is not merely concerned with the *content* of any particular theory, but is concerned with the *methodology* and the criteria for acceptance of theories in general.³⁴ Some varieties of Community Objectivity theory are sometimes called, usually disparagingly, "conventionalism."³⁵

This community definition of objectivity has been widely adopted in the philosophy of science. In *The Logic of Scientific Discovery*, Karl Popper defined objectivity as that which is intersubjectively testable pursuant to criteria conventionally adopted by an identifiable community of subjects.³⁶ Although Kuhn rarely uses the term

34. I have argued elsewhere that the intersubjective agreement also has similarities with the concept of "feminist consciousness" reached through "consciousness raising," as promoted by MacKinnon, among others, despite the fact that she claims to reject objectivism. Schroeder, *supra* note 4, at 157-79.

35. See, e.g., KARL POPPER, *THE LOGIC OF SCIENTIFIC DISCOVERY* 78-81 (1968); Imre Lakatos, *Falsification and the Methodologies of Scientific Research Programmes*, in *CRITICISM AND THE GROWTH OF KNOWLEDGE* (I. Lakatos & A. Musgrave eds., 1987) 91, 105-06; Schlag, *supra* note 3, at 1668 (where Schlag refers to Owen Fiss, who adopts a standard of Community Objectivity, as a "conventionalist"). See generally David Millon, *Objectivity and Democracy*, 67 N.Y.U. L. REV. 1 (1992).

36. POPPER, *supra* note 35, at 31. Popper was not the first philosopher of science to adopt an intersubjective definition of objectivity. Charles Sanders Peirce, for example, also adopted a concept of objective reality which was limited to that which survives repetitive intersubjective testing. Peirce's concept of objectivity as community agreement has been described as follows: "The thought or opinion that defines reality must . . . belong to a *community* of knowers, and this community must be structured and disciplined in accordance with super-individual principles." John E. Smith, *Community and Reality*, in *PERSPECTIVES ON PEIRCE* 92, 103 (Richard J. Bernstein ed., 1965). In connection with Peirce's concept of reality, Bernstein notes Peirce's ". . . emphasis on the social or communicative nature of men [which] reflects Peirce's anti-subjectivistic and anti-individualistic bias." Richard J. Bernstein, *Action, Conduct, and Self-Control*, in *PERSPECTIVES ON PEIRCE* 82-83 (Richard J. Bernstein ed., 1965).

Unlike Kuhn and his intellectual progeny who developed a theory of paradigms from this insight, Peirce would not have included in his definition of objective reality *any* conclusion reached by *any* empirical community of scientists. Rather, he believed that, although any specific subject of community might be in error, in the long run every one would eventually come to the same conclusion. The necessary intersubjective agreement must be universal. See

"objectivity," the community definition is implicit is his theory of paradigms, normal science, and scientific revolutions.³⁷ The very concept of scientific paradigms presupposes that "scientific knowledge" does not exist outside of the theories produced by the methodology adopted by the members of the scientific community. Paradigms³⁸ can be thought of as agreements within a community as to the standards or the methodology of objective scientific knowledge. Consequently, Jürgen Habermas has characterized the philosophy of science from the time of Charles Sanders Peirce's writings on as concentrating on "the method of arriving at uncompelled and permanent consensus," as opposed to traditional categories of being or knowing.³⁹ In post-modern science, methodology replaces ontology and epistemology.⁴⁰

JÜRGEN HABERMAS, KNOWLEDGE AND HUMAN INTERESTS 91-108 (J. Shapiro trans., 1968); Schroeder, *supra* note 4, at 163 n.149. Cornell argues that, despite Peirce's theory of eventual unanimous agreement, his concept of "secondness" will prevent this ever leading to "closure" in the sense of Hegelian totality. Instead, "thirdness" will forever lead us toward the future. See, e.g., Cornell, *supra* note 32, at 1196-286 (in which Cornell relies heavily on Peirce's concept of ethics in reason yet rejects the postulation of eventual closure).

37. In his most famous work, *The Structure of Scientific Revolutions*, *supra* note 26, Kuhn generally avoids the term "objectivity," although he does discuss the various meanings of subjectivity in later works.

38. In his later writings, Kuhn agrees with his critics that his uses of this term are circular, if not inconsistent. I am concentrating only on one aspect of the way he uses the term.

39. HABERMAS, *supra* note 36, at 91. Rorty and Feyerabend critique the concept of scientific methodology as epistemology in practice. In Rorty's critique, traditional Western thought is based on an attempt to find the correct methodology to mirror an external truth about the material world which exists "out there." RICHARD RORTY, CONSEQUENCES OF PRAGMATISM 195 (1986). "The idea that in science or philosophy we can substitute 'method' for deliberation between alternate results of speculation is just wishful thinking." *Id.* at 164. Rorty, it appears, sees traditional thought as confusing methodology and epistemology. Rorty, who relies heavily on Kuhn speaks about *pre-Kuhnian* scientific theory. His work, therefore, does not necessarily validly critique contemporary scientific theories. Arguably, his work does not even validly critique many of the pre-Kuhnian theories such as those of Peirce and Popper. However, most scientists may think that they are mirroring nature. My friend, Gabriel Motznik, a philosopher at Hebrew University in Tel Aviv and the son of a mathematician, has told me that he believes that most natural scientists probably accept an epistemology of mirroring nature, and most mathematicians are Platonic realists (who believe that they are reflecting an ideal reality which is beyond the merely physical and contingent). Consequently, Rorty has been heavily influenced by Kuhn, whose concept of paradigms emphasizes the methodology of science as itself being science, rather than as a means of approaching reality.

Feyerabend similarly lambastes attempts to identify correct scientific methodology. This does not mean that different methods are not relatively superior or inferior to other methods for specific tasks. The method of inquiry is, however, developed and modified simultaneously with, and as part of, the very act of developing and testing the theory to which the method is applied. PAUL FEYERABEND, SCIENCE IN A FREE SOCIETY 13-16, 98-99, 187-91 (1982). To put it another way, insofar as Feyerabend sees method and result as inextricably linked, to assume prior to its application that one has identified the correct scientific methodology to solve a problem is to presuppose the solution.

40. Popper also tries to distinguish scientific methodology from traditional epistemology

It is not necessary to bestow such honorifics as "logical" or "rational" upon Community Objectivity. Decisions made by augury⁴¹ would be Community Objective in a community which believed in sorcery, although they may not be logical or "rational" in the transcendental sense. Moreover, Community Objectivity need not

which concentrates the theory of knowledge of individual subjects. KARL POPPER, *OBJECTIVE KNOWLEDGE: AN EVOLUTIONARY APPROACH* 111 (1986). Popper's theory of worlds 1, 2, and 3 is an interesting variation on Community Objectivity. Popper's world 1 is the external physical world. World 2 is the world of psychological states. This is the subjective world of what we experience as thinking, feeling, and believing; individual knowledge in the sense of the psychological sense of certainty. World 3 is the world of the content of our thoughts: this is the objective world of our ideas, the collective knowledge of humanity incorporated in writings, conversations, etc. *Id.* at 106-08, 152-65. (Sometimes Popper uses the terminology first, second, and third worlds. Usually he uses the 1, 2, and 3 terminology to avoid potential political implications.) World 3, the social world, and world 1, the material world, cannot directly interact, requiring the mediation of world 2, our individual psychology. *Id.* at 155. Although world 3 is a human creation, it has an autonomous existence in that the ideas created by any one individual can survive independently of that individual. In addition, our creations have characteristics and are able to grow in ways which we individually, and collectively, can not predict or totally control. Examples include number systems, which are human inventions. Nevertheless, we are always discovering new and unexpected things about numbers. *Id.* at 115-22, 158-61. Popper's theory of the logic of scientific discovery is a theory of the development of the Community Objective world of world 3 and, therefore, of Community Objective methods shared by humanity. Popper argues that a study of the subjective world of world 2 is irrelevant to this enterprise, a position I do not share. *Id.* at 111-12, 163-64; see Schroeder, *supra* note 4, at 162.

I have included Popper's world 3 social objectivity within the definition of Community Objectivity both because it develops from his earlier concept of Community Objectivity and because it retains the basic concept that a community creates objectivity. Popper's definition differs from many accounts of Community Objectivity in that Popper emphasizes the autonomy of the community standard once that standard is created, and because, unlike Kuhn, Popper insists on the necessity of there being only one correct methodology. Rather than seeing the history of science as a series of periodic revolutions in paradigms, he sees one paradigm consisting of an unending and constant string of tiny mini-revolutions as individual scientific theories are tested and rejected through a methodology which is constantly being improved. Consequently, Popper's concept of Community Objectivity, like certain other Community Objectivist theories I will discuss below, might be described as functioning as what I will call External Objectivity. Arguably, Popper can be justly accused by Rorty of treating methodology as epistemology.

41. Feyerabend, in his attack on the pretense of scientific claims to correct method and objectivity, refers to a study of Zande sorcery. He argues that sorcery is justifiable under its own criteria of acceptability. Moreover, standard scientific critiques are incompetent to persuade a Zande because they are based on criteria which would be irrelevant to someone who accepted the tenets of sorcery.

Feyerabend does not pretend, however, that there may not be good reasons for one to accept modern medicine over sorcery; e.g., the former may be more efficient than the latter in curing people. PAUL FEYERABEND, *FAREWELL TO REASON* 6-8 (1987). Feyerabend's primary concerns are to reveal the arrogance of the scientific community and its claims to have identified one, and only one, appropriate methodology. Not only does Feyerabend believe that traditions other than science have their own validity, but that "science" does not have any one method. *Id.*; see also FEYERABEND, *supra* note 39, at 9-10, 13-16, 27-30, 98-100, 106, 189-93, 205-07.

be "value free." Indeed, most thoughtful proponents of Community Objectivity emphasize how thoroughly value-laden Community Objective standards are.⁴² Community Objectivity cannot purport to be aperspectival or universal,⁴³ because it starts from the presupposition that a specific historical community adopts the standard.⁴⁴ The only way in which Community Objective methods purport to be "value free" or aperspectival is in the sense that they are not dependent on the idiosyncratically held opinions or the viewpoint of any *one* member of the community but are chosen by, and shared within, the community. This is a subtle, but very important, point which is frequently forgotten by many proponents of Community Objectivity.⁴⁵

42. See, e.g., POPPER, *supra* note 35, at 31.

43. A noted exception to this generality is Peirce's Community Objectivity which, he posits, will theoretically eventually become universal. See *supra* note 36.

44. Thus, Popper believes that every idea consequently contains an "irrational element" or a "creative intuition." POPPER, *supra* note 35, at 32. Popper is using a very narrow definition of rationality as strict deductive logic and falsification, which he believes is the definition that is or should be adopted by the scientific community. However, as I discuss below, this definition is rarely used by self-identified rationalists. Rather, this narrow definition of rationality is frequently used by self-identified irrationalist as a straw man to attack. Consequently, unlike paradigmists such as Kuhn, Popper comes to the surprising conclusion that although it is inevitable that subjective (personal, individual, value laden, intuitive, psychological, etc.) considerations are a necessary part of all scientific investigation (for example, the decision as to what questions to explore in what order is inherently value laden), the "correct" scientific method of falsification renders the source of our theories irrelevant! *Id.* at 31. "Objective" method renders science "subjectless" in the sense that the resulting theory is not individual to a particular subject but is intersubjective within the community. *Id.* at 57.

Kuhn, a rationalist on a different standard of rationality, agrees with objectivity's value-laden aspect, but disagrees with Popper that this aspect can, or should be, eliminated by scientific method. According to Drucilla Cornell, "When Kuhn suggests that, without neutral procedural rules, the standards developed within the scientific community achieve a status as values, he is not suggesting that these standards are irrational. He is suggesting that community choice contains not only a descriptive moment, but a normative moment that cannot be ignored." Cornell, *supra* note 1, at 159.

45. One of the most insightful aspects of feminist legal theory has been to remind the legal community not only are the standards of behavior adopted by our community not "value neutral", but they are based on those contemporary, American, middle class, white, Protestant values which our society identifies as masculine, which the law cannot, and should not, separate from ethics. MacKinnon is one of the most eloquent, but hardly the only, proponents of this view. Of course, feminists are not the only legalists who have made this argument. See, for example, feminist fellow traveler Sunstein, *supra* note 21, at 1-3.

Ernest Nagel makes a point concerning theories of subjective scientific methodologies, that some purported rejections of "objectivity" arguably degenerate into semantics. Some theorists reject the concept of the possibility of any universal concept of objectivity and instead adopt a "local" concept of truth limited to a specific community—what Nagel calls "relational objectivity." Yet if one accepts this concept of truth at a local level, then one is only trying to avoid the problem of truth by shifting it to a different linguistic level, because within the local community—the only relevant universe—local Community Objectivity serves the same *function* as universal truth. The possibility that other communities not being discussed adopt other definitions of Community Objectivity dissolves into an uninteresting theoretical

One of the perplexing aspects of Community Objectivity/Individualistic Subjectivity dyads is that the judgment as to which pole to privilege, or whether either pole is possible, is inevitably tied to a theory of community and the self. If the subject is perceived as an autonomous individual, so that moral judgments lack universality, on what grounds does the aggregate thought of the community of subjects, as congealed in law, have normative legitimacy? Does Community Objectivity in liberalism inevitably reduce to positivism? If not, and the decision of the community is somehow true or just (for example, reflective of natural law), then why can it not be intuited by an individual standing alone? If the individual can do this, then moral thought no longer is individual but universal.⁴⁶ On the other hand, if one conceives of the community itself as being the basic categorical unit, so that the self (the subject) is a social construct, how can there ever be Individualistic Subjectivity to serve as the defining other of Community Objectivity? If one is a dissident who rejects the particular standards of her community, yet adopts the post-modern theory that the self is a social construct, then how can her own "subjective" critique survive her critique of the community which formed her, let alone have any superior normative claim over the status quo?⁴⁷

Many who adopt a Community Objectivity definition, such as Popper, consider Community Objectivity as the privileged pole of the objectivity/subjectivity dyad. Subjectivity is associated with negative aspects of individuality, such as idiosyncrasy, solipsism, or imaginary. I will call this corresponding definition Individualistic Subjec-

possibility; and the "false universals" problem which these critics are trying to avoid (i.e. the imperialistic imposition of local norms on other persons in the name of objectivity) remains at the local level (i.e., it is just as oppressive for "the community" to impose its values of truth on any individual.). ERNEST NAGEL, *THE STRUCTURES OF SCIENCE* 501-02 (1979).

A variation on the Nagelian critique has been taken up by West in her critique on Smith's purported relativism, which allows for a concept of local right and wrong within a community even as Smith condemns the concept of universal right and wrong. West points out the possible inherent conservatism of such an approach in which, in my terminology, Community Objectivity functions as External Objectivity despite protests to the contrary. West, *supra* note 10, at 1491-99.

Of course, both Nagel and West make this point as part of a defense of the concept of a more universal non-relativistic Externally Objective truth. However, they ignore the fact that this point does not go to the heart of the relativists attack on External Objectivity, but merely to the failure of relativists to find a way to implement fully the relativist insight. Consequently, I make the point not to defend External Objectivity against relatively, but to argue that the terms are not very useful ways of dealing with a very difficult philosophical problem.

46. This, of course, is natural law theory. See, e.g., Arthur J. Jacobson, *Autopoietic Law: The New Science of Niklas Luhmann*, 87 MICH. L. REV. 1647, 1655-56 (1989).

47. This is the fundamental epistemological question of the feminist theory of consciousness raising. Some feminists, notably MacKinnon, believe they have solved this problem.

tivity. For example, Popper freely admits that we all experience the subjective feeling of certainty that causes us to believe things which cannot be "objectively" demonstrated, and we have no choice but to act on such feelings. He argues, though, that there is no reason for anyone else to consider our subjective feelings as evidence of the truth of the things we believe.⁴⁸ The privileging of Community Objectivity often seems related to the writer's identification with, and inclusion in, the community that sets the relevant standards, such as Popper's community of dispassionate and benevolent truth seeking scientists,⁴⁹ or Owen Fiss' interpretative community of tweedy gentlemen sipping sherry in the faculty lounge while having important conversations.⁵⁰

It is possible, however, to adopt the community definition of objectivity but make Individualistic Subjectivity the privileged pole. This approach attributes to Individualistic Subjectivity the positive virtues of individuality, emphasizes the necessity for individualistic moral choice, and associates Community Objectivity with oppression of an unjust society. Such an approach is attractive when the relevant community is, for example, Nazi Germany.⁵¹ Even communities such as Popper and Fiss' may not seem very attractive to women, minorities, and others who are excluded from these communities on the express grounds that these groups objectively do not meet Popper and Fiss' standards.⁵²

Significantly, those feminists who privilege community and seek

48. POPPER, *supra* note 35, at 46.

49. Kuhn emphasizes that the communities of scientists that establish what he identifies as paradigms are very small and elitist groups of specialists. Thomas Kuhn, *Reflections on My Critics*, in GROWTH OF KNOWLEDGE, *supra* note 35, at 231, 253-54. The fact that most of the public is excluded from the elitist community of "science" underlies much of Feyerabend's objection to claims of the superiority of scientific method in a supposedly democratic society. FEYERABEND, *supra* note 39, at 86-90, 96-100.

50. This is the same chummy and civil group, of course, which engages in delightfully edifying conversational philosophy with Richard Rorty.

51. Michel Rosenfeld warns, in critiquing Owen Fiss' concept of the interpretative legal community, that "the claim that an adequate standard of legal interpretation can be fashioned by reference to the intersubjective perspective of an 'interpretative community,' [i.e., what I am calling Community Objectivity] can only prevail through the suppression of difference and the subordination of the dissenting other." Michel Rosenfeld, *Deconstruction and Legal Interpretation: Conflict, Indeterminacy and the Temptations of the New Legal Formalism*, 11 CARDOZO L. REV. 1211, 1213 (1990). Cornell makes the same point that an appeal to community as a standard can not serve as a defense to a critique aimed at the legitimacy, or even existence, of a community. Cornell, *supra* note 32, at 1139.

Joseph Singer presents the possibility that any specific community might adopt morally reprehensible positions, such as slavery, as an argument for the incoherence of what I call Community Objectivity.

52. An example is Harvard Law School's continuing inability to identify an African American woman law professor who meets their "high standards." Fox Butterfield, *Harvard Law Professor Quits Until Black Woman Is Named*, N.Y. TIMES, April 24, 1990, at A1; Fox

to create collective knowledge through "feminist methods" such as consciousness-raising use concepts that come very close to Community Objectivity even while they claim to deny or deprivilege objectivity.⁵³ For example, Ann Scales contrasts feminist ways of knowing with masculinist ways that she associates with objectivity (which is described as "abstract," "universal" and "impersonal"). She calls for "concrete," "interpersonal," and "interrelational" concepts of knowledge. These concepts are remarkably similar to the concept of Community Objectivity accepted by many masculinist theorists. Later in this article, I will argue that Joseph Singer's deprivileging of Community Objectivity ultimately will lead him to privilege a solipsistic form of Idiosyncratic Subjectivity that is potentially inconsistent with his leftist political position.⁵⁴

It is possible to take a more balanced view on Community Objectivity—neither accepting nor rejecting it for all purposes, but recognizing where and when it is useful. As I have said, Kuhn and Rorty limit objectivity to the normal science/discourse within a paradigm. Thus, there cannot be any objective way of choosing between paradigms.⁵⁵ At first blush, one could interpret Kuhn and Rorty as disparaging objectivity, and, therefore, exclusively privileging some form of subjectivity.⁵⁶ After a second look, however, one realizes that they argue that the concept of objectivity is absolutely acceptable and useful (if not inevitable) within a discourse. Kuhn and Rorty do not,

Butterfield, *Harvard Law School Torn by Race Issue*, N.Y. TIMES, April 26, 1990, at A20; Fox Butterfield, *At Rally, Jackson Assails Harvard Law School*, N.Y. TIMES, May 10, 1990, at A14.

53. Schroeder, *supra* note 4, at 117-18, 120, 172-79. Consequently, I believe that many feminist legalist critiques of objectivity do not serve as critiques of Community Objectivity but in many cases are "false universals" critiques of specific claims to External Objectivity, or defenses of Psychological and Individualistic Subjective methodologies. Unfortunately, as I will argue in my discussion of MacKinnon's work, the failure of many feminists accurately to identify how liberal legalists *in fact* purport to define objectivity substantially weakens the force of their important arguments.

54. See *infra* notes 228-94 and accompanying text.

55. In Kuhn's theory, revolutions occur when the community accepts a new set of criteria for the determination of scientific truths. Incommensurability of paradigms exists because the two different communities adopt different standards of objectivity—by definition there can not be a single objective criteria for deciding between the two standards of objectivity. Richard Rorty, who, in formulating his concepts of normal discourse and edifying discourse, relies heavily on Kuhn's scientific paradigms of normal science and revolutionary science while stating "the only usable category of 'objectivity' is 'agreement' [i.e. Community Objectivity] rather than 'mirroring.'" RORTY, *supra* note 14, at 337. As I will discuss below, theories of interpretation that make reference to "interpretative communities" accept Community Objectivity as at least one element in the molecular definition of objectivity they accept. In other words, Community Objectivity is the standard that operates within a normal discourse, but there can be no [Community] Objectivity between discourses.

56. Joseph Singer so misinterprets Rorty's work. See *infra* notes 254-71 and accompanying text.

therefore, totally disparage the concept of objectivity when used for the appropriate analytical purpose. They merely emphasize that it is limited in its uses. Consequently, they do not argue in favor of Individualistic Subjective methods.⁵⁷ They argue for the possibility and necessity of discussion and persuasion between paradigms—*intersubjective*, rather than subjective methods. Moreover, Kuhn, at least, believes that science is evolutionary and progressive and that there are good and perhaps rational reasons to make a paradigm shift, although he believes that this process cannot meaningfully be called objective.⁵⁸ He, therefore, denies that he is a subjectivist or a relativist.⁵⁹

Some legal writers who wish to critique objectivity generally object to the use of the definition as inept because it is not “real” objectivity but only “intersubjectivity.”⁶⁰ Such a critique is a peculiarly essentialist approach to definitions. Whether or not Community Objectivity is synonymous with intersubjectivity, it is also a very common and well-accepted definition of the term. To reject this use and insist upon another definition that is easier to defeat is to avoid, rather than join, the debate.

57. Kuhn argues that it is the very conflation of this one pejorative meaning of subjectivity with other possible definitions of subjectivity which causes some of his critics to reject the relativistic aspect of his theory. See *infra* notes 266-70 and accompanying text.

58. Examples he gives of potential “good reasons” include “accuracy, scope, simplicity, fruitfulness, and the like.” KUHN, *supra* note 26, at 261.

59. That is to say, he denies that he is subjectivist, in the sense of judgmental or idiosyncratic and relativist in the sense of believing that any theory is as good as another. KUHN, *supra* note 26, at 263-65. On the other hand Kuhn freely admits that he might be considered a relativist in other senses of the term.

60. “Western culture teaches us that the patriarchal description of reality is not biased but neutral; that our knowledge and truths are not subjective, intersubjective, relative or constructed from narrow perspectives, but objective, scientifically based and universal . . .” Bender, *supra* note 1, at 9. Bender fails to recognize that much post-modern masculinist thought, and in particular, post-modern scientific theory, expressly identifies objective reality with value judgments, intersubjectivity, and locality.

Boyle also distinguishes subjectivity and objectivity from intersubjectivity. “How can we imagine that there is an *objective set* of descriptive/prescriptive historical laws that act on the *subjects* of those laws, if ‘object’ and ‘subject’ are both socially, that is ‘intersubjectively’ produced categories?” Boyle, *supra* note 8, at 730. However, in context it can be seen that Boyle is not arguing that all theorists adopt a concept of objectivity inconsistent with intersubjectivity. Rather, he is contrasting certain uses of objectivity (such as Algorithmic or Argumentative Objectivity), which he associates with specific conceptions of rationality with intersubjectivity, and is not attempting to address the issues of what objectivity could, or should, mean.

Other legal scholars, however, accept that validity of a Community Objectivity definition of objectivity. “Because I seek a source of objective judgments about property for personhood, but do not wish to rely on natural law or simple moral realism, consensus must be a sufficient source of objective moral criteria—and I believe it can be, sometimes, without destroying the meaning of objectivity.” (citations omitted) Margaret J. Radin, *Property and Personhood*, 34 STAN. L. REV. 957, 969 (1982).

b. Algorithmic Objectivity v. Irrational Subjectivity

The next definition of objectivity restricts objective truth to those propositions mandated by the application of logic or rationality as narrowly defined. Its opposite—"Irrational" Subjectivity—includes all other criterion.⁶¹

In a sense, the Algorithmic Objectivity/Irrational Subjectivity dyad might be better seen as a subset of the next dyad I will discuss, the Argumentative Objectivity/Idiosyncratic Subjectivity dyad. I identify it first and discuss it separately because it reflects a very limited concept of rationality which self-identified irrationalists often incorrectly assume is either the only possible definition of rationality or the definition adopted by self-identified rationalists. Certain feminist critiques of objectivity emphasize these aspects of objectivity which I associate here with Algorithmic Objectivity and will associate below with Observation Objectivity.⁶² However, few contemporary legal scholars would argue that all legal problems can be solved through the application of mathematical logic.⁶³ Consequently, Algorithmic Objectivity is rarely adopted by defenders of objectivity,

61. Despite my statement to the contrary, this definition of objectivity at first blush seems to be easily stated without reference to the corresponding definition of subjectivity. I have placed it within this section, however, because I believe that this definition is almost always used in contrast with its corresponding negative (even if the contrast is not made expressly). Indeed, what is meant by logic and rationality can probably not be expressed without reference to what those concepts are not.

62. See, e.g., Scales, *supra* note 1, at 1378 (rejecting "objective methodology [as] a myth"). In her article, she identifies objectivity with "abstract universality" of masculinism, which she contrast with the "concrete universality" of feminism. She identifies "objectivity" with a specific type of abstract mechanistic thought processes which she believes is inadequate because it ignores other valid "subjective" "concrete" factors.

Bender makes a similar argument. "A system with feminist underpinnings would value emotion and instinct, as well as reason and intellect, and reject a dualistic either-or, self-other approach to understanding." Bender, *supra* note 1, at 12. "They [masculinist legalists] take a distanced, objective posture informed by liberalism's concerns for autonomy and liberty, many come to accept the legal rule that intuitively seemed so wrong to them. They are taught to reject their emotions, instincts and ethics, and to view accidents and tragedies abstractly, removed from their social and particularized contexts, and to apply instead rationally-derived, universal principles, and a vision of human nature as atomistic, self-interested and as free from constraint as possible." *Id.* at 33.

In both cases, these arguments are weakened by their failure to recognize that they identified only one limited definition of objectivity which many liberal legalists ostensibly reject. Liberal legalists can easily counter the argument by pointing to their writings in which they adopt alternate definitions of objectivity, such as Community Objectivity or a broader concept of Argumentative Objectivity, which incorporates many of the thought processes that these feminists champion. Consequently, this feminist critique of objectivity in liberal legalism could much more strongly be presented by contrasting precisely how "liberals" purport to use the concept of objectivity with the legitimizing function served by this use.

63. Even Ronald Dworkin, who believes there are demonstrably right and wrong answers in law, does not rely on the identification of rationality with logic and algorithmic objectivity,

but more often is set up as a "straw man" for irrationalists, nihilists and some feminists to attack.⁶⁴ As a result, Algorithmic Objectivity is a definition of objectivity encountered mostly in irrationalist rhetoric.⁶⁵

but relies on coherence theories of knowledge, emphasizing "integrity" and "fit". RONALD DWORKIN, *LAW'S EMPIRE* 225-58 (1986).

An important exception to my general statement in the area of Constitutional law is originalist theory. Originalists such as Robert Bork believe that definitive answers to legal questions can be rationally derived from reading the literal language of the U.S. Constitution in order to determine the objective intent of the framers. ROBERT BORK, *THE TEMPTING OF AMERICA* (1990).

64. See *infra* notes 230-48, 313-14 and accompanying text.

65. In other words, paradoxically, self-proclaimed irrationalists are the staunchest proponents of the identification of rationality with logic because they believe this position is the least defensible. Furthermore, despite the unassailable logic of the irrationalist position, self-proclaimed rationalists are no different from the irrationalists, except that rationalists sentimentally cling to the notion that successful thought must be characterized as rational. Kuhn, for example, rejects Feyerabend's defense of "irrationality" as well as Feyerabend's identification of Kuhn as an irrationalist, on the grounds that this presupposes a definition of rationality which is so narrow as to be useless. If we so narrow our definitions of rationality then:

existing theories of rationality are not quite right and . . . we must readjust or change them to explain why science works as it does. To suppose, instead, that we possess criteria of rationality which are independent of our understanding of the essentials of the scientific process is to open the door to cloud-cuckoo land.

Kuhn, *supra* note 49, at 264.

Similarly, Cornell argues that the irrationalist view of rationality is impossibly narrow:

Many objections can be raised against the irrationalist position. But to my mind, the most important objection is that it shares with the positions it purports to delegitimize a very limited notion of reason and a corresponding restricted vision of which discourses can be crowned with cognitive status. Both sides of the debate over interpretation in legal scholarship are caught in a dilemma: either objectivism or relativism, or put somewhat differently, either neutral standards of rationality or the irrationality of the will to power.

Cornell, *supra* note 1, at 142-43. Richard Bernstein also makes a similar rationalist defense of broadly based rationality. Cornell and Bernstein argue that even the theories of arch-irrationalist Feyerabend are within the definition of rationalism adopted by most rationalists. *Id.* at 152-55; BERNSTEIN, *supra* note 1, at 62-63.

Feyerabend states that at times he realizes that his irrationalist position risks sounding like a defense of "stammering and absurdity." PAUL FEYERABEND, *AGAINST METHOD: OUTLINE OF AN ANARCHISTIC THEORY OF KNOWLEDGE* 218-19 (1978). Insofar as he is not an absurd stammerer, he probably acts "rationally" in the broad definition of the word. Elsewhere, Feyerabend admits that he is a contrarian and has chosen to structure his argument as an attack of "rationality" precisely because we live in a society which unthinkingly privileges scientific rationality. More accurately, Feyerabend does not attack reason as invalid, but merely as limited. He proposes that other traditions might have equal validity. FEYERABEND, *supra* note 39, at 189 ("I also favour imagination and emotion but I don't want them to *replace* reason, I want them to *limit* it, and to *supplement* it.").

On the other side of the spectrum from Feyerabend, arch-rationalist Popper emphasizes the necessity of non-logical modes of thinking in day-to-day life. Although he would argue that decisions which are not based on his algorithmic scientific method can not be considered "scientific fact" (defined precisely as conclusions with especial claim to validity because they are reached through these methods), Popper recognizes the necessity and reliability of "our

I do not mean to imply, however, that all disagreements between rationalists and irrationalists are illusory. Some extreme irrationalists accept, or at least do not reject, the validity of some ways of knowledge, such as religious mysticism or magic, which strict rationalists might not include in even a broad definition of rationality. Feyerabend, for example, defends the possibility of valid sorcery and astrology against a standard "scientific" assault.⁶⁶ Less radical irrationalists would merely grant a more central role to non-logical modes of thought—such as empathy and intuition—than do rational-

knowledge" based primarily on conclusions reached through other modes of thought. For example, Popper insists that the first "objective" world of ideas can only have contact with the third physical world (which is the subject of science) through the intervention of the second "subjective" world of our knowledge. POPPER, *supra* note 40, at 155-56.

Despite this, Popper perhaps comes the closest of any contemporary philosopher to adopting and privileging a concept of Algorithmic Objectivity (combined with Community Objectivity), although even his approach is more complex. First, as stated above, Popper defines objective to mean "intersubjectively testable." He then identifies the criteria for testing that he believes has most successfully been adopted by the scientific community in the past and which should be accepted by the scientific community in the future as the only appropriate criteria to be considered objective. Within the realm of science, Popper pronounces the problem of the affirmative use of induction to be insolvable and limits scientific objectivity to deductive logic which mandates results. Consequently, he limits scientific method to falsification.

