LEGAL STUDIES RESEARCH PAPER SERIES

Working Paper Number 07-09
August 6, 2007

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41 Cont. Phil. Rev. 35 (2009)

This paper can be downloaded without charge from
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at: http://ssrn.com/abstract=975810

Cont Philos Rev
DOI 10.1007/s11007-009-9095-z

The dedifferentiation problem

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Abstract This article demonstrates that our more sophisticated theories of law lead us to a point where we are no longer able to distinguish law from culture, or society, or the market, or politics or anything of the sort. Not only are the various terms inextricably intertwined (something that other thinkers have observed) but we are no longer in a position to articulate any relations between these various terms at all. It is with this latter realization that the dedifferentiation problem kicks in. Because the various terms cannot be disentangled, we find ourselves in the odd position where there is nothing of any positive character to be said about their relations. Each is already the other and, thus, they can have no relation. This is rather bad news for the ways in which we have traditionally conceived theories of law—indeed any theory that gets off the ground by distinguishing law from a discrete something else (which, on first glance, would seem to include all legal theory).

Keywords Dedifferentiation · Law · Interpretation · Conceptual indeterminacy · Reification · Causation · Aesthetics

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Byron R. White Professor of Law, University of Colorado School of Law. For comments and criticisms, I wish to thank the participants at a colloquium held at the Iowa College of Law, February 17, 2006 as well as Peter Goodrich, Gordon Hull, Clare Huntington, Sarah Krakoff, Desmond Manderson, Jeremy Paul, Chris Sagers, Nick Smith, Phil Weiser, and Ahmed White. The present work is a continuation of a critical exploration of legal thought begun in Pierre Schlag, "The Aesthetics of American Law," *Harvard Law Review* 115 (2002): 1047.

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Published online: 03 March 2009

> If you can think about something which is attached to
> something else without thinking about what it is attached to,
> then you have what is called a legal mind.
>
> Thomas Reed Powell[1]

This article aims to present a problem for the ways in which we think about law. This problem, the dedifferentiation problem, is strikingly simple, indeed obvious—once one gets it. But getting it in the first place takes some work.

To illustrate the problem, consider the cutting edge of cultural studies in law as evidenced in the work of Austin Sarat, Thomas Kearns, Susan Silbey, Patricia Ewick and Naomi Mezey.[2] These thinkers have been trying to articulate the relation (or rather relations) of law and culture. They all recognize that law and culture are mutually constitutive. In other words, they all recognize that law and culture constitute, shape, construct or otherwise "verb" each other in a variety of ways. Now, were this all they were claiming, there wouldn't be much more to say here. But, these thinkers have advanced significantly beyond this point.

The advance is on display in a single sentence written by Sarat and Kearns in their book "Law in the Domains of Culture." Sarat and Kearns write, "To recognize that law has meaning-making power, then, is to see that social practices *are not logically separable* from the laws that *shape* them—that social practices are unintelligible apart from the legal norms that *give rise to* them."[3] Now, what is interesting about this sentence is that it announces two incompatible views of the relations (and non-relations) of law and culture. On the one hand, Sarat and Kearns want to say that the laws "shape" and "give rise to" social practices. This, of course, implies that law and social practice are distinct—that law is one thing and social practice is another.[4] On the other hand, Sarat and Kearns also want to say—and this is the interesting part—that law and social practice are not "logically separable." This would mean that law and social practice are indistinguishable—that they are in fact not one thing and another, but just one thing.

Now my point here is definitely not to criticize Sarat and Kearns for holding two incompatible views. For one thing, my strong reading of that single sentence above is not entirely charitable. And for another, I will be doing the same thing shortly. Even more important than those two qualifications, however, is that their view about the inseparability of law and social practices is a significant advance in cultural legal studies and in legal theory generally.

Still, what about the incompatibility? Here, we turn to Naomi Mezey who draws out the implications. She writes, in a very thought-provoking article: "Perhaps we should not speak of the 'relationship' between law and culture at all, as this tends to reinforce the distinction between the concepts that my description here seeks to

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[1] Arnold (1930, p. 58) (quoting Thomas Reed Powell).

[2] Sarat and Kearns (1998), Ewick and Silbey (1998), and Mezey (2001, p. 35).

[3] Sarat and Kearns (1998).

[4] For the two to be distinct means some ability to separate the two out. It does not mean a perfect boundary by any means. There could be some overlap, some fuzziness, some melding at the edges, or what have you.

deny."[5] Yes. Exactly so. Indeed, if law and culture are not separable, then we really should not be asserting any relation between the two at all. Why not? Because we do not have two things to relate. We have only one thing. And having only one thing, there is literally nothing to relate.

This then is a very abstract sketch of the dedifferentiation problem: Identities previously thought separate and distinct (e.g. law and culture) turn out to be inextricably intertwined. Each is already inextricably the other—in ways that cannot be disentangled through any definition, specification, stipulation or theorization. The upshot, of course, is that if we cannot distinguish the two—if we do not have two different referents—then we have nothing to relate, nothing to connect. We have, in short, nothing of any positive character to say about their relations.

Notice that the dedifferentiation problem here is not some claim that the relations between law and culture (or law and politics, law and economics, law and cognition, law and language, etc.) are extremely complicated, difficult to articulate, indeterminate, maddeningly elusive or any such thing. Those observations may (or may not) be interesting in their own right. But either way, they are not the dedifferentiation problem. The dedifferentiation problem is that there is nothing to be said about the relations between the two identities because we were never entitled to separate them out in the first place.

This then is a statement of the dedifferentiation problem. As I hope the reader will come to appreciate throughout the course of this article, to *state the problem* and to actually *experience it* is not the same thing. In part, that is because the dedifferentiation problem is not just some discrete proposition, theory, thesis, or idea one can examine from some safe intellectual distance. On the contrary, to understand the problem is to make it one's own—even if only temporarily. To understand the problem entails not simply accepting it as true or right, but experiencing the radical transformations it brings about in how one thinks about law.[6] I emphasize the importance of *experience* here because the temptation for academics, when confronted with the dedifferentiation problem, is to think that if one can only be more careful, rigorous or sophisticated in providing definitions, specifications, stipulations or theorizations of the key identities, then the dedifferentiation problem can be avoided. But those strategies will not work. And the best way I have of turning the reader away from those strategies is to impart the experience (an experience that can be recalled and reproduced) of the dedifferentiation problem.[7]

[5] Mezey (2001, p. 46).

[6] There is this anti-intellectual tendency in the contemporary American legal thought to reduce pieces of scholarship to the propounding of some proposition, thesis, theory, or other reified intellectual form. Following this reduction, the idea-commodity is then typically submitted to a set of deeply stereotyped arguments to see whether "it" is "right" or "true" or "well-argued" or not…. as if the key thing in intellectual endeavor were to produce idea-commodities and to police their production and… as if everything worth thinking about in law could usefully be reduced to idea-commodity form and… as if the set of stereotyped arguments routinely deployed had already been vindicated as valid. This is an exceedingly narrow view of intellectual endeavor. In law, it is the reigning orthodoxy.

[7] The great thinker of differentiation in social systems is Niklas Luhmann. Oddly, however, his thinking has limited relevance here. The reason is simple: Luhmann writes from a perspective that assumes the cogency of differentiation in *his own* thinking. He presumes the perspicuousness and relevance of his own differentiations. And, accordingly, he *bypasses* the intellectual problem raised here (Luhmann 1985).

In Part I, I try to show how our more sophisticated theories of law lead us to a point where we are no longer able to distinguish law from culture, or society, or the market, or politics, or anything of the sort. Not only are the various terms inextricably intertwined (something that other thinkers have observed), but we are no longer in a position to articulate any relations between these various terms at all.[8]

In Part II, I adopt a slightly different approach to show how the dedifferentiation problem already afflicts conventional legal analysis. Here the strategy consists of showing that many of our everyday legal concepts—for instance, “employee” or “corporation”—are already effects of dedifferentiation. If we think about these concepts we will see that they are “hybrids”—concepts that involve the inextricable intertwining of the law with the cultural, the social, the market, the political (and so on).

Part III is an attempt to acknowledge what, for many legal thinkers, will seem to be the counter-intuitive character of Parts I and II. The claim in this section is that we are more or less caught within “reifying” and “de-reifying” tendencies that produce both the sense of differentiation and dedifferentiation. A certain kind of formalism in legal thought systematically leads us to reify legal concepts—to conflate/confuse words with concepts, documents with the texts, official events with law and so on and so forth. A certain kind of critical thought enables de-reification but leaves us conceptually adrift. American legal thinkers vacillate between the two.

