Beyond Freedom of Speech and the Public Interest: The Relevance of Critical Legal Studies to Communications Policy

by Thomas Streeter

The major competing positions in the key contemporary broadcast policy debates may be better understood not as "genuine choices between practical activities" but as "recapitulations of a set of insoluble dilemmas inherent in our notions of rights, individuals, and government."

Critical Legal Studies is a new current in contemporary legal theory. This essay explores the implications of CLS for the study of communications policy (6, 22, 24, 45, 46).[1] The essay begins with some key CLS concepts and their implications for general discussions of freedom of speech and the public interest. It then illustrates those concepts by applying them to the conflict between broadcasters' and citizens' free speech rights as expressed in the contemporary Fairness Doctrine debate. The second half of the essay discusses CLS's broad view of the nature and development of the U.S. legal and policy framework, and explores that view's relevance to several communications policy issues: spectrum scarcity and the Fairness Doctrine debate, struggles between industry interest groups in policy debate, the ambiguity of the "public interest," and contemporary academic approaches to the study of communications policy.

The principal contributions of CLS are threefold. First, CLS has revived attention to the role of concepts and belief structures in legal and policy decision making, particularly those of Liberalism. Second, CLS has advanced the concept of legal indeterminacy, a legal parallel to the linguistic and literary concept of the arbitrary sign that has important implications for understanding laws and legal procedures. These first two contributions have led to the third: a general view of contemporary law and policy as a series of Liberalism's attempts to rescue itself from its own limitations, attempts that in the long run only obscure

[1] This essay presents a sampling of CLS concepts, not a comprehensive overview. CLS has been associated with such a broad diversity of work that many important issues and positions within CLS cannot be addressed here.

Thomas Streeter is Assistant Professor in the Department of Sociology, University of Vermont. The author thanks the many who provided helpful comments on drafts of this article, particularly Hendrik Hartog, David Kennedy, and David Sholle.

the limitations they are supposed to transcend. Each of these three contributions, this essay will show, can shed light on some otherwise puzzling features of U.S. communications policy and regulation.

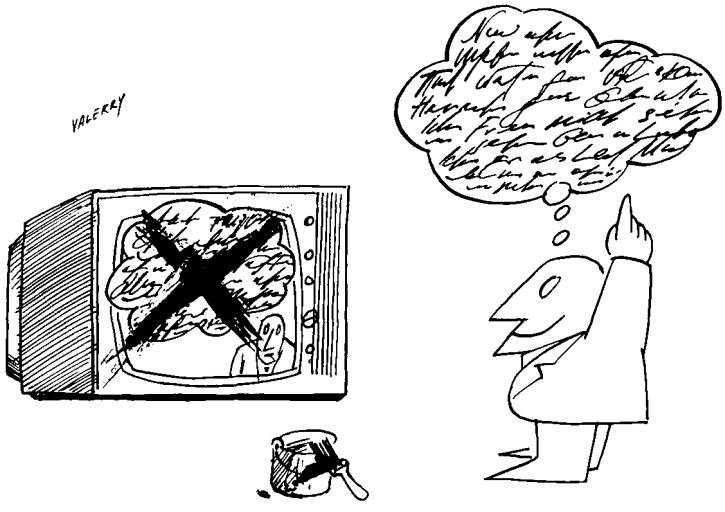
For an academic movement, CLS has received an unusual amount of attention in the popular press, largely as the result of a series of acrimonious hiring and tenure battles at prestigious law schools. The storm and fury surrounding these battles unfortunately has distracted attention from the substantive content of CLS scholarship and has fostered a false impression that CLS is ultraradical and lacking in sober scholarly significance. Most CLS members probably do fall somewhere left-of-center on the political spectrum and share a commitment to progressive social change. The movement is deeply sensitive, however, to the dangers of imposing reductive ideological frameworks on the complexity of social reality. CLS scholars are generally much more reluctant to connect intellectual work with doctrinaire political programs than, say, contemporary conservative and neoconservative legal scholars. The concepts and practices common to CLS work, moreover, are widely accepted in fields outside law, and they by no means justify the notoriety often ascribed to the movement.

CLS offers an analytical framework that gives full (though skeptical) attention to the philosophical structures and values that comprise laws and policies. Communications policy, like many other fields, often focuses on contemporary regulatory details at the expense of the broad structure of regulation. Much of the work that does focus on broad structures, furthermore, emphasizes non-intellectual forces like economics, technology, or the self-interests of policy-making groups.

In contrast, CLS has focused analysis on the concepts of law, particularly those that characterize Western Enlightenment thought. It is thus distinguished from "liberal pluralist" and some Marxist-influenced analyses because it does not reduce the intellectual content of law to an epiphenomenal reflection of group or class interests.[2]

Although the patterns of thought and action that make up our legal and political systems are diverse and have gone through numerous permutations, most of them stem from a relatively limited set of assumptions that reflect the Western heritage of Enlightenment thought—beliefs, for example, in the fundamental autonomy of the individual from society, in universal, natural rights, and in the existence and value of neutral, objective forms of language and pro-

[2] Krasnow, Longley, and Terry (29) provide the classic statement of the liberal pluralist focus on interest group struggle applied to broadcast regulation. They are completely silent, for example, about the principle of commercial broadcasting itself, assuming it to be an inevitable fact, without intellectual or political import. The work on communications policy of critical scholars such as Vincent Mosco and Herbert Schiller is closer to the spirit of CLS in many ways, but tends, in orthodox Marxist fashion, to discount the importance of the "ideological superstructure" by treating it as an epiphenomenal reflection of the economic base. The areas of communications research closest in origins and focus to CLS are the studies of ideology, hegemony, and cultural form characteristic of the work of Stuart Hall and others. For the most part, these approaches have not yet been applied to communications policy.



cedure (the basis for the familiar claim that we should live by "the rule of law, not of men"). As expressed in the patterns and practices of U.S. legal discourse, this set of principles and procedures, usually called legal Liberalism,[3] is the main target of CLS's scrutiny.

On one level, CLS's concern with legal Liberalism merely betokens an unremarkable conviction that ideas matter. But CLS scholarship emphasizes the extent to which legal Liberalism, when taken as a whole, is riddled with ambiguities and contradictions. CLS's skepticism regarding the coherence of legal Liberalism springs from two events: an attempt to explain why the U.S. legal and political system has failed to yield progressive social change in the last two decades, and an encounter between the corrosive philosophical insights of modernist thought and the patterns and practices of U.S. legal discourse, particularly as taught in U.S. law schools.[4] In one sense, therefore, CLS represents yet another skeptical, modernist assault on the Enlightenment optimism of Western industrial culture, this time on the terrain of legal theory. For historical and theoretical reasons, CLS analysis suggests, the U.S. legal system has failed to

[3] For a discussion of the relevance of Liberalism to media theory in general see (44). The relationship between legal Liberalism and larger social formations has not been fully addressed by CLS, although it is generally assumed that such a relation exists—that legal Liberalism is not merely a set of ideas consciously held by lawyers and judges, but rather expresses modes of thought and action characteristic of society as a whole. Unger describes Liberalism not as a political or legal philosophy but as "a kind of social life" (45, p. 18). In many ways, CLS's Liberalism is reminiscent of what many Continental thinkers have called "bourgeois thought," "Enlightenment thought," or "bourgeois ideology."