But even Popper admits the necessity for many different rational thought processes in daily life (and even in connection with science, which inevitably includes psychological and intuitive aspects), but his insistence that only falsification (i.e. deduction) rises to the level of scientific method reveals his hierarchization. This hierarchization results from the way Popper has structured his philosophical task. Because he believes that science has been the most successful mode of inquiry, he tries to identify what is unique about scientific method compared to other modes of thought. This task is both descriptive (what has been most successful in the past) and prescriptive of what scientists should do in the future based on our past experience and logic. Popper argues that scientific method requires an algorithmic standard which conclusively determines whether a theory is to be accepted or rejected. Because he concludes that only deduction meets this standard (or, more accurately, that the problem of induction can be solved by only using it negatively, which is functionally equivalent to limiting logic to deduction), he limits scientific method to falsification. Indeed, he might be said to argue that within the scientific community, Algorithmic Objectivity is the standard which should be adopted as that community's Community Objectivity. Popper does not argue, however, that "objectivity" is the only standard or judgment, nor that any "objective" scientific method can ever be used except in conjunction with subjective methods. See Schroeder, *supra* note 4, at 162.

In essence, our reliance that the sun will rise tomorrow is not based on the fact that some scientist has "proved" that this will happen, but on our practical experience: it has happened each and every day of our lives and we feel justified in relying on the presumption that it will happen tomorrow, even though we know that this is a non sequitur, logically speaking. POPPER, *supra* note 40, at 1-31. Popper argues against David Hume's assumption that since induction is a "logical" problem, it is also a psychological problem. The fact that induction is irrational in the sense of not logical does not mean that it is irrational in the sense of crazy or stupid.

66. FEYERABEND, *supra* note 41, at 7-8; FEYERABEND, *supra* note 39, at 91-96. Read in context, Feyerabend does not accept the validity of sorcery and astrology. Rather, he critiques the arrogance of the practitioners of Western "rationalism" who confuse imperialistic ethnocentrism with truth. See, e.g., FEYERABEND, *supra* note 39, at 191.

ists, despite the fact that rationalists might include "empathy" and "intuition" within the definition of rationality. Many feminists refer to feminist methods as either subjective or, at least, non-objective, not because they reject logical or rational thought. Rather, they try to create or restore a more balanced, full, and human way of knowing.⁶⁷

If Algorithmic Objectivity, in its pure form, arguably exists only in the rhetoric of its opponents, Algorithmic Objectivity does commonly appear in molecular form combined with either Community or External Objectivity. When combined with Community Objectivity, Algorithmic Objectivity is not presented as value-free or aperspectival in the sense that it is expressly considered to reflect the values and perspective of the specified community. When used in reference to "universal" human standards of logic, Algorithmic Objective facts might purport to be aperspectival as conclusions not dependent on any individual or community act of will. Yet these facts are not "value-free" because the adoption or rejection of algorithmic reasoning as a standard depends on the prior judgment that algorithmic reasoning is a superior or inferior mode of reaching truth or of making judgments than other alternate modes of knowing.

Consequently, those who adopt Algorithmic Objectivity—as a part of a more complicated molecular definition—may make either objectivity or subjectivity the privileged pole. Those who privilege Algorithmic Objectivity associate Irrational Subjectivity with the negative aspects of non-logical thought. Irrationality, from this perspective, is emotional, unreliable, solipsistic, prejudiced, delusional, and perhaps crazy. Those who privilege Irrational Subjectivity—associating it with intuition, pragmatism, empathy, authenticity, etc.—dismiss Algorithmic Objectivity as a lie.

c. Argumentative Objectivity v. Idiosyncratic Subjectivity

"Argumentative" Objectivity presupposes a broader definition of rationality than that which underlies Algorithmic Objectivity. Consequently, Argumentative Objectivity is closer to the "rationalist" position that philosophers actually take. An Argumentatively Objective conclusion is one with which almost all reasonable persons would agree after a good faith, rational argument. Reflecting a broad definition of rationality, rational argument could include not merely logi-

67. See, e.g., Bender, *supra* note 1, at 11-12; Carrie Menkel-Meadow, *Portia in a Different Voice: Speculation on Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, 49 (1985); Scales, *supra* note 1, at 1389. This common feminist approach also relates to the dispute within the social sciences concerning what I will call Observation Objectivity and Psychological Subjectivity.

cally (algorithmically) conclusive arguments, but also those that are so reliable or persuasive that there would be general agreement that one conclusion is more probably correct than any alternate. James Boyle, for example, suggests that the form of rationality embodied in Argumentative Objectivity more nearly reflects the Enlightenment concept of rationality that underlies liberal theory than does the Algorithmic Objective-reasoning frequently ascribed to liberalism by its critics:

The lack of ultimate rational grounding for our ideas is compatible with the Enlightenment vision of reason: a reason that is used to break down the illusion of necessity and that is thus "tilted" towards a love of freedom. The ideas are compatible because you can break down a claim to correctness, naturalness, or neutrality without asserting that you have the pure truth yourself. Put more simply, you can claim that someone else is wrong without claiming that you, yourself, are right.⁶⁸

In other words, while the "necessity" required by the algorithmic reasoning process is incompatible with the Enlightenment concept of freedom of the individual, the Enlightenment concept of rationality allows for free choice and consensus.⁶⁹

I call the negation of Argumentative Objectivity "Idiosyncratic

68. Boyle, *supra* note 8, at 738-39.

69. An example of what I might call Argumentative Objectivity in contemporary liberal thought is Ronald Dworkin's coherence theory of interpretation. Dworkin believes that there are "right" answers to questions of legal interpretation. See generally DWORKIN, *supra* note 63. Cornell questions whether Dworkin's is truly a coherence theory. She suggests that Dworkin adopts consistency (integrity) for normative, rather than epistemological, reasons. Cornell, *supra* note 32, at 1140. Dworkin does not argue that these answers are "objective" in the algorithmic sense in that they are supported by arguments that would persuade everyone. Ronald Dworkin, *My Reply to Stanley Fish (and Walter Benn Michaels): Please Don't Talk About Objectivity Any More, in THE POLITICS OF INTERPRETATION* 287, 295 (W. J. T. Mitchell, ed. 1983) [hereinafter Dworkin, *Objectivity*]. Nor does it make any sense to describe moral judgments as objective. Consequently, Dworkin admirably concludes that the objectivity/subjectivity terminology is confusing—or "a fake"—and is both unhelpful and should be avoided. *Id.* at 298. Dworkin states:

Objectivity is another matter. It is an open question, I think, whether the main judgments we make about art can properly be said to be true or false, valid or invalid. This question is part of the more general philosophical issue of objectivity. . . . Of course no important aesthetic claim can be "demonstrated" to be true or false; no argument can be produced for any interpretation that we can be sure will commend itself to everyone, or even everyone with experience and training. . . . If this is what it means to say that aesthetic ideas are subjective—that they are not demonstrable—then of course they are subjective.

Ronald Dworkin, *Law as Interpretation, in THE POLITICS OF INTERPRETATION* 249, 256 (W.J.T. Mitchell, ed. 1983) [hereinafter Dworkin, *Interpretation*]. Dworkin further argues that to conclude from the impossibility of this type of objectivity that the alternative is total relativism is a non sequitur. *Id.* at 256-57.

Although I usually agree with very little of what Dworkin has to say, as will become

Subjectivity." The idiosyncratic subject is one who stubbornly maintains her ideas despite good arguments and evidence to the contrary. In a pejorative sense, Idiosyncratic Subjectivity is identified with ignorance, prejudice, bad faith, and closed-mindedness.⁷⁰

We frequently hear this usage in casual conversation. For instance, if I were to say that I was going to "try to be objective" when reading a law review article written by a certain legal scholar, I might mean that I have personal feelings of affection or dislike for the author that I will try to disregard because I do not deem such feelings relevant to judging the quality of the scholarship. Objectivity in this sense means ruling out ideas which are deemed not relevant to the argument, such as personal taste.⁷¹

One occasionally finds positive views of Idiosyncratic Subjectivity. For example, Umberto Eco has described how Renaissance Hermetics and Kabbalists believed that God is infinite and beyond all human thought. Consequently, these believers did not consider a proof that X existed as evidence that non-X did not exist; logically contradictory truths could exist simultaneously. As God was conceived as the infinite transcendent subject, the universe reflected infinite Idiosyncratic Subjectivity.⁷²

Like Algorithmic Objectivity, Argumentative Objectivity is frequently, or perhaps always necessarily, found in molecular form. For example, Argumentative Objectivity is sometimes combined with Community Objectivity. A methodology based on algorithmic logic may be promoted on the grounds that it is the methodology that has been adopted by a community.⁷³ John Stick describes this form of Argumentative/Community Objectivity (which he calls Group Objectivity) as follows:

The claim that law is objective can mean many things. . . . [I]t can mean that the judge announcing the law has used accepted procedures for reasoning to his decision rather than reaching his decision as a result of extraneous factors. The notions of bias or prejudice in decision-making refer to a failure in this . . . sense of objectivity. . . . [O]bjectivity can mean that a legal decision has

clear, I completely agree with his overall sentiment that claims to subjectivity frequently, or usually, serve an "honorific" function and do not further argument.

70. Kuhn identifies this as one common pejorative meaning of subjectivity which many writers incorrectly use as an argument in favor of an unrelated definition of objectivity. See *supra* notes 57, 59.

71. Greenawalt includes other elements within his definition as well. See *infra* text accompanying notes 146-47.

72. Eco, *supra* note 13, at 18-20.

73. This may be the approach taken by Popper. See *supra* notes 35, 36, 40 and accompanying text.

been made according to the agreed rules of rationality of the legal system itself. . . . It is not to imply, however, that these standards of rationality have any necessary relationship to reality, truth, justice, symbolic logic, revealed religion, or any party line.⁷⁴

Another possibility is a combination of Argumentative Objectivity with a form of what I will call External Objectivity,⁷⁵ a belief either in a rationally organized and/or rationally knowable external truth, or a belief that it is externally true that human subjects share a logical facility which must serve as the basis of intersubjective argument and agreement.⁷⁶

The first type of Algorithmic Objectivity/External Objectivity molecule relates to what Rorty identifies as the philosophical error of attempting to mirror nature, and of assuming that agreement among thinkers, that is, Community Objectivity, is only possible if there is an external reality to agree about:

Kuhn's critics have helped perpetuate the dogma that only where there is correspondence to reality is there the possibility of rational agreement, in a special sense of "rational" of which science is the paradigm. This confusion is aided by the use of "objective" to mean both "characterizing the view which would be agreed upon as a result of argument unreflected by irrelevant considerations" and "representing these things as they really are."⁷⁷

Dworkin, for example, combines Argumentative Objectivity with Community Objectivity (although he avoids the confusing terminology of objectivity).

d. Reasonable Person Objectivity v. Mental State Subjectivity

One of the most common objectivity/subjectivity dyads in American law is the dichotomy between what I will call "Reasonable Person Objectivity" and "Mental State Subjectivity."⁷⁸ In Reasonable Person Objectivity, the behavior of a legal subject is given legal characterization not by reference to the subject's actual mental state, or by

74. Stick, *supra* note 9, at 369-70.

75. See *infra* text accompanying notes 114-15.

76. Peirce might be said to have adopted the latter approach. Peirce thought that objectivity could only be defined intersubjectively, and did not think that the external world could be known (and therefore could exist meaningfully) outside of human consciousness. Thus, he did not base his philosophy on a concept of external universal truth. He proposed, however, that in the long run all humans applying the appropriate method will come to agreement because of a shared rationality. Consequently, objective reality is independent of the beliefs of any specific community.

77. RORTY, *supra* note 14, at 333-34. Rorty goes on to say that these two meanings so greatly overlap that, for everyday conversation, the two can be treated as the same, but that conflating them in philosophical analysis is mischievous.

78. I use these terms because the "reasonable person" test of tort law is one of the most

reference to any other characteristic individual to the subject, but by comparison to a standard based on a hypothetical person or industry having certain ideal characteristics.⁷⁹

Reasonable Person Objectivity may be seen as a variation of Standardized Objectivity. The difference I am emphasizing is the positive/negative polarity of this dichotomy. Standardized Objectivity does not necessarily imply privileging of objectivity or subjectivity. It is a comparative, rather than an oppositional, standard. Reasonable Person Objectivity usually has normative implications, insofar as it refers to some idealized characteristics or behavior, and, therefore, serves as the goal to which mental state subjectivity ought to aspire.

This dyad differs from other oppositional dyads, however, in that the subjective mental state of an individual legal actor in a specific situation may, in fact, meet or exceed the objective standard. That is, the opposition and privileging of the two poles of this dyad exist in theory, but not necessarily in fact, in any specific application. In other words, Reasonable Person Objectivity is usually a minimum standard of behavior (as in negligence law) to which an actual mental state can be compared.

Reasonable Person Objectivity often presupposes that the standards chosen for the hypothetical standard are valuable based on some other type of objectivity. For example, a "reasonable" person may be thought of as having the characteristics which a specific community has decided are appropriate for its members (i.e., Community Objectivity) or having characteristics which meet standards for goodness established by God (i.e., External Objectivity). It has become almost a cliché to recognize that the reasonable man standard of torts, despite the recent cosmetic change to the reasonable "person" standard, incorporates as the standard for behavior an able-bodied individualistic and autonomous adult male.⁸⁰ I have been unable to find

familiar examples. However, the standard need not necessarily be hypothesized reasonability. Another example is the "prudent person" standard applicable to fiduciaries.

Federal securities law is replete with Reasonable Person Objective and Mental State Subjective standards. For example, in *Backman v. Polaroid*, 893 F.2d 1405 (1st Cir. 1990), the First Circuit Court of Appeals held that a plaintiff in a private right of action under Rule 10b-5 must establish that the defendant acted with "scienter" defined as a [Reasonable Person] objective standard of recklessness, although a defendant is permitted to raise a [Mental State] subjective good faith defense.

The Uniform Commercial Code also generally recognizes a Mental State Subjective standard of good faith. See U.C.C. § 1-201(19) (1990). However, the UCC sometimes imposes a potentially higher Reasonable Person Objective Standard. See U.C.C. § 2-103(1)(b) (with respect to merchants); § 3-103(a)(4) (1990).

79. This is similar to certain of the definitions of objectivity identified by Greenawalt. See *infra* text accompanying notes 177-78.

80. "Today we are taught to consider women reasonable when they act as men would

an example of Reasonable Person Objectivity which relates to purportedly random standards for the sake of consistency, as in the Standardized Objectivity example of traffic lights. Although theoretically possible, it probably would never be expected as a practical or political matter.

e. Observation Objectivity v. Psychological Subjectivity

Another use of the term "objectivity" occurs primarily in the social sciences, but is also found in feminist legal writings on methodology as well as some jurisprudential writing. "Observation Objectivity" describes empiricism, that is, an emphasis on phenomena that are observable by a person other than the subject experiencing the mental state or participating in the social system. The opposite form of subjectivity, "Psychological Subjectivity," refers to the subject's own account of her psychological or mental state or social world.

Either pole of this dyad can be privileged. Early behaviorists argued that only the external behavior of subjects—that is, Observation Objective facts, and not their statements of their psychological state—constitute the only reliable, and therefore appropriate, study for social scientists.⁸¹ Later behaviorists modified this position to include consideration of subjective statements (i.e., the subject's state-

under the same circumstance, and unreasonable when they act more as they themselves or as other women act" (footnote omitted). Bender, *supra* note 1, at 25; see Leslie Bender, *Feminist (Re)torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities*, 1990 DUKE L.J. 848 (1990); Nancy S. Erickson, *Sex Bias in Law School Courses: Some Common Issues*, 38 J. LEGAL EDUC. 101, 108 (1988). Courts have recently begun to adopt a "reasonable woman" standard in sexual harassment cases, finally recognizing that the very theory behind making sexual harassment actionable is that men and women are socially situated differently. For a useful survey of the development of "reasonable" man, woman or person objective standards, see Martha Chamallas, *Feminist Constructions of Objectivity: Multiple Perspectives in Sexual and Racial Harassment Litigation*, 1 TEX. J. WOMEN & LAW 95 (1992).

Some explicit reminders of the gender assumptions behind legal standards can still be found. For example, official comment 7 to the pre-1990 version of § 3-305 of the Uniform Commercial Code provides that among the factors to be considered in determining whether an obligor under a negotiable instrument had "reasonable opportunity" to obtain certain knowledge are the obligor's "age and sex." The implication seems to be that females are generally more ignorant than males in commercial matters and should be held to a lower standard. The parallel comment to the 1990 version of Article 3 drops this overt reference to sex.

81. Ernest Nagel argues that this description is a caricature of early behaviorist theories. He implicitly admits that some people who characterized themselves as behaviorists may have adopted a crude theory not differing much from the caricature. NAGEL, *supra* note 45, at 473-85 (discussing the debate between subjectivists and objectivists in social science). Nagel's discussion of behaviorism forms part of his argument that social scientists who adopt a psychological subjective methodology erroneously assume that their methodology differs in kind from the methodologies of the physical sciences. Nagel, therefore, anxiously concentrates on the similarities among various branches of science and methodologies, and anxiously de-emphasizes the differences. See also David M. Trubeck, *Where the Action Is: Critical Legal*

ment as to her perception of her mental state) as observable objective events, but not necessarily as reliable, let alone conclusive evidence of the actual psychological state of the subject.⁸²

Other theorists of social science methodologies posit that Observation Objective methods, standing alone, are inadequate. They insist on understanding mental states that others not merely observe, but which we experience and know individually as subjects. This knowledge demands development of Psychologically Subjective methodologies for the social sciences.⁸³ Many social scientists who characterize themselves and their methodology as feminist,⁸⁴ as well as some feminist legalists, take this approach.⁸⁵

Some left-leaning legalists assail an Observation Objective stance as based on the unworkable positivist fact/opinion dichotomy. For example, Gary Peller criticizes Bruce Ackerman of making this familiar error: "[Ackerman] adopts the traditional positivist distinction between questions of fact (which he assumes can be verified through real, observable data) and questions of value (which are inherently

Studies and Empiricism, 36 STAN. L. REV. 575, 603 (1984) (discussing of the behaviorist concept of objectivity and other approaches to empirical information).

Another Nagel, Thomas, has critiqued Daniel Dennett's theory of consciousness on the express grounds that Dennett mistakenly thinks that the Observation Objective methodology of the physical sciences is also the appropriate "objective" methodology for all purposes. In particular, Thomas Nagel argues that the study of human consciousness must also include what I call Psychologically Subjective data. "A theory of consciousness that doesn't include mental events among the data is like a book about Picasso that doesn't mention his painting." Nagel, *supra* note 17, at A12.

82. NAGEL, *supra* note 45, at 479-80.

83. Ernest Nagel, in describing the subjectivist view, states that: The subjective nature of social science is based on the "familiar claim that objectively warranted explanations of social phenomena are difficult if not impossible to achieve, because those phenomena have an essentially 'subjective' or 'value-impregnated' aspect." *Id.* at 473. "In short, the categories of description and explanation in the social sciences are held to be radically 'subjective,' so that these disciplines are forced to rely on 'nonobjective' techniques of inquiry." *Id.* at 474. "The social scientist is able to do these things only because he is himself an active agent in social processes, and can therefore understand in the light of his own 'subjective' experiences the 'internal meanings' of social actions. A purely 'objective' or 'behavioristic' social science is in consequence held to be a vain hope." *Id.* at 475. Nagel argues that the theoretical distinction between behaviorism and Weberian subjective social science is largely one of semantics.

84. See, e.g., JOYCE M. NIELSEN, INTRODUCTION, *FEMINIST RESEARCH METHODS* 1, 7-9 (Joyce M. Nielsen ed., 1990); Marcia Millman & Rosabeth M. Kantor, *Introduction to Another Voice: Feminist Perspectives on Social Life and Social Science*, in *FEMINISM & METHODOLOGY* 29, 30 (SANDRA HARDING ed., 1987).

85. MacKinnon's account of consciousness-raising as a feminist methodology in which she emphasizes the importance of interpersonal transformation of the women both analyzing and being analyzed, as opposed to dispassionate observation by outsiders, may be seen as working within this tradition. MACKINNON, *supra* note 1, at 83-105. See generally Schroeder, *supra* note 4; Bartlett, *supra* note 1 (discussing various methodological theories adopted by feminist legalists).

subjective)”⁸⁶ Peller notes that “[Ackerman’s] ideological vision revolves around an image of an objective reality uncontaminated by subjectivity.”⁸⁷

David Trubek also recognizes that many on the left reject empiricism because they confuse it with positivism, behaviorism and determinism. “Social science, in [the deterministic] view, reveals the objective conditions which determine our fate.”⁸⁸ Trubek observes that “behaviorism sees social knowledge as objective because it is knowledge about facts that are neutral and external to the observer. (This is the weak sense of objectivism).”⁸⁹ Trubek also argues that this identification is erroneous and that empiricism—Observation Objectivity—has an important role to play in leftist social theory.⁹⁰

Others defend Observation Objectivity against those who would reject it in favor of Psychological Subjectivity by pointing out that the same analysis that makes Observation Objectivity suspect, by necessity, equally applies to Psychological Subjectivity. If Observation Objectivity is illusory because our society is socially constructed, the same can be said for our psychological selves. As I have argued extensively elsewhere,⁹¹ the sense of self varies widely among different cultures.⁹²

86. Gary Peller, *The Politics of Reconstruction*, 98 HARV. L. REV. 863, 876 (1985) (reviewing BRUCE ACKERMAN, *RECONSTRUCTING AMERICAN LAW* (1984)).

87. *Id.* at 879.

88. Trubek, *supra* note 81, at 579.

89. *Id.* at 603.

90. *Id.*

91. Jeanne L. Schroeder, *Feminism Historicized: Medieval Misogynist Stereotypes in Contemporary Feminist Jurisprudence*, 75 IOWA L. REV. 1135 (1990).

92. Lacanian theory, for example, locates the subject (i.e., the Ego) in the linguistic realm of the symbolic. The subject is, therefore, always intersubjective, and the atomistic individual of liberalism is, consequently, illusory.

A related concept recurs in a work of James Boyle’s. He asks “[h]ow can we imagine that there is an *objective* set of descriptive/prescriptive historical laws that act on the *subjects* of those laws, if ‘object’ and ‘subject’ are both socially, that is ‘*intersubjectively*’ produced categories?” Boyle, *supra* note 8, at 730. Boyle proposes, as a useful tool for analyzing disputes among certain members of the critical legal studies movement that one look to the degree with which the writer emphasizes the role of the individual in shaping society (the subjectivist approach) or the role of society in shaping individuals (the structuralist approach).

And so one can also ask “how can we imagine that there is a *subjective* way of viewing the object, society?”:

If we cannot “get to” objectivity, we must fall back onto our subjectivity and its collective constructs. But if there has been one dominant strain in recent philosophical thought, it is that the “subject” is by no means as natural, as obvious, or as basic a term as it appears. The subject can appear to be the crossroads of time and culture. The “self” can appear to be the artificial construct necessitated by a particular way of viewing the world.

Id. at 777.

The deconstruction of the subject as the express or implicit focus of nearly all legal schol-

Paradoxically, those feminists who reject objective claims to knowledge on the grounds that reality is socially constituted (and, thereafter, there can be no unsituated observer), by framing their argument in favor of "subjectivist" modes of thought, risk reinstating the liberal concept of the autonomous self as the only criterion of knowledge.⁹³

Yet not all theorists who recognize Psychologically Subjective methodologies entirely reject the use of Observation Objectivity. For example, the feminist "positionality" critique of External Objectivity (as aperspectivity) promoted by Katherine Bartlett and Sandra Harding is similar to the feminist critique of objectivity as Observation Objectivity.⁹⁴ The positionality critique challenges the assumption that arguably underlies the concept of Observation Objectivity—that any specific observer's perspective should be considered so privileged as to be deemed aperspectival. The positionality approach emphasizes the aggregation of multiple perspectives, including, but not privileging, the perspective of the observed. Consequently, as Harding recognizes, positionality—often framed as a rejection of objectivity—is better seen as a defense of a form of External Objectivity.⁹⁵

Similarly, some schools of social science theory emphasize that Psychological Subjective methodologies, while necessary, may not suffice for an adequate understanding. An example of this approach is Max Weber's concept of the necessity of subjective methodologies in the social sciences. Arthur Jacobson's succinct paraphrase of Weber avoids Weber's use of the potentially ambiguous terms "objectivity" and "subjectivity" in favor of a more precise description:

The test [of a social science theory] . . . is whether it helps disinterested observers "understand" the world in which people think they live, so that decisions they make, together or separately, appear

arship is also a recurring theme in Pierre Schlag's scholarship. See, e.g., Schlag, *supra* note 3; Pierre Schlag, *Normativity and Politics of Form*, 139 U. PA. L. REV. 801 (1991); Pierre Schlag, "Le Hors de Texte, C'est Moi:" *The Politics of Form and the Domestication of Deconstruction*, 11 CARDOZO L. REV. 1631 (1990).

Curiously, during a seminar I attended, Jacques Derrida, one of the founders of deconstruction, expressly stated, in response to a participant's question, that he is not interested in getting beyond the subject. He argued that the concept of the subject has been one of the great achievements of Western civilization. This does not mean that we can forget that subjectivity is "artificial" in the sense that it is man-made. Being a human creation does not imply unreality.

93. As does the insistence of many feminists on "choice" as being the goal of feminism. See *supra* note 4.

94. See *infra* text accompanying notes 122-28.

95. See *infra* text accompanying notes 126-28. Ernest Nagel also forcefully argues that so-called subjectivists in the social sciences are really adopting a position which is indistinguishable from the objectivist position.

meaningful or rational to the observers. The observers' understanding must, in turn, be comprehensible to the people observed, but may not simply restate their self-understanding. The understanding must be on an *observation* that the observed receive with their *own* understanding. (Here social science mimics natural science, where the test of validity is *universal* agreement on the basis of common observations. The difference is that the universal agreement in social science includes agreement of the object being observed.) The observed's understanding of the observers' understanding will have fresh insights (about observers too!), requiring fresh efforts of understanding. Also, the self-knowledge the observed obtain in cooperation with the observers may lead to changes in the way the observed carry on their lives, requiring further cooperative efforts of understanding⁹⁶

This is a point of view which defers both to the observations and empathy of the observer, as well as the psychological experience of the observed. Feyerabend similarly suggests that there are at least two perspectives on social reality: the observer's perspective (Observation Objectivity) and the participant's perspective (Psychological Subjectivity). Feyerabend asserts that neither is adequate without the other.⁹⁷ The combination of the Observable Objective and the Psychological Subjective also appears in the theory of the hermeneutic circle of interpretation.⁹⁸

Although framed in the form of a critique of objectivity, MacKinnon's theory of consciousness raising arguably falls within this tradition. Consciousness raising, while necessarily including the accounts by women of their individual experiences (Psychological Subjective testimony), is not limited to these accounts. MacKinnon believes that a theory recognizing society as a social construct must also recognize the self as a social construct. Subjective and objective observations are, therefore, equally suspect. Consequently, she argues that those who engage in consciousness-raising must intersubjectively mediate, analyze, and compare individual subjective accounts (Psy-

96. Arthur J. Jacobson, *supra* note 47, at 1679-80 (footnotes omitted).

97. FEYERABEND, *supra* note 39, at 18-19. Thomas Nagel presents another example of this mode of thought in arguing that the strictly Observation Objective method of the physical sciences is not the correct method for the study of human consciousness which must account for our own experiences of our mental states. He does not argue, however, that Psychological Subjective methods are sufficient for the study of psychology merely because they are necessary. "It means only that we need to use objective standards that combine the first- and third-person points of view as they are in fact combined in the ordinary concepts for attribution of conscious states that we all employ without difficulty, and that we use to correct experiential descriptions and others." Nagel, *supra* note 17, at A12.

98. See HANS-GEORG GADAMER, *TRUTH AND METHOD* (Joel Weinsheimer & Donald G. Marshall trans., 1989).

chological Subjective analysis) to determine what has not been said (Observation Objective analysis) in order to come to a more complete understanding than that which mere psychological or observed data alone could give.⁹⁹ Thus, MacKinnon insists that her conception of consciousness-raising is not "subjective" and feminism must not celebrate subjectivism.¹⁰⁰

All of these approaches recognize that the observer may inadequately interpret the other and must consult with the other as to her own perceptions. However, these approaches also recognize that the observed self's own interpretation of her behavior may not be adequate, and that the observed may learn from the observations of others. The inter-subjective encounter enriches both the observer and the observed.

A version of the Observation Objectivity/Psychological Subjectivity dyad appears in discussions of intent in contract law. In deciding the intent of the parties to a contract, some have questioned whether a judge should limit the finder of fact to considerations of observable objective intent. Clare Dalton argues that for a court to try to apply both the subjective and objective approach, the court must engage in "entirely circular" reasoning.¹⁰¹ However, by analogizing these approaches to the social sciences, they do not appear mutually exclusive. It is possible, but not necessary, for one to consider both the Observation Objective and the Psychological Subjective.¹⁰² The process, while circular, is not hopeless. Rather, it relates to the process of communication and understanding known as the hermeneutic circle.

2. CONCLUSORY OR HONORIFIC DEFINITIONS

I now move to another separate set of dyads which may be distinguished from those relating to the above methodological dyads. The following definitions use objectivity as a label that attests to the validity of a statement. I would argue that these honorifics are at

99. See Schroeder, *supra* note 4, at 151-61, 172-79, 181-83 (analyzing MacKinnon's methodological theory).

100. MACKINNON, *supra* note 1, at 83-84, 115-16, 120-21.

101. Dalton, *supra* note 7, at 1046.

102. Insofar as this process is similar to the hermeneutic circle, many would argue that the circularity is an indicia of coherence, not circularity.

Hermeneutic theory assures us, however, that while its understanding is indeed circular, the circle is not vicious. On the contrary, it claims, the circularity of its understanding is just the certificate of its validity. That is so because the circle reflects the necessary circularity of understanding itself, the ground of which is the mutual presupposition of the subject and object.

Brudner, *supra* note 5, at 150.

best, not useful; and at worst, malignant. Merely labeling a decision "objective" does not validate the process leading to the decision.¹⁰³ Several writers, including Dworkin,¹⁰⁴ Rorty,¹⁰⁵ and Feyerabend,¹⁰⁶ argue against the use of the word "objective" largely because honorific usage neither adds to, nor detracts, from the validity of an argument.

a. Factual Objectivity v. Opinion Subjectivity

What I am calling "Factual" Objectivity and its negative, "Opinion" Subjectivity, are primarily colloquial, rather than philosophical or jurisprudential, terms. I include this term here because, despite its mixed nature, it is a very common and casual use of the term. In addition, many writers assume, without analysis, that the normativity associated with this colloquial use of the term "objectivity" automatically applies to the other methodological uses of the term

103. Commercial lawyers might recognize this reasoning as that underlying the deconstruction of the concept of "title" under Article 2 of the Uniform Commercial Code. As every teacher of commercial law knows, one of the great innovations of the drafters of the code was the diminution of the significance of "title" of goods. Yet, as continually confuses generations of commercial law students, Article 2 of the UCC frequently refers to "title." I find it helpful to suggest to my students that they think of the "title" that survives in the Code as short-hand for a legal conclusion after analysis, rather than a tool of analysis. If one determines, through application of the substantive provisions of the UCC, that a party has certain rights in an item of goods, it may be convenient to say that the person has "title" in the goods. However, one can no longer follow the common law approach whereby a person could first determine which party has "title" in the goods and conclude from that alone that such party has particular rights or responsibilities in the goods (such as risk of loss, the ability to defeat subsequent purchaser's claims in the good, etc.).