Part IV lays out some reasons for thinking that dedifferentiation cannot be quarantined. It is epidemic.

In Part V, I briefly describe the implications of dedifferentiation for various kinds of traditional academic projects: explanation, understanding, interpretation, and more.

The conclusion poses the “So what?” question. The implications of dedifferentiation are, if taken to heart, catastrophic for the ways in which legal thinkers have usually thought about established theories and research agendas in law. At the same time, however, recognition of the dedifferentiation problem opens up new and interesting ways to think about law and world.[9] In recognizing the problem we are enabled to shed many beliefs that previously paraded as knowledge (but are not). Perhaps the most important reason to take the problem seriously is that it’s happening. All around us, and not just in law.[10]

[8] The dedifferentiation problem can be seen as an addition to the ways in which legal distinctions can collapse. What is distinct (an ironic term here) about the dedifferentiation problem is (1) how the collapse is produced (2) its sweep and (3) its implications for further thinking. For an elegant description of the stages in the collapse of a legal distinction, see Kennedy (1982, p. 1349).

[9] In this sense, the present work builds upon and addresses questions posed, but left unanswered in Schlag (2002, p. 1047) and Schlag (1997, p. 877).

[10] I will leave this term (law) generously under-theorized. In light of observations offered in this paper, I rather doubt that we have any cogent theory or conceptualization of law available at all. For some fairly conventional efforts to conceptualize law, see text accompanying notes below.

1 Theory's story: beyond reciprocal determination

In this section, we explore legal theory in its more advanced incarnations to see how already articulated accounts lead to the dedifferentiation problem. The claim here is that contemporary legal and social theory have already reached an unstable condition that leads, if one thinks about it, to an experience of the dedifferentiation problem.

So here we start at a point prior to the emergence of the dedifferentiation problem. We begin with recognition that the law determines, constitutes, constructs, shapes or otherwise "verbs" the social and the social in turn determines constitutes, constructs, shapes or otherwise "verbs" the law.

Here is an example of this view articulated by the social theorist, Pierre Bourdieu:

> The law is the quintessential form of "active" discourse, able by its own operation to produce its effects. It would not be excessive to say that it *creates* the social world, but only if we remember that it is this world which first creates the law.[11]

Here is another example articulated by the cultural legal studies thinkers, Silbey and Ewick:

> We claim that legality is a structural component of society. That is, legality consists of cultural schemas and resources that operate to define and pattern social life. At the same time that schemas and resources shape social relations, they must also be continually produced and worked on—invoked and deployed—by individual and group actors. Legality is not inserted into situations; rather, through repeated invocations of the law and legal concepts and terminology as well as through imaginative and unusual associations between legality and other social structures, legality is constituted through everyday actions and practices.[12]

This view of the matter can be called, for the sake of brevity, reciprocal determination. It is a view that has been variously espoused by Marxists, liberals, functionalists, microeconomists, comparativists, and thinkers in jurisprudence, law and society and critical legal studies (among others). The nouns, the verbs may change from school to school, but the formal structure remains the same:

[11] Bourdieu (1987, p. 839).

[12] Ewick and Silbey (1998, p. 43).

Law,
laws,
rules,
doctrines,
policies,
principles,
and the like…

Shapes,
causes,
constitutes,
constructs,
structures,
facilitates,
or otherwise verbs…

The Social
market transactions,
private behavior,
institutional practices,
cultural production,
politics,
and the like, which…

Shapes,
cause,
constitutes,
constructs,
structures,
facilitates,
or otherwise verbs…

The Law,
laws,
rules,
doctrines,
policies,
principles,
and the like, which…

Shapes,
causes,
constitutes,
constructs,
structures,
facilitates,
or otherwise verbs…

And so on and so forth…

This then is reciprocal determination: The *law shapes the social* and the *social shapes the law* and so on.[13]

Now, the recognition of reciprocal determination poses a *potential* intellectual problem. The risk is that reciprocal determination will collapse into an abstract and

[13] Notice that images other than the circle are possible here: the spiral, the pendulum, the ratchet, and so on. But this would be getting ahead of the story.

fundamentally uninteresting circle: A explains B which explains A.[14] Going around in circles *may be* pretty bad all on its own, but it is downright vexing if the circle turns out to be abstract, shallow and mechanistic.[15] There are a variety of ways of avoiding this vexing prospect.

In the legal academy generally, the difficulties wrought by this sort of unhappy circularity have been attenuated or even elided altogether through a specialization of academic labor—a narrowing of the scholarly agenda. Hence, it is that the vast majority of American legal thinkers have narrowed the focus of their work to the first movement (e.g., *the law—shapes—the social*), largely disregarding the second. Moreover, within that first movement, they have further narrowed their work on the normative dimension—namely, on the question how the law *should* shape society. And in yet a further narrowing, the vast bulk of that normative work has consisted of figuring out what the law should be by tinkering with its various artifacts (rules, doctrines, principles, etc.) to achieve the ostensibly desired effect. Hence, it is that the vast majority of American legal thought simply does not deal with problems associated with reciprocal determination. It is not that mainstream American legal thinkers deny reciprocal determination. It's just that it's not an issue for them (at least as they see it).[16]

But, as we've already seen, not all American legal thought fits within this paradigm. Indeed, with the advent of interdisciplinary work (microeconomics, law and society, and the like) reciprocal determination and its attendant problems become explicit challenges. For one thing, thinkers associated with such interdisciplinary academic projects affirmatively want to insist on something like reciprocal determination (the two way movement). And for another, the "law and…" nomenclature brings the issue front and center as does the appearance of "transdisciplinarity"—with its implication that disciplinary boundaries are or must be dissolved.

Some legal thinkers have addressed reciprocal determination and its associated difficulties in a fairly straightforward manner. In this endeavor, they have drawn upon and elaborated various high-level social theories. The key conceptualizations in play have varied in form and content:

[14] In some cases, some degree of priority—analytical or ontological—was given to one term over the other. Some Marxists, for instance, relied upon concepts of "determination in the final instance" to maintain the constitutive or functional priority of the base over the superstructure. Conventional legal thinkers, by contrast, typically maintain the priority of law by according conscious directive power to legal decision makers such as judges and legislators, and occasionally (in the case of legal formalists) to "the law" itself.

[15] This was one aspect of Sartre's indictment of orthodox Marxism. Sartre was concerned that orthodox Marxists continually failed to address concrete social reality by constantly finding in the particular (a particular individual, event, etc.) simply one more occasion for the confirmation of abstract Marxists truths. Sartre (1968, p. 56). For the complete discussion, see (ibid., pp. 35–84).

[16] All sorts of criticisms can be launched here over this conventional perspective. The great shortcomings of conventional legal scholarship—its residual formalism, its systemic over-confidence in the capacity of law to shape human relations, its political naiveté, and its fetishism and enchantment of reason—can all be ascribed in part to a failure to consider reciprocal determination seriously.

law/society (liberalism)[17]
public/private (liberalism)[18]
state/civil society (Marxism)[19]
superstructure/base (Marxism)[20]
law/culture (cultural legal studies)[21]
and so on.[22]

What matters here is not the considerable differences in these distinctions, but rather their structural or formal similarity. Here, by way of example, is a recent, emblematic, and generously ecumenical articulation of reciprocal determination:

> The patterns of order in any given society are themselves largely the product of internal influences. These influences may be geography, history, tradition, religion, semiotic systems, or a range of other phenomena that drive the path that law takes. Law interacts with these phenomena to help form culture. Cultural elements, in turn, help form law.[23]

For the sake of brevity, I will subsume all the variations mentioned thus far under the terms "law" and "the social".

The question now is: how does legal theory address the prospect of an abstract, shallow and mechanistic circularity? If legal theory were not to collapse into this unhappy circularity some internal complexity would have to be introduced into the movements of reciprocal determination. Social theories—from Marxism to cultural legal studies—evolved to do just that.[24] One strategy was to loosen, and problematize, the relations between law and the social. Concepts of mediation, mediating institutions, indeterminacy, relative autonomy and the like were pressed into service to render reciprocal determination more complex, nuanced, and sophisticated. Similarly, identity-destabilizing relations between law and the social were also introduced. The move was towards a more dynamic model.

