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DOUBTING DONALD: A REPLY TO PROFESSOR DONALD GALLOWAY'S "CRITICAL MISTAKES"***

by
Richard F. Devlin*

In a recent article Professor Galloway has argued that supporters of the Critical Legal Studies perspective make five fundamental errors in their analyses of liberal theory and as a result have failed in their deconstructive agenda. In this essay Professor Devlin replies to these criticisms and posits that Galloway's essay in retrieval is itself subject to the very same errors of which he accuses the "crits". Moreover, it is argued that the nature of Galloway's partial defence of liberalism confirms rather than denies the accuracy of critical assessments.

Donald l'incrédule: Réponse aux "Critical Mistakes" (Erreurs critiques) du professeur Donald Galloway

Un article récent du professeur Galloway prétend que les partisans des Critical Legal Studies (Etudes juridiques critiques) commettent cinq erreurs fondamentales dans leurs analyses de la théorie libérale, et que par conséquent ils échouent dans leur tentative de déconstruction. Ici, le professeur Devlin répond à ces critiques en affirmant que l'essai d'itération de Galloway commet les mêmes erreurs dont il accuse les "criticistes." En plus, le présent auteur trouve que la défense partielle du libéralisme offerte par Galloway, loin de nier l'exactitude des évaluations criticistes, tend plutôt à les confirmer.

"An observation of human behaviour is that people respond, often dramatically, when the ideas that give meaning to their lives are threatened. Critical Legal Studies challenges many of the things that constitute the psychological and professional identity of legal academics, so their response is understandable. While CLS has been scorned and derided, at least within the legal academy it has had a profoundly disquieting impact in undermining the accepted modes of legal discourse. One response has been simply to attempt to remove the critics. For more thoughtful and committed scholars, a different response has been to build an intellectual defense."¹

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¹ J.M. Feinman, "Practical Legal Studies and Critical Legal Studies" (1988), 87 Mich. L.R. 724, 730.

It seems to me that one of the most interesting developments in the legal scholarship of the rich Euro-American societies has been the emergence of what has become known as Critical Legal Studies. Somewhat less interesting, but politically crucial, has been the response triggered in the legal academy. At first, the liberal legal academy was open to critical analyses while they were still in embryonic form and scarce enough to be politically unthreatening. However, as the movement has garnered strength (and followers) the limits of liberal tolerance have rapidly been reached. It is in the United States that the reaction has been most vehement with widely publicized invectives from pillars of the American legal academy calling for the expulsion of the Crits from the citadel.² In Britain, the response has been more subtle suggesting that there is nothing particularly innovative about the Crits, that they may be merely "iconoclastic social democrats",³ "perhaps no more than a passing fashion".⁴

Characteristically, the Canadian response has been more muted.⁵ In this brief essay I want to respond to what I consider to be an important Canadian challenge to critical legal studies, Professor Donald Galloway's "Critical Mistakes".⁶ In so doing I will suggest

² P. Carrington, "Of Law and the River" (1984), 34 *J. of Leg. Ed.* 222; R. Posner, "The Present Situation in Legal Scholarship" (1981), 90 *Yale L.J.* 1113, 1128. For a useful overview of reactions to the crits in the United States coupled with some thoughtful replies see J. Frug, "McCarthyism and Critical Legal Studies" (1987), 22 *Harv. C.R.C.L.L.R.* 665.

³ N. McCormick, "Reconstruction After Deconstruction: A Response to CLS" (1990), 10 *Ox. J. Leg. St.* 539.

⁴ J.M. Finnis, "On Legal Studies Movement" in J. Eekelaar, J. Bell (eds.) *Oxford Essays in Jurisprudence* (Third Series) (1987) 145. The politeness of the British response should not however be understood as totally benign for McCormick accuses various crits of being "contemptuous" and "impertinent" (*supra* note 3, 555 & 556), and Finnis posits that Unger is "careless" (*id.*, 150) and guilty of "alarmist conjuring" (*id.*, 163). Perhaps the most vitriolic response is Tony Weir's review of Hugh Collins, *The Law of Contract* (1986), in which he variously accuses Collins of *inter alia*, "perversity", "obscurity", "omission", "misrepresentation" and "inaccuracy" (1986), 45 *C.L.J.* 501. As will become obvious, similar accusations underpin Galloway's essay.