104. Dworkin, *Objectivity*, *supra* note 69, at 297-300.

105. Since Kant, the principle employment of such theories has been to support intuitions concerning the subjective-objective distinction—either attempts to show that nothing outside natural science counts as 'objective' or attempts to apply this honorific term to morals, or politics, or poems. Metaphysics . . . attempts to find out what we can be objective about . . . I am recommending [that], we might in an imaginary age in which consensus in these areas was almost complete, view morality physics and psychology as equally 'objective'. . . The application of such honorifics as 'objective' . . . is never anything more than an expression of the presence of, or the hope for, agreement among inquirers.

RORTY, *supra* note 14, at 335.

106. Feyerabend views claims to objectivity as merely an attempt to hide the source of one's ideas and, thereby, give these ideas special status. This is similar to the "false universals" critique which many feminists make of specific claims to objectivity. "But that does not make them 'objective' and independent of traditions. To infer from the absence of terms concerning subjects or groups in 'there ought to be . . . ' that the demand made is 'objective' would be just as erroneous as to claim 'objectivity' i.e. independence from personal or group idiosyncracies for optical illusions and mass hallucinations on the grounds that the subject, or the group, nowhere occurs in them. . . . [These are] statements which are *formulated* 'objectively'. . . ." FEYERABEND, *supra* note 39, at 23. Feyerabend is obviously using the word "objectivity" not to mean Community Objectivity, but to mean External Objectivity.

objectivity.¹⁰⁷

Factual Objectivity refers to facts in the sense of what is really true, while opinion subjectivity refers to mere "opinion" or personal taste. On the one hand, the definition of Opinion Subjectivity is a variation on Idiosyncratic Subjectivity. On the other hand, the definition of Factual Objectivity can be, but is not necessarily the same as, Argumentative Objectivity. Alternatively, Factual Objectivity can mean nothing more than what the parties to a conversation are willing to stipulate are the facts in order for the discussion to continue (i.e., Community Objectivity). Frequently, Factual Objectivity implies some form of External Objectivity. Some might regard certain objective "facts" such as religious truths (which are also Externally Objective) as knowable only through Individually or Idiosyncratically Subjective means such as divine inspiration. For the mystic, such objective facts cannot be known through Algorithmic or even Argumentative Objective means. Consequently, although Factual Objectivity and Opinion Subjectivity are often assumed to form an oppositional dyad, each is not necessarily defined as the other's simple negative.

Nevertheless, despite the dubiousness of the fact/opinion distinction on a philosophical level, and despite the judgmental nature of this use of terms, I consider the Factual Objectivity/Opinion Subjectivity dyad to be perfectly acceptable in everyday conversation. Indeed, there is probably no other English expression which adequately expresses the useful distinction between recognized conclusions and opinion. I find this usage too ambiguous to be of much use in jurisprudential analysis, however.

b. Fairness Objectivity v. Biased Subjectivity

A statement that a decision is objective may be equivalent to the speaker's judgment that the decision was fair, just, or ethical. A statement that a decision is subjective may be equivalent to the speaker's condemnation that the judgment is unfair, unjust, or immoral. I call this contrast the Fairness Objectivity/Biased Subjectivity dyad. In this use, fairness is frequently identified with neutrality, either in the standard to be applied or in the application of the standard.

Fairness Objectivity can be combined with any number of the other definitions of objectivity. For example, if one adopts Argumentative Objectivity, a statement that a decision is (Biased) Subjective would accuse the decision maker of having considered factors which

107. See, for example, my analysis of Greenawalt, *infra* text accompanying notes 159, 185-87.

are not considered relevant to reasonable argument—that is, Idiosyncratic Subjective reasons. In my earlier example, if I had rejected the conclusions of a certain scholar because he snubbed me at the most recent AALS annual meeting, one would probably chide me for being (Biased) Subjective.

Fairness Objectivity is also frequently used with Standardized Objectivity. For example, if I were to announce to my class that grades would be based on the answer key to a multiple choice test, one might criticize me for grading subjectively and unfairly if I failed a student whose answers “objectively” corresponded to the answers on the key.

Some writers identify unfairness (i.e., Biased Subjectivity) with arbitrariness and identify fairness with the predictable and consistent application of an announced standard.¹⁰⁸ Fairness Objectivity, therefore, may be seen as a normative judgment on Standardized Objectivity.

Ronald Dworkin’s concept of law as integrity is similar to this approach, although he avoids calling his “right answers” objective. Dworkin argues that justice requires that we prefer the consistent application of standards across the board, as opposed to what he calls a “checkerboard” approach, even if we disagree with the standards.¹⁰⁹

Critics of the status quo who question the current legal regime, however, might find such a checkerboard attractive. One may disagree with Dworkin’s judgment that an unjust standard consistently applied is better than the sporadic and inconsistent application of an unjust standard. In the context of criminal law, for example, if one believed that execution constituted cruel and unusual punishment, then one might understandably prefer that individual convicted criminals occasionally be spared rather than all convicted criminals die in the name of consistency. James Boyle has suggested that the post-modern sensibility celebrates diversity, experimentation, and disjunction as liberating, and may, therefore, affirmatively prefer checkerboards.¹¹⁰

The feminist critique of liberal legalism, which purports to be

108. See, e.g., KENT GREENAWALT, *LAW AND OBJECTIVITY* 121 (1992).

109. “Checkerboard statutes are the most dramatic violations of the ideal of integrity.” DWORKIN, *supra* note 63, at 184; see also GREENAWALT, *supra* note 108, at 175-86, 217-18.

110. James D.A. Boyle, *Legal Fiction*, 38 HASTINGS L.J. 1013 (1987) (reviewing RONALD DWORKIN, *LAW’S EMPIRE* (1986)). Another critique of Dworkin’s integrity concept is that it risks begging the question. The concept of integrity requires treating similar situations in similar ways—treating like as like. Yet insofar as no two fact situations are identical by definition, most legal questions (and many questions of gender and racial equality) revolve around which characteristics are most relevant in determining what the situation is most like.

"aperspectival" and "neutral," relates to this honorific use of the word. Feminists argue that masculinism seeks to give the status quo the appearance of External Objectivity (thereby insulating it from attack) by labeling the male perspective as the only (i.e., no) perspective. Feminists also advocate rules that favor men as "objective." Claims to objectivity are seen as a rhetorical device: by avoiding reference to the traditions on which a conclusion depends, the writer hopes to convince his audience that the conclusion is independent of that tradition.¹¹¹ Although this form of the feminist critique is frequently worded in terms of an attack on External Objectivity, in its positionalist form this critique is more precisely a false universals critique of particular claims to External Objectivity.

c. Really, Really True Objectivity v. Wishy-Washy Subjectivity

Perhaps most frequently, "Objectivity" is used as a means of emphasizing one's emphatic insistence upon a proposition. In this sense, when a writer chooses to word her assessment not merely as "this is true," but as "this is *objectively* true," she tries to convey the idea that the reader should take the statement particularly seriously and had better not dispute it. Really, Really True Objectivity frequently boils down to little more than "I wish you to acknowledge that this is not merely my opinion, it has some support." In contrast, "Wishy-Washy Subjectivity" expresses the writer's lack of confidence in a proposition. An assertion of Really, Really True Objective truth might be implicitly based on a variety of other types of objectivity. The writer may believe that the assessment should not be disputed because it is Externally Objective, Algorithmically Objective, Argumentatively Objective, or Community Objective. The corresponding reasons for believing that the assessment is arguable (subjective) may, similarly, be based on any of a number of concepts of subjectivity.

Really, Really True Objectivity is an honorific in that it is an attempt to support one's assertion by praise, as opposed to argument.¹¹² As Dworkin rhetorically asks, if an argument in favor of one's conclusion is good, does it add anything to assert that the result is objective? Or if the argument is faulty, will you convince anyone by

111. This is one of Feyerabend's arguments against "objectivity." See *supra* note 106.

112. Dworkin calls for the end of discussing claims in terms of objectivity on the grounds that labeling an assertion as objectively true rarely adds anything to an argument other than rhetorical emphasis. "So Hercules [Dworkin's hypothetical model judge] might agree never to use the redundant words "objective" or "really" to decorate his judgments . . ." DWORKIN, *supra* note 63, at 267; see also Dworkin, *Objectivity*, *supra* note 69, at 300. Using my vocabulary, Dworkin states that many attempts to demonstrate various forms of objectivity are really confusing claims of Really, Really True Objectivity.

adding such an assertion? The word "objective," consequently, does little *itself* to further the argument. Rather, the word invites the reader to make one of two responses: either to stipulate the facticity of the assertion or to request that the writer provide the underlying support for the assertion. If, as Rorty suggests, the only usable definition of objectivity is "agreement among inquirers," a claim to objectivity can be no more than a request for agreement.¹¹³

C. *External Objectivity*

"External Objectivity" reflects a belief that there is truth "out there." External Objectivity refers to knowledge of truth external from mere human invention or opinion, or, at least, from the invention of any specific individual or group of individuals. The negative of External Objectivity is not necessarily subjectivity, but relativity. Objectivism is a term used occasionally to describe a belief in external, objective truth. The proponents of objectivism see any rejection of External Objectivity as necessarily equivalent to an acceptance of its exclusive oppositional negative, relativism. Relativism in this pejorative view might be described as a theory that any belief is as good as any others.

There are many different ways to conceive of what Externally Objective truth might be, whether it can be known, and how it could be known. Many writers assume that those who espouse External Objectivity assume that the external world is rationally ordered and that humans can distinguish External Objective truth through rationality (either narrowly or broadly defined). These writers presume that External Objectivity must be half of an oppositional dichotomy of which the other pole is Individualistic or Idiosyncratic Subjectivity.¹¹⁴ As John Stick has correctly pointed out, however, the standard of External Objectivity need not be based on rationality:

[The claim to objectivity] can mean that law is established according to the correct and fundamental principles of human rationality. It can also mean that law accurately reflects some extralegal reality: the natural law, whether construed as the law of God or of our own essential natures. . . . [A] legal decision, or the legal system as a whole, might be considered objective only if faithful to some extralegal norm, such as natural law. A variation of this type of objectivity would require that the legal system operate under the correct rational decision procedure as determined by philosophy,

113. See *supra* note 55.

114. Singer, for instance, makes this assumption. See *infra* text accompanying notes 249-53.

mathematics or the natural sciences.¹¹⁵

The presumed identity of External Objectivity and rationality may be a legacy of the Enlightenment in American political theory, which emphasizes reason as well as recent scientific theory which replaced ontology and epistemology with methodology. *Presuming* this relationship, however, forgets that the privileging of reason over revelation was largely a reaction of the Enlightenment against Christianity, while the methodological approach was an innovation of the philosophy of science and is not necessarily a part of all philosophical systems. That is, while many External Objectivists, including some in jurisprudence, do espouse such views, they are not a necessary part of all forms of External Objectivism. Many who believe in external truth believe that it can be recognized only through the evidence of one's own heart.

Perhaps the best examples of non-rational External Objectivity can be found in the most significant intellectual trend in American culture to be ignored in law reviews—Christianity.¹¹⁶ There are, of course, many different varieties of Christianity, but I understand that they all accept the existence of God as an objective truth and the source of the good, the right, and the just. It is probably this concept of an external source of justice which, either explicitly or implicitly underlies the commitment to justice of most jurisprudential theorists educated in the Christian tradition.¹¹⁷

I believe that I can safely say that most (if not all) variations of Christianity hold that External Objective religious truth cannot be known fully through rational methods. Whether or not God chose to create the universe in a way we would describe as rational, God is beyond mere human rationality. Faith, not logical argument, justifies the Christian's belief. Even such arch-rationalists as Thomas Aquinas, who tried to prove logically the existence of God, and who

115. Stick, *supra* note 9, at 369. Stick calls these types of objectivity Fundamental or Foundational Objectivity. In my terminology, the first form of Fundamental Objectivity is a molecule of External Objectivity combined with either Algorithmic or Argumentative Objectivity, while the second is External Objectivity.

116. Enlightenment rationality, however, never succeeded in replacing Christianity as the dominant intellectual tradition in the United States. At most, Enlightenment rationality was overlaid upon Protestant Christianity as an uncomfortable and unstable veneer.

117. Similar statements could, of course, be made of other religious traditions in the United States and elsewhere. I chose to use Christianity as an example because it is the tradition in which I was raised and, therefore, the only tradition about which I believe I have any right to make glib pronouncements.

Ruth Colker, for example, has recently defended a form of External Objectivity within feminism based in large part on a religious concept of truth. Colker has emphasized the influence of Buddhism, as well as Roman Catholic mysticism, on her thought.

believed not only that the knowledge achievable through human rationality is not inconsistent with Divine knowledge but that rational argument can 'lead one to faith, did not hold that human rational knowledge is a substitute for the knowledge achieved through faith.¹¹⁸

Other Christian theologians, emphasizing the infinite subjectivity of God beyond human understanding, do not think merely that human rationality is incompetent to understand God fully, they do not even believe that human rationality is necessarily consistent with God or the universe God created. I have already mentioned Hermetics, but admittedly they never represented a mainstream Christian sect.¹¹⁹ Nevertheless, this belief is also found in mainstream theologies. Tertullian, an early Christian theologian, is remembered for his rhetorical question "What does Athens [i.e., philosophy] have to do with Jerusalem [i.e., religious truth]?" as well as the statement "I believe, because it is impossible."¹²⁰ I interpret Tertullian's statement as meaning that religious faith is required for salvation (i.e., "I believe," not "I am convinced by logical argument") because certain doctrines that have been revealed to us cannot be logically proven, and may even seem to contradict that which can be logically proven (i.e., they are "impossible" by the standards of human logic).¹²¹ I am

118. For a short and elegant discussion about the development of the relative valorization of logical and non-logical modes of knowing in Christian theology through the high middle ages, see ETIENNE GILSON, *REASON AND REVELATION IN THE MIDDLE AGES* (1966).

119. See *supra* text accompanying note 72.

120. GILSON, *supra* note 118, at 9. This phrase is often misquoted as "I believe because it is absurd." For a recent example in the popular press, see Adam Gopnik, *WILSON'S VERSION* [book review of A.N. Wilson's *JESUS* (1992)], *NEW YORKER*, Oct. 26, 1992, at 135, 137. A variation of this was used in an episode of the old television show *All in the Family*, in which Archie Bunker explains to his atheist "meathead" son-in-law that "[f]aith is something you believe that nobody in his right mind would believe." John J. O'Connor, *Critic's Notebook: Fast Forwarding Into TV's Past*, *N.Y. TIMES*, Feb. 15, 1991, at C1. Of course, by putting this phrase in the mouth of the bigoted Archie, the scriptwriters meant to hold it up to the scorn of the audience. The phrase is, however, a very accurate description of the concept of Christian religious faith.

121. I have frequently heard this statement of Tertullian regarding the importance of individually or idiosyncratically subjective paths to knowledge misinterpreted to mean that Tertullian thought that absurdity itself was an argument for accepting a proposition. See, e.g., Gopnik, *supra* note 120. This assumes that Tertullian was a very silly man, and it ignores the context in which the statement was made: in answer to philosophical arguments made against Christianity. Ancient rationalist critics of Christianity argued that many of the doctrines of Christianity, such as creation and the teleological conception of historical time, were inconsistent with "truths" which had been logically proven by classical philosophy, such as the necessity of an eternal world and cyclical time. Tertullian denied the assumptions underlying the argument that the universe was ordered in accordance with human rationality, and that human rationality could, consequently, determine external truth. Using my terminology, Tertullian denied that External Objectivity was synonymous with Algorithmic or Argumentative Objectivity.

Feyerabend defends Galileo's prosecutors on the grounds that they adopted a similar

also reminded of the American fundamentalist Protestants persistent rejection of theories, such as evolution, that are overwhelmingly accepted as demonstrated by science, precisely because these theories conflict with revelation.

Within the Christian tradition, External Objectivity is far from being the negative of Individualistic or Idiosyncratic Subjectivity. Rather, External Objectivity may only be fully understandable at least partly, by means which we associate with Individualistic or Idiosyncratic Subjectivity: faith, intuition, ecstasy, or revelation. Even though Christians theology teaches that the truth of faith is universally applicable, and that salvation is potentially available to all persons, making it "objective" (i.e., not limited to an individual), Christians also believe that each person must be saved individually through conversion, the Sacraments, or grace, etc. and is, therefore, subjective.

The feminist critique of objectivity, which Katherine Bartlett calls positionality, might be reinterpreted as a defense of External Objectivity. Bartlett makes the familiar feminist (and post-modernist) critique that all claims to an aperspectival, universal, and permanent "objective" truth (what I call External Objectivity) are false universals because all human knowledge is necessarily situated and perspectival. However, insofar as she proposes that we may see more adequately if we both acknowledge our individual perspectives while trying to acknowledge the perspectives of others, she could be interpreted as implying that there is an external truth, even though we can never completely grasp it.¹²² Bartlett describes her concept of positionality as:

impos[ing] a twin obligation to make commitments based on the current truths and values that have emerged from methods of feminism, and to be open to previously unseen perspectives that might come to alter these commitments. . . . Positionality, however, sets an ideal of self-critical commitment whereby I act, but consider the truths upon which I act subject to further refinement, amendment and correction.¹²³

She further states: "I can improve my perspective by stretching my

approach. Feyerabend explains that the prosecutors had no objection to Galileo using his theories as heuristics, models to be used for predicting and measuring planetary movements. They objected to Galileo's arrogance in presuming that that which is arguable or observable is also externally real, particularly in light of more reliable proof to the contrary (i.e., religious revelation in the Bible and the tradition of the Catholic Church). Feyerabend charges that modern science continues in this unsupported arrogance. FEYERABEND, *supra* note 39, at 247-64.

122. Bartlett, *supra* note 1, at 880-87.

123. *Id.* at 883.

imagination to identify and understand the perspectives of others."¹²⁴ "There can be no universal, final, or objective truth; there can only be 'partial, locatable, critical knowledges', no aperspectivity—only improved perspectives."¹²⁵ These assertions imply an External Objectivity, as the concept of a perceiver necessarily implies an object to be perceived.

In contradistinction, Harding, a feminist philosopher of science who also adopts a perspectivist approach, recognizes that she cannot reject objectivity while adopting positionalism. Consequently, while she critiques many scientific claims of objectivity and value-neutrality as being claims to false universals, she also defends objectivity.

We need to avoid the "objectivist" stance that attempts to make the researcher's cultural beliefs and practices invisible while simultaneously skewering the research object's beliefs and practices to the display board. . . . Introducing th[e] "subjective" element into the analysis in fact increases the objectivity of the research and decreases the "objectivism". . . .¹²⁶

Harding understands that it does not follow from the observation that claims to objectivity are frequently used as a strategy to legitimate the status quo (i.e., false universals), that one must necessarily reject the possibility of "objectivity." "From the perspective of feminist theory and research, it is *traditional* thought that is subjective in its distortion by androcentrism—a claim that feminists are willing to defend on

124. *Id.* at 882.

125. *Id.* at 885. Bender and Rhode make similar false universals criticisms of claims to External Objectivity while simultaneously proposing that the truth may be better grasped through multiple perspectives. "Feminists value a collective and dialectical creation of knowledge through sharings of multiple perspectives and reject the false notion of neutral, objective, unsituated knowledge." Bender, *supra* note 1, at 11. "Our objective should be multiple accounts and avoid privileging any single universalist or essentialist standpoint." Deborah L. Rhode, *Feminist Critical Theories*, 42 STAN. L. REV. 617, 628 (1990).

In feminist scientific theory, Millman and Kantor, in their defense of what I have referred to as Psychological Subjectivity, also seem to make a similar defense of multi-perspectivity: "reality is subjective, or rather subject to social definition. . . . Collective delusions can be undone by introducing fresh perspectives." Millman & Kantor, *supra* note 84, at 30. The reference to multiple perspectives itself suggests that the possibility of External Objective truth despite their denials of the possibility of objective truth.

An alternate interpretation is that the aggregation of the perspectives of many individual subjects will eventually lead to the formation of a community through consensus. The process creates a Community Objective standard. Indeed, Harding relies heavily on Kuhn. See *infra* note 132. The insistence in this literature on a progressive *improvement* of perspective, rather than merely the formation of perspective, arguably belies this approach.

126. SANDRA HARDING, *FEMINISM & METHODOLOGY* 9 (1987) [hereinafter HARDING, *FEMINISM & METHODOLOGY*]. "Objectivity never has been and could not be increased by value-neutrality." SANDRA HARDING, *THE SCIENCE QUESTION IN FEMININISM* 27 (1986) [hereinafter HARDING, *THE SCIENCE QUESTION*].

traditional objectivist grounds."¹²⁷ "[W]hat feminism should distrust is not objectivity or epistemology's policing of thought per se but the particular distorted and ineffectual form of objectivity and epistemology."¹²⁸

Harding further recognizes that a feminist response which rejects objectivity and celebrates subjectivity must accept the very masculinist definition of the feminine which feminism is trying to move beyond.¹²⁹ She recognizes that conscious awareness of perspectives and values—concepts sometimes associated with subjectivity and femininity—are actually *more*, not less, objectivity-enhancing in the scientific sense. Post-modern science's goal of objectivity is to achieve a type of knowledge that is shared, as opposed to knowledge comprised of idiosyncratic individual views that mask themselves as universals. Similarly, the feminist critique seeks knowledge and ways of making value judgments beyond the false universals of the masculine status quo.

To elaborate, twentieth-century philosophy of science recognizes that each scientist makes observations from a perspective, and that scientific research is necessarily permeated by value judgments. Mainstream scientific theory, as exemplified by Popper, tries to get beyond idiosyncrasy and solipsism by intersubjective criticism. Popper argues that through idiosyncratic criticism—having other scientists add their perspectives—science can be made "subjectless."¹³⁰ Scientific theory is, consequently, ruthlessly communitarian and anti-individualist.¹³¹

While she does not disagree with the goal of mainstream science, Harding argues that the methodology of mainstream science is inadequate to accomplish its goal. Popper's very terminology gives a false sense that science has reached the goal of getting beyond solipsism and achieving universality, leading to hubris and non-critical thinking. It also totally devalues the subject in pursuit of the object.

127. HARDING, *THE SCIENCE QUESTION*, *supra* note 126, at 138.

128. *Id.* at 158.

129. "Objectivity vs. subjectivity, the scientist as knowing subject vs. the objects of his inquiry, reason vs. the emotions, mind vs. body—in each case the former has been associated with masculinity and the latter with femininity." *Id.* at 23. Many feminist theories run the risk of reinstating masculine theory by reacting to the analytical categories of masculinism. Schroeder, *supra* note 4, at 125.

130. *See supra* note 65.

131. Anti-individualism is one of the hallmarks of Peirce's thought as well. *See* Bernstein, *supra* note 36, at 66; Cornell, *supra*, note 32. An interesting comparison can be made between Harding-Bartlett perspectivity and Gadamer's theory of hermeneutics. Gadamer insists that in interpretation we cannot, and indeed should not, try to get past our perspective (what he call our "prejudices"). We understand and interpret through and by means of, not despite of, our prejudices. GADAMER, *supra* note 98, at 277, 288-92.

Harding's feminist approach recognizes that objectivity—in the sense of External Objectivity—might never be reached, but must be constantly strived for. Indeed, External Objectivity may be a human creation which is produced by this process. Achieving or creating objectivity in this affirmative sense requires not only that the subject critique the perspectives of others but that the subject attempt to remain critically aware of her perspective, even though a perfect understanding of one's own perspective may never be fully possible. Moreover, the subject must empathize with and explore, as well as critique, the perspectives of others. That is, Popper views subjectivity as invalid; Harding views subjectivity as necessary, but insufficient.

In this context, Bartlett's use of objectivity has implications of correspondence with External Objectivity and acts as the opposite of Idiosyncratic Subjectivity. Harding recognizes that this common version of the feminist critique of objectivity relates to the use of certain claims to objectivity as a justificatory strategy, rather than serving as an effective attack on the possibility of objectivity.¹³²

Friedrich Nietzsche, one of the founders of modern perspectivism, was well aware that a positionalist view is implicitly and essentially External Objectivist as well. His propositions that no individual subject can have a complete view of the world—that knowledge and morals are contingent—do not imply that there is no external truth being viewed from our individual perspectives:

Henceforth, my dear philosophers, let us be on guard against the dangerous old conceptual fiction that posited a 'pure, will-less, painless, timeless knowing subject': these always demand that we should think of an eye that is completely unthinkable, an eye turned in no particular direction, in which the active and interpreting forces, through which alone seeing becomes seeing *something*, are supposed to be lacking; there are always demand of the eye an absurdity and a nonsense. There is *only* a perspective seeing, *only a perspective* 'knowing'; and the *more* affects we allow to speak about one thing, the *more* eyes, different eyes, we can use to observe one thing, the more complete will our 'concept' of this thing, our 'objectivity' be. But to eliminate the will altogether, to suspend each and every affect, supposing we were capable of this—what would that mean but to *castrate* the intellect?¹³³

132. HARDING, THE SCIENCE QUESTION, *supra* note 126, at 23-27, 37-38, 157-58; HARDING, FEMINISM & METHODOLOGY, *supra* note 126, at 9. A detailed description of Harding's more sophisticated approach is beyond the scope of this article. Harding's concept of objectivity is also heavily influenced by Kuhn's insight that our understanding of physical phenomena is largely a matter of humanly created paradigms. However, Harding understands that Kuhnian theory, while not totally relativistic, is progressive.

133. FRIEDRICH NIETZSCHE, BASIC WRITINGS OF NIETZSCHE 555 (W. Kaufmann ed. &

If nothing else, Nietzsche thought he had something "true" to say about the impossibility that we could ever have full assurance of the "truth" of our knowledge and the necessity, therefore, of creating our own truths.

Of course, Nietzsche's conception of a limited, perspectival, interpretative, and, to some extent, self-created (and subjective) Externally Objective truth is radically different from the Externally Objective truths of religion or science. This again illustrates how the simultaneously impoverished and over-endowed terminology of objectivity/subjectivity dichotomies is inept to capture many profound philosophical and jurisprudential distinctions.

D. *Philosophical Objectivity*

The last conception of objectivity I will consider is perhaps better described as a different way of considering some of the foregoing concepts of objectivity. I have not been able to avoid using this concept in the foregoing definitions either implicitly or expressly. I was referring to this use of objectivity when I emphasized the concern of American jurisprudences for the emancipation of the subject.

This terminology reflects the notion that each of us is a subject confronting the outside world, other persons, the community, and texts as objects.¹³⁴ The concepts of Philosophical Subjectivity and

trans., 1968). A full, coherent analysis of Nietzsche's thought is beyond the scope of this essay. Nietzsche uses the word "truth" in many different and seemingly contradictory ways, and the meaning in any given sentence can only be divined by reading it in the context of the entire work. Consequently, statements in some sentences denying the possibility of "truth" in the sense of "human truth" and "human knowledge" do not necessarily imply that Nietzsche has no criteria for truth.

It is common to characterize (or more accurately, caricature) Nietzsche as a "nihilist" who denies all meaning and validity of morals. "A good example is Friedrich Nietzsche, who argued that once God was dead, morality came tumbling after, leaving only the raw exercise of power." Joan L. Williams, *Rorty, Radicalism, Romanticism: The Politics of the Game*, 1992 WIS. L. REV. 131, 132 (1992). A better reading is that Nietzsche argued for a necessary nihilist moment in which we tear down the lies of the past, so that the overman can then proceed with the positive task of constructing a life-affirming morality. Once one realizes that "God is dead," the foundations are knocked out from under Western Christianity morality. Yet this is not the end of morality:

"What are you really doing, erecting an ideal or knocking one down?" I may perhaps be asked. "But have you ever asked yourselves sufficiently how much the erection of *every* ideal on earth has cost? How much reality has had to be misunderstood and slandered, how many lies have had to be sanctified, how many consciences disturbed, how much "God" sacrificed every time? If a temple is to be erected *a temple must be destroyed*: that is the law—let anyone who can show me a case in which it is not fulfilled!"

NIETZSCHE, *supra*, at 531. The concept of the "will to power" is very different from that of a "raw exercise of power".

134. By necessity, I am being overly simplistic. As many concepts of the subject and object

Philosophical Objectivity in the law can be seen in the issue of whether the text constrains interpretation or whether the interpreter is free to engage in unlimited interpretation. Philosophical Objectivity and Subjectivity have much in common with Observation Objectivity and Psychological Subjectivity. The use of these terms differs in that the former concentrates on the status of the observer and the observed, while the latter is limited specifically to methodological questions (although one's stance on the methodological questions arguably requires an implicit stance on the philosophical question).

The neo-Hegelian philosophical concept (or the "Concept") posits, among other things, that the subject and the object mutually constitute each other. In one moment of the Concept the subject and the object are opposed, but because the subject can only exist in opposition with the object, in the other moment of the Concept, the subject and the object are unified.¹³⁵

One of the questions posed by neo-Hegelian thought is how can the subject and the object can be reconciled in a way which recognizes both the separateness and the unity of the subject and object without subjecting the object to the subject, or the subject to the object? In other words, how can Philosophical Subjectivity and Objectivity be reconciled? In such a conception, Philosophical Subjectivity and Objectivity are simultaneously contradictory and complementary. At one moment of the Concept, Philosophical Objective truth is external to the subject and has much in common with External Objectivity in that it constrains the subjectivity of the subject. Yet at the other moment of the Concept, the object is only understood through the

exist as there are philosophers, psychoanalysts, linguists and other theorists. Those who use this terminology disagree as to whether the subject is inherent, constructed, created, actual, or illusory.

The subject/object (self/other) distinction can take on various meanings depending on the context:

The concepts of self and the other should not be understood as referring to fixed entities, but instead as designating relationships respectively of identify and of difference or alterity. Thus, depending on the particular context, both 'self' and 'other' may refer to an individual or a group, to an economic class or an ethnic minority, to tribes or nations, and to temporary as well as to permanent groups. Also, two (individual or collective) actors may concurrently be part of the same self for some purpose, while standing vis-a-vis one another in a relation of self to other for some other purpose. For example, white men and women may constitute a single self in the context of racism against blacks—that is, such men and women identify with one another as being white and relate to blacks as "the other"—and self and other in the context of the relationship between the sexes, where difference is defined along gender lines.

Rosenfeld, *supra* note 51, at 1228-29.

135. The Concept is described as "[t]he identity of identity and difference." CHARLES TAYLOR, *HEGEL* 103 (1975).

subject and, in common with any number of definitions of subjectivity I have outlined, there is no external truth. Truth can only be understood in terms of subjectivity. In this system, objectivity does not exist as a static and fixed eternal category.¹³⁶

Note that although many feminists word their theories in terms of the rejection of objectivity, the concept of Philosophical Objectivity is appealing to certain forms of feminism because the concept is concerned with the possibility of reconciliation of the subject-object distinction. Many feminists, particularly those who identify with the "different voice" approach, privilege relationality, responsibility, and the ethical call of the other over the liberal values of autonomous individuality and rights analysis. Traditional western thought has envisioned the self (the subject) as male and the other (the object) as female. Continental psycho-linguistic theory suggests that, at least as society and families are currently structured, psycho-linguistically, the subject can only be imagined as the masculine.¹³⁷ Feminism seeks recognition of woman as subject, or more accurately, the creation of a society in which a woman can be a subject and in which their speech is recognized as speech. If women were to be recognized as Philosophical Subjects, they would be selves, and others would be their objects. If, as philosophical subjects, women refused to respond to Philosophical Objectivity, they would not be responding to the ethical call of the other, and would not be acting interrelationally or responsibly. Rather, they would be acting as autonomous individuals demanding rights against others and reinstating the violence of hierarchy which women seek to critique. In other words, while feminism may argue correctly that a concept of objectivity which does not recognize or permit the subjectivity of women is oppressive, a feminine

136. Brudner, *supra* note 5; Drucilla Cornell, *From the Lighthouse*, 11 CARDOZO L. REV. 1687 (1990). Much of the so-called "post-modern" thought is characterized by the critique of the concept of the subject. Hegel, of course, recognized that the individual subject is a human creation. Michel Foucault, however, is generally recognized for his theory of social construction of the subject and sexuality, which maintains that power in modern society is subjectless—there are victims but no perpetrators. See, e.g., CHARLES TAYLOR, *FOUCAULT ON FREEDOM AND TRUTH; FOUCAULT: A CRITICAL READER* (D. Hoy ed., 1986).