Now, at this point we join up again with Naomi Mezey's view as articulated in the introduction. Her view of the matter:

> Therefore, if one were to talk about the relationship between culture and law, it would certainly be right to say that it is always *dynamic, interactive, and dialectical*—law is both a producer of culture and an object of culture. Put generally, law shapes individual and group identity, social practices as well as the meaning of cultural symbols, but all of these things (culture in its myriad

[17] See, e.g., Friedman (1986, pp. 763–764).

[18] See, e.g., Kennedy (1982).

[19] Marx (1975, p. 154).

[20] Marx (1913).

[21] Sarat and Kearns (1998).

[22] See text accompanying notes 46–48.

[23] Grossfeld and Eberle (2003, p. 295).

[24] Coombe (2001, pp. 36–62).

manifestations) also shape law by changing what is socially desirable, politically feasible, legally legitimate.[25]

The key words in this passage are those that articulate the relations between law and the social as "*dynamic, interactive and dialectical*." It is at this point that the dedifferentiation problem begins to emerge. Indeed, Mezey says and I quote the sentence again: "Perhaps we should not speak of the 'relationship' between law and culture at all, as this tends to reinforce the distinction between the concepts that my description here seeks to deny."[26] Exactly so.

Indeed, Mezey's description here means that the relations between law and the social are mutable. They are not fixed. And presumably, neither are the identities marked out by law and the social. Indeed, if the relations really are "dynamic, interactive and dialectical," one might expect the things being related—to wit, the law and the social—to change character and identity themselves. The introduction of this complexity adds nuance and sophistication. Things are going to become more intricate, subtle—in short, more differentiated.

And yet this more complex view will also lead to the dedifferentiation problem. How so? Like this: If we understand the relation of law and the social to be "dynamic, interactive, and dialectical," then not only might we expect the *relations* of law and the social to change but their *identities* as well. In fact, we might expect all three original identities—the law, the social, and their relations—to change. Indeed if law and the social are radically underspecified in the first place, and if they are subject to no transcendent constraint, and if their relations are "dynamic, interactive, and dialectical," then we have no reason to suppose that they will retain their distinct identities over time.

Perhaps it is easier to think about this in terms of a radically underspecified A and B. If the relations between A and B are dynamic, interactive, and dialectical, then we have no reason to suppose that A and B will retain any sort of conceptual or ontological integrity. On the contrary, we would expect all sorts of stuff to happen. Maybe A would be transformed into A_1 A_2 or A_{105}. Some regions or moments of A might fade into B. In turn, B might become more A-like. We would get some hybrids—some AB-things happening, some B within A within B within A things. And so on and so forth. We would get a lot of differentiation as well as a lot of entropy. The system is dynamic and being dynamic, the identities at stake (originally A and B) combine and change in a variety of ways. At some point, we would begin to think that A and B or more topically, law and the social, have become inextricably intertwined in multiple ways. At the very least, we would lose any confidence in our ability to deploy an A/B distinction.

And why would we be driven to such views? Because they are entailed in what we (along with Naomi Mezey) just said before. We just said, and I quote, "The relations are '*dynamic, interactive, and dialectical*'." We cannot now in good faith—that is to say without giving reasons—turn around and say "Oh well, yes, of course, it's true that it's all dynamic, interactive and dialectical, but not so much so

[25] Mezey (2001, p. 46).

[26] Ibid.

as to preclude us from using our theories and our distinctions just as before." It's possible, of course, to write the sentence that says as much—I have just done so—but we have no reason to believe it. The genie is out of the bottle.

Just to be clear: I am not suggesting that just because a system is dynamic, interactive and dialectical, one cannot specify its permutations. I am, however, saying that if the only constraint on the system is that it is "dynamic, interactive, and dialectical" and the key identities (i.e. law and the social) are radically under-determined in the first place, then we have introduced enough variability to produce a great deal of differentiation accompanied or followed by entropy—a lot of AB-ness. We have produced enough AB-ness that the A/B distinction and the cogency of the key identities (A and B) have lost traction. Now, there is nothing logically necessary about this view of the matter: It could be that the dynamism, interactivity and dialectic at some point stall, leaving some differentiations in place. But the point here is most assuredly not about logical necessity: It is about how we *experience* the playing out of the "dynamic, interactive, and dialectical" relations of law and the social.

The point is that if one presses hard on sophisticated social theory one is led to recognition of the dedifferentiation problem. Now once one experiences the dedifferentiation problem, it then becomes possible to turn the arguments around (in a slightly more aggressive manner) to question the original stances: What authorizes us to distinguish the legal and the social in the first place? Why accept such a distinction? What are its referents? In fact, are there any referents—apart from the disciplinary frameworks that automatically reproduce such distinctions in order to get their research agenda off the ground?

For those who believe that the relations between law and the social are dynamic, interactive, and dialectical, the recognition of the dedifferentiation problem is almost irresistible. But if it is irresistible, then why have legal theorists and others not recognized the point? Two answers: first, some, like Naomi Mezey, have in fact recognized this movement. It's just that they have not yet confronted the devastating implications for a wide number of conventional (and even critical) research agendas. Second, academics are generally not keen on insights that scuttle the value of their disciplinary training and disable their research agendas. And the dedifferentiation problem is one that will definitely do that. It's one thing to recognize that the relations between law and the social are indeterminate, maddeningly elusive, mutable or extremely complex. That just produces a very challenging research agenda. It's quite another to recognize that one's key identities (law and the social) are ab initio non-referential. That requires abandonment of the security of the disciplinary framework and an overhaul of the research agenda.

2 Conventional legal analysis: the hybrids

In conventional legal analysis, key identities such as corporation, employee, and contract are understood to be both social and legal in character.[27] Nonetheless, most

[27] See, e.g., Gordon (1984, pp. 102–109).

legal thinkers continue to believe that with these sociolegal identities it remains possible to separate out what is social and what is legal. They believe that definitions, specifications, stipulations or theorizations are up to the task.

But let us presume that we do not believe that such separation is possible. Say, we believe instead that in such identities, the legal and the social are so inextricably intertwined that it is impossible to separate out the two. At that point—notice we have now encountered dedifferentiation—we would be talking about what I will call, to borrow from Bruno Latour, "hybrids."[28] Hybrids, as the term is used here, are not merely "mixed" identities. They are identities mixed in such a manner that their different social and legal aspects are inextricably intertwined—both conceptually and ontologically.

Given that, the purpose in this section will be to make two points. First, many identities on the sociolegal scene are hybrids—which is to say that they cannot be disentangled into a law aspect and a social aspect. (Not only are the eggs broken, but the omelet has been cooked.) Second, hybrids dominate the sociolegal scene.

By way of example, consider the identity of "employee." As we will see, there is no legal idea of employee that does not incorporate the social identity of "employee." Meanwhile there is no social idea of "employee" that does not incorporate the legal identity "employee."

The term *employee* registers in many fields of positive law—tax, contract, labor, workers' compensation, social security, and so on. What an "employee" is, as a social matter, is in part what the positive law has constructed him to be.[29] This does not mean that the positive law's idea of "employee" is simply impressed jot for jot into the social order[30] In other words, the statutory law's or case law's conception of the employee is not simply projected into the social sphere. The legal construction of the employee is also, among other things, the way in which "employees" are materially treated by judges, magistrates, police officers, administrative agents, and so on.[31] This treatment will be sometimes more and sometimes less consonant with

[28] This term is not entirely satisfactory for it implies that whatever we call a "hybrid" is somehow derivative or secondary—composed from pure elements. I want to reject this implication of priority. Unfortunately, all the available terms that might be used here (amalgam, blend, alloy, compound mixture, combination, etc.) also seem to imply a derivation or descent from a purer state. So, we go with "hybrid."

The use of the term here is an extension of Bruno Latour's "hybrids." Latour uses that term to designate entities that are at once natural and social, human and nonhuman, global and local—such things as frozen embryos, hybrid corn, psychotropic drugs, global warming (and so on). Latour complains that our theories and our philosophies are constantly attempting to "purify" these hybrids by subsuming them within a single pole of some binary (nature/social, subject/object, global/local). *See generally,* Latour (1993, pp. 51–59). If we can abstract this "purifying" tendency from Latour's specific concerns (nature/society, human/nonhuman, global/local), we can see that it is very much in evidence in our social and legal theories. In law (as elsewhere) we typically aspire to produce such "purifications" under a variety of names: models, paradigms, ideal types.