[4] The precepts of modernism have surfaced in a variety of guises in approaches to communications ranging from symbolic interactionism to film theory and semiotics (see 4, 5, 18) and have been amplified in postmodernism.

produce justice, not because it failed to live up to its own Liberal ideals but in a sense *because* of those ideals.[5]

In keeping with their modernist roots, CLS scholars generally hold to some version of the belief that human reality is socially constructed. Much of CLS's purported "radicalism" stems from a thorough and conscientious effort to explore the full implications of this idea for law. Although the notion of the social construction of reality has become nearly axiomatic within fields such as sociology, many of its implications conflict with the principles of legal Liberalism.

Within social construction of reality approaches, neither language nor collective procedures can be value-neutral; individual selves are not apart from but are inseparably intertwined with society; aspects of human social life such as "rights" are always socially constructed, contingent, and context-bound instead of natural or universal; and so forth. CLS scholars have thus argued, for example, that the activities of lawyers and judges are social rituals embedded in social structure, not objective procedures that stand above social reality and power relations, and they have explored how legal modes of interpretation change dramatically over time, so that what was once considered a correct legal decision would now be considered incorrect, and vice versa.

Another central concept for many (though not all) CLS scholars is legal indeterminacy. Most forms of legal Liberalism rely on some sense of the permanence and universality of the meaning of words. Legal language and legal expertise are thought valuable precisely because they provide fixed, rigorous meanings unsullied by the political and social winds of the moment. Given a certain set of legal rules and a certain legally defined situation, it is assumed, a properly trained judge or lawyer, within certain boundaries, can use his or her expertise in legal language and reasoning to arrive at, or at least approximate, *the* correct interpretation.[6]

CLS, however, has argued that, in a profound way, legal reasoning and procedure are incapable of resolving disputes in such a neutral fashion. Using detailed textual analyses of laws and legal judgments, CLS scholars show that opposite interpretations are equally valid within the logic of legal reasoning and that it is impossible to distinguish between competing legal interpretations

[5] CLS provides a vivid example of how the concerns of modernist and postmodernist theories are not mere academic constructs, but are rooted in and relevant to the structures and textures of human existence in the industrializing world. Therein lies much of CLS's value for "critical" scholarship in general (see, e.g., 22, 26, 34).

[6] Many legal scholars and most practicing lawyers are quick to qualify this notion of legal neutrality by pointing out that individual points of view and preferences frequently, if not always, enter the process. Even so, such observers tend to assume that the neutrality of legal decision making is central to our legal system—even if only as an ideal, an underlying operating principle, or rule of thumb—which is why we rely on trained lawyers and judges for so much of our decision making instead of some more direct process such as voting. For a discussion of CLS's ideas of indeterminacy and their relation to literary deconstruction, see (8, pp. 139–152). For a debate on the nature and importance of indeterminacy focused on the interpretation of the U.S. Constitution, see (32, especially the essays by Levinson, Fish, and Hoy).

of a given situation without turning to nonlegal factors, such as personal moral beliefs, social structure, or power relations. When considered as a set of neutral principles and procedures, in other words, law is fundamentally indeterminate.

Again, the roots of the concept of indeterminacy are relatively uncontroversial: Indeterminacy parallels the linguistic precept that the meaning of words is not fixed by their referent, that signs are what Saussure called "arbitrary" and conventional, not mechanically determined by a universal logic or by relations to material objects. Nothing internal to the English language, for example, dictates "correct" grammatical structure. "Correctness" is a habit of the people speaking: What is correct for some groups is incorrect for others, and what is correct now was incorrect in the past and will be incorrect in the future. According to CLS, the same can be said for law. Just as there is no immutable language standard or logic that determines the "correctness" of grammatical structures, there is no fixed, objective logic that can determine the correctness of a legal decision.

With a characteristic, self-deprecatory glibness, some CLS scholars have dubbed the resulting pattern of analysis "trashing"[7]—which is less simple and less anarchistic than its name implies. Mark Kelman has offered the following definition:

Take specific arguments very seriously *in their own terms; discover they are actually* foolish *([tragi]-comic); and then look for some (external observer's)* order *(*not *the germ of truth) in the internally contradictory, incoherent chaos we've exposed* (23, p. 293, emphases in original).

In other words, trashing involves treating legal propositions and arguments in the way that they present themselves (sometimes explicitly, almost always implicitly): as part of a neutral, autonomous, fixed and coherent system of legal logic. The "tragi-comic chaos" thus exposed results from the discovery that, in the absence of some external criteria such as personal moral and political preferences, all potential competing interpretations are equally plausible (or implausible). The external observer's "order" involves postulating some external sociological explanation for the patterns of legal decision making, such as culture, class interest, or the fact that almost all judges are white affluent men.

Underneath the apparent flippant simplicity of "trashing" lies a concern with the troubled dichotomy our society tries to maintain between the private, individual realm and the public, social realm. One of the core assumptions of Liberalism is a belief in the fundamental opposition between individuals and society, a belief that individuals and society are both

[7] In part, the intellectual point behind the glib tone of some CLS work seems to be that U.S. legal scholarship has come to rely on a series of simplistic and thoroughly outmoded concepts, sustained only by dint of a haughty, entrenched isolation from the rest of Western intellectual life. The law, in other words, rests on such flimsy foundations that, minus the pompous mystifications of *Paper Chase*–style classroom melodramas, no subtlety or complexity of argument is necessary to reveal its bankruptcy (see, e.g., 27). The intellectual well-being of U.S. law schools, however, is not the concern of this essay.

apart from and opposed to one another. Tied to this fundamental opposition are a number of others. Individuals are self-interested and are the sources of freedom, difference, change, and activity. Groups, on the other hand, are everything that individuals are not—collective, stable, static, constraining, homogeneous. From this individual/society dichotomy thus come the familiar tenets of Liberalism, such as the belief that freedom of speech and individualism act as key mechanisms of resistance to social domination.