The neo-Freudian psychoanalytical theory of Jacques Lacan emphasizes that the subject (the ego) is a intersubjective symbolic concept and is only one element in human psychology. JACQUES LACAN, *THE SEMINAR OF JACQUES LACAN: BOOK I FREUD'S PAPERS ON TECHNIQUE* 1953 (J. Miller ed., 1988). Boyle, Schlag, and Winter have critiqued contemporary American legal leftists for the unquestioning reliance on the concept of the subject. See *supra* note 8.

137. See DRUCILLA CORNELL, *BEYOND ACCOMMODATION: ETHICAL FEMINISM, SEXUAL DIFFERENCE AND UTOPIAN POSSIBILITY* (1991) [hereinafter CORNELL, *BEYOND ACCOMMODATION*]; Drucilla Cornell, *The Doubly-Prized World: Myth, Allegory and the Feminine*, 75 CORNELL L. REV. 644 (1990) [hereinafter Cornell, *Doubly-Prized World*]; ELIZABETH GROSZ, *JACQUES LACAN: A FEMINIST INTRODUCTION* (1990).

subjectivity which does not recognize the subjectivity of others (i.e., Philosophical Objectivity when viewed by woman as subject) would be equally inadequate to a feminist concept of personhood.

E. Objectivity and Determinacy

Many legal scholars, both liberal and leftist, presume that "objectivity" (particularly Argumentative and Algorithmic Objective) is inextricably related to determinacy.¹³⁸ This presumption is so widely held that it is very rarely explained, let alone defended. Nevertheless all philosophical systems accept this proposition.

An alternate view is reflected in the rabbinic tradition of Jewish law. Jewish law recognizes that many legal questions are (Algorithmically, Argumentatively, and perhaps even Externally) objectively indeterminate. Such questions are indicated in the Babylonian Talmud by the device "TEYKU."¹³⁹ The concept is that there is a right answer to the question established by the external truth of the Lord, but that rational persons, making rational arguments based on the legal system, will disagree. The indeterminacy of these laws is (argumentatively) objective.¹⁴⁰ Yet another type of objective indeterminacy is Goedel's Incompleteness Theorem, which mathematically proves that all statements within a fixed number system cannot be mathematically proved.¹⁴¹

The neo-Hegelian concept of Philosophical Objectivity is also not

138. Both Greenawalt, who purports to be a defender of the concept of objectivity in the law, and Singer, who purports to deny the possibility of objectivity in the law, make this identification. See *infra* text accompanying notes 150-52, 237-38. See generally Millon, *supra* note 35.

139. The etymology of this device is uncertain but it is probably derived from the Hebrew word *teykum* or "let is stand [undecided]." LOUIS JACOBS, *TEYKU: THE UNSOLVED PROBLEM IN THE BABYLONIAN TALMUD; A STUDY IN THE LITERARY ANALYSIS AND FORM OF THE TALMUDIC ARGUMENT* 14 (1981). Other popular interpretations, such as the theory that TEYKU is an acronym for a phrase denoting that the problem will eventually be provided by Elijah in the Messianic age, are probably folk etymologies. *Id.* at 295.

140. I have chosen to call this Argumentative Objectivity because rabbinical reasoning, although quite formal, is not limited to the syllogistic logic recognized by the Christian-Hellenic tradition. SUSAN A. HANDELMAN, *THE SLAYERS OF MOSES: THE EMERGENCE OF RABBINIC INTERPRETATION IN MODERN LITERARY THEORY* (1982). Within the Christian-Hellenic tradition, many rabbinical arguments would not be deemed algorithmic, but merely rational. Within the rabbinical tradition itself, however, this form of objectivity might more accurately be called "Algorithmic Objectivity."

141. Goedel's Incompleteness Theorem is fairly well known among legal scholars because of Douglass Hofstadter's popularization of Goedel's work and the theory of recursive systems. DOUGLAS HOFSTADTER, *GOEDEL, ESCHER, BACH: AN ETERNAL GOLDEN BRAID* (1980). Hofstadter paraphrases Goedel's Incompleteness Theorem into colloquial English as: "All consistent axiomatic formulations of number theory include undecidable propositions." *Id.* at 17.

determinate. In a dialectic system, objective reality, along with persons as subjects is constantly in a state of change.¹⁴² It does not follow that because we can anticipate the direction of change, because we as subjects create, and are created by, the change, and because the result of change is eventually determined, Philosophical Objective reality is totally determinate in advance. In fact, if it were determinate in advance, it would contradict the dialectic concept that we, and our physical reality, change together.¹⁴³

A complete analysis of the indeterminacy controversy is beyond the scope of this article. Nevertheless, I believe that given the primacy of determinacy to Greenawalt's and Singer's concepts of objectivity (to which I will soon turn), it impossible for me not to digress and comment.

Greenawalt makes the extraordinary statement that determinacy in the law is so self-evident that he wonders if the indeterminacy argument is a straw man. He asks "Does anyone *really* think the law *usually fails* to provide answers to legal questions, in a sense of 'fails' that has practical significance? I am not sure."¹⁴⁴ Has this man ever practiced law? That law is indeterminate is so "obvious" to practitioners (although they tend not to use such high-fallutin' academic terms). I am constantly surprised this idea is even a subject of discussion among academics. I do not think I have ever encountered, researched, advised on, negotiated, or been involved in litigating a legal issue in practice in which there were not multiple ways of interpreting and applying the law to the particular fact pattern. On a simplistic level, the fact that issues are negotiated and litigated means that competing interpretations not only can be articulated, but that the eventual outcome is questionable. On a cynical level, indeterminacy keeps lawyers in business—if the law were clear clients would not have to hire us. On a more flattering level, reinterpreting and rewriting the law to enable our clients to achieve their goals is "what lawyers do." The most successful lawyers are often the ones who are most creative and audacious in their reinterpretations.¹⁴⁵ Anyone

142. See *supra* note 136.

143. Cornell, *supra* note 32, at 1195. A similar concept is found in Peirce's notion of "thirdness" and his theory of the communitarian nature of scientific truth, although Peirce held out the theoretical possibility of eventual determination, but not determinacy.

144. Kent Greenawalt, *How Law Can Be Determinate*, 38 UCLA L. REV. 1, 4 (1990). Greenawalt later declares that the claim that "no or few legal questions have determinate answers" is "ridiculous." *Id.* at 31. Far from disproving the indeterminacy thesis, Greenawalt inadvertently restates the CLS argument for indeterminacy.

145. Charles Yablon has made a similar point previously in the area of corporate and securities law. He takes issue with the presupposition of many legal academics that, with time, the development through case law of standards to be applied to the corporations and their

who has structured a deal or negotiated a contract knows that both lawyers and lay people experience American law as being so radically indeterminate that they wish to ensure that they never encounter the court system. Instead, clients spend tens or hundreds of thousands (and occasionally millions) of dollars to negotiate and draft elaborate contracts and to devise elaborate private alternate dispute mechanisms in order to avoid formal arbitration, let alone the courts.

On the other hand, one experiences moments of predictability as well. Contracts get signed, deals get done, litigation gets settled—all on the strength of shared experiences of predictability. There is no sense in making empirical claims about which moment predominates over the other.

III. APPLICATIONS

I shall apply the definitions developed in this article to the work of five writers who expressly confront law's objectivity. I will show that Kent Greenawalt, Owen Fiss (both on the liberal center) and Stanley Fish and Joseph Singer (on the critical left) all use their own private definitions of objectivity either to defend the status quo and to silence deviant voices or otherwise to limit the universe of acceptable legal arguments. By concentrating on their own private definitions they also avoid, rather than join in debate with each other. I will further show that, although Catharine MacKinnon makes a powerful critique of how claims to objectivity function to exclude women from the law, her failure to recognize in her writings how the masculinist writers actually purport to define their terms weakens the force of her argument.

A. Greenawalt

I have chosen to analyze the theories of Kent Greenawalt primarily because he has embarked on an ambitious program of defending objectivity in the law. Greenawalt can be identified as working within the classical liberal tradition of mainstream legal scholarship.¹⁴⁶

I have also chosen Greenawalt because I believe his use of the

officers and directors in adopting so-called "poison pills" will become more precise and more determinate. Yablon argues that attorneys and clients attempt to make the law increasingly *more indeterminate* as they intentionally try to invent new legal devices, new ways of acting, and new ways of characterizing their actions to avoid the strictures of previous case law. Charles M. Yablon, *Poison Pills and Litigation Uncertainty*, 1989 DUKE L.J. 54 (1989).

146. See Greenawalt, *supra* note 144. Greenawalt has subsequently further developed his ideas in this article into a book. GREENAWALT, *supra* note 108.

term "objectivity" epitomizes the danger that arises from choosing to frame jurisprudential debate within such ambiguous terminology. Greenawalt attempts to formulate possible defensible definitions of objectivity, but he fails to recognize the definitions or objectivity used by critics of legal liberalism to which he tries to respond. As a result, Greenawalt and his opponents pass like ships in the night. More important for this article, his own use of the word "objectivity" in his analysis betrays his own specified definitions.

1. DEFINITIONS

In his article *How Law Can Be Determinate*, Kent Greenawalt states that:

[L]aw might be objective in: 1) addressing external acts, not thoughts and emotions; 2) taking acts as they reasonably appear, rather than examining intents, motives, and understandings; 3) viewing acts in light of what "reasonable people" would be expected to do, not in light of what the particular individuals might do; and 4) establishing criteria of liability and designing remedies and punishments with regard to general classes of people rather than individuals.¹⁴⁷

Under my definitional structure, the first and second definitions are forms of Observation Objectivity (perhaps, combined with a form of Reasonable Person Objectivity) and the third, a form of Reasonable Person Objectivity. Classification of the fourth definition is somewhat difficult because Greenawalt does not state the source of the criteria to be used in judging. In fact, the fourth definition does not describe something uniquely, or even commonly, associated with the word "objectivity." Arguably, all categorization, judgments, and even language itself consist of characterizing individual cases (whether persons or acts) in light of criteria that abstract some aspect(s) of the cases as relevant or controlling. Thus, Greenawalt's fourth definition of objectivity is consistent with a number of this article's elemental categories of *objectivity* standards (such as Standardized Objectivity,

147. *Id.* In this article, I do not attempt to deal with all possible definitions of objectivity identified by Greenawalt. In *Law and Objectivity*, *supra* note 108, Greenawalt tries to clarify his definitions of objectivity by identifying their negatives, or what he would call oppositions;

(1) Objective (external) versus subjective (internal); (2) objective (criteria based on reasonable persons) versus subjective (personalized criteria); (3) objective (dealing with many situations similarly) versus contextualized (using individualized approaches); (4) objective (dictating results) versus discretionary (leaving much to the judgment of officials); (5) objective (fair) versus arbitrary (or unfair).

GREENAWALT, *supra* note 108, at 93. Greenawalt believes that "[t]he simple idea that the law is 'objective' usually has a flavor of all of these senses." *Id.* at 93.

Community Objectivity, Algorithmic Objectivity, Argumentative Objectivity, or External Objectivity). At the same time, Greenawalt's fourth definition is also consistent with many categories of *subjectivity*. For example, one may judge individuals pursuant to criteria established by Individualistic Subjective means. One may suspect, however, that in context, the fourth definition supposedly refers to a Standardized Objectivity in which the standard itself is a form of Reasonable Person Objectivity. Greenawalt also raises the possibility that law can be "objective" because it is anchored in correct political morality, economic efficiency, cultural morality, or some other criterion," which seems to concern External Objectivity.¹⁴⁸

Elsewhere, Greenawalt identifies another definition of objectivity when he attempts to address the feminist critique: "the sense that a legal category is not arbitrary or unfair."¹⁴⁹ This is "Fairness Objectivity," the negative of "Biased Subjectivity." This portion of Greenawalt's argument dealing with the feminist challenge will be revisited after I introduce MacKinnon's feminist political theory.

Although a later version of *How Law Can Be Determinate* serves as the first section of Greenawalt's defense of objectivity in the law, *Law and Objectivity*, the article, as indicated by its name, is more accurately a defense of the concept of determinacy of the law.¹⁵⁰ He does this because he expressly equates (and, arguably, conflates) determinacy with objectivity.¹⁵¹ He makes no argument for this identification; he merely asserts it. However none of the four definitions of objectivity which he identifies in his article has, on its face, any necessary relationship with determinacy. For example, if tort liability is based on a determination of whether an accused tortfeasor met the

148. *Id.* As Greenawalt refers in the sentence immediately following to correct answers reached through legal reasoning, this may, instead, refer to Algorithmic or Argumentative Objectivity, Community Objectivity or an Algorithmic/External Objective molecule, or even something else.

149. GREENAWALT, *supra* note 108, at 121.

150. Greenawalt believes that the "possibility that the law provides one correct answer is closely tied to the law's relationship" to broader standards (i.e., probably Algorithmic or External Objective standards, or a combination of them). Greenawalt, *supra* note 144, at 1 n.1. He identifies determinacy with the "rule of law" and defines a determinate answer as one which "virtually any intelligent person familiar with the legal system would conclude, after careful study, that the law provides this answer." *Id.* at 3. Greenawalt identifies this as a "fairly strict interpretation of a determinate answer." *Id.* at 2.

Greenawalt states that he wishes to develop an even higher standard than mere predictability of agreement. He therefore adds an additional criterion "that no powerful argument consonant with the broad premises of a legal system exists for a contrary answer." *Id.* at 3.

151. *See, e.g., id.* at 12, 45, 70. Because Greenawalt usually uses objectivity and determinacy in sequence, it is difficult to tell from his context whether he thinks that the ideas are identical or merely that they substantially overlap. Perhaps one is a subset of the other.

standards of a reasonable person (Greenawalt's third type of objectivity), it does not follow that tort law will be determinate either in practice or in theory. Nevertheless, based on his identification of objectivity and determinacy, Greenawalt concludes that in order to show that objectivity in the law is possible, he must first show that determinacy in the law is possible.

Having identified objectivity with determinacy, Greenawalt tries to develop hypotheticals which will be unarguably determinate and, therefore, unarguably objective. As a theoretical matter, the identification of objectivity with determinacy is doubtful at best. But even if one accepts that determinacy and objectivity are necessarily interrelated, Greenawalt's examples are not determinate. In fact, he unwittingly illustrates one of the primary CLS arguments in favor of indeterminacy—i.e., the "law" alone does not determine results. Rather, results are determined, and may in fact be predictable, because of many factors in addition to the law, such as social conventions, political and ethical choices, and brute power.

Let me explain the structure of Greenawalt's arguments more fully before turning to the details of his hypotheticals. As I have stated, Greenawalt initially equates, or arguably conflates, objectivity with determinacy. He then conflates a number of different concepts of objectivity. He tries to illustrate the possibility of one form of objectivity, argues that this is evidence of a different form of objectivity, and finally argues that the existence of this second form of objectivity is proof of determinacy. Greenawalt specifically makes the error of thinking that if he can show an example of Standardized Objectivity (and perhaps Argumentative Objectivity), which itself has no internal normative content, the result can be given the honorific label of either Fairness or Really, Really True Objective. He confuses the application of this honorific to the result with proof that the result was achieved through some methodologically objective method which does, in fact, carry normative significance, such as Community Objectivity or Algorithmic Objectivity. He assumes that this "demonstration" of the possibility of Algorithmic Objectivity also demonstrates determinacy. He then presents the fact that law can at least theoretically be determinate in some circumstances as proof that objectivity in the law is a realizable goal.

This argument is a rich mixture of the non sequitur and the circular.¹⁵² At best, his argument dissolves into a bald declaration that his argument is Really, Really True Objective, with the goal of depriv-

152. I do not condemn all circular arguments. Proponents of the hermeneutic circle of interpretation expressly adopt a special form of circular reasoning which they believe can be

ing contrary arguments of power—by definition, a justificatory strategy for silencing voices that dissent.

2. LAW AS BASKETBALL

Let us examine Greenawalt's use of the term "objectivity" in context. In this section I will limit myself primarily to examining, in excruciating detail, one of the first hypotheticals he devises of a purportedly "easy" case of objectivity and determinacy. If we deconstruct the case Greenawalt identifies as "easy," we will have saved a great deal of time and effort required to grasp the rest of his thesis.¹⁵³

Greenawalt raises a question dealing with the interpretation of the rules of half-court basketball by a player he identifies as Kate.¹⁵⁴

justified. See *supra* note 102. I criticize Greenawalt not for accepting the hermeneutic circle, but for making a circular argument when he is instead trying to make a linear argument.

153. Greenawalt's style consists largely of presenting examples which he believes illustrate the conclusions he proposes, working from the simplest through supposedly more complex problems of interpretation (including the interpretation of dog leash laws and the Holy Bible). His basketball hypothetical is one of the shortest, taking up only 3 pages in the 86 page article. I have chosen to discuss it because its very brevity enables me to deconstruct it in full and because it epitomizes the non sequitur aspect of his presentation.

154. Greenawalt apologizes for the potential sexism of the use of a sports metaphor, but justifies it on the basis of the usefulness of the analogy between the rules of team sports and arbitrary laws. Greenawalt misses the primary point of the feminist critique. If the writer assumes knowledge by his reading audience which is typically known by one class of persons (in this case men) but is typically less familiar to another class of persons (in this case women), he implicitly excludes the second group from the conversation. This exclusion has an oppressive political effect when, as in this case, the excluded class is also the socially subordinate class. Consequently, given the gendered nature of the analogy, the writer then has an obligation to make sure that his use of the analogy does not serve to exclude. This requires explanation, not assumption of knowledge, of the rules. In *Law and Objectivity*, Greenawalt goes far to remedy this problem by including a diagram of a basketball court. GREENAWALT, *supra* note 108, at 93.

As is probably more typical of women than men, I have virtually no interest in, and virtually no familiarity with, the rules of basketball (which Red Smith accurately derided as one of the "back and forth sports"). I was totally mystified by Greenawalt's specific analogy.

Another feminist point, which Greenawalt seems to recognize, is that the assumption that law and society is, or should be, organized on the model of the competitive battles of sport which may reflect unexamined masculinist views of human nature. He tries to ameliorate this by giving feminine names to the protagonists in his hypothetical. However, as the protagonists are engaging in the stereotypically masculine behavior of playing half-court basketball, (which, unlike regular basketball which has become a major women's college sport, is almost exclusively played by men), this is little more than having the men play in drag. I am willing to assume for argument sake, that the sports-rules analogy is appropriate in this case. Indeed, sports rules strike me as a good example of a certain type of relatively Standardized Objective and arbitrary standards—sports may be socially masculine, but most feminists would agree that law is also socially masculine. However, not all would agree. For example, although Max Weber initially begins his discussion of law with an analogy to the rules of a card game, he eventually rejects this approach, and decides that the arbitrary, voluntary, and limited nature of games has little to tell us about law. MAX WEBER, *CRITIQUE OF STAMMLER* (G. Oakes trans. & ed, 1977) at 137.

The specific interpretative question is: "what does the rule that a player must 'take the ball as far back as the foul line' mean?" He concludes that the answer is both determinate as well as objectively correct.

Based upon Greenawalt's description, I assume that two of the principles of half-court basketball are: i) that a team is ordinarily awarded points when a member of that team throws the basketball through the hoop guarded by the rival team; but ii) under certain circumstances (as a penalty, perhaps?), the team will not be awarded a point unless the player was standing a minimum distance away from the basket (i.e., behind a certain line painted on the floor of the court called the foul line) when the shot was made. We are told that in all previously similar occasions, the player's team was not awarded points even though the player successfully shot a basket when the player was standing on the same side of the foul line as the basket.¹⁵⁵ On one occasion, Kate makes a basket while standing one-half step in front of the foul line, and in another, she makes a basket while standing in the corner of the court on the same side of the foul line as the basket, but at a distance from the basket further than the distance from the basket to the middle of the foul line. In each occasion she claims that her team should be awarded a point.

Greenawalt concludes that Kate's interpretations of the rule are "objectively wrong."¹⁵⁶ He states that because her interpretations contest "a clear shared understanding among all relevant participants (including herself up to the time she proposes a change)."¹⁵⁷ This is so, he continues, even if the rules themselves are arbitrary. In addition, he states that "[o]ur culture shares a basic understanding that sharp changes in rules of informal competitive games are not made after the fact when urged by a team that would benefit."¹⁵⁸

Greenawalt's hypothetical is not persuasive, let alone convincing. Perhaps he realizes this, as he makes no attempt to persuade or argue

155. After I finished the first draft of this article, I was informed by my husband that these are not the rules of half-court basketball. According to him, the player must walk or run with the ball to a place behind the foul line, but, after having done so, the player may then return to the front of the foul line before shooting the basket. I did not understand this from Greenawalt's description and, indeed, even after rereading, I still cannot derive this rule merely from his description. The diagram contained in the later version of the hypothetical in *Law and Determinacy* did not help me much. See *supra* note 153. Because my husband dislikes basketball as much as I do, I do not know which of our interpretations is "right." I decided not to change my description because it illustrates both Greenawalt's unthinking masculinist assumptions about the common knowledge of law professors and the difficulty of interpreting language out of context.

156. Greenawalt, *supra* note 144, at 26.

157. *Id.* at 27.

158. *Id.*

his case. Greenawalt merely asserts repeatedly that Kate is objectively wrong in the hope that by constant repetition the inattentive reader might confuse his assertion with an argument. Greenawalt's assertion that Kate's interpretation is objectively wrong is an example of Really, Really True Objectivity. He wishes us to respond by stipulating that his interpretation is correct. Unfortunately, my response is: "What is the implicit use of the term 'objectivity' which justifies his bestowal of this honorific?"

First, the definition of objectivity which Greenawalt uses in this hypothetical does not relate to any of the four definitions which Greenawalt specified at the beginning of the article, or to the fifth definition he identified elsewhere. Greenawalt does not question which standard should be adopted—the purpose of several of my methodological definitions of objectivity and the concern of his third and fourth definitions. Thus, we are told to assume that the rules of basketball are arbitrary, the standard has already been chosen, and that we are not debating whether the standard should be based upon the characteristics of a hypothetically reasonable basketball player or of some other defined class of persons.

Nor does Kate argue that because of her special physical condition or Psychologically Subjective mental state, she should not have to go as far back as the average player does. Greenawalt does not deal with a possible disparity between externally observable events (i.e., Observation Objectivity or Reasonable Person Objectivity) and Kate's actual psychology or physiology (i.e., Psychological Subjectivity or Mental State Subjectivity), which is the concern of his first definition. Kate does not argue that she should get the point because she thought in good faith that she went far enough back, even though other evidence shows that she was mistaken. Rather, Kate proposes an interpretation of an existing standard which applies to all players regardless of their mental state or idiosyncratic characteristics. Finally, because the rules of basketball are arbitrary, they do not relate to correct political, moral, economic, or other external criteria. This question implicates none of Greenawalt's definitions of objectivity.

At first blush, the definition used in the basketball hypothetical relates to the easy and consistent interpretation of an arbitrary standard. Consequently, Greenawalt's use of the word "objectivity" in this instance seems to resemble my concept of Standardized Objectivity. The difference (as I will explain) is that Greenawalt requires his concept of objectivity to bear a normative weight which Standardized Objectivity is too weak to bear, unless it is combined with another

form of objectivity, or another justificatory strategy is pursued. He does this, in this hypothetical, as well as elsewhere in the article, in two ways. First, and most defensibly, he justifies Standardized Objectivity not by its content (which is arbitrary and normatively empty), but by the legitimacy of the procedure used to adopt it—i.e., consent theory. This is the traditional approach of positivist legal theory which locates politics (normativity) outside of law.¹⁵⁹ However, no sooner had Greenawalt done this then he moves this externalized normativity back into the standard itself. He assumes that Standardized Objectivity necessarily relates to other normative forms of objectivity. These concepts are not theoretically inconsistent with Standardized Objectivity, but neither are they *necessarily* related. Greenawalt assumes that demonstrating Standardized Objectivity will automatically invoke other forms of objectivity, which will supply the normativity required by his argument. In short, Greenawalt is guilty of metaphorical error.

By this error, Greenawalt assigns Standardized Objectivity a normativity it cannot bear. Remember, Greenawalt has also told us that his analysis of the basketball hypothetical would be the same even if we assume that the rules of half-court basketball are *arbitrary*. What are we to make of the pure coincidence that this case of “arbitrary” (i.e., non-normative) Standardized Objectivity results in the same conclusions as non-arbitrary (i.e., normative) standards reached through Algorithmic or Argumentative Objective methodologies?

Even as Greenawalt smuggles an unjustified normativity into Standardized Objectivity, his example also fails to prove that determinacy is required by Standardized Objectivity requires determinacy. Greenawalt’s conclusion that Kate wrongly interprets the rules is a mere presupposition. He stacks the deck by implying that Kate knew she was wrong and that she argued in bad faith, if not dishonestly. Consequently, the hypothetical does not illustrate how to choose between different interpretations of law because no alternate interpretations are asserted in the article. This assumption is implicit in Greenawalt’s statement that Kate proposes a “*sharp change*”¹⁶⁰ in the rules *after the fact*.¹⁶¹ Greenawalt uses conclusional language presupposing, rather than arguing, that Kate’s proposal is not a legitimate reinterpretation of the rules.

Greenawalt later states in his article that the basketball hypothetical was “easy” because he assumed that the team’s agreement as to

159. See *infra* discussion at notes 244-45.

160. Greenawalt, *supra* note 144, at 27.

161. *Id.* (emphasis added).

the interpretation was unanimous. Assuming that Greenawalt does not intend to make the facetious argument that the hypothetical demonstrates determinacy because he has hypothesized that it is, in fact, determinate, one may assume he means that every player (including Kate), by agreeing to play the game, implicitly consented to be bound by the rules in the rule book and to certain shared understandings of how the rules have been interpreted in the past. Moreover, every member of both teams (presumably excluding Kate)¹⁶² agreed to a particular statement of the rule after the judgment was made. It is a logical flaw to assume that the second event was necessarily determined by the first event merely because the second event followed in time.

That is, Greenawalt conflates the concept of determinacy with determinability. Determinacy does not relate to the observation, after the fact, that a determination was eventually made. It relates to the process by which that ruling was actually made—a process that Greenawalt skips. The fact that the dispute was eventually determined does not demonstrate that any specific determination was necessary or that it could have been logically derived prior to the ruling (i.e., that it was determinate).¹⁶³

Analyzing Greenawalt's discussion in greater detail helps to determine what is really going on here. To repeat, Greenawalt states that Kate is objectively wrong because we share a culture which agrees that such "changes" may not be made "in rules of informal competitive games . . . after the fact *when urged by a team that would benefit*."¹⁶⁴ Note that this is a hint that Kate acted in narrow self-interest, that her argument should be discounted, and that her interpretation is absurd (and dishonest).

These assumptions, however, are inconsistent with other details given in the hypothetical which raise real interpretative questions. Greenawalt does not tell us what argument Kate made to support her position that she could stand immediately before the foul line. Instead, Greenawalt offers one that she did not make: "Kate might argue that she went back far enough to serve the purpose of the rule, but games would be *plagued* if highly contextual decisions had to be

162. Note that there is unanimity afterwards *only* if we assume that either i) Kate herself thought her argument was spurious, i.e., that there was, in fact, no legal dispute; or ii) Kate, as a dissident, has been expelled from the relevant community so that her vote does not count.

163. See Charles M. Yablon, *Law & Metaphysics*, 96 YALE L.J. 613 (1987) (explaining Wittgenstein's point that you cannot deduce what procedure was followed from a determined, fixed result).

164. Greenawalt, *supra* note 144, at 27 (emphasis added).

made about how far is far enough.”¹⁶⁵ This argument (which was not made) is disqualified as an argument assertorily. Greenawalt damns the mere possibility of contextual disputes during a game as a “plague.” But, as any baseball fan can tell you, there are sports where the existence of legalistic disputes on the interpretation of complex rules plays an essential and, to some, one of the most enjoyable parts of the game.¹⁶⁶ It may very well be that the players and fans might eventually determine that the degree of contextual complexity urged by this argument would not be “fun” in such a fast moving game as basketball, but this determination does not imply that it was determinate at the time the argument was first asserted.

Regardless, Greenawalt disposes of this argument by informing us that it is never asserted. Let us now consider other arguments that were, or could have been, asserted.

With respect to the shot from the corner of the room, Kate’s interpretation, although never applied before, is within the literal language of the rules. It may be the case that no other player in the history of basketball had ever considered this interpretation before. This does not mean, however, that all other players would not be convinced by this argument, so that this interpretation would become the common understanding of the new rule.

A litigator could certainly imagine potential fact situations and potential arguments to support Kate’s proposed interpretation that she could stand before the foul line. Perhaps someone had been videotaping the game with a camcorder which allows for “instant replays.” The videotape shows that, unnoticed by any of the other players (and perhaps by accident of the player who was in total good faith), Mary, a player on the other team, stood one foot in front of the foul line while making a shot in a similar situation. Mary did not score a point but put the ball into play so that one of her team members was able to make a basket a few seconds later. The usual remedy of deleting a point from the score would be arguably inappropriate since the causal link between Mary’s “infraction” and her teammate’s scoring of the point is problematic. Rather, Kate might suggest that

165. *Id.* at 26 (emphasis added).

166. My husband is a rabid baseball fan. Arguing about the rules (and comparing obscure statistics) is often as much a part of the game as the outcome. As child psychologist Carol Gilligan, among others, has noted, formulating and arguing about rules seems to be an essential part of play and seems to be enjoyed as much or more than the physical aspects of the game. CAROL GILLIGAN, *IN A DIFFERENT VOICE* 9-10 (1982). Gilligan believes this concern with argument is characteristic of boys, but other psychologists and linguists argue that this is a misconception based on gender stereotyping. Empirical studies tend to show that girls at play tend to engage in more frequent, longer, and more complex arguments than boys of similar age. Schroeder, *supra* note 4, at 131-32.

the simplest way of evening out the play is to allow one member of her team to make one shot from the same position as Mary. This may be an argument no one ever thought of before, but this may be because it is designed to confront a problem which none of the players had ever encountered.

And yet, Greenawalt makes novelty itself the standard of right and wrong. He states that the "decisive" answer to Kate is that "all of the other players have understood the rule differently" in the past.¹⁶⁷ No one, not even Kate, ever had considered this new interpretation of the rule before.¹⁶⁸ Rules in sport must be "agreed upon *before* the game, or during the game to cover plays that have not yet taken place [emphasis added]."¹⁶⁹ Greenawalt admits that the reason he believes this hypothetical is easy is because he has assumed unanimity of opinion among the team as to the interpretation of the rules.¹⁷⁰

These conclusions and presumptions ignore the very point of the argument in favor of a novel interpretation. The issue of how to interpret the rules covering *this* fact situation have *not* been decided before. Greenawalt proposes that novelty, creativity, and dissent from the majority are in and of themselves not merely evidence of the incorrectness of Kate's views, but are the deciding factors. He confuses the fact that there may have been unanimity as to interpretation until the novel argument was made with the proposition that there must be unanimity *after* the argument has been made—that no one can be convinced to change her mind. Kate does not merely lose the argument—the fact that she *did* lose is offered as proof that she *should* have lost. And this extraordinary view of right and wrong comes from a writer who thinks he is working within the liberal and common law tradition!¹⁷¹

167. Greenawalt, *supra* note 144, at 27.

168. Kate was "contesting a clear shared understanding among all relevant participants (including herself up to the time she proposes a change)." *Id.* Later in his article, Greenawalt does confront the problem of overruling precedents and other developments in the law. In this hypothetical, however, he merely states that Kate can not rely on an argument that "rules . . . need a capacity to grow" because her interpretation is a "sharp change." *Id.* Once again, he assumes the very conclusion he is trying to support.