[29] Gordon (1984, pp. 103–108).

[30] Here, as Bourdieu cautions, we are to avoid the nominalist error of thinking that the law's conceptualization of employee is simply transcribed without distortion into the social sphere. See, Bourdieu (1987, p. 839). There is no reason to presuppose any fidelity in "translation" from the law to materiality or vice versa.

[31] The law, in its ideational guise, will tend to present the two as synonymous. We, however, have no reason to believe the law when it tells us this.

the statutory law's and the case law's ideational representation of "the employee."[32] But we have no reason to presume, ab initio, a coincidence between materiality and ideation.

Meanwhile, the law's idea—the law's conceptualization of "employee"—acquires its meaning in part from the social identity of the employee—the employee as a human being, as biological specimen, as unit of skilled labor, as factor of production, and so on. Here, we should not fall into the error of a crude materialism; that is, we should not think that the social identity of "employee" is simply transposed or introjected *jot for jot* into the law. The law's conceptualization of employee is also a response to many other sociolegal influences. Some of these influences—such as the legal training of lawyers, the class background of judges, or the like—are seemingly very far removed from the notion of "employee" (and yet they too will bear upon the way in which the law's notion of employee is constructed).

The important point is that whether we look at "employee" as a legal identity or a social identity—we unavoidably bring in the other. In other words, what we cannot do (at least not if we think about it) is to consider an employee either as a strictly legal identity or a strictly social identity.

Why not? I think the point is perhaps easiest to see if we start by thinking of the employee as a social identity. What would an employee be as a pure social identity—that is without resort to law or legal conceptions? We would be talking about an employee in something like a state of nature. There is no such thing. In the same way, it is hard to understand what meaning the legal identity of employee would be like apart from the importation of images of servitude, hierarchy, scarcity, wage compensation, and the like.[33] We would be trying to achieve an impossible ultra-formalism—formalism without any social referent at all.

The two challenges here are to try to imagine the social concept of employee without resort to legal concepts or legal norms and to try to imagine the legal concept of employee without resort to social forms and social content. One can, of course, write the sentences that will proclaim that one is doing so. It's just that the proclamations will amount to nothing more than wishful thinking.

If this collapse, this dedifferentiation, occurs with the identity "employee," it will also happen for any number of other identities: property owner, merchant, franchisor, common carriers, etc. And it will, of course, apply to various relations: marriage, contract, delegation. And it will also apply to…..

At this point, we can experience the same gestalt shift encountered earlier: the more we think about it, the more obvious it becomes that hybrids are the dominant form of identities on the sociolegal scene. Indeed, far from being special cases,

[32] But, we have, ab initio, no reason to presuppose that the two are consonant. Still less, I suppose, should we join with the legal professional's commonplace presumption that the law's idea of "employee" somehow rules or determines the way "the employee" is materially treated by the juridical process.

[33] But surely (one might say) we can distinguish between a legal text's definition of an employee and a sociological text's conception of an employee? Actually, no. The legal text's definition of an employee already invokes the social and the sociological text's conception already invokes the legal. The question is not whether we can state a distinction; the question is: does the distinction have any referent, any purchase, any traction?

hybrids are everywhere. In fact, they are so much everywhere that one is hard put to find or name a *pure unalloyed* construct of the legal or the social. It is not clear, in fact, that we can think of any. We can try out some possibilities, of course, but the effort will likely prove futile. Nonetheless, I have attempted to list a few possibilities:

> *Ostensible Unalloyed Constructs of the Law*: Constructive notice, constructive trust. (We would be talking here of identities that are created by law simply to create relations or plug gaps between legal concepts. Legal fictions would be a source of examples.)[34]
>
> *Ostensible Unalloyed Constructs of the Social*: Love, honor, gift-giving, waiting in line. (We would be talking about those identities that seem furthest removed from any juridification.)[35]

To repeat: I doubt that there are in fact any pure unalloyed constructs. On the contrary, I think that if we pursued the question, all of these examples would turn out to be hybrids. It is true that occasionally, we have a strong intuitive sense that some areas of social life are not juridified (love, honor) and that some juridical concepts are purely constructs of the law's ideational dimension (constructive notice). But it is doubtful that this intuitive sense can be maintained for long once we start to think. Can we really say that love and honor have escaped juridification—that they are exempt from the conceptualizations of law? Can we really say that constructive notice can be imagined apart from any social form and content?

No.[36]

The upshot—and again, this is a matter of social aesthetics, not logic—is that the sociolegal scene is composed of hybrids. If this is right, the prospect of constructing a theory that would provide a cogent analytical distinction between the social and the legal is nil. To be sure, it is possible to write out a conceptual distinction on paper. Indeed, scholars do this sort of thing all the time. Hence, it is possible to say something like, "When I use the term 'employee', I mean to refer to the *legal status* known as employee as strictly distinct from the social dimension of that particular identity." That sentence can indeed be written. (It has just been done.) But the question is: Has the action intended in writing the sentence above been successful? What is the referent for this sentence? Does the demarcation in the sentence between "legal status" and "social dimension" in fact track with anything? Or is it just an expression of a wish—an unfulfilled wish to make a conceptual distinction which turns out to have no real traction? I think the answer is the latter: It is akin to drawing lines with a stick in a Heraclitean river.

[34] But how can one think of constructive notice, without thinking of notice, which in turn leads us to think about communication which is clearly social?

[35] Reisman (1999) (describing proto-legal regimes such as "waiting in line").

[36] Long ago, there were courts of love. Goodrich (1996). More recently, we had the tort of seduction. For discussion see, Oberma (2005, pp. 887–890).

As for honor, it was juridified in the torts of libel and slander. The more we look, the more we find the law everywhere. It's just that for purposes of "doing law" judges, lawyers and legal academics do not look everywhere. That's part of what our legal training teaches—not only where to look, but where not to look and also when to stop looking.

3 Why the foregoing might seem strange—of reification and de-reification

Depending upon one's (disciplinary) perspective, the foregoing might register anywhere on a spectrum running from truly bizarre to totally obvious. For instance, I rather doubt that anthropologists would find the foregoing particularly odd. For conventional legal academics, by contrast, the foregoing will seem exotic, far-fetched, and very likely wrong. Many legal thinkers do not experience law and the social as dedifferentiated.

What follows below then is an attempt to try to appreciate how and why legal thinkers (and others) might continue to affirm and perhaps even believe in the differentiation of the law and the social. To foreshadow what follows, my argument is that we are caught between reifying and de-reifying tendencies in our thinking about law and the social. Whichever tendency prevails in any given context—the law of common carriers, the regulation of children, etc.—influences whether we see law and the social as differentiated or dedifferentiated.

What follows then is a bit tricky. The effort is to show both how seeing the law and the social as differentiated becomes believable, and how it becomes unbelievable as well. We are dealing with two conflicting or opposed tendencies that affect what we believe. Sometimes the two conflicting tendencies are themselves stabilized (a reification moment) and sometimes they are not (a de-reification moment). The switch can occur rapidly—indeed, in the midst of a single sentence.

3.1 Our always already differentiated sociolegal world

Most legal thinkers, if asked, would intuitively view the law as distinct from the rest of the social. They might suggest, for instance, that the law is marked off (more or less definitely) by:

Authoritative texts such as the constitution, statutes, judicial opinions, administrative regulations.
Identifiable professional corps composed of legal practitioners trained in law schools and certified through the bar exam.
Expert knowledge as manifested in the specialized manipulation of legal authorities—the techniques called legal reasoning and legal interpretation.
Determinate legal institutions, such as courts, legislatures, and enforcement agencies.
Recognizable Ritual Sites such as courtrooms, legislative halls, law libraries, Lexis-Nexis, Westlaw, government buildings.
Historical Demarcations in the form of literature, philosophical divisions, monuments, chains of authorities, and persistence of legal texts across time, etc. And/or more.

This *intuitive sense* that law is differentiated from the social is widely shared among American legal thinkers. If so, then the suspicion arises that the analysis in Section II is perhaps wrong.

But it is not. The reason is as follows: the perception that the law and the social are differentiated is in part the effect of systemic reifications—precisely those listed

above.[37] Each of the demarcations listed above reduces law to a thing-like manifestation of law. But precisely because it is a reification, it misses much of what we consider law to be. Indeed, what we have above is a double-reduction of law: the law is reduced to things. And in being reduced to things, much of law is left out. Reconsider the list above in light of the reductions effectuated:

Authoritative texts such as the constitution, statutes, judicial opinions, administrative regulations.