For CLS, as for the modernist movement generally, the problem with this notion of the absolute autonomy of the individual from the social (and its correlates, such as the opposition of freedom and constraint and of public and private) is not that it is a hopeless ideal that doesn't fit reality, nor that too much individual autonomy is threatening or dangerous, but that, even when considered on its own terms, the dichotomy is paradoxical. In one of the most frequently cited CLS works, Duncan Kennedy, using the phenomenological couplet of "self" and "other," provided a vivid description of this paradox:

Others (family, friends, bureaucrats, cultural figures, the state) are necessary if we are to become persons at all—they provide us the stuff of our selves and protect us in crucial ways against destruction. . . . But at the same time that it forms and protects us, the universe of others. . .threatens us with annihilation and urges upon us forms of fusion that are quite plainly bad rather than good. . . . Numberless conformities, large and small abandonments of self to others, are the price of what freedom we experience in society. [Hence] the very structures against which we rebel are necessarily within us as well as outside of us. . . . Relations with others are both necessary to and incompatible with our freedom (25, pp. 212–213).[8]

Thus, the radical autonomy of the individual from the social, the goal and premise of Liberal thought, collapses under its own weight. The very idea of individual rights and freedoms, in this view, necessarily involves what we typically think of as coercion, and any assertion of the social good or the "public interest" necessarily involves what we ordinarily think of as "subjective" contingency and variability. The public interest, one could almost say, necessarily involves private interest, and vice versa. This is not a claim, moreover, that everything is a matter of degree, that pure private interest and pure public interest are merely the two ideal poles of a continuum and that real situations

[8] One could give this argument a more structuralist slant and describe the intertwined nature of the individual and the social in terms of the phenomena of language and communication. As Saussure observed, language exists in practice only in individuals; people talked to one another long before the first dictionary or grammar manual. And yet language is also "the social side of speech, outside the individual who can never create nor modify it by himself; it exists only by virtue of a sort of contract signed by the members of a community" (41, p. 14). In language, therefore, the individual and the social are intertwined, two sides of the same coin, not opposed to one another as Liberal thought would lead us to believe. Finally, one could also approach this argument from a poststructuralist angle and say that the individual or "subject" is by definition always subject *to* something, and thus always entangled with its opposite. Because he or she is made comprehensible by way of contrast with a social other, in other words, the individual always bears internally the trace of the social.

fall somewhere in the middle. On the contrary, the argument is that, *as ideals,* the public and private are more like two sides of the same coin (28).

The collapse of the private/public distinction has important implications for the meaning of freedom of speech and the public interest. U.S. constitutional free speech rights, for example, are negatively defined as the absence of social constraint ("Congress shall make no law. . ."). They are framed, in other words, in terms of the problematic Liberal assumption that the relation of the social to the individual is one only of constraint, that individual freedoms are constituted simply by the absence or limitation of the social. Free speech, however, *requires* certain social relations; to define it as merely the absence of social constraint is nonsensical. Speech, after all, is impossible without language, itself an essentially collective and highly structured form of social life. The exercise of freedom of the press is similarly preconditioned upon a particular form of organized collective life with all its requisite "constraints": literacy, technology, economic relations, systems of distribution, etc.

By the same token, the collective side of life has no reified existence apart from the varied contingencies of individual activities. The term "public interest," therefore, *by its very nature* will always be implicated with what we normally call "subjectivity." The phrase will always only be spoken or written by actual, unique, and varied human beings with concrete, contingent historical motivations, motivations that will inevitably vary from person to person and from time to time. The problem with the "public interest" is thus not that subjective "special interests" can creep in and subvert its elevated purpose. The problem is rather that, however conceived, the term will always exist only in a context, will always be nothing more than a reification of concrete circumstances.

The CLS critique thus leads toward the conclusion that the quandaries associated with efforts to reconcile broadcasting, freedom of speech, and the public interest have little to do with the unique technical circumstances of broadcasting, such as its dependence on spectrum regulation. Rather, the policy dilemmas of broadcasting are an unusually vivid expression of the dilemmas faced by Liberal thought in dealing with the most mundane of communicative situations.

The contemporary Fairness Doctrine debate provides a useful illustration of the concept of indeterminacy. Consider a case involving a Syracuse television station (*Syracuse Peace Council* v. *Television Station WTVH Syracuse, New York,* 55 RR.2d, F.C.C. 84-518 35113, 1985). An antinuclear group had accused the station of presenting only the nuclear energy industry's position on the issue of constructing a nuclear plant in New York. In 1984 the Federal Communications Commission ordered the station to balance its programming by airing the antinuclear point of view. The FCC then made the equally controversial decision to reverse itself when it disposed of the doctrine in its current form (*Memorandum Opinion and Order in re complaint of Syracuse Peace Council against Television Station WTVH,* F.C.C. 87-266 37141, August 7, 1987). In light of both ongoing congressional attempts to codify the

doctrine and appeals of the FCC's reversal, the Syracuse case has become a rather celebrated one for both the Left and the Right, and it seems very likely that the doctrine will go to the Supreme Court once again.

Clearly, all major arguments in the Fairness Doctrine debate conform to some version of legal Liberalism. All sides agree that the ultimate purpose of broadcast regulation in a case like this is to protect the freedom of individual communication from constraint by others and thus to maintain what the Supreme Court calls "an uninhibited marketplace of ideas in which truth will ultimately prevail" (21, p. 287). Furthermore, although the doctrine appears to embody twentieth-century beliefs in professional expertise and "social responsibility" (which will be addressed later in this essay), proponents and opponents of the doctrine frequently tend to frame their arguments, at least at the outset, within the language of absolute free speech rights, in which the autonomous dynamic individual struggles against static social constraint.

Within the language of absolute rights, the situation in Syracuse can be interpreted in at least four different ways, two that suggest the Fairness Doctrine works as it should and two that suggest it works against its own goals. First, one can describe this as a case of the group constraining the individual, of state tyranny constraining the free speech rights of an individual broadcaster: The Fairness Doctrine interferes with free speech. Or, conversely, one can say that the antinuclear individuals were being constrained from exercising their free speech rights by the notoriously centrist and politically timid television industry: The doctrine supports free speech. Or one can argue that this is a matter of individuals interfering with the rights of other individuals, of an individual broadcaster constraining individual antinuclear activists by preventing them from exercising their free speech rights: Again, the doctrine works as it should. Or, finally, one can argue that the real interfering individuals are the marauding government bureaucrats and special interest groups taking self-interested, subjective actions that limit the self-expression of a television broadcaster: The doctrine is dysfunctional.

From within a CLS analysis, the problem is not that these multiple positions allow for a happy plurality of points of view, a starting point for debate, or a fulcrum for political struggle between interest groups. The problem is rather that, in a sense, they allow for nothing at all. Framed in this manner, the debate is unresolvable. The difference between each of these alternative accounts of the situation is not that some of them support freedom and others support constraint, or that some support individuals and others support the good of the group. Each account clearly conforms with the same basic formula; each seeks to protect individuals' freedom to communicate by limiting constraints on that freedom by others, for the ultimate purpose of upholding the marketplace of ideas and thus the public interest.

The difference is that each account assigns the participants in the case (activists, broadcasters, FCC commissioners) to different roles (individuals, groups, constrainer, constrainee). Are broadcasters, antinuclear associations, and commissioners groups, or are they individuals? Clearly, on some level, they are both. Similarly, is the selection of a schedule of broadcast programming, the

decision to include some programs and exclude other programs, an exercise of freedom or an act of constraint? What about forcing a station to add one's own point of view to that schedule? Both actions fairly obviously contain elements of both freedom and constraint. In sum, because either side in a conflict can be defined either as the individual exercising his or her freedom or the group exerting constraint, any position along the entire spectrum of views on the Fairness Doctrine appears equally justified. In a famous comment, Judge J. Skelly Wright noted that, in matters of broadcast freedom and fairness, it becomes difficult to "tell the good guys from the bad guys" (13, p. ix). It's hard to tell the good guys from the bad guys, this analysis suggests, because it's impossible to tell the constrainers from the constrainees.