169. *Id.*

170. *Id.* at 50; see *supra* discussion at note 162. Actually, the only possible "ease" the prior unanimity gives to the hypothetical goes to the question of the legitimization of the judgment through consent theory. See *infra* discussion at notes 184-86. Unanimous prior consent does not make the argument for determinacy easier, however, because it only goes to the question of whether the eventual outcome was probable, not to whether it was necessary.

171. Greenawalt might try to argue that the hypothetical does not deal with the application of laws, but with the rules of sport. This argument does not suffice. The reason Greenawalt presents the hypothetical is to argue by analogy how legal decisions can be determinate. If he

What of arguments relating to the literal language of the rules? Greenawalt wants to have it both ways. He first declares that Kate's assertion that she should be able to stand in front of the foul line fails because it is not within the literal language of the rule.¹⁷² Greenawalt then takes the opposite approach with respect to Kate's assertion that she should be able to shoot from the sidelines so long as she stands at a distance greater than the distance from the basket to the foul line. He asserts that the rule has never been applied by these players in the way Kate suggests and, therefore, the literal language of the rule "is not to be taken as a definitive formulation of the content of the rule."¹⁷³ That is, Kate loses because her argument is novel. First we are told that one of Kate's potential arguments fails because it violates the literal language of the rule, and yet now we are told that the literal language does not control. Why? Because the others outvoted Kate each time.¹⁷⁴

Greenawalt might respond that "agreeing to play in the game" means implicitly agreeing "to accept the rules that governed it,"¹⁷⁵ and that rules of sport are not just the literal meaning of the rules but "what participants accept as the rules."¹⁷⁶ Once again this begs the question. One might say that the question of legal interpretation is "what did the participants agree to when they adopted certain language?" To say that they agreed to the rules of the game is not enough, especially when there is a dispute as to how to interpret those rules. The written rules on their face do not seem to deal with this

argues that his sports-rules hypothetical is determinate because sports disputes lack essential aspects of legal disputes, then the analogy does not work as an argument in favor of determinacy in the law.

For example, Michel Rosenfeld, after hearing Greenawalt present a version of *How Law Can Be Determinate*, argued that the example was not useful because, arguably, the only purpose of a game is to follow the rules mechanically and unquestioningly. We intuitively believe that this purpose is somehow different than the purpose of law. For example, many laws are instrumental and are designed to further some purpose beyond the law itself. Consequently, the issues raised in interpreting the rules of a game might be considered fundamentally different from the issues raised by interpreting a law; the analysis of the first tells us little or nothing about the latter.

172. "All the players have understood the rule to require one to go back to the foul line, not that close to it. . . . In any event, all of the players have accepted an interpretation of the rule that is literal in this respect." Greenawalt, *supra* note 144, at 26.

173. *Id.* at 27.

174. Imagine if the half-court basketball game was being played by a group of off-duty Supreme Court clerks and that Justice Antonin Scalia had graciously offered to serve as referee. Would the literal language of the law still not control? Justice Scalia is, of course, known for his theory of literalist interpretation of statutory language. See generally *Symposium, The Jurisprudence of Justice Antonin Scalia*, 12 CARDOZO L. REV. 1583 (1991). Would Kate now be objectively justified?

175. Greenawalt, *supra* note 144, at 28.

176. *Id.* at 27.

precise fact situation, and there is no evidence that the participants ever expressly considered this fact situation when promulgating the rules. We are engaging in a counterfactual: given the language of the rules and the way disputes have been decided in the past, what would the participants have agreed to had they discussed this novel fact situation prior to the game? Or if the situation had been discussed before, would there be a new interpretation if the novel argument offered by Kate had been made? Or if this argument had been made, would a different result occur if it had been so forcefully and convincingly argued by anyone as charismatic as Mary or with as brilliant rhetoric as that offered by Kate?

Let us remove for a moment Greenawalt's snide implication that Kate did not honestly propose a novel interpretation of the law and that Kate cynically lied for her own self-interest. What if Mary urged this same interpretation rather than Kate? After having viewed the videotaped instant replay, what if Mary suddenly realized that there are possible alternative interpretations of the rules which no one ever thought of before but which are consistent in this case with the literal language of the rules and would remedy a wrong which she inadvertently committed in the other case. Mary understands that these interpretations would give her rival, Kate, an extra point, but she nevertheless advances these interpretations in the name of good sports(wo)manship. Would these reinterpretations, this "sharp change," be rehabilitated because they are not "urged by a team which would benefit?" If so—if the identity of the individual subject proposing an interpretation is relevant to the outcome—in what way is the determination that Kate was wrong "objective?" Is not dependence on an individual subject or idiosyncratic fact-situation the hallmark of all definitions of subjectivity, and, consequently, the antithesis of many definitions of objectivity?

Ironically, Greenawalt's rule of law is almost precisely the same as Joseph Singer's facetious proposal for a truly determinate legal system: one with the rule that the plaintiff always loses.¹⁷⁷ Singer's point, of course, is that such determinacy is so morally bankrupt and empty of all concepts of justice that it cannot serve as the basis of a legal system. Anthony D'Amato has cleverly remarked that such a rule is not even determinate because it would quickly drive all disputes out of the courtroom into that most indeterminate of decision-making arenas: self help.¹⁷⁸

177. Joseph W. Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 11 (1984).

178. Anthony D'Amato, *Aspects of Deconstruction: Refuting Indeterminacy with One Bold*

Even if one accepts Singer's facetious, and Greenawalt's serious, contention that a legal system in which plaintiffs always lose is determinative and objective, this hypothetical legal system would seem to have little in common with *our* adversary legal system. The adversary system does not reject a novel legal interpretation as objectively wrong merely because the proponent would benefit from it. Indeed, one justification for our adversary system is precisely that the party who would benefit from an interpretation of the law will develop the strongest argument in favor of that interpretation, which will be compared by the trier of law to the strongest argument against that interpretation made by the party who would be detrimented.¹⁷⁹ If Greenawalt is arguing that half-court basketball is a determinate system because it adopts a rule that plaintiffs always lose, he is basing his determinacy argument on a hypothetical that cannot serve as a useful argument by analogy for determinacy in American law.¹⁸⁰

Perhaps we can revive Greenawalt's defense of determinacy (and objectivity) if we return to his definition of determinacy. His definition of a determinate legal answer includes not merely the main criterion that "virtually any intelligent person familiar with the legal system would conclude, after careful study, that the law provides that answer"¹⁸¹ (this seems to be similar to my concept of Argumentative

Thought, 85 Nw. U. L. REV. 148 (1990). I had exactly same reaction as D'Amato to Singer's statement. The only way I could think that a court system could survive as a legal system in such a world is if litigants developed a jurisprudence of who is to be deemed the "true" plaintiff, regardless of who filed papers first (e.g., the party who really "started" the dispute might have tricked or provoked the "true" defendant into filing first). This hardly suggests determinacy.

179. Not everyone agrees that the adversary system's view of law as combat is a good thing. Precisely this oppositional presupposition is critiqued as masculinist by many feminists. I do not think that Greenawalt, in his attempt to defend the current legal regime, is very subtly trying to sneak in an argument against such a fundamental aspect of that regime.

180. If he does not make this argument, then Greenawalt confuses the fact that the adjudicator (the members of the teams in the hypothetical or the judge in a courtroom) did not accept a particular interpretation of a rule with the conclusion that the adjudicator *could* not have accepted the alternate interpretation, as well as with the normative judgment that the argument in favor of the new interpretation was objectively wrong. He also confuses the issue of whether the novel interpretation should be adopted with the question as to how the novel interpretation should be applied in the case being tried. A decision not to apply the novel interpretation in a case of first impression, but to apply it prospectively, does not necessarily reflect a decision that the prospective reinterpretation is "objectively wrong." Greenawalt admits as much when he says that rules in sports can be agreed to "during the game" if they are prospectively applied. Greenawalt, *supra* note 144, at 27. The reinterpretation is made because the adjudicator has decided that the old interpretation was less adequate than the new interpretation. The adjudicator may decide to make the change prospectively because of concerns of notice and fairness to people who (in retrospect incorrectly, but not unreasonably) acted on reliance or assumed that the old interpretation was right merely because it was old.

181. *Id.* at 3.

Objectivity), but also includes the additional criterion that "no powerful argument consonant with the broad premises of a legal system exists for a contrary answer."¹⁸² This seems to be an extremely constrained version of Argumentative Objectivity, which might be equivalent to its subset, Algorithmic Objectivity, insofar as Greenawalt requires the absence of any powerful alternate argument. This suggests the winning argument must compel the result.

In the hypothetical, the reason Kate's argument is not considered "powerful" stems not from the sense that these words imply—the power of the argument to convince reasonable persons—but from the debased sense of political power frequently encountered in legal scholarship—in other words, she was outvoted.¹⁸³ Greenawalt does not argue *why* Kate's interpretation is incorrect or unpowerful. He asserts that it *is incorrect* because it deviates from the status quo. Decisions made on Standardized Objective grounds may be *determined in fact*. The applier of the standard (in this case, the majority of the players) has the power to impose its will upon the dissident, but this does not make the rules *determinate in theory*. That is, by definition there can be no powerful opposing argument to Greenawalt's objectivity because success is the sole criterion of power. The fact that Kate lost is conclusive evidence of her relative lack of power. To say that her arguments are not powerful justifies not merely the decision, but also the normative conclusion that the judgment was objective and causally driven by the rules. Her voice is defined as silence, or mere barking. Consequently, one needs a political theory to justify the implicit violence of this imposition of power by the trier of law.

Greenawalt's implicit justificatory system is majority rule. Given a commitment to this principle, what does Greenawalt add in honoring the outcome of a vote with titles like "determinate" and "objective?" Indeed, the use of these honorifics conflicts with one of the fundamental principles of liberalism, that voting (politics) is inherently and essentially arbitrary as well as non-objective.¹⁸⁴

Greenawalt's basketball hypothetical is, at best, an example of the application of a Standardized Objective test. An adjudicator

182. *Id.*

183. In other words, Greenawalt confuses "powerful" with "outcome determinative." By definition, there can be no "powerful" losing argument. The fact that a certain outcome occurred then becomes conclusive proof that an argument against the outcome was not as powerful. One should contrast Greenawalt's concept of "powerful" with the concept of "material" in federal securities law.

184. David G. Carlson, *In Defense of the Rule of Law*, 62 U. Toronto L.J. — (forthcoming 1993) (reviewing ANDREW ALTMAN, *CRITICAL LEGAL STUDIES: A LIBERAL CRITIQUE* (1990)).

imposes a Standardized Objective because a substantial proportion of the community agrees with it. Kate's deviation is by definition (Standardized) objectively wrong—a trivial truism. Yet "Standardized Objectivity," i.e., the choice of an easily applied standard, neither contains any internal normativity nor is it necessarily perfectly determinate,¹⁸⁵ as Greenawalt's example unintentionally demonstrates. The truism ceases to be trivial if one tries to smuggle the external normative conclusion into the use of the word "objective," in which case the terminology becomes a justificatory technique for masking an exercise of brute power by the majority over the dissenter.

Greenawalt expressly adds this normative judgment. He states that if Kate had bet on the game and had lost because her controversial baskets were not scored, she would have a moral duty to pay the winner of the bet because the rules were applied and enforced objectively, though only in the standardized non-normative sense.¹⁸⁶ By calling it "objective," Greenawalt believes this result is justified by the fact that in other contexts the word "objective" does have normative bite. In other words, Standardized Objectivity is combined with honorific uses such as Fairness Objectivity, or Really, Really True Objectivity. Standardized Objectivity started as a recognition of a determination *in fact*, in the trivial sense that all opposing arguments turned out not to have been as powerful as the winning argument. When one equates Standardized Objectivity with normative objectivity, however, Standardized Objectivity becomes a way of condemning the losing argument as non-powerful in theory. So used, objectivity becomes a legitimization tactic for silencing the minority.

3. THE FIRING LINE

The importance of raw power in Greenawalt's theory can be seen in his discussion of a different hypothetical used to illustrate why one is *required* to accept certain interpretations of law. A boss tells her subordinate to come into the boss' office and shut the door behind the subordinate. Greenawalt goes through, in excruciating detail, any number of exceptions which might be implied in the request and demonstrates the various perspectives which could be taken in interpreting the order.¹⁸⁷ Nevertheless, Greenawalt eventually concludes that

185. It is one thing to say that an answer to a question on an LSAT exam is Standardized Objectively wrong in the sense that it does not match the official key. It is quite another to say that those who are given a higher score on this "objective" test should be preferred in law school admissions. One must justify this use of the exam by reference to something other than the test's mere ease of grading.

186. Greenawalt, *supra* note 144, at 27-28.

187. Greenawalt discusses the possible permutations of the meaning of the mediated

the employee will not only understand what he should do, but understand that it was his duty as an employee to understand and obey.¹⁸⁸ This makes the "right" interpretation "objectively" correct.

In what way is this interpretation "objective"? It does not seem to be Algorithmic Objective or Argumentative Objective because the boss makes no attempt to come to an agreement with or to persuade her employee through the application of any methodology. It does not seem to be Externally Objective because Greenawalt is not discussing truth or reality, but communication and linguistic and social conventions. It does not even seem to be Fairness Objective because Greenawalt does not try to argue that the boss' interpretation is fair, just, or ethical, except in the sense that in our economic system we recognize the right of bosses to fire employees at will in many cases.¹⁸⁹

Arguably, this is a form of Community Objectivity in that Greenawalt does speak of the subordinate's agreement, although not to the particular interpretation. "By accepting the job, Sam may have promised implicitly to act as employees are generally expected to act."¹⁹⁰ One could argue that by accepting employment, Sam has joined a community having understood the criterion for determining correct answers—the boss is always right. Unlike the "easy" basketball case, Greenawalt cannot, however, fall back on the support of constructive, *unanimous* consent to playing by the rules ahead of time and to a specific interpretation of the rules after the determination. At most, Greenawalt presents a half-hearted pseudo-consent theory. The employee *may* have agreed to certain standards. But this begs the question as to what standards *might* the employee have consented?

We are told that a boss, a person with power over another person, has given an instruction to her subordinate. The subordinate must determine how the boss interprets her own statement or must face punishment.¹⁹¹ The deviant is "required" to act in accordance

directive "Please shut the door" for twenty continuous pages. The imperious boss and her frightened subordinate keep showing up like old friends throughout the rest of the article. *Id.* at 6-26.

188. *Id.*

189. As *Wall Street Journal* columnist Raymond Sokolov wryly noted in an article written during the failed coup in the former Soviet Union, one of the differences between our superior system and the Soviet's now defunct system is that "if I want to say I think that George Bush is a rascal, only my employer can stop me." Raymond Sokolov, *Shushing the Dead and Dying*, WALL ST. J., Aug. 21, 1991, at A10.

190. Greenawalt, *supra* note 144, at 18.

191. In this hypothetical, Greenawalt relies primarily on the shared convention of language as it acts to constrain the possible number of interpretations. This conflates several things. Greenawalt thinks that the fact that we can eliminate some possible interpretations means that we can limit the possibilities to one. See *id.* at 32. It is a logical truism, though, that

with the interpretation, not because he is convinced, but because he acts from the fear of being fired if he either disagrees or disobeys.¹⁹² The criterion is not external, as in External Objectivity, nor is it truly intersubjective, as in the Community or Argumentative Objectivity. The criterion is the Individualistic and/or Idiosyncratic Subjective interpretation of the boss.¹⁹³ When the boss exercises power, she is the acting subject and her interpretation is, from her perspective, Philosophically Subjective. She wields power against the employee, whom she objectifies as her passive object.¹⁹⁴

The interpretation is arguably objective in two ways. It might be Community Objective if we deem this a community which has as its criterion of truth the Individualistic Subjective "will to power" of the boss. On the other hand, it might be Philosophically Objective from the employee's perspective in the sense that, from the employee's point of view, the Philosophical Subjectivity of his boss robs him of his personhood, making him into a Philosophical Object.

Let us now go back and try to reread Greenawalt's hypotheticals more charitably. Consider that both the criterion of majority rule in

falsification can only prove what is *not*, not what *is*. In addition, it is possible to have limited, yet infinite, possibilities. Perhaps the most apparent example comes from mathematics. Prime numbers are a limited set (I can demonstrate that certain numbers, such as 4 or 6, are not prime), yet there are an infinite number of prime numbers.

Greenawalt admits that there are many different ways to interpret the boss' order depending on both the context in which the order is uttered and whose perspective is deemed as controlling. Greenawalt's hypothetical is designed to demonstrate that in the specific fact situation hypothesized, and in the particular hierarchial social situation (where the boss' perspective generally controls), most people familiar with both the English language and the organization of American business offices would probably agree on the appropriate interpretation of the order. Greenawalt labels this interpretation as "objective." Once again, this so-called objectivity does not evidence the generality usually associated with objectivity but depends entirely on the idiosyncratic will of an individual and the context-specific aspects of his hypothetical, concepts generally associated with subjectivity.

192. Greenawalt alludes to this possibility when he states that the employee's obligations arise from his duty as a subordinate. *Id.* at 11-13.

193. This concept—the rule of law as the subjective intent of the boss—may be compared with Thomas Hobbes' concept of the sovereign. As explicated by Boyle, Hobbes "finds objectivity to be impossible, and instead plumps for a kind of privileged secular subjectivity. The Sovereign becomes a 'transcendental' subject, but only in the sense that the sovereign's decision on some issue of interpretation is on a different, higher level of validity." Boyle, *Subjectivity*, *supra* note 8, at 510. In my terminology, Hobbes held that the Idiosyncratic or Individualistic Subjectivity of the sovereign serves as the rule of law. Insofar as the people agree to this as part of the social contract, recognition of the sovereign's will can be said to be a Community Objective standard, but the acceptance of the sovereign's will is necessitated by the fact that more conventional concepts of objectivity, such as External Objectivity, are not possible.

194. Greenawalt specifically states that by becoming an employee, the subordinate "has lost whatever power or responsibility he might otherwise have" to make decisions. Greenawalt, *supra* note 144, at 11.

the basketball case and the principle that "the boss is always right" in the office case could be viewed as forms of Community Objectivity. Even if one accepts that Community Objectivity is the only usable definition of "objectivity," as many do, this definition raises, but does not answer, the normative question. If one empathizes with the dissident, a Community Objective "right" answer by no means necessarily provides the "right" answer in the sense of justice. One may conclude that objectivity is merely a tool of oppression. To make the normative point, one must have a theory as to why the community standard itself is justified, such as through a political theory as to the legitimacy of the procedure followed.

Obscured beneath Greenawalt's failed attempt to demonstrate objectivity and determinacy in his basketball and door-closing hypotheticals are three very important points. First, despite our recognition of indeterminacy and all the various ways words can be interpreted, occasionally, and perhaps frequently, we reach a consensus, and communication *does* occur. The teams decided how to resolve their dispute about rules; the employee figured out what his boss wanted. The fact that this occurs, despite what often seems like theoretical impossibility, fuels our hopes of eventually achieving community and justice.

Second, most contemporary Americans reading Greenawalt's hypotheticals probably would agree on an emotional or intuitive level that not only were the results reached in those hypotheticals correct, but the procedures used to reach them were appropriate. Without a referee, majority rule is the best way to resolve a dispute concerning the rules of a game. Employees should obey their employers' reasonable requests. Greenawalt's use of the honorific "objective" seems to have been intended to serve as a recognition of this shared sense of fairness. However, the use of the honorific begs, rather than answers the questions of political philosophy and jurisprudence: Why do we consider majority rule legitimate or just in the one case and autocracy legitimate or just in the other?

Finally, language, although a human convention, is not merely (Individualistic, Idiosyncratic, or Psychological) Subjective, it is intersubjective, with a Community Objective aspect.¹⁹⁵ Moreover, language seems to have an external object-like aspect that acts to

195. Unlike other forms of Community Objectivity I have discussed, such as Kuhn's, language is not as easily discussed as a freely chosen standard. Rather, the community imposes language upon us. The constraints of language may relate, consequently, more to what Fish refers to as an interpretative community than what Fiss refers to as an interpretative community. See *infra* discussion at notes 209, 220-22.

construct and constrain our thoughts and actions in ways that we cannot totally control and do not totally understand.¹⁹⁶ To a scholar of linguistics or philosophy, language might, therefore, seem to have an External or Philosophical Objective aspect to it in this highly abstract sense. But this form of abstract objectivity is hardly related to determinacy. Greenawalt's insistence on the use of the term objectivity, which tends to have a very different connotation when used in legal discourse, leads him to confuse the fact that consensus and communication can and do occur with the conclusions that they always do and, more importantly, must occur.¹⁹⁷ Greenawalt presumes the existence of the community that we must seek to form. In doing so, all who dissent are, by definition, not members of the community—their speech is not speech.

B. *Fish v. Fiss*

If you prefer debate without dialogue, I recommend the celebrated Fiss-Fish debate of the 1980s. Owen Fiss works within the classical liberal tradition. Stanley Fish works with critical theory. What particularly interests me about the Fiss-Fish debate is that they both ostensibly discuss the possibility of objective legal interpretation, yet their shared use of the word "objectivity" disguises the fact that they are discussing very different issues.

1. FISSION

In *Objectivity and Interpretation*,¹⁹⁸ Fiss adopts the critical-theory position that adjudication is an interpretative activity. Fiss, however, seeks to avoid the nihilism that he associates with post-modern thought, a nihilism that questions the legitimacy of law as an independent field of study and sees law as politics.¹⁹⁹ Nihilists, says Fiss, believe that while the law aspires to objectivity, objectivity of the law is impossible.²⁰⁰ According to the nihilist, judges seek objectively

196. Like Popper's world 3 of objective ideas. See *supra* note 40.

197. Habermas brilliantly accuses Hans-Georg Gadamer of making this mistake in his hermeneutic theory. Quoting Albrecht Wellmer, Habermas reminds Gadamer that although Gadamer might be correct in stating that "the context of tradition, as the locus of possible truth and real accord," he then forgets that it is "at the same time the locus of real falsehood and the persistent use of force." Jürgen Habermas, *On Hermeneutics Claim to Universality*, in *HERMENEUTICS AND THE SOCIAL SCIENCES* 314. Our recognition of the possibility that free communication might (and sometimes does) occur, and that this might lead us to true consensus, should not blind us to the historical actuality of oppression resulting from constrained and systematically distorted communication and forced consent.

198. Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

199. *Id.* at 740.

200. *Id.* at 742.

true answers to Constitutional issues as opposed to plausible ones (i.e., answers merely consistent with a number of permissible interpretations).²⁰¹ The nihilist believes, however, that the language of the Constitution is so general and so comprehensive that there are so many interpretations as to preclude objectivity. At this point in the argument, Fiss assumes that these "nihilists" adopt a form of "External Objectivity."²⁰² It should be obvious by this point that Fiss, a defender of objectivity, is about to accuse the nihilists of erecting an impossibly brittle definition of objectivity. He will counter with an unworkably malleable definition.

Fiss proceeds as follows: While it may be impossible to consider the Constitution as the law in the External Objectivity sense,²⁰³ the Constitution might be objective in another sense. If this is so, then the law is entitled to the honorific "objective."

Fiss' concern is constraint, sometimes colloquially known as the "Hitler question." Fiss is worried that if the Constitution could be interpreted in an infinite number of ways, there would be no way to guarantee that the Constitution can prevent another Hitler. Fiss, therefore, seeks a way of constraining the number of permissible interpretations of the law so that future Hitlers will be defeated.²⁰⁴

In constructing a definition of objectivity, Fiss, on the one hand, requires a standard of judgment other than one individual's subjective experience²⁰⁵ (i.e., in such a way as to suggest "impersonality").²⁰⁶ On the other hand, because a subject must interpret, and because a

201. *Id.* Fiss presupposes that the idea of justice requires objectivity in this sense.

202. Of course, while the Constitution is a human creation, it is external because it exists independently in a way that the text itself is not open to challenge based on any other standard such as reason (except in the extraordinary circumstances of a Constitutional amendment). In Popper's terminology, the Constitution exists in the social world of world 3. The use of the term "objectivity," in regards to the Constitution, also has similarities to Standardized Objectivity. Despite this, I have decided that it is more useful to characterize Fiss' description of the nihilist view as "external" because the Constitution, in this view, has a special status as "truth" which most Standardized Objective standards lack. In addition, this view emphasizes an either/or approach to objectivity (something is either objective or it is not) rather than the comparative meaning I associate with Standardized Objectivity.

203. Fiss implicitly recognizes that the nihilist definition of Constitutional objectivity is intentionally designed to be indefensible; it has no purpose except to serve as a straw man to the nihilist argument. In order to defend "objectivity," Fiss needs to develop another definition of "objectivity" which is, by definition, defensible. Such a strategy, of course, is a decision *not* to engage the nihilists on their own terms, but to restructure the argument.

204. Fiss ignores the "nihilist" (or, at least, the pragmatist) answer to this: we *cannot* rely on the Constitution alone to protect us from Hitler (this example is particularly apt because Hitler was elected pursuant to the German constitution of the time). See *infra* text accompanying notes 211-17.

205. Fiss, *supra* note 198, at 744.

206. *Id.*

text is not a pre-existing object but an object created by human subjects, a usable definition of objectivity in interpretation must recognize a role for the subject.²⁰⁷ Fiss reaches the usual conclusion: the dyad that opposes solipsistic Individualistic Subjectivity to Community Objectivity.²⁰⁸

According to Fiss, the subjectivity of the interpreter can be constrained by the disciplinary rules of the interpretative community.²⁰⁹ This Community Objectivity does not insure correct answers.²¹⁰ Instead, as a set of constraining rules or disciplinary standards, this Community Objectivity limits the number of answers considered acceptable.²¹¹ At first blush, this sounds somewhat like the Popperian-Kuhnian concept of objectivity in science, in which the criteria of testing adopted by the scientific community justifies results.

But something very strange happens to Fiss' Community Objectivity. Having identified objectivity with the agreement of the interpretative community—disciplinary rules as intersubjective creations—he then presents the rules of the legal community almost as though they are pre-existing rules that he can positivistically discover and describe. Having ostensibly thrown out External Objectivity as unworkable, he smuggles it back in by treating his avowedly Community Objective standard internally as though it were Externally Objective.

At this point, Fiss might object that my critique is inept. The concept of normal discourse presupposes that *within* the paradigm of normal discourse Community Objectivity should be functionally equivalent to External Objectivity. It is possible, though, to criticize Fiss' operation in at least four interrelated ways.

First, Fiss does not consider the legitimacy of the membership

207. *Id.*

208. Fiss specifically refers to Kuhn's concept of paradigms in developing this ideal. *Id.* at 746.

209. *Id.* Although Fiss uses the same "interpretative community" terminology as Fish, Fiss' concept of community is very different from Fish's but similar to Kuhn's. This is because, as a liberal, Fiss accepts a concept of the self as an autonomous subject. A community can only, therefore, be made up of an aggregate of consenting subjects.

210. One may question the justification for following the disciplinary rules unless there is an expectation that the results reached by their application will be correct (just) more frequently than the expected results reached by alternate available methods, or that the disciplinary rules themselves have some claim to justice (i.e., if one can conceive of justice in a formalist or procedural way).

211. Fiss, *supra* note 198, at 744-45. Fiss' concept is distinguishable from External Objectivity because it distinguishes objective answers from "correct" answers—room is left for judicial error. *Id.* at 749. Fiss' concept is also distinguishable from Algorithmic Objectivity because it does not require unanimous agreement among the interpretative community as to the decision in any specific case. *Id.* at 752.

standards of the community that sets these standards. Unlike Greenawalt's "easy" case of law as basketball, the actual unanimous consent of all persons affected by the law does not determine the standards of interpretation. Fiss implicitly accepts the status quo of overwhelmingly white male academicians and judges. Such acceptance ignores one of the fundamental critiques made by critical race theorists and feminists (and "nihilists" who are sympathetic to their positions) that in the past (and, to a shocking extent, in the present) the community has systematically excluded them on the very grounds that they did not meet its standards. The community had defined them as not members of the community by definition—not meaningfully human, but merely barking dogs.

The feminist challenge is a claim to membership. Contemporary feminists are not bargaining for the right to change themselves until they meet the standards of the community. They instead demand that the community expand its standards to include them. Unlike the first generation of modern feminists who based their claim on the assertion that woman could meet the community standards if prejudice were eliminated,²¹² contemporary feminists now challenge the standards of the community. They claim membership, not on the grounds that we can become as good as men if given the opportunity, but because we are now as good as women. An argument that we should interpret the law in accordance with the standards of the very community which standards we otherwise challenge is hardly persuasive from this perspective. This response again serves to silence dissidents by not hearing them.²¹³

Second, Fiss manages to forget that, within Kuhnian theory, even after one has identified a community, disciplinary rules are creations, not discoveries. Kuhn does not argue, as does Fiss, that communities happen upon and enshrine the pre-existing practices of that community. Rather, the community develops and accepts the criteria of a Kuhnian paradigm for "good reasons." It may be true that as a normal science degenerates, to use Lakatosian terminology, the community may cease to question its methodology. This is a sign of a

212. This viewpoint is frequently referred to as the sameness/difference approach to sexual equality. See CATHERINE A. MACKINNON, *FEMINISM UNMODIFIED* 32 (1987).

213. I do not mean to imply that the standards of the status quo are necessarily illegitimate. I am as much a child of the western civilization as Fiss, and probably would agree with his standards more often than not. My point is that Fiss' assertions that standards exist, and his positivistic description of these standards, do not work as a justification for these standards for external critics. Like Greenawalt, Fiss' use of the term "objectivity" begs, rather than answers, the very jurisprudential questions of legitimacy that he purports to be asking.

degenerate paradigm.²¹⁴ The concept of revolutionary science is that occasionally the community agrees to change its methodology of objectivity. The emphasis on the paradigmatic concept of objectivity is that the community develops these techniques intersubjectively, and intersubjectively tests, accepts, and rejects them.

In other words, Fiss' vision accepts a Kuhnian concept of "normal law," but does not accept its necessary corollary, "revolutionary law." Nevertheless, by analogy to Kuhn's concept of normal science, one does not, even in normal law, merely follow blindly the disciplinary rules just because these rules have been sanctified in the past. One must critique and develop methods to further the goals the normal discourse identified. One must always be aware that new "revolutionary" disciplinary rules may develop and overthrow the old rules. Identifying the concept of the interpretative community does not solve the nihilism question because doing so presupposes that the status quo is normal law and that nihilism is an alternate, potentially revolutionary, paradigmatic law. As such, Fiss' arguments, which are based on the criteria of the status quo of normal law, *by definition*, are not arguments against the revolutionary law he identifies as nihilism.

The third criticism is closely related to the second. The Kuhnian concept of Community Objectivity insists that objectivity is a matter of community choice. By merely identifying the standards of what he sees as a pre-existing interpretative community, Fiss conceals, rather than admits, the fact that he and other members of the interpretative community create these rules.²¹⁵ Ironically, Fiss set out to incorporate hermeneutics into mainstream interpretative community, but he ultimately denies hermeneutics. To Fiss, the community interprets but the constrained judge does not. For the judge, subjective thought

214. For a brief discussion of Lakatos's theory of degenerate and progressive paradigms, see *infra* note 276; Schroeder, *supra* note 4, at 168-71.

215. This aspect of the so-called nihilist position has great force. The nihilists similarly fail to engage the objectivist critique of nihilism. The problem of post-modernism is identifying the source of morality for making a moral issue when one is denying foundations. To put it another way, to say that Nazism is a moral issue and that there is such a thing as moral responsibility is, of course, to presuppose that there is such a concept as morality. Consequently, the most thoughtful post-modernists, such as Derrida, do not deny the concept of justice even while insisting on our necessary inability to achieve justice. Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority"*, 11 CARDOZO L. REV. 920 (1990).