> Law here is reduced to certain kinds of texts. But, this reduction is illusory because the texts themselves are not law—one needs the capacity to interpret them, the know-how to invoke them appropriately.

Identifiable professional corps composed of legal practitioners trained in law schools and certified through the bar exam.

> Law here is reduced to the actions of a discrete set of personnel. But, this reduction is also suspect: Lawyers are not the only ones who invoke and reproduce law. When consumers exercise warranties or when employees file grievances, they too are invoking and reproducing law.

Expert knowledge as manifested in the specialized manipulation of legal authorities—the techniques we call legal reasoning and legal interpretation.

> Law is equated here with discrete cognitive operations. But again the reduction can fail: These operations are not discrete. Legal reasoning is rooted in practical reason, induction, deduction, analogy—indeed all sorts of cognitive operations common to human beings generally.

Determinate legal institutions, such as courts, legislatures, and enforcement agencies.

> Law here is reduced to the actions of discrete institutions. But, the reduction can falter on the recognition that the institutions are not discrete. And the questions of what constitutes a judicial, a legislative, or executive action is itself often a contested matter of law.)

Recognizable ritual sites such as courtrooms, legislative halls, law libraries, government buildings.

> Law here is reduced to certain occurrences in certain physical sites. But, of course, law can be articulated and laid down quite apart from these physical manifestations.

Historical demarcations in the form of literature, philosophical divisions, monuments, chains of authorities, and persistence of legal texts across time, etc.

> Law here is equated with a discrete pedigree. But, of course, the pedigree of law is anything but discrete—law stemming historically from religion, philosophy, tradition, custom, etc.

[37] One of the most elucidating discussions of reification remains Lukács (1971). The key texts in law are Gabel (1980) and Balbus (1977).

The point here is that once we start to think about our attempts to demarcate law from the social, the reifications, which seemed so plausible just a few pages ago, dissolve. The reduction of law to certain texts, personnel, cognitive operations, institutions, physical sites, and/or pedigrees is no longer adequate and no longer credible. In the face of their collapse, we are left with dedifferentiation of law and the social.

And, once one thinks about it, this collapse is not altogether surprising. On the contrary, once we think about it, for every reifying tendency we see above, we can also find an opposed de-reifying tendency.

Authoritative texts such as the constitution, statutes, judicial opinions, administrative regulations….

> …which increasingly defer to foreign expert knowledges (microeconomics, linguistics, engineering, chemistry) as authoritative.[38]

Identifiable professional corps composed of legal practitioners trained in law schools and certified through the bar exam…

> …which, in accordance with the commercialization of the profession and the erosion of guild values, has led to the indeterminate extension of legal personnel to include paralegals, mediators, arbitrators, rent-a-judge, law-trained business people, online dispute resolution services and legal research services located in foreign countries such as India.[39]

Expert knowledge as manifested in the specialized manipulation of legal authorities—the techniques we call legal reasoning and legal interpretation…

> …which have become integrated with sundry kinds of extra-legal expertise—all of which meld into vast bureaucratic forms fashioned by organization specialists, accountants, consultants, etc. Increasingly, the nature of legal knowledge is knowledge of bureaucratically integrated forms of expertise.

Determinate legal institutions, such as courts, legislatures, and enforcement agencies…

> …whose operations are both public and private—run by lobbyists, lawyers and officials working together.[40]

Recognizable ritual sites such as courtrooms, legislative halls, law libraries, Westlaw,

> …which are now housed in all-purpose government buildings and are used in accordance with time-sharing principles for all sorts of things. Moreover, the

[38] This, of course, has been going on for quite some time. For an interesting discussion, see Balkin (1996, p. 949).

[39] For a melancholy account, see Kronman (1993) (bemoaning the commercialization of the profession and the loss of the ideal of lawyer as statesman). For a positively cheery assessment, see Posner (1993) (celebrating the death of the guild mentality among lawyers and the displacement of the legal profession by other specialists in social coordination).

[40] White (2001, p. 111).

sites of law now extend to the deposition rooms, document repositories, online search databases, etc.

Historical demarcations in the form of literature, philosophical divisions, monuments, chains-of-authority, and persistence of legal texts across time, etc…

…which have become increasingly porous and indeterminate in accordance with the rise of interdisciplinary and transdisciplinary work.

These processes (presented in italics above) are all erosions of the ideational and social differentiation that we call the law. That is to say, these processes tend to weaken or attenuate the differentiations. It is important, of course, not to overstate the power of these de-reifying tendencies. Even as they register their effects, it nonetheless remains clear that the differentiation between law and the social remain to some degree ideationally perspicuous as well as socially real and effective.

As a provisional understanding, we might think of our intellectual situation as shaped by moments of reification and de-reification. And, of course, the moments are themselves not fixed but subject to contextualization in terms of time (the last five minutes or the last X decades), subject matter (family dissolution or leveraged buyouts), and depth (how deeply anchored or superficial a particular moment of reification or de-reification might be). In short, there is a lot of variation and flux—certainly, much more than legal thinkers typically care to acknowledge.

But, if in our theories we take the reifications of law listed above as unproblematic referents, or if we use them *unreflectively* as theoretical categories, this will entail certain intellectual errors.

First, there is an error in moving from the supposition that we have effective and extant social differentiations (e.g., "the texts of law," "the corps of lawyers") to a supposition that these particular differentiations are useful and cogent explanatory categories.[41] (Maybe they are, maybe they are not—but we should not *unreflectively* assume that they are).

Second, it is an error to unreflectively suppose that because we have an effective and extant differentiation in place that it frames a hermetic or even a discrete field for inquiry. (Maybe it does, maybe it does not. But the mere presence of a socially extant and effective differentiation says nothing about its durability, porousness, or lack thereof.)

Third, to unreflectively transform effective and extant differentiations into the categories of explanation or understanding eclipses much of what we would like to understand or explain.[42] Indeed, it is precisely the effectiveness and the presence of these differentiations that we would like to explain or understand.

This brings us then to a second reason why the analysis in Section II can seems so counterintuitive to many legal thinkers.

[41] Pierre Bourdieu put it very succinctly with regard to the state: "To endeavor to think the state is to take the risk of taking over (or being taken over) by a thought of the state, that is, applying to the state categories of thought produced and guaranteed by the state and hence to misrecognize its most profound truth." (Bourdieu 1998, p. 35).

[42] See, Ewick and Silbey (1998, pp. 34–35).

3.2 Our own already differentiated academic disciplines and disciplinary projects

A second reason why the analysis in Section II can seem bizarre is that it seems in tension with the state of many our academic disciplines. Many of these disciplines—law is a prime example—are marked out in acutely intricate subject matter differentiations: departments, specialties, sub-specialties (and so on). Moreover, in law the articulation of rules, regimes, and the like—in short, the architecture of the field—is, at least on first impression, excruciatingly intricate.

Moreover, in law, the differentiations (e.g. tort and contracts, negligence and strict liability) are longstanding, tacitly accepted and institutionalized. Moreover, these differentiations are not simply intellectual constructs but also in some sense the organization of state and civil society. That is, these differentiations are forcefully sustained by judges, legislators, and administrative officials. Perhaps the differentiations do not always register fully or faithfully—that is almost surely right—but they do register and endure. Moreover, the differentiations are sustained independently of and often without regard for intellectual cogency.

To the extent that legal thinkers adopt this language of the law as their own (and the vast majority does) it becomes difficult to reconcile the acute differentiations of the discipline of law with the experience of dedifferentiation sketched out in Section II above.

At the same time, however, the intuitive sense that the acute differentiations of law register (in however deformed a manner) does not falsify the insights about dedifferentiation as articulated in Section II.

For one thing, the fact that disciplines such as law are marked out in acutely wrought differentiations says nothing about the status, validity or depth of the differentiations. One can imagine the production of elaborate differentiations as a sign of disciplinary achievement—sophistication, nuance, and the like. One can also imagine the proliferation of differentiation—analytical philosophy in law comes to mind—as indicative of the morbidity of a disciplinary paradigm: For instance, just what more is there to say about the Hart-Dworkin debate or the positivism-natural law debates? What are the marginal returns on yet another subdivision or distinction? And why fixate on these particular issues for so long as opposed to all the others of similar importance to both the theory and practice of law?