The basic task of the Fairness Doctrine—protecting individual freedoms from group constraints—makes sense only if freedom, constraint, individuals, and groups are manifestly distinct categories. And manifestly, they are not. The apparently noble task of protecting the freedoms of individuals against group constraints, as a result, begins to look like an empty verbal exercise. If anyone involved with broadcasting can be construed as either group or individual, moreover, if any action can be equally well construed as either an act of constraint or the exercise of freedom, then it will always be possible to argue that someone's individual freedom is being constrained by somebody else.

The Fairness Doctrine controversy, of course, does not revolve only around a discussion of rights but also around "technical" questions of spectrum scarcity and chilling effects. As many contemporary legal debates progress, the language and terminology of the founding fathers is gradually supplanted by the trappings of policy science such as allocations tables and survey data. Discussion, in other words, often begins with references to hallowed constitutional principles that are two centuries old but then moves in a decidedly twentieth-century direction.

CLS scholarship suggests a way to understand not only the Liberal underpinnings of broadcast policy but also the nature of the differences between the modern policy-making process and earlier patterns of law that more directly conformed to the classical Liberal model (see 33, p. 23). The twentieth-century political and legal forms important to broadcast regulation such as the independent regulatory agency and administrative law, CLS suggests, are neither rational extensions of classic Liberal legal principles nor clear-cut departures from those principles. Rather, they mark a maneuver to rescue Liberalism from itself, an attempt to regain the footing lost in the shifting sands of one set of Liberal contradictions—the incoherence of atomistic individualism and of its industrial correlate, laissez-faire business principles—by moving in the direction of another set of (also contradictory) Liberal principles—a faith in the power of expertise and objective scientific knowledge to make manifest a transcendent, reified "public interest."

Attempts to rescue Liberalism via a turn to expertise can be seen most explicitly among the "legal realists," a group of legal scholars active during the 1930s and 1940s who were associated with New Deal politics. Their criticisms

of legal Liberalism prefigured the critiques of CLS, and so they are often seen as CLS's predecessors (39). But the legal realists' proposed alternative to legal Liberalism—social engineering approaches to law rooted in positivist epistemology and functionalist social analysis—has itself become a target of CLS critique.

The legal realists argued that the classic oppositions of legal thought, particularly that between law and politics, could not hold up, "because of the impossibility of constructing a set of rules that could be applied in a neutral or objective manner" (6, p. 692). In a classic legal realist analysis called "Transcendental Nonsense and the Functional Approach," for example, Felix Cohen clearly foreshadowed the work of CLS:

In every field of law we should find peculiar concepts which are not defined either in terms of empirical fact or in terms of ethics but which are used to answer empirical and ethical questions alike, and thus bar the way to intelligent investigation of social fact and social policy. Corporate entity, property rights, fair value, *and* due process *are such concepts. So too are* title, contract, conspiracy, malice, proximate cause, *and all the rest of the magic "solving words" of traditional jurisprudence. Legal arguments couched in these terms are necessarily circular, since these terms are themselves creations of law, and such arguments add precisely as much to our knowledge as Molière's physician's discovery that opium puts men to sleep because it contains a dormitive principle* (7, p. 809; quoted in 6, p. 693).

Some of the legal realists, faced with the indeterminacy of classic legal thought, sought certainty for both their analyses of and solutions to the problems of social life in expertise and social science, frequently in the form of structural-functionalist sociology. One of the more extreme examples of this gesture came from Harold Lasswell (not coincidentally one of the founding fathers of the empiricist mass media research tradition) and Myres S. McDougal, who argued in 1943 that the traditional legal education, based as it was on insupportable distinctions like that between politics and law, should be completely abandoned and replaced with training in social scientific techniques (31). The arbitrary and empty verbal games of law thus would be replaced by the presumed certainty of modern scientific techniques guided by highly trained experts armed with the tools of structural-functionalist sociology. As one scholar has put it, "the judge was supposed to give up playing with words and to begin playing with policy science" (6, pp. 707–708).

One can view the attempt to rescue Liberalism by qualifying it as simply self-contradictory; this seems to be the argument of some contemporary conservative legal critics who call for a return to constitutional fundamentals and rail against the "judicial activism" implicit in rules like the Fairness Doctrine. But these critics ignore the important ways in which the move from traditional Liberal principles such as rights to expert decision making and other policy-oriented procedures is fully consistent with the Liberal tradition. Even the original Liberal philosophers turned to objective science and universal laws to rescue their Liberal beliefs from internal contradictions. For Locke, scientific knowl-

edge—because it could be arrived at by freely acting individuals following scientific methods—provided the possibility of breaking through the solipsistic isolation that would otherwise make a society of Liberal individuals impossible (37, p. 5; 44).

The shift from an emphasis on Liberal rights and freedoms to an emphasis on expertise and the public interest, therefore, ultimately represents a shift from one pole within the Liberal cosmos to another, not an abandonment of Liberalism altogether.[9] To a large degree CLS's critiques of legal realism's tendencies toward social engineering parallel the various critiques of positivism and its associated technocratic political structures that have become a staple of debate in the human sciences. Many have pointed to the antidemocratic character of social engineering, suggesting that it is colossally arrogant for a handful of altruistic, publicly minded lawyers, policy experts, and professors—the overwhelming majority of whom are white males—to assume for themselves the task of resolving major political issues of a society of more than 200 million individuals. On a more abstract level, it is common to point to the fundamentally context-bound, contingent, and socially constructed nature of human existence and the consequent impossibility of establishing methods, procedures, or language that can ensure neutrality and objectivity. References to objectivity and scientific and bureaucratic rationality, as a consequence, end up merely restating the contradictions they are supposed to transcend. In the face of this argument, a turn to objectivity, "neutral" bureaucratic procedures, expertise, and other forms of "instrumental reasoning" are merely another form of politics that postpone or obscure moral and political actions under the cloak of a supposedly universal neutrality (1).

The result is that, rather than rescuing Liberalism from itself, most of our policy-oriented innovations of twentieth-century law have consisted, according to Mensch,

> *of simply conceding a number of key realist insights [about the weaknesses of Liberal legal theory] and then attempting to incorporate those insights into an otherwise intact doctrinal structure. What were once perceived as deep and unsettling logical flaws have been translated into the strengths of a progressive legal system. For example, the indeterminacy of rules has become the* flexibility *required for sensible, policy-oriented decision making; and the collapse of rights into contradiction has been recast as "competing interests," which are inevitable in a complex, tragic world and which obviously require an enlightened judicial* balancing. *In other words, we justify as legal sophistication what the classics would have viewed as the obvious abandonment of legality* (33, p. 29).