MacKinnon has an alternate approach. She does not try to critique masculinism or to defend feminism on moral or ethical grounds. Instead, she presents feminism as purely a political problem in the debased meaning of "politics" currently fashionable in legal writing. She sees women on the bottom and she does not want to be there. Whether or not they "deserve" to be there is totally irrelevant. Drucilla Cornell has accurately characterized MacKinnon's unmodified feminism as an entirely negative program, the "politics of revenge." Cornell, *supra* note 9, at 11.

is transparent to legal reality. But I would argue that any judge who behaves on this assumption falsely denies his own responsibility for the legal regime. Every reading is a re-writing and a re-institution of the objective legal regime. Responsibility cannot be denied. Fiss tries to avoid all of this by *naming* his objectivity a "Community Objectivity" while treating it as the same old External Objectivity of the nihilist critique.

By rejecting the nihilist definition of objectivity, which admittedly is too fragile to work, Fiss has failed to respond to an important moment in the nihilist critique. A primary point made by nihilists such as Singer is that either embracing or critiquing positive law (whether liberalism or Nazism) is necessarily a moral, ethical, and political judgment. Attempts to reduce such important issues to the so-called logic of the mechanistic application of legal doctrine can only be vain denials of moral responsibility. One can no more duck this responsibility by claiming that one was acting under the mandate of the law than a concentration camp guard could claim that he was merely following orders of his military superiors. Calling the mechanistic application of disciplinary rules of an interpretative community (i.e., the status quo) objective is further window dressing. This is, once again, the honorific use of Really, Really True Objectivity. At one point, Fiss pretends to realize the existence of at least communal choice (i.e., ethics, if not personal morality) involved in law, yet quickly enshrines the past choices of the community as a constraint.

The fourth and final criticism is that a community standard like Fiss' does not *solve* the Hitler problem, it *exemplifies* it.²¹⁶ As argued in the discussion of Greenawalt, Community Objectivity can serve as a strategy for legitimizing the imposition of the will of the status quo (calling itself the community) over the dissenter. The dissenter, who is excluded from the community, can only defend herself within the discourse established by the "community" and, therefore, has no defense. She must make arguments within the very criteria which excludes her. She can make no powerful argument because she is not powerful—there is nothing more powerful than the political power to define away the power of one's opponent. Blacks, Jews, Gypsies, and other persons defined away as non-human by interpretative communities have no powerful opposing arguments to their murder within the prevailing disciplinary rules. In feminism, the ethical force of MacK-

216. I do not suggest either that Fiss is a fascist or that he is acting cynically or in bad faith. Rather, I am arguing that in his attempt to protect the individual freedoms and the rule of law which he so clearly holds dear, he unintentionally risks replicating the very arguments which threaten to undermine them.

innon's dominance theory of equality and critique of objectivity is based in large part on the recognition that the prevailing community standards of masculinism serve to keep men in power over women by defining the feminine as weak.²¹⁷ In MacKinnon's opinion, pornography *defines* a woman as a non-person: a woman's voice is not a different voice, it is non-speech.²¹⁸ Contrary to his intent, Fiss' pretense that he is identifying, rather than choosing, the disciplinary rules of a pre-existing, self-selected legitimate interpretative community, combined with his failure to confront directly the ethical responsibility involved in such choice, is precisely the type of justificatory strategy suited to oppressive communities.

2. FISHING

Stanley Fish claims to confront Fiss directly. Indeed, his reply is bluntly entitled *Fish v. Fiss*.²¹⁹ This claim is wrong, however, as Fish speaks to concerns about which Fiss is indifferent.

Fiss' concept of Community Objectivity flows from his concern about Individualistic Subjectivity, which could be dangerous if unconstrained. Fish, accordingly, attacks the concept of Individualistic Subjectivity. His concept of subjectivity, however, is also a form of Philosophical Subjectivity, in addition to the Individualistic Subjectivity which worries Fiss.

Fish replies to Fiss in a very strange way. Initially, he seems to retain something like the concepts of Community Objectivity and Philosophical Objectivity. Our community so constrains us that the concept of unconstrained philosophical subjectivity is an illusion:

I stand with Fiss in his desire to defend adjudication in the face of "nihilist" and "subjectivist" arguments, I do not believe that this defense need take the form of asserting a set of external constraints [Fiss's disciplinary rules of the interpretative community], because the necessary constraints are always already in place.²²⁰

That is, the constraints of our community are so internalized that there is no such thing as Individualistic or Philosophical Subjectivity;

217. This is also achieved by making this definition literal by deforming women until they conform to the feminine "ideal."

218. See Jeanne L. Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Feminist Theory*, 5 YALE J.L. & FEMINISM 127 (1992), for an exhaustive explication of MacKinnon's pornography analysis.

219. Stanley Fish, *Fish v. Fiss*, 36 STAN. L. REV. 1325 (1984).

220. *Id.* at 1345.

there is only constrained subjectivity.²²¹

Ultimately, Fish does not respond to Fiss' concerns and fears. Fiss' concern with unconstrained Individualistic/Philosophical Subjectivity does not exist in a vacuum, it arises from classical liberal political theory which adopts a theory of humanity as consisting of substantially autonomous, freely acting individuals. Fish's idea of constraint in legal interpretation is a rejection of the very basis of liberal theory. Fiss' "interpretative community," like Kuhn's, is a community of autonomous individual subjects. This is why I insist that Fiss identify the subjects who choose, and are chosen, to make up the community. Fish, rejecting subjectivity, envisions the collective of the "interpretative community" as a brute fact which imposes itself upon us.²²² Fiss cannot accept Fish in the area of adjudication without rejecting liberalism. If Fiss continues to accept liberalism, Fish's idea is an absurdity. The paradox that faces contemporary liberal jurisprudence is that its search for objectivity is fueled precisely by its insistence on preserving subjectivity.

221. Elsewhere, Fish celebrates the ability of law to deny its own origin and appear as an external, uncreated reality.

The simplistic argument against the Fish concept is that Fish forgets that the community has been created by subjects so that it can be changed by subjects.

For example, Robert Gordon asserts that Marxist inquiries into the objective determinants of social reality are meaningless precisely because it is *social* reality, that is, a reality structured by subjects, by us, and not by structures. . . . But if there has been one dominant strain in recent philosophical thought, it is that the "subject" is by no means as natural, as obvious or as basic a term as it appears.

The subject can appear merely to be the crossroads of time and culture.

Boyle, *Politics of Reason*, *supra* note 8, at 776-77. A potential Fishian answer to this should be readily apparent. That society is a creation of human beings (i.e., it is Community Objective) does not imply that any single individual subject has any philosophically subjective control over the creation. As Popper describes his world 3 of objectivity, although our ideas (world 3) are created by subjects (world 2), they have an autonomous and independent existence. Not only are ideas not completely in our control, they often control us. *See supra* note 40. In the political context, this is a variation on the obvious point that although society is an aggregate of individuals, sometimes society constrains individuals. A rejoinder to the Fishian response is that the powerlessness of the individual does not preclude the power of collective action. Drucilla Cornell, following Popper, calls Fish's view the "myth of the framework." *See supra* note 32. This debate is beyond the scope of this article, but it should seem obvious that this ping pong game can continue for quite a long time with neither side needing to give in. Boyle describes these two different points of view as the subjectivist, who emphasizes the individual subject's creation of his social reality, and the structuralist, who emphasizes how individual subjects are created by their community. Boyle, *Politics of Reason*, *supra* note 8, at 776-77.

222. Schlag argues powerfully that what constitutes Fish's interpretative community without subjects is not all clear. Schlag characterizes the Fishian interpretative community as a "theoretical unmentionable, which Fish not only does not, but according to his theory cannot, talk about. Consequently, his concept of the interpretative community is substantively empty and is, in fact, no constraint at all." Pierre Schlag, *Fish v. Zapp: The Case of the Relatively Autonomous Self*, 76 GEO. L.J. 37 (1987).

Second, and more directly, Fish and Fiss speak at different levels of generality. Fish does not answer Fiss' Hitler question. Whether or not we are all constrained, "we"²²³ experience ourselves as very close to Individualistic/Philosophical Subjectivity. We also recognize that many individuals in a society frequently violate the constraints (moral and ethical values) consciously adopted by that society. Consequently, Fiss accepts our individual psychological experiences of subjectivity as "real" in the only meaningful sense. Fish, on the other hand, believes that this experience is an illusion. Our constraints are so internalized as to be unconscious much of the time.

Fiss has no reason to feel comforted by Fish's reassurance that Hitler had no subjectivity as he raged through Europe—that he was constrained by his society. Quite the contrary. If Fish offers Fiss any solace, it stems from a judgment that as an empirical matter, the way judges in American courts are currently constrained makes the type of horrible behavior Fiss fears unlikely at this time in our country.

What interests me, however, is that Fiss and Fish both tailor their very different conceptions of Community Objectivity to serve the same function as External Objectivity, but for different reasons. Fiss defends External Objectivity because he accepts subjectivity; Fish defends External Objectivity because he rejects subjectivity. For Fiss, there must be no dialogue because he is afraid of what people would say; for Fish, there can be no dialogue because there are no people to speak. Fish is the more audacious of the two because he states exactly what he is doing. Fiss is perhaps the more insidious in that he conceals, or more accurately, does not realize, what he is doing. But Fish's claim of relativism has all the oppressive advantages of External Objectivity, with the additional advantage of removing the possibility of this challenge—he admits that his claim does not claim to be true, so showings of falsity are irrelevant.²²⁴

Fiss' concept of the interpretative community serves to exclude certain voices. Fish is known for disavowing the concept of universal, external restraints (objectivity) in interpretation.²²⁵ The so-called

223. Or, at least, professional, white, male (and maybe female), able-bodied, heterosexual Americans.

224. Schlag calls Fish's ethical legerdemain the "relatively autonomous self." By ostensibly doing away with the subject simultaneous with presupposing the substantively empty constraints of an under-described and unexplained interpretative community, he leaves us with the best of all possible worlds—"one that enshrines the self as the ultimate adjudicator of the nature of reality and one which reprieves it of responsibility for the choice." Schlag, *supra* note 222, at 48.

225. Fish, as a good post-modernist, understands that subjectivity and objectivity, as negatives, are mutually constituted. If the defining concept of subjectivity is not meaningful, neither is its negative, objectivity.

internal constraints of the framework, however, might as well be external constraints. There is little practical difference in saying that these constraints are universal and that these constraints govern the universe (the framework) in which the individual is constrained. The possibility that other constraints exist in other universes (frameworks, communities) becomes merely a theoretical curiosity. The myth of the framework—expressly adopted by Fish (and covertly adopted by Fiss)—is, if anything, more conservative than External Objectivity. As Robin West has argued, such thoroughgoing relativism has a great risk of quietism.²²⁶ If, within a framework, one can only argue justifications adopted by the framework, and one has no recourse to more universal standards, there is little room for real change. The arguments that blacks can make within racism, Jews can make within anti-Semitism, and, according to MacKinnon, the speech women can have in pornography, come to mind. The response of intolerant communities to the excluded gives tragic meaning to Ring Lardner's comic response, "[s]hut up he explained."²²⁷ Lardner at least assumed the possibility of speech, a possibility which must be actively thwarted. If the prevailing standards are racism, anti-Semitism, or pornography, then blacks, Jews and women have no speech. What they say is not merely irrelevant, it is, by definition, not speech.

Fiss and Fish have learned a trick from Circe: they turn articulate humans into inarticulate beasts.

C. Singer

I have chosen to address Joseph Singer's work²²⁸ for several reasons. First, like Greenawalt, Singer attempts to identify several possible definitions of objectivity. Second, despite these definitions, Singer does not recognize the definitions of objectivity adopted by the theorists he purports to criticize. Third, despite this criticism, some aspects of his so-called nihilist critique²²⁹ have great power—in particular its insistence on the importance of ethics in law and its concern as to how objectivity can be a tool for the community's oppression of

226. West, *supra* note 10, at 1497-99.

227. RING LARDNER, *The Young Immigrants*, in *FIRST AND LAST* 17, 42 (C. Seldes ed., 1934).

228. See Singer, *supra* note 177.

229. As indicated in his footnotes, Singer recognizes that the term "nihilism" has been given various technical and philosophical meanings, as well as loose pejorative meanings. *Id.* at 3 n.5; 4 nn.6-7. Singer is probably not a nihilist in these senses. Nevertheless, Singer willingly adopts the terminology "nihilist" because it is the name imposed on critics by the defenders of legal liberalism such as Fiss.

Singer uses the word "pragmatic" because he claims to be heavily influenced by Richard Rorty and to be applying Rorty's theory to legal scholarship. For the purposes of this article, I

the individual. Nevertheless, Singer's self-proclaimed nihilism and his rejection of "objectivity" entail a disparagement of community and a privileging of an extreme individualism. In the name of a critique of liberalism, he is more liberal than the contemporary liberal legalists he critiques! Even worse, Singer's individualistic nihilism, though intended to be a critical, conversational, and edifying discourse, degenerates into External neo-Objectivity. Paradoxically, in his effort to free the individual subject from objectivity, he disqualifies a whole range of arguments based on intersubjectivity and community. By disparaging certain forms of discourse, he does not join in edifying conversation, but silences certain unprivileged voices.

1. DEFINITIONS

Singer describes the "project of objectivity" as "creating standards by which we can judge the legitimacy of our political institutions and our legal rules. Not just any standards will do; they must be correct and founded on reason."²³⁰ This search assumes that "a moral view is not just someone's considered opinion or even the opinion of everyone, but that it is right and true, an accurate representation of the good."²³¹ Singer characterizes this approach as viewing morality as a matter of knowledge rather than conviction.²³² Singer uses the word "objective" in conjunction with such words as "apolitical,"²³³ "rational,"²³⁴ "neutral,"²³⁵ and "determinate,"²³⁶ thereby indicating that he sees a close, and perhaps necessary, connection among these concepts.

In particular, he identifies determinacy and objectivity as closely related questions.²³⁷ "If it is true that legal reasoning is indeterminate

will generally accept Singer's own terminology because my analysis of how Singer consistently misinterprets Rorty's theories is beyond this article's scope.

In addition, I can hardly improve on John Stick's analysis of Singer's misreading of Rorty. See Stick, *supra* note 9. In his article, Stick makes the more general point that Singer's arguments are often misplaced, in that Singer adopts a very limited algorithmic concept of rationality which cannot be maintained. Singer then makes the error of assuming that the liberal legalists he critiques adopt the same definition. While I agree with a large part of Stick's analysis, the purpose of my article is not to chastise Singer for making a common error. Liberals similarly mischaracterize critical theorists. I am trying to aid writers on both sides to avoid these non-disputes in the future and to concentrate on their actual disagreements.

230. Singer, *supra* note 177, at 25.

231. *Id.*

232. *Id.*

233. *Id.* at 5, 8.

234. *Id.*

235. *Id.* at 6, 8.

236. *Id.* at 8. His occasional identification of indeterminacy with a denial of objectivity also indicates the implied identification of objection and determinacy.

237. *Id.* at 26.

or otherwise incoherent [and] its claims to objectivity are false," he writes, "then we face two problems."²³⁸

Before moving to Singer's attempted identification of specific uses of objectivity by liberal legalists, I need to stop and analyze Singer's vocabulary within my definitional schema. Singer speaks about objectivity as the setting of standards. This could relate to Standardized Objectivity, which Greenawalt relates to determinacy. Singer's concepts are more complex, however. He states that objective standards must be based on rationality—i.e., Argumentative Objectivity. By linking objectivity with rationality and determinacy, he limits Argumentative Objectivity to its subset, Algorithmic Objectivity.²³⁹ When he states that objectivity is not merely unanimous opinion (i.e., he rejects Community Objectivity standing alone) but is right, true, and good, he assumes the equivalence of Algorithmic and External Objectivity. His statement that the assumptions behind claims to objectivity are the principles whereby "legal rules should have some kind of inherent validity independent of our individual beliefs"²⁴⁰ shows this. In the next sentence, Singer relates this to "rational foundations"²⁴¹ of law. That is, he assumes that Externally Objective reality must be reachable by means that are rational in the most narrow sense. Thus, Irrational and Idiosyncratic Subjective methods of gaining knowledge are inconsistent with objective truth. Finally, Singer relates objectivity to neutrality and legitimacy—i.e., Fairness Objectivity.

The structure of Singer's argument reflects an old assumption that if he shows that Algorithmic Objective methodologies are inadequate, he will show that law must be indeterminate. By showing that law is indeterminate, he thinks he proves not merely that External Objective reality and truth are unknowable, but that they are meaningless concepts. He assumes that if he can show that there can be no External Objectivity, then he has defeated objectivity altogether. Finally, since he has also identified "objectivity" with Fairness Objectivity, he claims to have demonstrated that our legal system, standing alone, cannot be legitimate, and that the law must appeal to other sources for legitimacy (e.g., "conviction" or "politics"). These steps in the argument are non sequiturs unless there are links among the

238. *Id.* at 6-7. Singer distinguishes between determinacy and objectivity in that the former relates to whether institutions determine results, while the latter relates to whether the institutions which produce the results are legitimate. *Id.* at 26.

239. Singer's conflation of rationality with strict syllogistic logic, which algorithmically compels answers, is one of Stick's primary critiques.

240. Singer, *supra* note 177, at 26.

241. *Id.*

various atomic definitions of objectivity, and between objectivity and determinacy.

Like Greenawalt, Singer merely assumes that the links he identifies exist, and he makes no attempt to explain their interrelationship.²⁴² By linking objectivity and determinacy, Singer reveals the unsupported assumption that rules must be determinate in order to be objective, and that objectivity will result in determinate rules. He does not even consider the possibilities of determinate subjectivity and objective indeterminacy.

In making his specific critique, Singer distinguishes between "substantive" and "procedural" objectivity. As the titles indicate, the first concentrates on the results reached and the second on the methods used to reach these results.

2. SUBSTANTIVE OBJECTIVITY

Singer identifies substantive objectivity with an assumption that law is a matter of knowledge, not judgment. He identifies the positivism of H.L.A. Hart as well as the rights theories of Ronald Dworkin and John Rawls with this view. Singer characterizes positivism as the identification of law with what the sovereign commands. He further characterizes rights theorists as those seeking to base law on pre-existing rights—that is, natural law.²⁴³ In both cases, Singer complains that by identifying law with truth (i.e., External Objectivity), these schools confuse the normative with the descriptive. As an anti-foundationalist, Singer believes that the attempt of positivists and rights theorists to base law on External Objectivity is preordained to failure. Positive claims are delusional, or even lies. In short, Singer believes that liberalism exploits false universals of the Really, Really True variety.

Nevertheless, it can be argued that Singer, and not these liberal theorists, relies on externalist claims. As Stick argued, Singer so loves Rorty's mirror of nature metaphor for epistemology that he confuses any attempted description with epistemological mirroring.²⁴⁴ By his

242. Insofar as Singer attempts to critique liberals such as Greenawalt, Singer's acceptance (at least for argument's sake) of this liberal assumption is more defensible than Greenawalt's.

243. Singer, *supra* note 177, at 28.

244. Stick, *supra* note 9, at 374-76. Singer conflates Rorty's critique of the attempt to mirror nature with something close to Jacques Derrida's critique of logocentrism. Rorty critiques the western philosophical tradition of describing a pre-existing external reality. Rorty tries to develop an edifying philosophy which avoids this error. Derrida critiques the assumption that unity between the signifier and the signified is possible, that some speech is "authentic" while other speech (frequently associated with writing) is somehow inauthentic, metaphoric, or rhetorical. Yet not even Derrida thinks that logocentrism can be completely avoided. One can, at most, be critically aware of one's own logocentrism. "Like all the

own reasoning, by attempting to express himself, Singer would himself engage in mirroring.

Even if we accept, for argument's sake, Singer's description of Hart's theories, by describing what the sovereign has done, Hart does not necessarily rely on universalist, foundational External Objectivity. Rather, Hart relies on a form of Standardized Objectivity combined with the normative judgment that the result also constitutes Fairness Objectivity. Unlike Greenawalt, who posits the legitimacy of such a normative judgment, Hart's positivist theory locates legitimacy in political theory, not in the objectivity of law. Or to reverse it, positivism insists upon a limited form of Standardized Objectivity in the law, but the legitimacy of the law does not come merely from this fact, the legitimacy comes from the way the standard is chosen. To use Singer's terminology, Hartian legitimacy is a matter of judgment rather than knowledge. But the sovereign legislature, not the judiciary, must make the judgment for it to be legitimate. Powerful arguments, legal and political, against positivism might exist, but Singer's account of its false universals (i.e., failed External Objectivity) is not one of them.²⁴⁵

Similarly, if Rawls and Dworkin describe rights, it does not follow that they are necessarily attempting to mirror nature. Neither Rawls nor Dworkin pretend to derive and describe pre-existing and independent rights through rigid logic. They consult intuition for attractive concepts and use very broad concepts of rationality, including practical reasoning and coherence theories of knowledge, to develop and test their intuitive ideas.²⁴⁶ Far from mirroring an External Objectivity,²⁴⁷ Rawls and Dworkin are conscious of their roles in

notions I use here, [experience] belongs to the history of metaphysics and we can use it only under erasure." JACQUES DERRIDA, ON GRAMMATOLOGY 60 (Gayatri Spivak trans., 1974) [hereinafter DERRIDA, ON GRAMMATOLOGY]. "But since *finite* silence is also the medium of violence, language can only definitely tend toward justice of knowledge and practicing the violence within it. Violence against violence. *Economy* of violence." JACQUES DERRIDA, WRITING AND DIFFERENCE 111 (Alan Bass trans., 1978) [hereinafter DERRIDA, WRITING AND DIFFERENCE].

245. For example, Hart's positivism might be critiqued for its uncritical logocentrism. Like Greenawalt, Hart assumes that language is transparent. Once the legislature has spoken, application of the law is a simple mechanical process which requires no interpretation. Positivism conceals the fact that every interpretation, every reading, of a text (or a law) is a rewriting. Singer may, therefore, be correct in his intuition that one of the problems with positivism is that it assumes that knowledge does not always involve judgment. But the knowledge claimed by positivism is not, as Singer implies, one of external reality, but of the meaning of a text. Despite some resemblances, logocentrism does not mean same thing as essentialism, which Rorty critiques as the mirror of nature. See, e.g., J.M. Balkin, *Nested Oppositions*, 99 YALE L.J. 1669, 1693-95 (1990) (book review).

246. Once again, Stick makes a very similar critique.

247. Singer, *supra* note 177, at 30.

creating reality. This does not imply that Rawls and Dworkin cannot be critiqued. I personally find Rawls fundamentally uninteresting because I find his initial intuition unattractive. But it is precisely his intellectual honesty about his project which enables me to make this judgment. The charge of mirroring External Objectivity is simply not apt.²⁴⁸

3. PROCEDURAL OBJECTIVITY

Singer's second category of objectivity is "procedural" objectivity. As its name implies, procedural objectivity concentrates on method. This matches my identification of certain definitions of objectivity as relating primarily to methodological and/or epistemological concerns. Procedural Objectivity is the concept that the right "objective" method yields the right rule.²⁴⁹ He identifies the source of the procedural objectivity concept as a dichotomy between:

subjective, personal preference, and objective, impersonal validity. The subjective/objective dichotomy assumes that a basic distinction exists between opinions that are merely a matter of personal preference about which we do not expect agreement, and opinions that are intersubjectively valid and about which, as a result, we do expect intelligent persons of good will to be able to agree. Moral views are intersubjectively valid if they are views that everyone who thought about moral issues from a legitimate common perspective . . . would accept.²⁵⁰

Singer's definition seems to be a molecular definition consisting of at least two atomic definitions. First, the definition invokes the Community Objectivity/Individualistic Subjectivity dyad. Objectivity is what is intersubjectively valid, as opposed to an Individualistically Subjective opinion. Second, there is Algorithmic Objectivity which rejects personal intuition as unprincipled. Finally, the result of this method is Factual Objective, not mere Opinion Subjective.

Having identified this concept of objectivity as procedural, Singer then attributes Fairness Objectivity—in the sense of a claim to neutrality of the law—to this concept. He states that claims to procedural objectivity are only "false appeals to neutrality."²⁵¹ Thus, he ignores the fact that, while some users of Standardized Objectivity

248. Singer might, for example, attempt a critique similar to mine of Fish and Fiss. Despite their ostensible attempt to disclaim an External Objectivist approach, Dworkin and Rawls might set up standards which function as External Objectivity. Because both are very careful writers, it is doubtful whether even this critique would be effective.

249. Singer, *supra* note 177, at 30.

250. *Id.* 30-31.

251. *Id.* at 32.

and External Objectivity speak in terms of neutrality, many theorists of Community Objectivity insist on its necessary value-ladenness.²⁵²

Singer argues further that procedural objectivity only gives the "appearance of objectivity"²⁵³ (implying that there is one true objectivity compared to which this appearance is false). Thus, rather than identify the different definitions of objectivity actually used by theorists, Singer critiques legal legalists for not adopting his unsupportable definition of objectivity.

From here, Singer tries to identify two possible definitions of procedural objectivity: i) commensuration and normal discourse; and ii) rational consensus. Normal discourse and rational consensus are synonyms in the Kuhn-Rorty analysis, and this article treats them similarly. However, Singer's concepts of both commensuration and normal discourse indicate a misunderstanding of the Kuhn-Rorty concepts of paradigms. Indeed, although Singer presents himself as heavily influenced by Rorty and, hence, by Kuhn, he replicates, in his discussion of commensuration, the very arguments which Popper made to show why Kuhn's theory was unusable!

a. Rational Consensus

I believe it is useful to approach Singer's definitions in reverse order. "Rational consensus" is Singer's attempt to capture what I have called Community Objectivity. However, Singer once again insists that rational consensus does not only rely on the *de facto* agreement of a community, but on the assumption that because this would make objectivity "an empty compliment, we confer on principles with which we agree. The compliment is empty because it is circular."²⁵⁴ Consequently, he believes not only (correctly) that consensus theory requires more than agreement, but also (incorrectly) that it requires algorithms, the belief that:

it is possible for intelligent people to agree on important moral and political issues if people think carefully about them; it assumes that rational agreement is the ultimate *source* of those values or is the foundation on which they rest.²⁵⁵

Singer identifies this necessary algorithm with a belief "that human beings possess an overarching and *antecedently existing* rational

252. See *supra* text accompanying notes 42-45. Dworkin's concept of law as integrity requires one concept of neutrality: consistent application of a rule to similar situations for the sake of consistency. He does not pretend, however, that the standard, itself, is ethically neutral.

253. Singer, *supra* note 177, at 31.

254. *Id.* at 35.

255. *Id.*

method" (emphasis added).²⁵⁶ This is an impossibility because "we have no antecedently existing rational method."²⁵⁷

Once again, Singer tries to shoe-horn this concept into Rorty's mirroring critique. "The possibility of accurately describing our society's rational consensus provides a foundation for legal theory and allows us to believe in the objectivity of legal reason."²⁵⁸ Once again, Singer condemns rational consensus theory as only *apparently* objective.²⁵⁹ And, once again, Singer attacks a definition of objectivity which combines External Objectivity and Algorithmic Objectivity and does not criticize liberal legalists on their own ground.

Unfortunately, Singer misses the entire point of Community Objectivity theory, which replaces epistemology and ontology (precisely what Singer finds objectionable) with methodology. According to Popper, Kuhn, and Rorty, the consensus that a community reaches (which, consensus theorists believe, is the only meaningful meaning of objectivity) is not so much the theories themselves, but the criteria to be used in testing theories. The criterion for testing is not, as Singer states, a belief in a "antecedently existing" rational method. Rather, the criteria, the definition of rationality, is the creation of the community. In fact, one could argue that it is the agreement as to criteria that constitutes a group of people as a community. Indeed, if the criteria consisted of an antecedently existing definition of rationality, there would be no need to specify a community to agree to the result—all humans would automatically eventually come to the same conclusion.

Singer seems to assume that Kuhn and Rorty's discussions of Community Objectivity within normal science/discourse are intended as criticisms. Far from it. It was Popper who condemned normal science as defined by Kuhn.²⁶⁰ Kuhn insisted on the validity of normal science.²⁶¹ He did not argue that the criteria chosen within a paradigm are "merely" agreement. Rather, communities agree to criteria for "good reasons," or for what Rorty would call "practical reasons."²⁶² The fact that the community agrees is not empty *if* one believes there is value in community.

256. *Id.*

257. *Id.*

258. *Id.* at 36.

259. *Id.*

260. POPPER, *supra* note 35, at 53.

261. See, e.g., Kuhn, *supra* note 49, at 241-49.

262. Kuhn's non-exclusive list of possible good reasons includes "accuracy, scope, simplicity, fruitfulness, and the like." *Id.* at 261.

b. Commensuration

Singer preceded his discussion of rational consensus with the discussion of commensuration as an alternate concept of procedural objectivity. He describes this as the belief in an "innate, antecedently existing thinking process common to all people or, at the very least, to everyone in our culture. The commonality of this thinking process is what makes it objective rather than subjective."²⁶³ This is a combination of External Objectivity, the belief in a universal human nature, and Argumentative (or Algorithmic) rationality. Singer then declares (but does not argue) that commensurability is not possible in discourse about law.²⁶⁴ Singer correctly describes the Kuhn-Rorty position as stating that commensurability between paradigms is not possible. But this is precisely because a paradigm (i.e., a normal discourse) is itself a consensus definition of rationality. If two apparently different paradigms adopt identical criteria of rationality, i.e., if they are commensurable, then they are, by definition, not different paradigms but one and the same paradigm.²⁶⁵

Kuhn's analogy to languages is very useful in understanding his concept. That two languages can never be perfectly translated into each other is almost axiomatic—something is always lost. However, we *do* translate between languages, albeit imperfectly. Translation may be more successful between some languages that share similar grammatical structure, etymologies, and cultures than between other languages. It is probably easier to translate French into Italian, because they are both Romance languages, than to translate English into Hungarian or Chinese, which are not both Indo-European languages. Even so, we often communicate relatively successfully, if not perfectly.

In Kuhn's terminology, two languages are incommensurable. If perfect translation were possible, the languages would be one, not two, languages. It is precisely the incommensurability of languages that makes translation necessary. As Drucilla Cornell has re-interpreted Jacques Derrida, translation is necessary *because* it is impossi-

263. Singer, *supra* note 177, at 33. Steven Winter points out that there is much empirical evidence suggesting that there is some truth in the idea of a shared rational structure among humans which seems to be anatomically based. Winter, *Transcendental Nonsense*, *supra* note 8, at 1136-59. At an obvious level, one tends to forget, among post-modern discussion as to incommensurability and logocentrism (which suggests the impossibility of perfect communication), that a good deal of communication takes place between humans. This is not to say, as Greenawalt incorrectly concludes, that communication inevitably occurs.

264. Singer, *supra* note 177, at 34.

265. See *supra* text accompanying notes 55-59.

ble.²⁶⁶ Correspondingly, despite the incommensurability of scientific paradigms, or rather, because of the incommensurability of paradigms, the inhabitants of different paradigms must try to communicate with each other. They have an ethical obligation to argue in support of their position:

When we refuse to give reasons, when we refuse to respond as if the other could still understand us, we no longer treat him or her as a subject we can talk to. By doing so we deny the other the status of an ethical subject, we treat the other no longer as an end, but as a means in the power struggle. The danger of irrationalism is that it can all too easily help to promote the conditions of its truth, conditions in which rational debate is no longer possible.²⁶⁷

Kuhn's point is that such arguments between paradigms are necessary, even if they cannot, in any meaningful way, be described as "objective."

By incommensurability, Kuhn and Rorty argue that one cannot make an algorithmic argument that mechanically compels a person or community to shift paradigms because the two paradigms will accept different algorithms. One may, however, translate so that rational argument takes place and parties make rational, pragmatic decisions. Translating between normal discourses is precisely what Rorty identifies as the goal of edifying philosophy. Edifying discourse can thus be seen as parasitic on normal discourse.²⁶⁸ Or, as Kuhn would say, normal science is a necessarily corollary of revolutionary science.²⁶⁹

By using his rigid definitions of commensurability, rationality, and objectivity, Singer misses Kuhn's insistence that science is progressive—that scientists move from one paradigm to another (i.e., adopting new criteria) pursuant to good reasons. This movement, therefore, is rational, in a broad pragmatic sense, but not in an algorithmic or "objective" sense. Singer, like Popper, perhaps Kuhn's strongest adversary,²⁷⁰ assumes that paradigms must be mutually exclusive, and that there is either perfect translation between paradigms or no translation.