In this respect, we must consider the possibility that disciplines sustain themselves by avoiding learning anything that would disrupt their structural integrity. Hence, rather than seeing great intellectual virtue in a well-formalized and highly intricate disciplinary structure, one could also see an elaborate disciplinary defense mechanism.[43]

One thing that has to be considered here is that the jurisdiction and organization of disciplinary divisions and disciplinary projects are not simply responsive to the imperatives of healthy research agendas. They also respond to the need to protect

[43] It would be interesting to investigate how academic *in terrorem* effects lead legal thinkers to reflexively protect their work by replicating the forms and methods of disciplinary structures, even when these are moribund.

the disciplinary structures from disintegration. In other words, disciplines and disciplinary projects are not only aimed at "knowing more about the world," but also and simultaneously at knowing less about anything that would subvert the integrity of the discipline or the disciplinary project.[44]

4 Epidemic dedifferentiation

Thus far the analysis has been cabined by a major constraint. We have been talking about the differentiation and dedifferentiation of *law and the social*. Thus, we have been talking loosely about differentiations such as:

law/society
public/private
state/civil society
superstructure/base
law/social practice
law/culture
and so on.

But now the question arises: Do we have any reason to suppose that the dedifferentiation problem is limited to these kinds of categories? Or might it be that the differentiation problem extends to other crucial categories as well?

The analysis thus far suggests that dedifferentiation might be a much more generalized phenomenon—indeed applicable to a host of familiar distinctions, such as:

Law and cognition
Law and language
Law and religion
Law and economics
Law and… (so on).

Given that these disjunctive conjunctions stand, at least formally, in much the same relation as law and the social, there is some reason to think that they too may be subject to dedifferentiation.

There is not sufficient space here to go through all the permutations. Moreover, my arguments in each instance would be formally much the same as those we encountered earlier. Still, I feel it would be helpful to give one example and to that end, I will focus here on law and economics. My aim is to show that microeconomists are also (or should be) on the brink of reckoning with dedifferentiation.

Here goes: For a long time, it has been standard operating instructions in normative law and economics that legal entitlements be structured so as to achieve some desired measure of economic value. In order to achieve this goal, legal scholars, judges, and legislators have to imagine (even if at a very high level of

[44] The point bears some resemblance to Imre Lakatos' view of progressive and degenerative research programs (Lakatos 1970, p. 91).

abstraction) what kinds of economic activities are worth enabling, prohibiting, or otherwise regulating. In order to do that, one has to have some idea of what kinds of goods/services, etc. people will want to produce and exchange. Very often, of course, the conclusion reached will be to fashion property entitlements so as to let "the market" or "the pricing mechanism" decide. But even in this situation, legal scholars, judges, and legislators can only fashion a legal regime based upon some assessment (however, abstract) of the kinds of goods or economic resources that the various parties want to produce or consume as, well, of course, as the value of these goods.[45] The upshot is that the government decision-maker must necessarily think about the economic effects or implications of this or that legal regime. Legal scholars, judges and legislators must thus think of how to fashion and fine-tune legal entitlements as ways of defining and allocating economic resources and/or wealth.

But now here comes the rub: How should legal scholars, judges and legislators think about economic goods and economic value? Here the movement runs the other way. We find that whether or not something is an economic good or has economic value depends upon the extent to which a good and its value are or are not legally protected.[46] For instance, Ronald Coase, the Nobel laureate in economics, noted in his most famous article that a "factor of production" is a legal entitlement and that economists would be well advised to think of factors of production in precisely that way.[47]

So notice the familiarity of this intellectual situation: We should think of legal entitlements as factors of production. Meanwhile, we should think of factors of production as legal entitlements. This leads to the view that each is already the other—that to truly understand a legal entitlement, you must see it as a factor of production and that to truly understand a factor of production you must see it as a legal entitlement. What we have here is the incipient dedifferentiation of the law and the economic.

What is going on? Will no abstract distinctions hold? Of course they will. They will hold, but, of course, only if one thinks about them in certain ways. More precisely, they will hold to the extent that we blind ourselves to the ways in which they melt away. If we think hard about such distinctions, dedifferentiation happens. If we do not want dedifferentiation to happen, then the thing to do is to abandon it before dedifferentiation happens.

5 Dealing with the dedifferentiation problem

What implications does the dedifferentiation problem yield for legal thought? Before answering, we need to introduce some further complexities: Consider that in legal thought one can describe a number of different intellectual projects:

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[45] Schlag (1989, p. 1661).

[46] This became a fairly standard story well before the arrival of the Chicago School. One finds this view articulated at least as far back as the work of Robert Hale in the 1920s (Hale 1923).

[47] Coase (1960, pp. 43–44).

Explanation[48]
Understanding[49]
Interpretation[50]
Description[51]
Edification[52]
Phenomenology[53]
Aesthetic Creation[54]

This extraordinarily spare typology would of course, warrant far more extensive treatment than one could give it in a single article. I hope to bypass elaboration here by relying on the reader's intuitive sense (1) that there are a variety of significantly different intellectual projects that one might pursue in law; (2) that these different projects are regulated by or express different conceptions of truth (however problematic that particular term has become for us recently); and (3) that the projects exhibit very different attitudes and hopes about what kinds of truths are available and worth pursuing. I have sought to put a little (very little) flesh on this typology by providing in the footnotes the prototypical canonical examples of the various enterprises.

I hope that the reader can recognize intuitively, that the projects above seem to be different in kind and ambition.[55] To many thinkers, these projects seem to answer to different and more or less demanding conceptions of truth. Similarly, the projects seem to stand on different epistemic footings—explanation having perhaps more of a need to grasp "the truth of the matter" than say, art, which need not even reference a truth of the matter.

Let us suppose for the moment that these observations are largely, even if somewhat nebulously, right. If that is so, then the dedifferentiation problem presents a real difficulty for some of these projects (those at the explanation end of the spectrum) and no real difficulty for other projects (those at the art end of the spectrum).

Consider the explanation end of the spectrum first. For a legal thinker who wants to explain some discrete sociolegal phenomena, the dedifferentiation problem is

[48] Posner (2003).

[49] Habermas (1984).

[50] Gadamer (1989).

[51] Geertz (1973).

[52] Rorty (1982).

[53] Kennedy (1986).

[54] What would an art of law look like? Not just a discussion of law as art—Karl Llewellyn could be cited for that. Llewellyn (1942). Nor merely art about law—we have cites here too. See, for example, Auden (1983). We would need an art of law—self conscious of its status as art. For an engaging exploration of such possibilities, see Manderson (2000).

Much could be learned by legal thinkers from the considerable literature on the aesthetics of social organizations and private firms. See, for example, Linstead and Hopfl (2000), Morgan (1986), Ramirez (1991), and Strati (1999). This literature seems particularly rich for the study of legal aesthetics. One can, of course, analogize to this literature. More interesting perhaps, one can come to realize that the aesthetics of the organization are, in many ways already "legal" and at the same time that much of what we call "law" is already organizational in character. Each is already the other—leaving us with the tasks of recognizing the point, articulating its implications, and moving on from there.

[55] By this point in this essay, I have pretty much deprived myself of the ability to offer any rigorous analytical distinction between these enterprises.

extremely frustrating. A thinker who wants to make causal claims (A is caused by B) must have identities that are discernible and fixed. He cannot make causal claims about B if he is not sure whether he is dealing with B or B + 1 or B − 1 (and so on).[56] But this is precisely what the dedifferentiation problem does: it unsettles fixed identities.

Now consider a project at the art end of the spectrum. It is hardly threatened by the dedifferentiation problem at all. Rather, dedifferentiation becomes a phenomenon to explore or experience, or exploit. The general point here: as our intellectual agendas slide from "explanation" towards "art," the dedifferentiation problem becomes less problematic. The reason is simple: the presence of discernible and fixed identities becomes less necessary *to the performance* of the enterprise. Referentiality becomes less crucial. Of course, some art critics would claim, and perhaps not wrongly, that art as an enterprise is itself in crisis. But that is consonant with my point. As an enterprise, art is already highly dedifferentiated—so much so today that we can entertain seriously the idea that nothing is art and everything is art.