In summary, the uniqueness of CLS's view of law is not merely its skepticism about certain traditional Liberal concepts, but its analysis of the progress of

[9] Jensen (20) distinguishes between classic Liberalism and what he calls "neo-Liberalism," which has gradually come to prominence in the twentieth century and is exemplified in the "social responsibility" approach to press theory of the Hutchings Commission.

legal thought from the Enlightenment era into this century. CLS envisions legal evolution in the United States as part of the American polity's steady struggle to avert confrontation with the increasingly obvious limits and contradictions of Liberalism by means of a series of maneuvers within the Liberal framework, maneuvers that in the end only obscure the contradictions they are supposed to transcend. Because the attempts rest on limited premises such as the autonomy of the individual from society and the universality of objective scientific knowledge, they inevitably fall short of the permanence and universality that the Liberal concept of law would demand.

In upholding the Fairness Doctrine in the 1969 *Red Lion* case, the Supreme Court responded to the dilemmas of absolute rights by recasting the problem in terms of empirical questions amenable to resolution by sociological expertise. The procedure of "judicial balancing" was central to this effort.

The court made it clear in *Red Lion* that in the case of broadcasting the normal exercise of rights can restrict the rights of others; ownership of a television station, after all, gives one the power to prevent others from using it. Broadcasters, the Court reasoned, are necessarily much fewer in number than the audience and yet have a much greater opportunity to make their views heard; treating their free speech rights as absolute would clearly violate the spirit, if not the letter, of the First Amendment. So, the Court shifted the terms of discussion away from moral principles toward technical, "empirical" questions: Is there spectrum scarcity? Does the Fairness Doctrine have a measurable chilling effect on broadcasters?

Broadcasters and audiences, the Court assumed, possess competing rights; if treated as absolutes, one set of rights proves fatal to the other. The Court's solution to this problem involves, in part, *balancing* broadcasters' rights against those of audience members (such as antinuclear activists and their supporters); this is implicit in the Court's support of the Fairness Doctrine on the grounds that "it is the right of the viewers and listeners, not the right of the broadcasters, which is paramount" (cited in 21, p. 287). To make the problem into an empirically testable one instead of a purely moral matter of rights, the Court in a sense symbolically calibrated the space between absolute rights for broadcasters and absolute rights for the audience into a series of measured increments along a continuum, and then calculated and weighed the resulting relative values against one another. By taking upon themselves this task of balancing, the Court acted as if they and the FCC were a body of social scientists or judicial engineers. Hence, they were able to conclude that if the Fairness Doctrine does interfere somewhat with broadcasters' free speech rights, such marginal interference is justified when empirically calculated against the rights of the audience.

But most CLS scholars would suggest that this maneuver does not solve the problem of indeterminacy. The objective certainty upon which balancing is premised is unobtainable, both practically and theoretically. As a result, no matter which particular increment along the continuum is selected—granting this-

and-such "quantity" of rights to broadcasters and the remaining "quantity" to, say, antinuclear activists—it will always be possible to argue plausibly that the selected point on the continuum constrains the individual it ought to liberate and that the "correct" point of balance is thus a notch or two in the other direction. Hence, arguments about "technical" details such as the presence or absence of spectrum scarcity or the chilling effect of regulations on the behaviors of broadcast journalists are, in the end, no more subject to "objective" resolution than the original discussion of rights. Balancing, in sum, merely subdivides the problem, creating countless small dilemmas where before there was one big one.

So a CLS analysis suggests that both aspects of the debate surrounding the Fairness Doctrine—the debate over rights, and the debate over empirical issues like spectrum scarcity—are indeterminate, that they lead legal discussion into an infinite regress of argument and counterargument without ever resolving the problems they are intended to solve. CLS thus explains the sense that it's difficult to "tell the good guys from the bad guys" in questions of broadcast freedom and fairness by reference to the Liberal precepts that structure the debate, not to peculiar "technical" contingencies such as spectrum scarcity.[10]

Some have responded to the concept of indeterminacy and the methodology of "trashing" by accusing CLS of sacrificing the possibility of reconstruction to an unconstrained enthusiasm for deconstruction. This accusation is misguided. First, the larger point of "trashing" something like the Fairness Doctrine is not that the doctrine is a bad idea in need of replacing by a new one, but that one needs to confront the taken-for-granted assumptions that underlie the debate, such as the assumption that the world of laws, rules, and regulations comprising communications policy is a place where practical problems of a democratic society can be solved. Second, a critical sensitivity to the paradoxes of Liberalism and the concept of indeterminacy can help us understand very concrete, day-to-day patterns of behavior in areas such as broadcast regulation. Legal Liberalism and its dilemmas need not be seen as pale ideological reflections of "real" forces such as economics, technology, or interest group pressure. Legal discourse has real implications in its own right.

For example, the bulk of regulatory discussion is produced in the course of struggles between industry factions, such as cable operators and broadcasters, networks and affiliates, and New York television executives and Hollywood producers. Many have noted the frequency and ease with which these industry groups muster "selfless" terms like "the public interest" in the service of clearly self-interested ends. Some accept this phenomenon with resignation as

[10] The dominant position is that these contingencies stem from the special complexities of spectrum scarcity; this was central to the Supreme Court's argument in *Red Lion*. For some, the contingencies are also administrative; Geller, for example, argues that the Fairness Doctrine is a good idea that has been poorly implemented (14). For others, the contingencies are economic; Parsons distinguishes broadcasting from print with what he calls the "failed market theory" (36, p. 151). Fairness Doctrine opponents often seem willing to concede the point that the problem is one of spectrum scarcity, but they argue that a *new* special contingency—new media technologies—has overcome the first one and thus made the doctrine obsolete.

an inevitable part of interest group politics (29) and others find it scandalous (3, 42). Few, however, have tried to explain the pattern, other than to attribute it to the wily cynicism of corporate lawyers and lobbyists.

The CLS view that legal terminology is fundamentally indeterminate suggests a more satisfying explanation for the conditions that make this apparent cynicism possible. If public interest and private interest are more like sides of a coin than poles on a continuum, any apparently "private" interest can be persuasively interpreted as in the public interest, and any assertion of the public interest is bound to appear to be in somebody's private interest. Both the use of terms like "public interest" by corporate lobbyists and the appearance of cynicism in that use, therefore, can be explained as the predictable product of the fundamental indeterminacy of policy language. As long as we interpret media activities through the lens of a public interest/private interest dichotomy, we will always encounter what appear to be confusions of the two.

In this light, it is not surprising that U.S. broadcast policy discourse has constantly zigzagged between calls for elaborate government assistance and loud objections to government interference with the marketplace and the right of free speech. In the 1960s, for example, television broadcasters successfully demanded government protection from the threat of cable competition at the same time that they railed against government interference with the free marketplace of ideas in the form of the Fairness Doctrine. More recently, the cable industry, after years of successfully championing its cause with the libertarian language of regulation-free markets and free speech rights, suddenly appears willing to accept certain forms of public interest regulation in exchange for protection of the fruits of their success, their status as local monopolies.