Singer's parable about his continuing political arguments with a college friend demonstrates this. Singer relates how for years he

266. If translation was "possible" and communication transparent, the difficult and intentional act of translation would not be necessary. Because such transparency is impossible, we are ethically required to attempt to translate in the hope and the knowledge that the theoretically impossible possibility of communication does occasionally occur. Cornell, *supra* note 1, at 148.

267. *Id.* at 182.

268. Stick makes a similar point. Stick, *supra* note 9, at 388-89.

269. Kuhn, *supra* note 49, at 233.

270. Because there is so much overlap between Kuhn and Popper's theories, perhaps.

engaged in political argument with his friend on the assumption that someday Singer would be able to convince his friend of the rightness of Singer's views. Singer was unsuccessful and had to reject some of his assumptions. Singer states that he continues to believe that his friend is intelligent and in good faith, albeit they have different values. Consequently, Singer finally gave up the "belief that if we talked long enough we would eventually agree."²⁷¹ It is difficult to think of an idea further from Rorty and Kuhn's concept of paradigms, although this is precisely Popper's critique of them.

4. COME THE REVOLUTION

An important point that Singer implicitly makes is that legal writers may be naively assuming that American law is currently *one* normal discourse. For example, Fiss ostensibly starts from a Kuhnian consensus analysis, but he merely attempts to identify what criteria are used in legal interpretation, as though there was one and only one existing paradigm in place.²⁷² Similarly, Stick, in critiquing Singer, argues that contemporary law is an example of normal discourse.²⁷³

I would argue that if one uses the Kuhn-Rorty model, one may conclude that we are not living in a period of normal discourse in the law. We may be located in a time when the existing discourse is in crisis and ripe for replacement by revolutionary discourse.²⁷⁴

Consensus theory as a legitimizing theory requires exactly what its name implies: consensus among a relevant community. For argument's sake, I will state that liberal legalism may have been the normal discourse of American law in the recent past. Throughout the 1980s, the consensus has been breaking down. Other alternate criteria for legal decisionmaking have been offered: law and economics, critical theory, feminism. Or, at least, proponents of these theories

271. Singer, *supra* note 177, at 39.

272. See *supra* text accompanying notes 209-11, 214-15.

273. Stick, *supra* note 9, at 380.

274. Winter has also argued that it is more useful to view contemporary legal discourse as a crisis period. Steven L. Winter, *Bull Durham and the Uses of Theory*, 42 STAN. L. REV. 639 (1990).

From the other side of the political spectrum, Bork has argued that the proliferation of legal theories in the 1980s does not represent a flowering of creativity, but shows that contemporary legal theory is in its decadence. "[T]he rising flood of innovative theories signifies not the health of scholarship and constitutionalism but rather a deep-seated malaise and, quite possibly, a state of approaching decadence." BORK, *supra* note 63, at 133. Bork may be right, but I cannot agree with his conclusion that the appropriate (or possible) response to decadence is to will ourselves back to innocence.

In Lakatos' terminology, the normal discourse of liberal theory is a degenerate research program ripe to be overthrown by a progressive research program.

have begun to critique the criteria of the predominant discourse, although they are still in the early stage of promulgating a full complement of new criteria.

Imre Lakatos, who tried to reconcile the theories of Kuhn and Popper, argued that this incompleteness is, almost by definition, typical of revolutionary discourses. Because they are younger, they can be expected to be less developed than normal discourses which have for years encapsulated themselves by a protective belt of auxiliary theories.²⁷⁵ This does not diminish the theories' potential power and value.

In Lakatosian terms, Fiss and Greenawalt, by trying to further refine the criteria of liberal legalism's existing normal discourse, are merely developing a "protective belt" designed to protect the core ideas of the paradigm. In Lakatos's theory, this is initially a useful enterprise. Insofar as liberal legalists continue to formulate their arguments within the language of their own discourse, they do not try to develop their reasons why the liberal paradigm should be considered more attractive (such as Rawl's argument that his view of rights is intuitively attractive). However, they are not responding to the arguments of the proponents of the new competing paradigms.²⁷⁶

275. Lakatos, *supra* note 35, at 134-38; see also Schroeder, *supra* note 4, at 169-70.

276. Lakatos tried to develop an "objective" way of choosing between two competing, incommensurable paradigms (which he called "Research Programmes"), and, thus, sought to reconcile the theories of Popper and Kuhn. Originally, the development of the "protective belt" is a worthwhile enterprise within a paradigm. Eventually, however, the core ideas become so encrusted by the protective belt that the paradigm begins to degenerate until the core ideas begin to explain less. An example is the ptolemaic model of the universe, which originally held that the planets moved in circular orbits around the earth. As scientists further observed planetary movement, they had to surround this core idea with the protective belt of epicycles. Eventually, epi-epicycles and epi-e-epicycles were added until the concept of circular movement lost explanatory power.

But one does not abandon a paradigm merely because it seems to be degenerating. Our ideas are tenacious. One abandons a paradigm by creating a new paradigm which seems to be superior to the old. Lakatos thought that the "objective" criterion for paradigm shifts was empirical content. If the new paradigm has excess empirical content (it explains everything the old paradigm explained and then some), it should be chosen over the old. For example, the Copernican model of the universe explained the planetary movements better than the ptolemaic model, so it superseded the ptolemaic model. In turn, the Keplerian model explained everything the Copernican model explained, and more. This replacement can continue onward ad infinitum.

Paul Feyerabend persuasively argued that Lakatos' concept fails for empirical and theoretical reasons. Empirically, the concept does not explain all paradigm shifts—new scientific paradigms have not always explained *more* than their predecessors—sometimes they explained less, but in a way that was perceived as being better. Theoretically, although excess empirical content may be *one* good reason for a paradigm shift, Lakatos fails to demonstrate why it is the only good reason. Historically, scientists have found other reasons to be more persuasive. Simplicity, for instance, frequently provides the deciding factor. Lakatos cannot demonstrate a reason, except consensus, for privileging excess empirical content over other

Furthering this debate between discourses is, in Rortian terms, a job for edifying jurisprudence.

In this light, edifying jurisprudence can serve a useful, but parasitic, function. Singer at one point recognizes this,²⁷⁷ yet loses sight of it in his radically libertarian individualism (i.e., Philosophical Subjectivity). One of the most disturbing aspects of Community Objectivity is that it can easily degenerate into a justification of not merely the status quo but of oppression by the majority over the dissenting subject. As Singer states, the community can agree as to slavery,²⁷⁸ and, as I have said, the community can consist of Nazis. This raises at least two issues, neither of which renders Community Objectivity a meaningless, circular concept.

The first issue concerns the meaning of "community." An intolerant community can constitute itself by exclusion—by accepting the criteria of racism, anti-Semitism, or misogyny, for example. The community may not have to respond to the claims of minorities, Jews, or women if they can be defined away as non-humans by the criteria of the community. As Kuhn argues, scientific communities have an advantage because they can be small, esoteric, isolated, and largely self-contained "congeries of specialists."²⁷⁹ He contrasts this with other disciplines, such as philosophy or history, which he believes, by necessity, must have broader membership in their communities.²⁸⁰

As one of the primary structures of our society, law cries out for broad membership in its defining community. Historically, the community of legal academia and practice has been an exclusive and intolerant community. One of the factors precipitating the emerging crisis may be that members of this community are beginning to question the very exclusions which constituted the community. Women and people of color, who have only recently entered the academic community, question the criteria which, in the past, excluded them precisely on the grounds that they failed to meet these criteria. The academic

criteria. Under Lakatos' own theory, the consensus choice of criteria is *itself* a paradigm, and cannot serve as the *only* criteria for choosing *between* paradigms (i.e., objectivity is only a useful idea within a normal science). Consequently, it is only one of many "good" and practical reasons for a paradigm shift. For a brief discussion of Lakatos' theory of sophisticated falsification and its similarity to MacKinnesque consciousness raising, see Schroeder, *supra* note 4, at 172-74.

277. "Criticism is initially reactive and destructive, rather than constructive." Singer, *supra* note 177, at 58.

278. Singer, *supra* note 177, at 37.

279. Kuhn, *supra* note 49, at 253.

280. *Id.* at 253-54. Weber also noted that one of the unique things about law is the universality of its power within a society. This is one reason why he thought that analysis of law based on analogies to games was incomplete. See *supra* note 154.

community, while starting to accept diversity, must listen to the questioning of the new members, as well as to persons still seeking membership in the community.

Yet questioning within a community begs the question. If there is dissent, is there consensus? Is there a community? If one person dissents? Ten percent? This is what is meant by a crisis in the paradigm. The consensus is breaking down, and society needs to form a new consensus and a new community.

By saying that we may be in a time of crisis in jurisprudential discourse, I do not mean to suggest that consensual theories are valueless. However, in a time of crisis, consensus theorists cannot, as Fiss and Greenawalt do, merely argue that a consensual criteria *could theoretically* be developed, or merely identify the criteria formerly accepted by the community. They must argue why the community should prefer this criteria over proposed alternatives.²⁸¹

This raises a second interrelated point. If rival jurisprudences are not currently working to develop the protective belt within one jurisprudential discourse, but are proposing other possible paradigmatic discourses, then the arguments are unlikely to be successful if they are limited to the criteria of the existing jurisprudence. Therefore, Singer calls for "practical" or "passionate" arguments—arguments not necessarily limited to the specific rationality standards of any one paradigm, but open to the possibility of competing standards of rationality. Mere consensus *itself* is not the justification for the consensus. Rather, consensus results from the community's adoption of certain justifications. As Singer states, citing Richard Bernstein, "consensus must be made, not found."²⁸²

This does not mean, however, that community is bad. Singer seems to assume that the community is valueless because claims to community can be used for oppression of the minority. He seems to

281. "We must prove that our moral principle is not just a reflection of the prejudices of the adult white well-educated, western male of today." Jürgen Habermas, *Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?*, 83 NW. U. L. REV. 38, 40 (1989). "What moral theory can do and should be trusted to do is clarify the universal core of our moral intuitions, thereby refuting value skepticism." *Id.* at 53. In so far as Habermas can be described as an objectivist, his point of view may not interest Singer. But Cornell, another jurist influenced by post-modern theory, also argues for the ethical necessity of "universal" standards, at least in the limited sense of standards that are intersubjectively true in local context. Otherwise, one risks degenerating into "decisionism"—the radical, relativistic position that any opinion is as good as any other, that ethics is a matter of individual choice. Drucilla Cornell, *Towards a Modern/Postmodern Reconstruction of Ethics*, 133 U. PA. L. REV. 291, 300, 312 (1985). In one of his most famous quotes, Rorty derided such a free wheeling form of relativism as promoted only by the "occasional cooperative freshman." RORTY, *supra* note 39, at 166.

282. Singer, *supra* note 177, at 64.

presume that because there are no universally shared standards of rationality and because consensus is not itself the justificatory principle adopted by the consensus, that community itself lacks value and each individual must decide for his or herself.²⁸³

One can argue, though, that community *is* itself valuable. We are created by communities and live in communities. It may make a profound difference to us that we belong to a community. Law is, to a large part, the structure on which communities are based. Community, as well as individualistic, views of legal standards may be necessary. Indeed, as Singer rightfully points out, liberalism, despite its acceptance of an individualistic model of human nature, requires a broad consensus as to what aspects of individual behavior can and should be subject to community control.²⁸⁴ Standardized Objectivity and Community Objectivity are practical creations and not epistemological concepts, knowledge, or mirroring. Like languages, they require a broad consensus that certain standards should be followed in some cases in order to be workable. They do not require determinacy, only a level of predictability which the consensus accepts as appropriate.

One aspect of the so-called "different voice" or "cultural" feminist critique of liberal legalism is that, reflecting masculine psychology, liberalism gives undue weight to individuality and deprives communitarianism, and relationalism which these feminists associate with feminine psychology.²⁸⁵ In this theory, Singer's depriving of community (Philosophical Objectivity) and privileging of individual judgments (Philosophical Subjectivity); like liberal legalism, serve to exclude women. Women's "different voice" is defined away as no voice.

Other feminists question whether women in our society can achieve the type of subjectivity which Singer celebrates. MacKinnon maintains that "[i]f the reality of this damage (i.e., the damage done

283. This is the inverse of Greenawalt's error. Greenawalt assumed that the possibility of consensus and communication was equivalent to the actuality of consensus and communication.

284. Singer, *supra* note 177, at 46.

285. I am very skeptical of different-voice feminism's equation of relationality, communitarianism, and feminine thought as being a universalization of a contemporary American, white, upper-middle class, Christian stereotype of femininity as the negative of a corresponding American, white, upper-middle class, Christian stereotype of masculinity. See Schroeder, *supra* note 91, at 1141; Schroeder, *supra* note 4, at 124. I do, however, agree with the different voice feminist analysis that these values are given insufficient weight in the law, that this is related to the devalorization of the feminine, and that sexual equality requires, in contra-distinction to MacKinnon's identification of the feminine with negativity, affirmation of the feminine.

to women by growing up in a male-dominated society) is accepted, women are not full people in the sense that men are allowed to become."²⁸⁶ MacKinnon bases her disagreement with different voice feminists' subjectivist interpretation of consciousness-raising on the critique that these feminists assume that women have already achieved the type of (philosophical) subjectivity which is the goal of feminism.²⁸⁷ Feminists influenced by continental psycho-linguistic theory hypothesize that in masculinist society, any concept of the subject is inevitably associated with the masculine, and objectivity and "lack" with femininity.²⁸⁸ Once again, by emphasizing individualistic subjectivity while not analyzing the psychic, linguistic, and social position of the subject (all of which imply intersubjective, or even objective elements), Singer unintentionally excludes consideration of the feminine. If only subjects may speak, then women's speech is not speech.²⁸⁹

Finally, Singer makes the common error of presuming that subjectivity is unproblematic. He forgets that, by attacking various concepts of objectivity, he also necessarily puts into question the validity of the corresponding concepts of subjectivity that can only be defined in terms of the negative of objectivity. If Singer believes that objectivity is meaningless because it is historically situated, societally constrained, and void of valid claims to universality or rationality, how can the subjectivity of the individuals historically situated in the society be valid?²⁹⁰

Therefore, despite his critique of liberalism, Singer's critique of determinacy often degenerates into radical individualism and Philosophical Subjectivity. He argues that, because determinacy is not possible, judges do not make decisions on legal principles and should be honest in stating their reasons.²⁹¹ This is a non sequitur.

286. MACKINNON, *supra* note 1, at 103; see also discussion *infra* text accompanying notes 329-35.

287. Schroeder, *supra* note 4, at 51, 116.

288. See *id.*; CORNELL, BEYOND ACCOMMODATION, *supra* note 137, at 50-52; GROSZ, *supra* note 137, at 140-46.

289. Lacanian feminists argue that the subject is a psycho-linguistic position which can only be identified with the masculine, at least under current conditions. Consequently, when a woman says "I," she is never really speaking "her" voice, but is adopting the masculine voice. GROSZ, *supra* note 137, at 71-72.

290. See *supra* text accompanying notes 86-93. See generally Boyle, *Subjectivity*, *supra* note 8.

291. "Judges rationalize their decisions as the results of reasoned elaboration of principles inherent in the legal system. Instead of choosing among available descriptions, theories, vocabularies, and courses of action, the official who feels 'bound' reasons from nonexistent 'grounds' and hides from herself the fact that she is exercising power." Singer, *supra* note 177, at 58.

The indeterminacy argument, at most, states that legal doctrine does not algorithmically mandate judicial decisions. It does not imply that legal doctrine does not have a role, even an important role, in many judicial decisions. That the concept of causality is problematic should be familiar territory to any lawyer who has taken first-year torts. The questions "what is the cause of an action or decision?" and "what is the reason for a decision?" can have many different meanings and many different answers.²⁹² If a judge states that she decided a case within the structures of liberal legalism, who is Singer to contradict her? He has no right to criticize even if the judge recognizes the proposition that legal doctrine does not compel one determinate answer. The existence of competing values in a legal system does not necessarily make the system incoherent despite Singer's claim to the contrary. Rather, it might make the system flexible and practical. Such a system might support a coherence concept of fit. Charles Yablon argues that the indeterminacy critique, which states that legal reasoning does not compel a judicial decision, does not lead to the inevitable decision that judges are either liars or fools. Rather, the reasoning given by judges in legal decisions should be seen as a form of practical argument or explanation of precisely the type Singer calls for.²⁹³

At one level, Singer recognizes this when he argues that in rejecting foundations, not all people will immediately become immorally selfish, nor all judges become outlaws. However, this raises the Hitler question. Tyranny does not need the majority in order to be selfish. The selfish tyrant is better served by a populace which unselfishly subordinates their interests to his.

Singer speaks of the creation of consensus, yet he derides any attempt to develop a consensus of rationality criteria that does not meet his unattainable criteria of algorithmic logic and External Objectivity. Consequently, he is not left with any consensus, or even the possibility of creating a meaningful consensus. Rather, he is left with the type of oppressive and circular consensus which he has tried to condemn—the empirical fact of agreement among autonomous indi-

292. See Charles M. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 CARDOZO L. REV. 917 (1985); Nagel, *supra* note 45, at 15-28, 503-46.

293. Charles M. Yablon, *Are Judges Liars? A Wittgensteinian Critique of Law's Empire*, CAN. J. L. & JURISPRUDENCE, July 1990, at 123, 138. Of course, I am not implying that judges are always sensitive to their own prejudices and motives or that there cannot be unstated (or unconscious) explanations for judicial decisions in addition to those expressed in opinions.

viduals, rather than the intersubjectivity of community and respect for the Philosophical Objectivity of the other.

Singer ends his article with a remarkable attempt at a will to power. He creates his own individual solipsistic (Psychologically Subjective) standards which will serve the function of the good and the true. This is an act which is no less Nietzschean because his standards are "niceness."²⁹⁴ Singer's standards serve the External Objectivity function of religious dogma while denying their objective status.

As with Fish's relativism, Singer's pseudo-pragmatism has an advantage which express External Objectivity lacks, and is, therefore, even more irretrievably Externally Objective in function, if not in rhetoric. Claims to External Objectivity can always be accused of falsity. Such an accusation of lying goes to External Objectivity's very heart—the reason for killing the heretic is because the words of the heretic are a threat to the life of the religion. The religious External Objectivist must deny the claim of falsehood or give up her beliefs. Singer, on the other hand, is immune from this charge. He can declare an accusation of falsehood meaningless and continue with business as usual.

Singer would argue that this is not so because he, the edifier, has the obligation of persuasion in order to reach a consensus. However, he has consistently disparaged any means of argument except passion and algorithmic logic (the former he thinks achievable and the latter he thinks unworkable in the real world). Singer has disparaged any communal, as opposed to individual, attempt to identify criteria, thereby silencing much of the feminist call to be heard. He is left with faith, the most Externally Objective of all objectivities, because faith is so Philosophically Subjective as to be unassailable.

D. MacKinnon

In *Towards a Feminist Theory of the State*,²⁹⁵ Catharine MacKinnon denounces "objectivity" as the "holy grail"²⁹⁶ of masculinism.²⁹⁷

294. Singer argues that we should prevent cruelty, alleviate misery, democratize illegitimate hierarchies, and alter the social conditions that create loneliness. Singer, *supra* note 177, at 66-70. I am, of course, using the familiar caricature of Nietzsche's concept of will to power that I critique *supra* note 133.

295. MACKINNON, *supra* note 1.

296. *Id.* at 107.

297. Or at least that branch of masculinism which she identifies as the Western political and philosophical tradition currently embodied primarily in liberalism, although much of MacKinnon's critique is intended also to encompass Marxism. She states that "[o]bjectivity is liberal legalism's conception of itself," and that "[o]bjectivist epistemology is the rule of law." *Id.* at 162, 163. "The rule form, which unites scientific knowledge with state control in its conception of what law is, institutionalizes the objective stance as jurisprudence." *Id.* at 163.

I have chosen to examine MacKinnon's work partly because the author is probably the most well known feminist legalist who has chosen to critique "objectivity." More important, I believe that her failure to recognize how the theorists she criticizes purport to define objectivity substantially weakens her argument as to how liberal legalism silences women by classifying their claims for equality as non-legal speech. As usual, MacKinnon's critique is frustrating because it is simultaneously both powerful and flawed.

On the one hand, I will argue that even though MacKinnon gives a convincing account of one function of the term "objectivity" in liberalism, her failure to recognize how contemporary liberal theorists actually define and use the term "objectivity" leaves her analysis vulnerable to easy dismissal by liberals who can retreat to arguments on semantics. On the other hand, MacKinnon's ostensible critique of objectivity inadvertently serves as a powerful example as to how the objectivity/subjectivity/relativity debate in jurisprudence is not working and currently serves to protect the status quo.

1. DEFINITIONS

MacKinnon gives several definitions of "objectivity" in political and legal theory. Actually, she veers back and forth between conflicting connotations of the word, often in succeeding sentences and even in the same sentence:

MacKinnon identifies objective method as one which is considered:

authority . . . [as producing] an account of knowledge which is certain, which ends speculation and precludes skepticism, which has power that no one else can as powerfully contest . . . an approach to the real on which to base arguments and conclusions that will make one's point of view unquestionable and unanswerable, immortal and definitive and the last word, regardless of time, place, or person. Its thrust has been to end diversity of viewpoint, so that there can be no valid disagreement over what knowing is right knowing.²⁹⁸

Elsewhere, she defines objectivity as:

[T]he nonsituated, universal standpoint, whether claimed or aspired to—[which] is a denial of the existence or potency of sex inequality that tacitly participates in constructing reality from the dominant point of view. Objectivity, as the epistemological stance of which objectification is the social process, creates the reality it

The Marxian concept of materialism claims to be scientific, that is, like liberalism, "an objective—that is, a nonsocially perspectival—content." *Id.* at 83.

298. *Id.* at 107 (citation omitted).

apprehends by defining as knowledge the reality it creates through its way of apprehending it.²⁹⁹

And as "the ostensibly noninvolved stance, the view from a distance and from no particular perspective, apparently transparent to its reality."³⁰⁰

These descriptions have characteristics of External Objectivity. Truth is not situated or perspectival because it is universal, and it is not limited to any individual. The first of the formulations quoted above also invokes Algorithmic Objectivity, in that MacKinnon refers to arguments that are unquestionable and definitive. Moreover, she expressly identifies the liberal concept of objectivity with scientific method (or, perhaps more accurately, science is seen as a branch of liberalism).³⁰¹ In this context she states:

Objectivity as a stance toward the world erects two tests to which its method [i.e., scientific method] must conform: distance and aperspectivity. To perceive reality accurately, one must be distant from what one is looking at and view it from no place and at no time in particular, hence from all places and times at once. This stance defines the relevant world as that which can be objectively known, as that which can be known in this way. An epistemology decisively controls not only the form of knowing but also its content by defining how to proceed, the process of knowing, and by confining what is worth knowing to that which can be known in this way. . . . For science, the tests of reality are replicability and measurability, the test of true meaning is intersubjective communicability, the test of rationality if formal (axiomatic) logical consistency, and the test of usefulness, as in technology, is whether it can be done.³⁰²

MacKinnon further identifies this approach as an attempt to see knowledge as a mirroring of the external world—like Singer, she equates scientific methodology with epistemology.³⁰³

299. *Id.* at 114.

300. *Id.* at 121-22.

301. *Id.* at 97.

302. *Id.*

303. *Id.* MacKinnon does not cite Rorty who, of course, is associated with this criticism, although she does cite the *Mirror of Nature* elsewhere in the book. Nor does she cite Irigaray for her analysis of the importance of sight and mirroring in male psychology—with women as the mirror of man. The title of Irigaray's most familiar work, which MacKinnon cites elsewhere in *Theory of the State*, is translated into English as *Speculum of the Other Woman*. "Speculum" is, of course, Latin for "mirror," as well as the English term for the instrument used by gynecologists in pelvic examinations. The hand mirror of Venus is still used by doctors as the symbol of woman, by astronomers as the symbol of the planet Venus, and by feminists as the symbol of feminism. Once again, although MacKinnon does cite *Speculum* elsewhere, she scrupulously avoids citing Irigaray for any number of insights associated with

This particular passage, however, goes beyond a mixed concept of External and Algorithmic Objectivity. The reference to intersubjective communication as a test of meaning invokes Community Objectivity, a concept which can be inconsistent with External Objectivity. MacKinnon's reference to a criterion of usefulness also does not cohere with Algorithmic Objectivity, but to some other test of validity, such as the "good reasons" of pragmatists. This might be considered Argumentative Objectivity, or even some form of Irrational Subjectivity.

Moreover, MacKinnon frequently uses "objectivity" in connection with "neutrality,"³⁰⁴ implying that liberalism sees these two concepts as interrelated, or at least connected. This, of course, reflects the judgment of Fairness Objectivity. But MacKinnon argues that according to liberalism, Fairness Objectivity is determined in accordance with external truth and algorithmic logic (and perhaps other forms of rational, or irrational, behavior). It is Factual Objectivity, not opinion, and it has a special claim to be taken seriously. It is Really, Really True Objectivity.

External Objectivity has relativity as its polar opposite. MacKinnon, however, calls objectivity's "polar opposite . . . subjectivity."³⁰⁵ Let us, therefore, turn to how she identifies this type of subjectivity in order to better understand how she believes objectivity is viewed.

MacKinnon identifies "subjective" ideas with "individual" ideas³⁰⁶—in this case specifically in contrast to feminist consciousness as collective social being. This kind of subjectivity I have called Individualistic, Idiosyncratic, and/or Psychological Subjectivity. In saying that subjectivity is the polar opposite of objectivity, MacKinnon adds that "[s]ocially, men are considered objective, women subjective."³⁰⁷ This identification may not seem to add much to the definition except to make clear that in MacKinnon's view, liberalism deems objectivity to be the privileged pole, so that it will be identified with masculinity. I will return to this point.

Almost immediately after this, however, in her discussion of social science methodology, MacKinnon states that:

social science attacks the problem of its own knowing largely in terms of the limitations on the 'in here' of the knower, with concern for how these limits can be overcome, exorcised or contained.

her work which are mirrored in MacKinnon's writings, such as Irigaray's evocative reinterpretation of Plato's myth of the cave.

304. See, e.g., *id.* at 232.

305. *Id.* at 97.

306. *Id.* at 83.

307. *Id.* at 97.

Its model of knowledge posits a mind needing to overstep its determinants in order to get outside itself in order to get at the facts. Otherwise, it is thought, the mind will only propagate and project its delusions, its determinants, the limitations of its experiences, onto social reality, remaining forever trapped within itself.³⁰⁸

Thus, scientific methodology is objective, its opposite is subjectivity, and the legitimate internal process is contrasted with science's external method. Consequently, I take this internal process to be within MacKinnon's definition of subjective method. As such, this seems to be close to my Observation Objective/Psychological Subjective dyad. Insofar as MacKinnon also refers to "subjectivist retreat" in parallel with "solipsistic circle" as common pejorative dismissals of feminism, her definition of subjectivity also seems to include Idiosyncratic Subjectivity.³⁰⁹

But this is not harmless Idiosyncratic Subjectivity in the sense of taste. By noting the identification of subjectivity with women, MacKinnon sees the terminology as being profoundly pejorative. As I have stated, MacKinnon argues that liberalism identifies neutrality and fairness in law and jurisprudence with objectivity. The woman's point of view, the subjective as the idiosyncratic by definition, is then explained away as the unfair, the irrelevant, and the not worthy of consideration in a court of law by definition.³¹⁰

2. THE FLIGHT FROM OBJECTIVITY

MacKinnon claims that objectivity is masculine and that the objectification of women is its inevitable result. She insists that sex is socially constructed by men. Does this argue for the adoption of a relativist view of reality as some feminists have suggested? I will argue that it does not. Despite the abuse she heaps upon objectivity, MacKinnon herself is neither a relativist nor an anti-objectivist.³¹¹

But first I will analyze MacKinnon's critique of objectivity in liberalism. I will argue that her critique combines and conflates many

308. *Id.* at 98. This may not be an accurate characterization of all social science theory, in that some schools of social science emphasize Psychological Subjective methodology in lieu of, or in conjunction with, Observation Objective methodology. See *supra* text accompanying notes 81-98.

309. MacKINNON, *supra* note 1, at 102.

310. MacKinnon will also occasionally switch to philosophical definitions of subjectivity and objectivity without indicating the very different way in which these terms are used.

311. Despite her use of post-modern social constructivist rhetoric, MacKinnon's theory reflects liberal theories of the autonomous self, as well as pre-modern Christian theories of the body. See Schroeder, *supra* note 4, at 193-200; Schroeder, *supra* note 91, at 1190-213. Her theory of pornography serves to link these two very different dimensions. See Schroeder, *supra* note 218, at 166-83.

inconsistent concepts of objectivity and fails to consider how masculinist theorists actually claim to define their terms. Nevertheless, I will partially defend MacKinnon as accurately describing how honorific claims of objectivity function in the law. MacKinnon's critique is, in large part (although not entirely), the traditional charge that the status quo is attempting to justify itself through claims to false universals, despite its claim to the contrary. By failing to identify her argument as a false universals complaint, MacKinnon endangers her argument, compromising its intelligibility to the very persons against which it is made.³¹² Moreover, her condemnation of "objectivity" has the danger of suggesting an embrace of certain concepts of subjectivity and relativity, which MacKinnon herself would probably reject.

To repeat, MacKinnon identifies liberal "objectivity" with a molecular External/ Algorithmic/ Observation/ Factual/ Fairness/ Really, Really True form of Objectivity. Subjectivity is deprived and, therefore, identified with the feminine. This feminine subjectivity is a molecular Idiosyncratic/Psychological/Opinion form of subjectivity and relativity.

However, as I have already argued, contemporary liberal thinkers are not as unaware of the post-modern world as MacKinnon supposes. Neither Fiss, nor even Greenawalt, identifies objectivity with External Objectivity or truth. Dworkin tries to avoid the terminology of objectivity entirely. "Everyone" has read Kuhn, with greater or less understanding and agrees, at some level, that all perception and knowledge is perspectival, situated, and value laden.³¹³ Consequently, modern liberals such as Fiss have learned to rely on Community Objectivity. Dworkin relies on holistic or coherence theories of knowledge, which also have similarities to what I call Community Objectivity. Greenawalt's definitions are more confused, but his main concern is with Standardized Objectivity—that there are clear standards—which he identifies with Reasonable Person/Fairness concepts and Community and Algorithmic Objectivity, rather than any criteria of external truth or justice. Remember, Rawls named his theory "justice as fairness" to make clear that it was not based on a transcendent notion of the good, but on a situated concept of the right—how people should treat each other within a specific society in order for each

312. Sometimes MacKinnon states that she is neither trying to argue her case to liberals nor trying to persuade, but is preaching to the converted. *MACKINNON*, *supra* note 1, at 116. However, the force and passion of her writing, as well as her political activities, belie these statements.

313. Cornell similarly criticized MacKinnon's description of liberalism as being out of date. Cornell, *supra* note 9, at 2258-61.

individual to seek his own good.³¹⁴

Accordingly, it should be easy for liberal critics to dismiss MacKinnon on the grounds that she does not know what she is talking about. They can claim that she has not read contemporary liberals who have tried to respond to the post-modern critique and, therefore, she is attacking, not masculinism, but straw men. She is, they can argue, preaching lessons which they have learned long ago. MacKinnon is reinventing the wheel. If these are valid criticisms, how, then, can I find validity in her argument?