There is, of course, another way to look at all these projects. If dedifferentiation is taken seriously, then we might come to recognize that the projects listed above are not as sharply distinct as the list may suggest. Perhaps the spectrum running from explanation all the way to art is itself subject to dedifferentiation. One might come to realize, for instance, that explanation, precisely in virtue of presuming and affirming sharply differentiated identities (i.e., B and not B + 1 or B − 1) is itself engaged in an artistic or creative endeavor.

Still, thinkers in law and in the social sciences typically believe that when they provide "explanations" or "understandings," they are doing something of a *completely* different order than "edification" or "art." Generally, they see their activities as resting on a different (a more solid) epistemic footing than the more literary or artistic approaches. Once one takes cognizance of the dedifferentiation problem, however, one is enabled to recognize that the projects of "explanation" or "understanding" are also, in some sense, artistic—that the identities affirmed in explanations and understandings are aesthetic—reflective of certain styles of apprehending and creating the world.[57]

The key difference, then, between an explanatory project and an artistic one in law, would not be so much epistemic but rather aesthetic in character. Some projects (e.g., law and economics) appear more formally stylized or more systematic than others (e.g., law as literature). But formalism and systematicity are not just informed by an epistemic stance. They are also aesthetic forms—formative modes of apprehending and creating the objects of which they speak.[58]

The crucial point though is that when literary critics and micro economists turn to law, they are both involved to some degree in a certain kind of artistic and creative

[56] For an excellent exploration of this problem in the context of environmental and toxic torts, see Rabin (1987).

[57] It may be doubted, of course, that many legal scholars would be content with this redefinition of the job description. For legal scholars who now see themselves as adding to the storehouse of knowledge or helping courts fashion appealing legal regimes, a redefinition of the job description as producing "interesting insights" can easily seem like serious status degradation.

[58] And so is microeconomics, according to Ronald Coase and his mentor, Frank Knight. (Coase 1960, p. 43).

endeavor. They are artistically creating the identities and relations that they then reveal, describe, and affirm. This is not to say, of course, that they are involved *only* in an artistic endeavor (see below). But there is an irreducible creative, artistic, aesthetic moment in their enterprise. Even the most hidebound legal thinkers who claim to "discover" the law are forever creating the moment of discovery and the meaning they discover.

The movement runs the other way as well: artistic or phenomenological projects in law are not purely detached from the explanatory schemes of law.[59] Self-conscious efforts at an "art of law" or at edification in law are themselves shaped by well-learned and well-honed regularities of law and legal training. Even those taken with the modernist desire to "break form" are compelled to recognize that one does not successfully "break form" any which way. To break form successfully, one must pay attention and respect to the form one is breaking. Anything less is just gratuitous and ineffectual noise.

6 Conclusion: so what?

An important question, that one.

The exploration of the dedifferentiation problem in this article has particular significance for those interested in social or cultural theories of law. Specifically, I have suggested that those who recognize the reciprocal determination difficulty must, as a function of their own intellectual commitments, take cognizance of the dedifferentiation problem. If one is serious about the former, reckoning with the latter seems to be a must. Hence to slowly wind back to the introduction of this article, those who, like the cultural legal studies thinkers, insist upon the inseparability of law and culture must recognize that speaking of "law" and "culture" as separate or distinct phenomena is inconsistent with their own intellectual commitments. But the point is hardly limited to cultural legal studies. It reaches all kinds of interdisciplinary enterprises in law.

Then too, those who think within and about law in more traditional ways—and here one can include most of the legal academy—must also recognize the dedifferentiation problem. Indeed, their own practice of legal thought suggests that they are incapable of thinking law at all without engaging covertly (or not) in some degree of dedifferentiation. They are continuously invoking hybrids—unstable identities that dissolve under intellectual pressure. It's just that they do not recognize, or perhaps do not want to recognize, the point.

But what to do once dedifferentiation strikes and the key disciplinary identities dissolve? What is to be done?

6.1 Politics

Some readers of this article have suggested that even if the foregoing is right ("right" being at this point, a very problematic term), we can still continue to

[59] See, for example, Llewellyn (1942), Manderson (2000), Schlag (2002), and Schlag (1997).

engage in meaningful political and normative activities in law. The claim is that whatever impact the dedifferentiation problem might have on the intellectual status of law as a discipline, legal thinkers can still continue to engage in normative and political endeavors.

At first, this may seem like a plausible position. Yet, it is doubtful that it can truly be sustained without serious modification. The reason is simple: those who are engaged in normative and political activities in law often base their advocacy on a claim to *understand* the situation they are dealing with. In other words, for most legal thinkers, the validity of advocacy rests on the validity of an *understanding* or even more strongly, an *explanation* of the situation they are addressing. Once one comes to recognize the onset of dedifferentiation, however, explanation and understanding are seriously compromised. One's claim to "know" what is happening in any strong sense of that term "know" is no longer credible. Or to put it differently, one's claim to "know" becomes itself a function of aesthetics (apprehension and creation) and politics (ungrounded commitment). To be engaged as a legal thinker or actor in a normative or political enterprise is in effect to become in part a kind of "social painter"—with all the disturbing implications of that characterization.[60]

So: yes it's possible to carry on normative or political projects in law, but not in the same way, not on the basis of a secure claim to knowledge nor with the comfort that reason is on one's side. Instead, one comes to recognize as Duncan Kennedy suggests that political and moral engagement depends upon a willingness to act without warrant.

6.2 The particularist tendency and the lure of localism

Another way of responding to the dedifferentiation problem is to retreat radically from theoretical ambitions and find refuge in the particular, the concrete, the local. Legal history is probably the most fertile field of examples here. Some historians have responded to this article by agreeing readily with the diagnosis. They seem quite untroubled with the diagnosis and seem willing to accept the actuality of dedifferentiation. In part, this response can be understood in terms of their professional commitment to particularism. Of course, not all historians are committed to the particularist tendency—the inquiry into the very concrete, the very local—but many are.

It is not obvious, however, that the particularist tendency enables a way out of the difficulty. At first, it might seem that if one sticks "close to the facts," one avoids the dedifferentiation problem, but that too is questionable. Facts—at least social or legal

[60] This insistence on the artistic or aesthetic aspect of law can seem troubling if one analogizes the aestheticization of law with the aestheticization of politics. Benjamin (1968, pp. 241–242) describing fascism as the aestheticization of politics, fascism as the creation of politics as public spectacle). I do not want to disown that such an association is troubling. But there are a few qualifications. First, what is at stake here is not the aestheticization of politics (or law) so much as the recognition that politics (and law) already have an aesthetic character. At the same time, if law is irreducibly aesthetic in character, then I believe that it is better for academics to recognize the point than to deny it. (But, obviously that is no more than a belief.)

facts—do not exist outside the very webs of meaning that are themselves subject to dedifferentiation. If anything, facts are particularly likely to pose as fundamental realities when they are precisely the sorts of things that are likely to be reified constructions of ideologies and ideations. Indeed, another word for a fact (a fixed, stable, unchanging kind of thing) is a hybrid (a mutable, not fully determinate, unstable identity).

Another problem with the "particularist tendency" is an incipient scholasticism. Often the result of the particularist tendency (in history, cultural studies, law and society work, and the like) is that the resulting work is so concrete, it has no generalizeable significance—which is to say, no significance except perhaps the display and rehearsal of a certain highly elaborated methodology. Indeed, one wearies of this work (in the same way one quickly wearied of postmodern work) because, despite its commitment to the particular, the concrete, the local, the research work itself quickly manifests a certain sameness—namely, the patterned, abstract, sameness of constantly exalting the particular, the concrete, the local. After a while, one can begin to wonder if one is moving beyond dedifferentiation or simply wallowing in it. Is it the cure or the symptom?

6.3 Ignore the problem and go on as before

One could take the stance that the dedifferentiation problem in no way invalidates any of our "knowledge" projects. One could say that recognition of the problem simply brings about a change in orientation. We would simply have to recognize that when we are doing law and economics or social theory or politics, we are involved in a kind of artistic and aesthetic enterprise—one which paints into existence certain necessary identities. We understand that these identities are problematic, but they are useful to knowledge production and so we will just go on using them and go on adding to the storehouse of knowledge. So goes the argument.

This is not entirely satisfying. It is also a bit disingenuous: The dedifferentiation problem is not simply a process through which boundaries become blurry, peripheries become fuzzy, and distinctions unclear. We are not rehearsing some old legal indeterminacy claims here.[61] We are talking about the internalization of contradiction, multiplicity, mutability, incommensurability (and the like) *within* the legal concept, *within* the legal identity itself. The implication is that not only does the law fail to compel outcomes (the old legal indeterminacy claims) but that we cannot even start the legal analysis coherently in the first place. We are lacking stable identities, and without those, we cannot even begin to articulate their relations.