Again, these maneuvers are easier to understand in the context of the indeterminacy of law. If the opposition between collective action and entrepreneurial autonomy is indeterminate, if the two conditions are ultimately inseparable, then a legal and policy language that presents them as incommensurable, that prohibits speaking of them at the same time, cannot help but flutter back and forth over a terrain of industrial activities that always involves both.

On a broader level, the CLS understanding of legal history as a series of maneuvers to rescue Liberalism from itself provides a suggestive overview of the nature of broadcast regulation in general. For example, the fact that broadcast channels are legally designated as "public" property but are nonetheless bought and sold as if they were private property has generated confusion ever since the basic structure of broadcast regulation was laid out in the 1920s. From both a left-of-center (2) and a right-wing (12) point of view, the system by which the government licenses the spectrum to private broadcasters who serve as trustees of the public interest has been much criticized as a confused jumble of laissez-faire and statist principles. CLS analysis points to a pattern in that confusion: the effort to rescue Liberalism from itself by shifting weight from one Liberal pole to another, from marketplace rights to bureaucratic expertise, from law toward policy.

The "chaos of the airwaves" that threatened the development of broadcasting

in the early 1920s presented government and business elites with a striking dilemma. Autonomous individual radio broadcasters, rationally pursuing their selfish individual interests, had created a mess, not a market; Adam Smith's invisible hand was not working. The trick was thus finding a way to rectify the situation without too obviously abandoning the Liberal principles of private ownership and competition upon which the legitimacy of private ownership of radio (and capitalism in general) depended.

In 1925, then-Secretary of Commerce Herbert Hoover told a conference of industry and government insiders concerned with solving the interference problem that "the choice is between public interest and private desire, and we need not hesitate in making a decision. . . . The use of a radio channel is justified only if there is public benefit" (16). Hoover's Liberalism here is revealed not merely in his preference for the "public interest" but in the fact that he sees the choice as one between a dichotomized public interest and private desire, between a reified public good set against an atomized, self-interested individual autonomy. Generally, Hoover and his cohorts reconciled the opposing poles of this basic Liberal dichotomy through the marketplace; and, in the case of radio, the market of course remained at the center of their vision. But when faced with the failure of the marketplace in the form of spectrum chaos, their dichotomized Liberal understanding of human existence made a turn to the public interest half of the dichotomy the natural thing to do.

Just as Locke pointed to the universal truths discovered by physicists to rescue his autonomous individual from solipsism, Hoover and friends pointed to a universal "public interest" ascertained by regulatory experts to rescue capitalist control of radio from self-destruction. They turned from one set of contradictions to another. Regulation of the spectrum by an independent, objective, expert body—at first the Federal Radio Commission, and later the Federal Communications Commission—was thought to be the only way to allow anything resembling private ownership and control to survive. The goal was thus to recover the marketplace in broadcasting by tempering it with regulation. Similarly, although conservative critics tend to obscure this fact, regulations like the Fairness Doctrine have always been designed to uphold the marketplace of ideas by protecting it from its own perceived failures.

Some hope to overcome the contradictions of our broadcast policy by reining in the chaos of private desire with a rationally conceived public interest—by moving, in other words, in the direction established but only sheepishly pursued in the Hoover era. One common reaction, strongly reminiscent of (and in some cases influenced by) the legal realists, implies that the confusions of broadcast policy can be overcome by making the FCC more independent, more expert, more scientific, and generally more rational. Frequent calls for more precise and objectively verifiable definitions of the public interest standard fall into this category,[11] as do the frequent propos-

[11] The FCC's controversial "Blue Book" proposal, for example, argued that the commercialism resulting from an exclusive reliance on marketplace forces to determine broadcast content (cont'd. on p. 58)

als for bureaucratically restructuring the regulatory system in order to make it more autonomous and thus better insulated from the "subjective" (and thus "irrational") political winds of the lobbying process.[12]

These measures, to date largely untried in the United States, nonetheless are propelled by a similar Liberal dichotomization of public good and individual desire and by a similar shift from one Liberal pole to another. Conservative critics' complaints that such measures favor bureaucratic state control at the expense of individual autonomy miss the point (and reflect a studied ignorance of the pressures toward private sector forms of bureaucratic totalitarianism common to corporate capitalist enterprises). Rather, the calls for a more activist regulatory apparatus would seem doomed to run aground because, as was the case with the legal realists, the references to rationality, public interest, and objectivity in the proposals are in the end reifications that merely obscure the contradictions they are supposed to transcend (cf. 40).

The major contemporary alternative to "rational policy" approaches is deregulation, which is often conceived as a return to Liberal fundamentals such as laissez-faire economics and the free marketplace. To the extent that this is true, the movement suffers from the same contradictions that prompted the shift toward policy-oriented measures in the first place. One of these contradictions centers on the belief in the "natural" or "normal" quality of the marketplace and of rights. This assumption is evident in the words of former FCC chair Fowler and his legal assistant: "Instead of defining public demand and categories of programming to serve this demand, the commission should rely on broadcasters' ability to determine the wants of their audiences through the normal mechanisms of the marketplace. The public's interest, then, defines the public interest" (12, p. 648). The last sentence is a marvelously blunt example of the closed loop of circular reasoning that characterizes the marketplace faith: Since the marketplace is "normal," whatever happens in the absence of govern-

(cont'd. from p. 57) clearly fell short of fulfilling the "public interest" (10, excerpted in 21). This inadequacy of the marketplace, therefore, ought to be remedied by specifying detailed requirements for informational and sustaining programming, according to percentages fixed by economic and social scientific analysis. A similar logic underlay the much less aggressive but temporarily successful efforts in 1960 to require broadcast stations to regularly "ascertain" the needs and interests of their local communities by conducting social scientific surveys (11). At this same time, when the self-confidence of positivist social science had reached its zenith, Paul Lazarsfeld confidently informed the FCC that, given enough time and "a corps of trained minds, it would be possible to set up workable standards of excellence in television" (9, p. 252). The pattern is also clearly evident in a recent proposal (appropriately enough advanced in one of Lasswell's brainchildren, the journal *Policy Sciences*) that argues—again on the grounds that the marketplace has failed to serve the public interest—for a mixture of formal bureaucratic structures (local radio boards) and sophisticated "psychographic" survey analyses for discovering "taste communities" that could be used to determine broadcast diversity (19; see also 15).

[12] This was the general thrust of the report for the Kennedy administration by James Landis, who condemned the FCC in 1960 for generally vacillating hopelessly in the face of political winds (30). Later in the decade, Eugene Rostow called for the creation of a centralized government agency charged with planning and coordinating the U.S. telecommunications system, on the theory that something was needed to lift communications policy making up above the petty, feudal squabbles that bogged down the FCC (47).

ment constraint is assumed to be a marketplace and thus, by definition, what the public needs and wants. Whatever happens, in other words, is in the public interest.