⁵ For some responses to the Crits in Canada see L. Green "The Political Content of Legal Theory" (1987), 17 *Phil. Soc. Sci.* 1; D. Dyzenhaus, "The New Positivists" (1989), 39 *U.T.L.J.* 361; B. Langille, "Revolution without Foundation: The Grammar of Scepticism and Law" (1988), 34 *McGill L.J.* 451; J. Underwood Lewis, "Jurisprudence" (1988), 20 *Ottawa L.R.* 671, 681; J.E. Bickenbach, Review: *The Rule of Law: Ideal or Ideology* (1989), 39 *U.T.L.J.* 211, 213.

⁶ In R.F. Devlin, *Canadian Perspectives on Legal Theory* (1991) 255, hereinafter *Perspectives*. All page references to Galloway's essay in text will be given in parentheses. A note of explanation is perhaps appropriate here. I asked Professor Galloway to participate in this book, which is an attempt to develop a set of Canadian teaching materials, as I believe he is an important interlocutor

that, first, he is guilty of some of the very things of which he accuses the crits; second, that his cautious defence of liberalism betrays a startlingly anaemic vision of the liberal theoretical agenda; and third, that his strategies of resistance incorporate both of the reactions outlined by Feinman in the opening quotation. To be fair to Galloway, though, he is no "fundamentalist liberal"⁷ for he recognizes some of the limitations of liberalism and acknowledges that the crits may have done some good. However, as I read him, these laurels are begrudgingly given and relate more to the vivacious style and emotionalism of the crits, and not to their substance.

But I rush ahead of myself. Before I substantiate these propositions through a cautious reading of Galloway's arguments, it will be helpful if I trace (if only briefly) the outline of his thesis. Galloway commences his article with a confession that the "non radical mainstream literature" [255] on law is somewhat flawed, but argues that it is much less problematic than the crits suggest. Indeed, he states that his aim is to "reassert . . . the strengths of mainstream theory" [256], to "expose . . . the weaknesses in the Crit strategies" [256], and that his method will be to demonstrate that crits have failed to "meet stringent internal requirements" [256]. In short, his is a self confessed essay in redemption.

The essence of his concern and the nature of his redemptive technique are captured in the following quotation:

"Canadian Crits have used a number of strategies . . . to dissuade people from exploring in depth or taking seriously the writings of non-radical theorists. I proceed by examining five of these strategies with a view to arguing that, while they may have been successful in so persuading people, they ought not to have been" [256, footnote omitted].

in the Canadian jurisprudential debate. As with all contributors, I gave him fairly wide scope to address whatever he felt was his current interest and perspective. I did request him to contribute to the Chapter on Liberalism, but he indicated that his preference would be to do a critique of the crits and I thought, and still think, it was a great idea as it reinforces the dialogic aspirations of the book. The only two limitations I set were that it be approximately twenty-five pages, and be as "Canadian" as possible. Obviously, in a text of the nature of *Canadian Perspectives on Legal Theory* it would have been an abuse of my editorial role to comment on Galloway's essay. Therefore, what follows is an attempt to continue the critical conversation in the spirit of openness and genuine disagreement. I should also point out that this is Galloway's second challenge to the crits, the first being his review of Allan Hutchinson's *Dwelling on the Threshold* (1988), perhaps somewhat harshly entitled, "No Guru, No Method" (1988), 8 *Windsor Yearb. Access Justice* 304.

⁷ I borrow this phrase from Asbjorn Eide, "Strategies to Enforce the Right to Food", Presentation at "Human Rights in the Twenty-First Century: A Global Challenge", Banff, Alberta, November 9-12, 1990.