To be sure, one can, of course, continue to play games with and within the differentiated architectures of academic disciplines as if nothing had changed. But the fact that one can continue to play the game says nothing about the value or nature of the game being played.

[61] Though, of course, indeterminacy is one among many consequences of dedifferentiation. For a typology of the *many kinds* of indeterminacy arguments, see Schlag (1991, pp. 1682–1684).

So going on as before is, in one sense, possible. But for those who truly want to take stock of dedifferentiation, going on as before will seem a lot like faking it. And this brings up a salient question: Apart from continued employment for academics, a steady run of conference and workshop invitations, and the warm regards of one's Dean or Department Chair, what is the point?

6.4 Reckoning with dedifferentiation

Here's another possible response: One can recognize that differentiation is an aesthetic enterprise—the apprehension and creation of identity, relations and distinctions. Differentiations—even in a discipline such as law—are not simply received, but collectively created and maintained.

This may seem an odd suggestion because many thinkers, both in and out of law, conceive of law as something found, not created, something that binds judges. But there is a trick to these oft-repeated slogans. When we say we are "discovering the law" or that we are "bound by law," we tend to forget that even as we follow such imperatives, we are simultaneously creating and re-creating a law capable of being discovered, a law capable of binding us. Not only that, but we are also collectively (some of us more than others) imagining and re-imagining our need to discover the law and to be bound by it.

If this entry into the problem seems plausible, then one appropriate response to dedifferentiation would be to reckon with the creative and aesthetic aspects of our intellectual projects. But what would this mean? In an important sense, this would be a critical project—an attempt to experience and evoke the ways in which disciplinary differentiations are created and sustained. There is a certain modesty and a certain ambition to such a project. Modesty—because one would try to drop the pretense to knowledge or truth in any strong sense of these terms. Ambition—because one would try to jettison the protection of our own disciplinary routines. And that is perhaps the greatest promise of the dedifferentiation problem—that it reprieves us, at least intellectually, from treating as knowledge and established truth, that which fundamentally, on its own terms, is not.

References

Arnold, Thurman W. 1930. Criminal attempts: The rise and fall of an abstraction. *Yale Law Journal* 40: 53–80.

Auden, W.H. 1983. Law like love. In *The Norton anthology of poetry*, 3rd ed, ed. Alexander W. Allison, et al., 1101–1102. New York: W. W. Norton and Company.

Balbus, Isaac. 1977. Commodity form and legal form: An essay on the 'Relative Autonomy' of the law. *Law and Society Review* 11: 571–588.

Balkin, J.M. 1996. Interdisciplinarity as colonization. *Washington and Lee Law Review* 53: 947–970.

Benjamin, Walter. 1968. The work of art in the age of mechanical reproduction. In *Illuminations* (trans: Harry Zohn), 217–251. New York: Schocken Books.

Bourdieu, Pierre. 1987. The force of law: Toward a sociology of the juridical field. *Hastings Law Journal* 38: 805–853.

Bourdieu, Pierre. 1998. *Practical reason: On the theory of action*. Cambridge, UK: Polity Press.

Coase, Ronald. 1960. The problem of social cost. *Journal of Law and Economics* 3: 1–44.
Coombe, Rosemary. 2001. Is there a cultural studies of law? In *A companion to cultural studies*, ed. Toby Miller, 36–62. Cambridge: Basil Blackwell.
Ewick, Patricia, and Susan S. Silbey. 1998. *The common place of law: Stories from everyday Life*. Chicago: University of Chicago Press.
Friedman, Lawrence. 1986. The law and society movement. *Stanford Law Review* 38: 763–780.
Gabel, Peter. 1980. Reification in legal reasoning. *Research in Law and Sociology* 3: 25–51.
Gadamer, Hans-Georg. 1989. *Truth and method* (trans: Joel Weinsheimer and Donald G. Marshall). New York: Continuum.
Geertz, Clifford. 1973. *The interpretation of cultures: Selected essays*. New York: Basic Books.
Goodrich, Peter. 1996. *Law in the courts of love: Literature and other minor jurisprudences*. New York: Routledge.
Gordon, Robert W. 1984. Critical legal histories. *Stanford Law Review* 36: 57–125.
Grossfeld, Bernhard, and Edward J. Eberle. 2003. Patterns of order in comparative law: Discovering and decoding invisible powers. *Texas International Law Journal* 38: 291–316.
Habermas, Jürgen. 1984. *The theory of communicative action* (trans: Thomas McCarthy). Boston: Beacon Press.
Hale, Robert L. 1923. Coercion and distribution in a supposedly non-coercive state. *Political Science Quarterly* 38: 470–494.
Kennedy, Duncan. 1982. The stages of the decline of the public/private distinction. *University of Pennsylvania Law Review* 130: 1349–1357.
Kennedy, Duncan. 1986. Freedom and constraint in adjudication: A critical phenomenology. *Journal of Legal Education* 36: 518–562.
Kronman, Anthony T. 1993. *The lost lawyer: Failing ideals of the legal profession*. Cambridge: Harvard University Press.
Lakatos, Imre. 1970. Falsification and the methodology of scientific research programmes. In *Criticism and the growth of knowledge*, ed. Imre Lakatos and Alan Musgrave, 91–196. New York: Cambridge University Press.
Latour, Bruno. 1993. *We have never been modern* (trans: Catherine Porter). Cambridge: Harvard University Press.
Linstead, Stephen, and Heather Hopfl (ed.). 2000. *The aesthetics of organization*. London: Sage.
Llewellyn, Karl. 1942. On the Good, the True, the Beautiful in law. *University of Chicago Law Review* 9: 224–265.
Luhmann, Nicklas. 1985. *A sociological theory of law* (trans: Elizabeth King and Martin Albrow). London: Routledge and Kegan Paul.
Lukács, Georg. 1971. *History and class-consciousness* (trans: Rodney Livingstone). Cambridge: MIT Press.
Manderson, Desmond. 2000. *Songs without music: Aesthetic dimensions of law and justice*. Berkeley: University of California Press.
Marx, Karl. 1913. Preface. In *A contribution to the critique of political economy* (trans: Stone, N. I.), 11–12. Chicago: Kerr.
Marx, Karl. 1975. On the Jewish question. In *Collected works: Karl Marx and Frederick Engels*, Vol. 3, 146–174. New York: International Publishers.
Mezey, Naomi. 2001. Approaches to the cultural study of law: Law as culture. *Yale Journal of Law and Humanities* 13: 35–67.
Morgan, Gareth. 1986. *Images of organization*. London: Sage.
Oberman, Michelle. 2005. Sex, lies and the duty to disclose. *Arizona Law Review* 47: 871–931.
Posner, Richard. 1993. The material basis of jurisprudence. *Indiana Law Journal* 69: 1–37.
Posner, Richard. 2003. *Economic analysis of law*, 6th ed. New York: Aspen Publishers.
Rabin, Robert L. 1987. Environmental liability and the tort system. *Houston Law Review* 24: 27–63.
Ramirez, Raphael. 1991. *The beauty of social organization*. Munich: Accedo.
Reisman, W.Michael. 1999. *Law in brief encounters*. New Haven: Yale University Press.
Rorty, Richard. 1982. *Consequences of pragmatism*. Minneapolis: University of Minnesota Press.
Sarat, Austin, and Thomas R. Kearns (ed.). 1998. *Law in the domains of culture*. Ann Arbor: University of Michigan Press.
Sartre, Jean-Paul. 1968. *Search for a method* (trans: Hazel E. Barnes). New York: Vintage Books.
Schlag, Pierre. 1989. The problem of transaction costs. *Southern California Law Review* 62: 1661–1699.
Schlag, Pierre. 1991. The problem of the subject. *Texas Law Review* 69: 1627–1743.

Schlag, Pierre. 1997. Law and phrenology. *Harvard Law Review* 110: 877–921.
Schlag, Pierre. 2002. The aesthetics of American law. *Harvard Law Review* 115: 1047–1118.
Strati, Antonio. 1999. *Organization and aesthetics*. London: Sage.
White, Ahmed. 2001. Rule of law and the limits of sovereignty: The private prison in jurisprudential perspective. *American Criminal Law Review* 38: 111–146.