This is how. Despite recent claims by liberals that they have incorporated the post-modern lesson, their recital of post-modern community standards is strictly by rote. And like most rote learning, the lesson is forgotten almost immediately. Fiss states that he recognizes Community Objectivity as the only form of objectivity, and Dworkin says we should not even talk about objectivity. Yet they then positivistically identify the standards used by the community in order to make their application more consistent. Nor do the liberals recognize (or admit that they recognize) that normal legal discourse might be in a stage of classic Kuhnian crisis. They do not, therefore, investigate whether the criteria and theory of their normal discourse is superior or inferior to alternative criteria and theories proposed by potentially revolutionary discourse. Rather, in Lakatos' terminology, they merely seek to thicken the protective belt protecting the paradigm. Lakatos identifies this as the sign of a "degenerate" paradigm, ripe for overthrow.³¹⁵

Consequently, their use of Community Objectivity degenerates into External Objectivity. The standards of objectivity become *functionally* universal because they are the only standards considered valid within the relevant universe of this community. If other potential communities exist, they are not considered relevant possibilities. The Community Objective standard becomes functionally aperspectival because it is the only perspective seriously considered. The criteria of

314. JOHN RAWLS, A THEORY OF JUSTICE (1971). Similarly, the criteria which contemporary liberals propose for making judgments are expressly presented not as Algorithmic/External Objectivity and universal logic, but as the rules adopted by an interpretative community or, in the case of positivists (which might include Greenawalt, although he does not use that term), the application of standards promulgated by a sovereign deemed authoritative on political grounds. Rawls' famous "veil of ignorance" argument is not presented as algorithmic proof of an externally objective notion of human nature, but as a way of testing (i.e., perhaps an argumentative objective methodology) the plausibility and consistency of his intuitions. *Id.* at 136-42. Even Dworkin, who claims that there are "right answers" to the law even in "hard cases," does not pretend to rely on algorithmic logic.

315. See *supra* note 276.

judgment takes on the function of universal logic because they are the only criteria acceptable within the relevant community-universe.

This neo-External Objectivity even has an advantage over old-fashioned external objectivity in that it does not *claim* to be "true," it only *acts* as though it were true. Cries of falsehood or injustice by the oppressed, by definition, are not considered valid unless they are expressed within the normal discourse and in accordance with the criteria of the paradigm. Claims of untruth are laughed off as unsophisticated. Insofar as the Enlightenment rationality of classical liberalism was a reaction to the traditional irrationality of Christian faith, the liberal response to post-modernism might be seen as the resurgence of Christian concepts of irrationality in reaction against the now traditional rationality of the Enlightenment. They believe because it is impossible.

3. THE RETURN TO OBJECTIVITY

MacKinnon's choice to associate legal liberalism with External Objectivism springs, I suggest, from an objectivist turn in her own theory. A central concept of MacKinnon's theory is that sexuality is socially constructed—constructed by men to subordinate women.³¹⁶ No doubt there is a strong relativist aspect to this approach which suggests this corollary: If society were organized differently, the characteristics that we associate with the social constructions we call men and women may or may not be true of biologically male and female persons. Consequently, a feminist agenda is possible.

To call this approach "relativist," however, can be misinterpreted as suggesting that the structures and dichotomies of masculinist society are illusory, and that feminism is a matter of merely changing one's point of view. For example, Robin West tries to modify the radical feminist position by arguing that it is not heterosexuality that is oppressive, but its compulsory nature.³¹⁷ Heterosexuality,

316. Schroeder, *supra* note 4, at 193-96; Schroeder, *supra* note 218, at 129, 166-83. Despite MacKinnon's use of ostensibly Foucaultian vocabulary, her theory is an attempt to superimpose a post-modern theory of society (i.e., sexuality is socially constructed) over a modern liberal theory of the self (i.e., freedom consists of unconstrained will of atomistic individuals), and a premodern Christian concept of the body (i.e., the involuntary nature of sexuality robs us of our subjectivity). She unsuccessfully tries to fuse these three incompatible world views through her theory of pornography. That is, through pornography, men, who are free standing individuals, freely impose their will (i.e., liberalism) by constructing sexuality (i.e., post-modernism) and imposing it on women who are thereby objectified (i.e., Christianity).

317. West, *supra* note 4, at 46. In this article West tries, unsuccessfully, to reconcile cultural and radical feminists by arguing that they both arise from the inherent, anatomically connectedness of women. Cultural feminists embrace their connectedness and fear separation,

freely and consciously chosen, need not be oppressive. Different voice feminists such as West interpret the harm of pornography as distorting the true relational sexuality of women.³¹⁸ Leslie Bender describes the public/private dichotomy of liberalism as "false."³¹⁹ Indeed, MacKinnon's own account of the knowledge achieved by consciousness-raising has substantial similarities to the relativistic concepts of Community Objectivity posited by the Popper/Kuhn/Lakatos philosophy of science.

MacKinnon has a strong objectivist streak in her writings as well. Her critique is not merely that liberalism falsely tries to set up masculinist community standards as universals. Men have the power to make their standards into the *true* universals within society. That is, the Community Objectivity of liberalism does not merely *function* as External Objectivity in our society. Because human beings create their reality, masculinism/liberalism has created our selves and our society such that the Community Objectivity standards of liberalism *are* Externally Objectively true within the relevant universe of our society. It makes its lies into the truth.

Pornography is not merely a grotesque distortion of Westian relational femininity. Pornography, says MacKinnon, *defines* the feminine. To be a woman socially is to be rapable, to be a non-person just as pornography demands.³²⁰ The public/private dichotomy is *not*

while radical feminists see their connectedness as oppressive and seek individuation. This theoretical difference of opinion can be better explained as both arising, not from a concept of the feminine, but from acceptance of the masculine stereotype of the masculine, and of the feminine as its negativity. The cultural feminists embrace the feminine stereotype while the radical reject it in favor of the masculine stereotype. Both are incipiently conservative in that they both preserve the masculine stereotype, which is the bulwark of the status quo.

318. Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMAN'S L.J. 81 (1987). Sunstein argues that the cultural feminist view, which sees pornography as a distortion of true, healthy sexuality, is similar to the traditional American Christian moralist view. Sunstein, *supra* note 21, at 21. Whether or not the view that sex is naturally clean and healthy, in contrast to the filth of pornography, has become mainstream in the United States, it hardly seems to be the "traditional" Christian approach which has emphasized the inherent sinfulness and corruption of sexuality. The traditional Christian believed, like MacKinnon, that the pornographic vision is the true vision of sexuality, not its distortion. See Schroeder, *supra* note 91, at 1155-56.

319. Bender, *supra* note 1, at 864, 868.

320. For MacKinnon, sex and gender are both sexually constructed. One of the mechanisms which masculinism uses to construct the sex "woman" is pornography. "Deeper than the personhood question or the violence question is the question of the mechanism of social causation by which pornography *constructs* women and sex, defines what 'woman' means and what sexuality is, in terms of each other." MACKINNON, *supra* note 1, at 161. "For example, men say all women are whores. We say men have the power to make this our fundamental condition. . . . Men define women as sexual beings; feminism comprehends that femininity is 'sexual.'" *Id.* at 59.

Along with the rape and prostitution in which it participates, pornography

false, if this implies illusory or deniable. It is only "false" in the sense that it is, in theory, not necessary in every society imaginable (it is not true in all universes) or that it is not consistently applied in our legal system. This dichotomy is, however, very, very real in fact and in law in our society. It is the structure of men's domination of women in liberal society—the universe we live in. It is, therefore, an Externally Objective truth for our universe, even though we might fantasize alternate universes.³²¹ The public/private distinction, which forbids law and the state from entering the private world of the home and the family where women, traditionally, have been confined, has insured that while men can *figuratively* be said to be governed by "laws and not men,"³²² women have *literally* been governed by men and not laws. MacKinnon repeatedly insists that she has no interest in discussing anything but our society from within our society—the only universe we can know.³²³ The (Externally) *Objective truth* is oppression. One of the (Externally) Objectively true and existing legal mechanisms of that oppression is the very real public/private distinction.³²⁴ Rape happens; it is neither a feminine fantasy nor a false charge.³²⁵

According to MacKinnon, liberalism needs the concept of External Objectivity. Because liberal legalists often conflate objectivity with legal determinacy, MacKinnon, who believes that masculinism has created its own reality, must also agree that the law is determinate.³²⁶ Her choice of the word "objective" as shorthand for this cri-

institutionalizes the sexuality of male supremacy Gender is sexual. Pornography constitutes the meaning of that sexuality. Men treat women as who they see women as being. Pornography constructs who that is. Men's power over women means that the way men see women defines who women can be. Pornography is that way.

Id. at 18. "Pornography is not imagery in some relation to a reality elsewhere constructed. It is not a distortion, reflection, projection, expression, fantasy, representation or symbol, either. It is sexual reality." MACKINNON, *supra* note 1, at 198. "Pornography can invent women because it has the power to make its vision into reality, which then passes, objectively, for truth." *Id.* at 205.

321. Consequently, MacKinnon resists speaking about what society would be like if sexual equality was achieved. To do so would be to engage in fantasies, imagining what does not exist as though one could change reality by wishing. MACKINNON, *supra* note 1, at 243-45.

322. *Marbury v. Madison*, 1 U.S. 137, 163 (1803).

323. See MACKINNON, *supra* note 212, at 221; MACKINNON, *supra* note 1, at 83-84, 98-99.

324. It is, of course, not the only legal mechanism. The sameness/difference approach to sexual equality is another.

325. MacKinnon insists that the oppression of women is a physical reality. "[Feminist theory] is deeply of the world: raw with women's blood, ragged with women's pain, shrill with women's screams. . . . It participates in reality: the reality of a fist in the face, not the concept of a fist in the face." Catharine MacKinnon, *Reflections on Sex Equality Under Law*, 100 YALE L.J. 1281, 1285 (1991).

326. See MACKINNON, *supra* note 1, at 137. In calling this "determinate," MacKinnon

tique unfortunately obfuscates, rather than clarifies, its genuine insights because it ignores the various way the word is used in liberal writings. Liberals (and others) who read her work are likely to get lost in semantic confusion.

Despite the power of this argument, MacKinnon's neo-External Objectivist approach does not give an adequate account for the actual, rather than theoretical, possibility of a feminist agenda. She argues that through consciousness raising women can achieve feminist consciousness. They can recognize the structure of oppression from within oppression. If we are sexually constructed by masculinist society, and if women have been objectified and do not have subjectivity in such a society,³²⁷ how do women achieve the subjectivity, or intersubjectivity, of such a revolutionary consciousness?

To use a masculinist sports metaphor, she punts. MacKinnon repeatedly states that she can not give an account of how feminist consciousness arises—how women achieve the initial consciousness which enables them to undergo consciousness raising to achieve feminist consciousness.³²⁸ As I have argued elsewhere,³²⁹ this throws her back onto an essentialist concept of human nature. This essence is strikingly similar to the concept of human nature, generally (which of course means masculinity, specifically) adopted by liberal legalism—the autonomous subject capable of abstracting herself from the contingencies of history and recreating a different reality.

This suggests that masculinism has not, in fact, been entirely successful in creating reality as MacKinnon has otherwise charged. Women are not totally objectified but can achieve at least a limited subjectivity. However, this is subjectivity in the philosophical sense. MacKinnon is accurate when she states that her account of the knowledge of consciousness is not subjective in the senses of Idiosyncratic or Individualistic.

This aspect of MacKinnon's argument reveals that liberal "objec-

makes the common error of confusing predictability and determination with the concept of theoretical determinacy.

327. *Id.* at 116.

328. *Id.* at 85-86.

329. Schroeder, *supra* note 4, at 193-96. Liberalism is not the only possible political philosophy which emphasizes individual autonomy (Psychological Subjectivity). Nevertheless, it is a fundamental characteristic of liberalism to emphasize autonomy to the exclusion of other values. Other philosophies, such as neo-Hegelian theory, emphasize that Psychological Subjectivity, although necessary, is not sufficient for the achievement of self-actualization. The problem with MacKinnon is that by insisting on only analyzing the existing social structure, and refusing to consider the possible, she must emphasize only the negative aspect of freedom—lack of choice of women. Consequently, her theory, like liberalism, only expressly considers the value of autonomy.

tivity" is not only Community Objectivity, but also a form of Community Objectivity which is at odds with the External Objectivity of true human nature. That is, the Community Objective truth of women established by liberalism is Externally Objectively false. Why is it false? It is because the true essence of women is the essence of human nature established by liberalism. The error of liberalism is that although it accurately identifies the Externally Objective truth of human nature with respect to men, it is Externally Objectively wrong by not fully recognizing this truth with respect to women. Liberalism not only does not recognize its error, it sets up structures, laws, and vocabularies which serve to deform women until they Factually Objectively conform to the Externally Objectively incorrect vision of their Externally Objectively true selves.

To summarize, although MacKinnon frames her theory in the form of a denial of the concept of (External) Objectivity, it is not all that clear that her theory in fact denies External Objectivity, let alone other forms of objectivity. Her continued use of the terminology of objectivity confuses her own analysis, and thereby blunts her attack. Her argument would seem to result in a paradox. Masculinism is Externally Objective, in the sense that it remakes us and our world until we actually conform to its Community Objective vision. False universals are made into true local universals. Yet simultaneously, masculinism is not Externally Objective because its Community Objective vision does not conform to our true Externally Objective reality, which can be glimpsed through consciousness raising. We are socially constructed; we are not totally socially constructed.

4. THE RETURN TO SUBJECTIVITY

Moreover, as I have already alluded to, MacKinnon also uses another conception of subjectivity/objectivity, one that relates more to the post-modern philosophical concepts of the subject-object distinction than with modern liberal concepts of objectivity. MacKinnon states that although liberalism defines the feminine as subjectivity, women cannot celebrate subjectivity³³⁰ because this requires a knowing, and free, subject. In masculinism, women are oppressed and cannot be subjects.³³¹ Only men are subjects. The concept of objectivity which MacKinnon thinks masculinism adopts—i.e., external reality—views that which is to be known as the external object. "The objectively knowable is object. Woman through male eyes is sex object, that by which man knows himself at once as man

330. MACKINNON, *supra* note 1, at 121.

331. *Id.* at 116.

and as subject."³³² Objectivism as masculinism results in the objectification of women.

MacKinnon comes to a similar insight of Lacanian psychology, which holds that psychically both male and female can only comprehend the concept of the subject—the acting self—as the masculine.³³³ The phallus is the name of the object of desire. The feminine is the lack of self, the object of desire as the Phallic Mother from whom we have been forever psychically castrated, and with whom we can never again achieve union. The Woman does not exist. But whereas Lacanians see this as psychic lying (myths in the negative sense), MacKinnon takes them literally. Lacanians think males deceive themselves by imagining that having physical penises means they have the psychic phallus, thereby making them subjects.³³⁴ MacKinnon's theory is purely instrumental and leaves no room for the unconscious. Because men are, in fact, dominant and women subordinate, and because males have real political power, MacKinnon's feminism holds that men *do* have the phallus—men *do* construct sexuality and sexuality is that which masculinity constructs.

To put it another way, MacKinnon's vision of selfhood is similar to the autonomous individuality of classical liberalism. Consequently, she assumes that the post-modern concept that human nature and society are socially constructed means that someone—some active subject—must be doing the constructing.³³⁵ This instrumental view of psychology implies that whoever is advantaged by society must be constructing society.³³⁶

By choosing not to distinguish between very different concepts of objectivity (i.e., External, Algorithmic, Community and Philosophical

332. *Id.* at 122.

333. See Schroeder, *supra* note 218; GROSZ, *supra* note 137, at 71-72.

334. However, fantasy does not have potency—in Lacanian theory it is the origin of the symbolic (language) and the gender hierarchy. Cornell, *supra* note 9, at 2269.

335. "Post-Lacan, actually post-Foucault, it has been customary to affirm that sexuality is socially constructed. Seldom specified is what, socially, it is constructed of, far less who does the constructing, or how when or where." MACKINNON, *supra* note 1, at 131.

Note, that despite her ostensible adoption of seemingly post-modern rhetoric, MacKinnon in fact rejects Michel Foucault's theory of the social construction of sexuality. Foucault's theory states that there is no subject to construct sexuality, and there is no authentic sexuality out of which sexuality is constructed. Schroeder, *supra* note 218.

336. This is not to suggest that MacKinnon comes to the ridiculous conclusion that because men are more empowered than women, men, unlike, women, are not themselves socially constructed. See Cain, *supra* note 4, at 807-08; Abrams, *supra* note 4, at 795. Unfortunately, some feminists have interpreted MacKinnon's feminist theory this way. MacKinnon, however, does state on several occasions that men *do* achieve a substantial degree of subjectivity and choice. "[W]omen are in fact not full people in the sense men are allowed to become." MACKINNON, *supra* note 1, at 103.

Objectivity), MacKinnon risks confusing her arguments, let alone her readers. This is because the gender identification of the polar opposites is reversed in different dyads. According to MacKinnon, masculinism posits External Objectivity and associates Idiosyncratic Subjectivity and relativity with women. But women are deprived of Philosophical Subjectivity and are Philosophical objects. Social knowledge is revealed as male Philosophical Subjectivity. Consequently, MacKinnon states that masculinism is both objective and subjective, and the feminine has been made both subjective and objective without distinguishing between these two very different concepts.

This leads to the paradoxes just discussed. MacKinnon states that the knowledge that comes with feminist consciousness is neither objective nor subjective.³³⁷ But MacKinnon's concept, or feminist consciousness, can be characterized as a form of Community Objectivity similar to that proposed by Kuhn/Rorty and post-modern liberals—i.e., intersubjective consensus.³³⁸ Yet how can there be intersubjective consensus among *objects*? MacKinnon argues that masculinism objectifies women so that they are not subjects. She further argues that it is wishful thinking for women to believe that, by declaration, they can become subjects in the current social structure.³³⁹ On these premises, how can there be feminist consciousness?

It would seem that, contrary to MacKinnon's claims, there must be some residue of Philosophical Subjectivity left within women (or at least in feminists who, because they grasp the material reality of the social construction of sexuality, are perhaps not socially "women" in MacKinnon's sense, but are what I have called viragos).³⁴⁰ Or does some form of External Objective truth exist which even Philosophical Objectified women can perceive, possibly through Individualistic or Idiosyncratic Subjective methods—here used in the affirmative sense of correct intuitive, mystical, or other "non-rational" ways of knowing? Once again, although we are socially constructed; we are not totally socially constructed.³⁴¹

337. By this she means it is neither Externally Objective nor Philosophically Subjective. These two are not polar-opposites and she does not successfully achieve her goal of abandoning subjectivity-objectivity as a useful dichotomy of social criticism. She retains Idiosyncratic Subjectivity and relativity, Community Objectivity (consciousness raising), and Philosophical Objectivity as valid categories for her account of the feminine in masculinist society.

338. See Schroeder, *supra* note 4, at 172-74.

339. See *supra* note 336.

340. See Schroeder, *supra* note 91, at 1141, 1208, for a discussion of the archaic honorific use of the term "virago" for a woman who has achieved masculine excellence.

341. Despite her otherwise helpful reinterpretation of MacKinnon's theories, Frances Olsen tries to declaw MacKinnon's radicalism, while explaining away her apparent internal contradictions, by supposing that MacKinnon is making a strategic choice of emphasizing

5. DOMINANCE THEORY

MacKinnon attacks another concept of objectivity in liberal legalism very successfully. Once again, she does not clearly distinguish her definitions and seems to deny objectivity's notorious polysemy. Her apparent conflation can be defended on the grounds that the liberals she criticizes also frequently conflate these issues. In this case, MacKinnon's choice of language may reflect an attempt to join the debate with liberals in a condominium of conflation.³⁴²

The objectivity that MacKinnon critiques is a form of Standardized/Fairness/ Factual Objectivity frequently met in sexual equality discourse. I reinterpret MacKinnon's critique of the liberal sameness/difference test of equality within this article's vocabulary as follows: the sameness/difference approach to sex equality derives from setting a Standardized Objective test based on whether women are like or dislike "similarly situated" men. This is seen as a matter of Factual Objective facts that are Observation Objective. Equality is expressed as treating like cases alike.³⁴³ But because the standards of desert in liberalism is a masculine standard (i.e., characteristics associated with masculinity are deemed deserving of the privileges which society has given to men), treating like as alike is interpreted as saying that individual women can have male privileges if they can prove that they are empirically masculine. Masculinity becomes the justification for its own dominant status, and equality is reduced to a fairness test based on the empirical observation of "equality of opportunity."

MacKinnon condemns this concept of equality because it ignores that the concept of equality is a political or ethical mandate. Liberal legalists tend to forget that the phrase "all men are created equal" in that great liberal document, the Declaration of Independence, cannot be read as stating that all male human beings are empirically simi-

some aspects of her theory over others. Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1175-76 (1989) (book review). Without denying that all writing necessarily requires inclusion and exclusion, emphasis and de-emphasis, MacKinnon is entitled to be taken seriously on her own terms and saved from "defenders" who try to suggest otherwise.

342. In a recent article, MacKinnon further develops her dominance concept of sexual equality but generally avoids wording it in terms of objectivity/subjectivity. I believe her analysis and her argument has been greatly strengthened by this decision. MacKinnon, *supra* note 325.

343. Treating like alike is not the only theory of equality under the law propounded by liberal political philosophers and jurists. ROSENFELD, *supra* note 2, at 13-42. At least one feminist has suggested that women abandon equality analysis entirely. Cain, *supra* note 4, at 806-07. Cain's suggestion might be appropriate if we wrote on a clean slate. Unfortunately, insofar as gender issues are considered under the equal protection clause of the United States Constitution, we are stuck with wording at least part of our analysis within equality discourse.

lar.³⁴⁴ Rather, it is a statement of what it means to be members of a political society *despite* empirical inequality. The sameness/difference approach to sex equality, which emphasizes membership based on empirical similarity, actually denies the concept of political equality, which is supposed to be one of the central tenets of liberalism.

One of the forms of objectivity which Greenawalt tries to defend is precisely such a Standardized/ Factual/ Observation/ Fairness standard of objectivity—i.e., objectivity in “the sense that a legal category is not arbitrary or unfair.”³⁴⁵ One problem with such a concept of objectivity is that Standardized Objectivity does not have normative implications that would justify honorific labels such as Factual and Fairness Objectivity. Observation Objectivity has normativity only insofar as it is deemed an “accurate” way of perceiving reality. However, even if an accurate description of reality might help one construct a standard, it does not alone give one guidance as to what judgments are to be made pursuant to that standard. An accurate description of gender difference does not, standing alone, tell us which gender, or neither, should be privileged. An external theory is needed to legitimate these normative judgments. The use of the normative, honorific word “objectivity” conceals, or begs, the very question which needs to be asked.

Greenawalt not only substantially misunderstands the MacKinnonesque domination critique, he conflates it with a different critique made by different voice feminists. Greenawalt states that objections that the law is arbitrary (Biased Subjective), are usually not, in reality, objections to classification of individuals by groups.³⁴⁶ This is because all classification (by definition) consists of abstractions of individuals to common essential characteristics. So far, I agree. He believes that classification is unacceptably arbitrary only when “the law’s unfavorable treatment of a group has no significant relation to a proper purpose of the classification.”³⁴⁷ His particular concern is whether certain classifications of individuals by race and gender can be

344. Indeed, Robin West actually adopts this interpretation of the liberal concept of equality and identifies it as uniquely male. She argues that because women are *not physically* equal to their husbands and children, equality is not a feminine value. West, *supra* note 10, at 12; see also Schroeder, *supra* note 91, at 1148 n.25.

Rosenfeld accurately explains that in liberalism, equality is a counterfactual—it does not pretend to be a positive description of reality but is prescriptive. “‘All men are created equal’ is not a declarative sentence; it is an imperative. It is not a statement but an exhortation. It is not an affirmation or description. It is a command. Whatever its form, its function is directive.” ROSENFELD, *supra* note 2, at 21.

345. GREENAWALT, *supra* note 108, at 121.

346. *Id.*

347. *Id.*

defended, and whether laws that make such classifications should be condemned because of their differential effect.³⁴⁸

Greenawalt then relates this discussion of classification to a consideration of the "generality" of the law. He presents this as addressing the feminist critique of objectivity in the law. He discusses whether the law should be "principled," which he identifies with the "masculine" (and which I would classify as more Standardized Objective or related to Reasonable Person Objectivity), or whether it can be more relational, which he identifies with the "feminine" (which I would classify as less Standardized Objective and either Mental State, Idiosyncratic, Irrational or Psychological Subjective).³⁴⁹ Based on his reading of the work of Carol Gilligan, Greenawalt characterizes the feminist critique of "objectivity" in law as arguing that the legal system is permeated with a masculine point of view, which he identifies with "principles." Consequently, for the male psychology, principled law is, *per se*, the standard of fairness.³⁵⁰ Greenawalt claims to accept the different voice theory by saying that the feminine voice, which he associates with subjectivity, is, in fact, morally superior and should be integrated into societal organization.³⁵¹ He is unable, however, to fit the "unprincipled" concepts of femininity into most areas of law, which he sees as necessarily principled (and masculine) for fairness reasons.³⁵² Law is not morality.

For Greenawalt, women's different voice is expressly not a legal voice. It may be spoken elsewhere in society, but it is mere barking in a court room.³⁵³

348. *Id.*

349. *Id.* at 155. Greenawalt compares the principled ("Standardized Objective") approach to law with marking exams. *Id.* at 31-32.

350. I have satirized Greenawalt's attempt to engage the different voice feminist critique elsewhere. See Schroeder, *supra* note 4, at 142-44.

351. GREENAWALT, *supra* note 108, at 156.

352. *Id.* at 157. Greenawalt does recognize a limited role for relational ideas in law. "Resolutions based more on caring concern might be an advance not only in divorce and custody cases but also for some contractual disputes, claims in tort, and other issues. Conciliation and mediation could play a much larger part. . . . [S]ome substantive standards could attend more to texture and relation." *Id.* Greenawalt specifically sees the different-voice relational concept as arguing against the use of Reasonable Person Objective standards, or perhaps against the use of any and all Standardized Objectivity. "Reasoning to decision by general abstractions is seen as alienating and less richly human than an alternative approach." *Id.* at 159. To Greenawalt, relationality means deciding each case separately without regard to precedent and consistency in any form.

353. Greenawalt's reading of different voice feminism, although simplistic, provides a valid interpretation of much of the work, to date, which contains an implicit conservatism. Greenawalt ignores a more sophisticated argument which could be developed from different-voice theory. One should not conclude that principled standards *are* justice to men and relational concepts *are* justice to women, as though we were two totally alien life forms which

Greenawalt accepts concepts of Standardized Objectivity (a "principled" and expressly masculine approach) in the law as fairness for him *as a man*. He feels the need to go on,³⁵⁴ to defend the particular uses of particular standards from the critique of feminists and persons of color. He interprets this critique as being primarily one of "disparate" effect. But disparate effect only sees harm when like is treated unlike (or, more precisely, when the effect of the treatment on two different likes is unlike). This is the very concept challenged by MacKinnon! Greenawalt is mainly concerned that a seemingly neutral standard may have a disparately negative effect on one or another sub-group in society.³⁵⁵ He also partially defends disparate effects in some circumstances on the ground that these effects do not always represent "bias" but empirically observable facts.³⁵⁶ He can only see deviation from such neutral standards for compensatory, affirmative-action type purposes.³⁵⁷

Greenawalt's analysis downplays the fact that the dominance approach (and the different voice approach) questions first and foremost the standards determined, rather than the application of standards. A recognition of the existence of observable empirical differences and similarities cannot, alone, serve as a justification for the use of empirical similarities and differences to justify the status quo. Neither radical nor different voice feminists argue that there are no empirically observable differences between men and women. The recognition of difference in the material reality of masculinity and femininity is one of the base insights of almost all contemporary femi-

just happen to live on the same planet. Empirical psychology is not jurisprudence. Rather, different-voice theory suggests that, as an empirical matter, a substantial percentage (perhaps a majority) of American men might be psychologically predisposed to be more likely to think *first* in terms of standards, while a substantial percentage of American women might be psychologically predisposed to be more likely to think *first* in terms of relations. These empirical observations should not be misconstrued into a reification of the observations into essentialist definitions of masculinity and femininity. Human psychology contains the unconscious, the conscious, and innumerable contradictions. Rather, the masculinist jurist should realize that he should self-critically re-examine his theories and his conceptions of personhood to determine whether they are based on unexamined assumptions derived from his own idiosyncratic psychological makeup. Moreover, he should self-critically re-examine alternate feminist theories which might not initially occur to him, but yet be valid and reflect a different, and perhaps more appealing, conception of the self. Ideally, this will result in a fuller conception of the self which does not submerge gender into the sameness of masculinity.

354. Actually, he discusses this issue before he discusses the different voice critique of categories. By defending the specific use of specific categories before defending the use of categories, Greenawalt gives away the fact that he does not really consider the feminist critique to be serious.

355. GREENAWALT, *supra* note 108, at 136.

356. *Id.* at 123-29, 136-39.

357. *Id.* at 130-33.

nism.³⁵⁸ Contemporary feminists do not argue that gender differences are illusory and that women would be "just as good as men" if they would be given a fair chance. Women are as good as women and, nevertheless, demand that men recognize them.

Greenawalt argues that a traditional legal standard may be defensible even if it is "based largely on male experience and disadvantages women" if it turns "out to be the rule that seems best from the perspective of women and disadvantages women. At the least, saying that the rule is based on male experience and disadvantages women is not sufficient to condemn the rule."³⁵⁹ MacKinnon is denying the validity of the standard chosen, even as a starting point for discussion. This is because she believes that she has shown how this standard is systematically used as an instrument of domination. Greenawalt argues that "innocently motivated standards" that have differential effects should not be condemned as "discriminatory."³⁶⁰ In MacKinnon's radical analysis, the Psychological or Philosophical Subjective "innocence" of the standard drafters is irrelevant to the conclusion that the political effect is discriminatory.³⁶¹ Changing standards or applying different standards for the oppressed may initially sound similar to Greenawalt's affirmative-action approach, but the similarity is only on the surface. Greenawalt recommends a form of affirmative action, a concept borrowed from the law of racial equality, as a short-term strategy to enable the oppressed eventually to reach the standards of the dominant. Affirmative action serves as a crutch for women who are seen as social cripples. Greenawalt equates femininity with effeminacy; women with incomplete men; as eunuchs. *This* form of affirmative action, therefore, reaffirms, rather than rejects the standards set by the status quo. The radical critique attempts to bring

358. Greenawalt does acknowledge that at least one aspect of feminist critiques of law is based on a recognition that the origin of some facially neutral rules lie in male perspectives. *Id.* at 136. He also recognizes that such rules may disadvantage women. *Id.* He, however, rejects the argument that these two conditions make the rule unacceptable on the ground that the rule may nevertheless be the "best" when viewed from both the female, as well as male, perspective. *Id.* at 136-39. This conclusion is logically correct, of course, if one rejects the radical feminist proposition that rules which are based on the male perspective and which systematically disadvantage women can never be the "best" when viewed from the female perspective.

359. *Id.* at 138.

360. *Id.* at 138-39.

361. Greenawalt may be indirectly making a good point as to the pragmatic, political wisdom of using the term "discrimination" in discussions of gender justice. Insofar as the word does connote intentionality, men and women can honestly insist that society is not misogynist because they do not consciously (i.e. Psychological and Philosophical Subjectively) experience themselves as hating women. And yet, society may be misogynist in the sense that women are systematically (Observation, Philosophically and, yes, Externally Objectively) disadvantaged.

the standards, themselves, into question.³⁶²

Greenawalt's liberal approach silences this question. By accepting the standards, which set forth the definition of equality, the criteria for determining who deserves rights and what counts as a legal claim of discrimination, Greenawalt defines away the cultural feminist's different voice as non-legal voice, and defines away the claims of radical feminists as non-speech. Women's demands are rendered no more meaningful than the barking of dogs. Feminists become whining bitches.

362. "Attempts" because I am not convinced that feminists have been successful in doing so. I believe that both MacKinnon's radical feminism and cultural (i.e., different-voice) feminism actually accept the gender stereotypes of the status quo. MacKinnon also sees women as incomplete men. See *supra* note 336.