It is common to condemn deregulators for forfeiting the public good to the greed of the rich and the powerful by completely freeing industry from government restraint. A more biting criticism, however, would begin with the internal contradictions of deregulatory philosophy. The idea of a market completely free of government is a logical impossibility. Even property rights, the foundation stone of the simplest, most pristine marketplace system, require government intervention in the form of a system of courts and police. As Mosco and others have pointed out, deregulation involves a shift in the *type* of government intervention, not a removal of government intervention altogether (35, p. 107). This fact helps explain why the Reagan-era FCC found itself engaged in regulation in the name of antiregulation. After setting out in pursuit of what it thought was a "normal" and self-evident marketplace, the FCC has found itself embroiled in the contentious and interminable process of determining if, and to what extent, the current telecommunications industry can be considered "competitive," particularly in the markets inhabited by A.T.&T. and its smaller challengers. As a result the FCC has been, in the words of *Business Week,* "deregulating itself into one of the most important agencies in Washington" (48, p. 48).

According to some CLS work, however, the new prestige of economics in policy and legal circles associated with deregulation embodies not so much a return to the old Liberal fundamentals as a version of the technocratic fascinations of the legal realists with an added conservative twist (17; 26, p. 387). Within policy circles, the heroes of deregulation such as Alfred Kahn and Richard Posner embody a new form of fascination with expertise and social science, this time centering on the concept of "efficiency" and the tools of "post-Coaseian" law and Chicago School economics. CLS critiques hold that the thrust of deregulatory economics is not so much in the direction of a preference for "subjective" freedoms as it is toward the "objective" values of competitive efficiency, understood in contrast with the arbitrary and "subjective" quality of industry regulation by clumsy government bureaucrats. Besides the tension that this technocratic tendency creates within the conservative ranks (the specter of economist-judges meddling with the intimate internal workings of businesses in order to make legal decisions that promote "efficiency" does not exactly square with the right wing's opposition to judicial activism), the key concepts of these neoclassical economists are susceptible to the same form of criticism that undermine the legal realists and their successors.

For example, it has been argued that economic "efficiency," although promoted as a value-neutral, objectively knowable quality of economic life, is actually a relative term; what is efficient for some people and some purposes is inefficient for other people and other purposes. The apparent neutrality of a policy devoted to promoting efficiency, therefore, can mask a decision that promotes the interests of some over those of others. At worst, the principle of economic "efficiency" is deceiving. At best, like the ambiguous phrases it is supposed to supplant, the indeterminacy of the term will allow it to be adapted to

the ends of the conventional policy arguments and interests with little substantive change in outcomes.

This essay has made two principal claims about U.S. broadcast policy. First, it has argued that broadcast policy generally embodies a response to the dilemmas of a social and political system that frames problems in Liberal terms, i.e., in terms of reconciling free autonomous individuals with the social good and thus rescuing individuals from solipsism and society from chaos. The means of accomplishing this reconciliation involves formal, abstract systems of procedure such as the rule of law, independent regulatory agencies, a reified public interest, and "policy research."

Second, this conceptual structure swivels around a hollow core that renders its basic terms indeterminate so that, when taken exclusively on its own terms, it leads to a kind of verbal dead end. *Within* those formal abstract systems, in other words, within law and within policy, one is limited to indeterminate, empty restatements of dilemmas. Legal reasoning cannot resolve the dilemmas of law; policy expertise cannot resolve the problems of policy.

The implication is that the major competing positions in the key contemporary broadcast policy debates—for example, freedom of the press vs. public access, or marketplace vs. public interest regulation—may not hinge on genuine choices between practical activities. Rather, today's policy debates may be better understood as recapitulations of a set of insoluble dilemmas inherent in our notions of rights, individuals, and government, notions rooted in the structures of Liberalism.

The goal here, it should be noted, has not been just to indulge in the common practice of pointing out the obvious ironies of the U.S. system of policy making. Most policy researchers are fully aware that the nominally independent FCC is anything but independent, that the phrase "public interest" is extraordinarily vague, that existing broadcast legislation was written for out-of-date technologies, and so forth. The argument here goes much deeper than that. Nor is this another claim that the policy process has somehow degenerated because, say, the FCC has been "captured" by special interests, or it hasn't been given a clear mandate, or its actions have become merely symbolic (although this analysis may suggest some explanations of why the FCC may *seem* so unsatisfying). The argument is rather that, even if one assumed that all parties to the policy process were supremely intelligent, benevolent, honest, effective, and deadly serious about following the terms and procedures of the U.S. system of policy to the letter, the policy-making process would still crumble of its own accord, would still fail to live up to its purported goals of impartially serving the public interest. Most U.S. broadcast policies and policy proposals rest on a hopelessly unstable and contradictory collection of terms and concepts.

So what is the value of this kind of analysis? Where is one to go from here? There is no simple answer. Communications policy, however confused, is still a patterned confusion, shaped by the structures of history and contemporary social life, particularly those associated with Liberalism. The contradictions of communications policy exemplify the tensions within our most fundamental

beliefs and ways of acting, tensions revealed in the way we use terms like "individuals," "groups," "freedom," and "constraint." No new law, policy, or bureaucratic structure can make those tensions disappear overnight. The hope for an administrative quick fix, for a clever regulatory stratagem or legal maneuver that will resolve those tensions, is itself a problematic expression of the same Liberal conceptual system that created the tensions in the first place.

This kind of analysis, nonetheless, has useful implications that merit further exploration. First, a critique of the principles and practices of broadcast policy can contribute to a better understanding of the medium. It has been said that the power of broadcasting in society should not be attributed "to the naked technology itself, but to the legal and organizational formulae that have been adopted to clothe and control it" (43, p. 15). This essay has suggested a way to analyze those legal and organizational formulae, the policies, of broadcasting. It has shown that many of the much-discussed and much-debated details of U.S. broadcast policy gain their meaning from a taken-for-granted intellectual framework—the complex and varied framework of Liberalism—and that many contemporary regulatory struggles and dilemmas are usefully understood as rooted in dilemmas within the Liberal belief system. Of course, this essay has presented only an overview. To pursue these issues in depth, one would have to explore policy practices, concepts, and their place in law, politics, history, and contemporary life at much greater length, along with numerous other important, related terms and concepts, such as "technology," "information," and "entertainment."

But the value of this kind of work goes beyond mere academic understanding. By lifting the broad outlines of communications policy out of the taken-for-granted background and holding them up for analysis and questioning, we reveal those outlines to be not simply "the way things are," not an objective necessity, but a product of the human imagination, a kind of social philosophy in practice. And the fact that our system of broadcast policy is something imagined raises the clear possibility—however remote such a possibility may seem at this moment in history—of imagining it, and thus constructing it, otherwise.

References

1. Adorno, Theodor W. and Max Horkheimer. *Dialectic of Enlightenment.* New York: Herder and Herder, 1972.
2. Barnouw, Erik. *A History of Broadcasting in the United States,* Volume 1: *A Tower in Babel; To 1933.* New York: Oxford University Press, 1966.
3. Barnouw, Erik. *The Sponsor: Notes on a Modern Potentate.* New York: Oxford University Press, 1978.
4. Berman, Marshall. *All that Is Solid Melts into Air: The Experience of Modernity.* New York: Simon & Schuster, 1982.
5. Boyle, James. "Modernist Social Theory: Roberto Unger's *Passion.*" *Harvard Law Review* 98, 1985, pp. 1066–1083.

6. Boyle, James. "The Politics of Reason: Critical Legal Theory and Local Social Thought." *University of Pennsylvania Law Review* 133(4), April 1985, pp. 685–780.

7. Cohen, Felix. "Transcendental Nonsense and the Functional Approach." *Columbia Law Review* 35, 1935.

8. Culler, Jonathan. *Framing the Sign: Criticism and Its Institutions.* Norman: University of Oklahoma Press, 1988.

9. *Current Biography.* Bronx, N.Y.: H. H. Wilson, 1964.

10. Federal Communications Commission. *Public Service Responsibility of Broadcast Licensees.* Washington, D.C.: U.S. Government Printing Office, March 7, 1946.

11. Federal Communications Commission. "Report and Statement of Policy re: Commission *en banc* Programming Inquiry (The 1960 Programming Policy Statement)." *Federal Register* 25, July 29, 1960, p. 7291; *Federal Communications Commission Reports* 44, July 29, 1960, p. 2303.

12. Fowler, Mark S. and Daniel L. Brenner. "A Marketplace Approach to Broadcast Regulation." *Texas Law Review* 60, 1982. Reprinted in Ellen Wartella and D. Charles Whitney (Eds.), *Mass Communication Review Yearbook,* Volume 4. Beverly Hills, Cal.: Sage, 1983, pp. 645–696.

13. Friendly, Fred W. *The Good Guys, the Bad Guys, and the First Amendment: Free Speech vs. Fairness in Broadcasting.* New York: Vintage Books, 1977.

14. Geller, Henry. *The Fairness Doctrine in Broadcasting.* Santa Monica, Cal.: Rand, 1973.

15. Glasser, Theodore L. "Competition and Diversity Among Radio Formats: Legal and Structural Issues." *Journal of Broadcasting* 28(2), Spring 1984, pp. 127–142.

16. Hoover, Herbert. "Opening Address to the Fourth National Radio Conference in 1925." In U.S. Senate, Committee on Interstate Commerce, *Hearings on Radio Control,* January 8–9, 1926, pp. 50–58.

17. Horwitz, Morton. "Law and Economics: Science or Politics?" *Hofstra Law Review* 8, 1980, pp. 905–914.

18. Huyssen, Andreas. *After the Great Divide.* Bloomington: Indiana University Press, 1986.

19. Jassem, Harvey C., Roger J. Desmond, and Theodore L. Glasser. "Pluralistic Programming and Radio Diversity: A Review and a Proposal." *Policy Sciences* 14, 1982, pp. 347–364.

20. Jensen, Jay W. "Liberalism, Democracy and the Mass Media." Unpublished Ph.D. dissertation, University of Illinois at Urbana-Champaign, 1957.

21. Kahn, Frank J. (Ed.). *Documents of American Broadcasting* (4th ed.). Englewood Cliffs, N.J.: Prentice-Hall, 1984.

22. Kairys, David (Ed.). *The Politics of Law: A Progressive Critique.* New York: Pantheon Books, 1982.

23. Kelman, Mark G. "Trashing." *Stanford Law Review* 36, January 1984, pp. 293–348.

24. Kennedy, David. "Critical Theory, Structuralism, and Contemporary Legal Scholarship." *New England Law Review* 21(2), 1985–1986, pp. 209–289.

25. Kennedy, Duncan. "The Structure of Blackstone's Commentaries." *Buffalo Law Review* 28, 1979, pp. 205–382.

26. Kennedy, Duncan. "Cost-Benefit Analysis of Entitlement Problems: A Critique." *Stanford Law Review* 33, 1981.

27. Kennedy, Duncan. "Legal Education as Training for Hierarchy." In David Kairys (Ed.), *The Politics of Law: A Progressive Critique.* New York: Pantheon Books, 1982, pp. 40–64.

28. Kennedy, Duncan. "The Stages of the Decline of the Public/Private Distinction." *University of Pennsylvania Law Review* 130, 1982, pp. 1349–1357.

29. Krasnow, Erwin G., Lawrence D. Longley, and Herbert A. Terry. *The Politics of Broadcast Regulation* (3d ed.). New York: St. Martin's Press, 1982.

30. Landis, James. *Report on Regulatory Agencies to the President-Elect.* Printed for use of the Senate Committee on the Judiciary, 86th Cong., 2d sess. Washington D.C.: U.S. Government Printing Office, 1960.

31. Lasswell, Harold D. and Myres S. McDougal. "Legal Education and Public Policy: Professional Training in the Public Interest." *Yale Law Journal* 52(2), March 1943, pp. 203–295.

32. Levinson, Sanford and Steven Mailloux (Eds.). *Interpreting Law and Literature: A Hermeneutic Reader.* Evanston, Ill.: Northwestern University Press, 1988.

33. Mensch, Elizabeth. "The History of Mainstream Legal Thought." In David Kairys (Ed.), *The Politics of Law: A Progressive Critique.* New York: Pantheon Books, 1982, pp. 18–39.

34. Moon, John. "The Freedom of Information Act: A Fundamental Contradiction." *American University Law Review* 34, 1985, pp. 1157–1189.

35. Mosco, Vincent. "Toward a Theory of the State and Telecommunications Policy." *Journal of Communication* 38(1), Winter 1988, pp. 107–124.

36. Parsons, Patrick. *Cable Television and the First Amendment.* Lexington, Mass.: Lexington Books, 1987.

37. Peters, John. "Four Liberals on the Public Sphere: Locke, Rousseau, Tocqueville, and Dewey." Paper presented to the annual meeting of the International Communication Association, Montreal, 1987.

38. Peters, John. "John Locke, the Individual, and the Origin of Communication." *Quarterly Journal of Speech,* in press.

39. " 'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship." *Harvard Law Review* 95, 1982, pp. 1669–1690.

40. Rowland, Willard D., Jr. "The Process of Reification: Recent Trends in Communications Legislation and Policy-Making." *Journal of Communication* 32(4), Autumn 1982, pp. 114–136.

41. Saussure, Ferdinand de. *Course in General Linguistics.* New York: McGraw-Hill, 1966.

42. Schwartz, Bernard. *The Professor and the Commissions.* New York: Knopf, 1959.

43. Smith, Anthony. *The Shadow in the Cave: The Broadcaster, His Audience, and the State.* Urbana: University of Illinois Press, 1973.

44. Streeter, Thomas. "Polysemy, Plurality, and Media Studies." *Journal of Communication Inquiry* 13(2), Summer 1989, pp. 89–103.

45. Unger, Roberto M. *Knowledge & Politics.* New York: Free Press, 1975.

46. Unger, Roberto M. *The Critical Legal Studies Movement.* Cambridge, Mass.: Harvard University Press, 1986.

47. United States, President's Task Force on Communications Policy. *Final Report.* Washington, D.C.: U.S. Government Printing Office, 1968.

48. Wilke, John. "Has the FCC Gone Too Far?" *Business Week,* August 5, 1985, pp. 48–54.