The remainder of the essay is a purported identification, documentation and deflation of these five posited critical strategies interspersed with some modest revisions of mainstream theory. More specifically, Galloway claims that the crits are guilty of: a) the false representation of non-critical positions; b) an absence of consideration of the nature of the enterprise upon which mainstream theorists are embarked; c) a reductionist reading of the rich and diverse liberal tradition; d) a failure to pay sufficient attention to, and discriminate between, the various positions within liberal theory; and e) the presentation of mainstream theory as an instrument of legitimation. In support of these indictments, Galloway draws heavily on the work of Joseph Raz and Ronald Dworkin.

If Professor Galloway was correct in these accusations, if he was accurate in his claim that the crits unfairly mislead people as to the virtues of liberal legal theory, then I do believe that this essay would be a serious challenge to the integrity of the critical agenda. However, I think that his critique is, in part, inaccurate and misplaced, and that his revision of the liberal project ultimately causes more, rather than less, problems for the liberal theoretical agenda. My purpose in this essay is to analyze and rebut each of Galloway's criticisms in turn and, in the process, to provide some further elaboration of certain critical positions as well as to conjecture as to the current status of the critical legal studies movement.

a) False Representation

Galloway's primary complaint is that Crits represent "noncritical positions falsely" [257]. This he variously describes as "patent inaccuracy" [257], a most "pernicious gambit" [257] and a "misinformation" [258] campaign. Just in case there is any doubt as to the seriousness of Galloway's concern, he emphasizes "that he is not referring to unusual interpretations of a text or argument" [257].

Galloway's first, and therefore I assume star, example of allegedly false representation relates to two sentences which he selects from one of my recently published articles. He quotes:

Coercion has been much ignored in recent jurisprudential debate. Not surprisingly liberals, emphasizing rights, have tended to ignore this issue because it raises the spectre of a legitimation crisis.⁸

Several points are worth noting about these sentences. The first is that Galloway provides little by way of their context. The sentences are to be found in an article that has less to do with critiquing "liberal theory" than providing a neo-marxist interpretation and examples of the nature and practice of law, premised upon an existentialist/situationalist rather than mainstream methodology.

⁸ "Law's Centaurs: An Inquiry into the Nature and Relations of Law, State and Violence" (1989), 27 *Osgoode Hall L.J.* 219, 235.

Secondly, the sentences that follow those quoted by Galloway then proceed to criticize the Frankfurt School of Critical Theory, the North American Critical Legal Studies Movement and neo-Marxist theorists of the state for also underestimating the potency of state violence. Consequently, the first sentence of the quotation refers to both mainstream and critical theory. Can one sentence in a seventy four page essay that does not specifically address liberal legal theory really do as much as Galloway fears?

Moreover, and third, if we are to be in the business of textual nitpicking, I do not say that liberals have "ignored" the issue of coercion, rather it is that they have "tended to ignore" it. My point was to suggest that it plays a less than crucial role in much of modern liberal analysis. But Galloway would reject even this restated version of my position. For example, he points to Dworkin's *Law's Empire* arguing that it is "built around the premise that the point of law is to guide and constrain the power of government" [258] and then proceeds to quote one sentence from Dworkin which states that, in essence, the use of force by the state is legitimate if it fits with previous political decisions as to when it can be legitimately used. This, then, is meant to be a refutation of my proposition as to the decentralization of coercion from the liberal discursive agenda.

Galloway sells Dworkin short here for, indeed, in *Law's Empire* there is a specific section entitled, "Grounds and Force of Law" that runs for a whole five pages! A careful reading of this section and a sensitivity to its location in Dworkin's 470 page tome confirms rather than denies my passing comment. For Dworkin, the necessarily coercive nature of law is a taken for granted assumption that does not merit jurisprudential interrogation. Dworkin posits:

for us, legal argument takes place on a rough plateau of consensus that if law exists it provides a justification for the collective use of power against individual citizens or groups.⁹

Or as he says a little later, legal philosophers "share a general unspecified opinion about the force of law . . . the law should be obeyed and enforced."¹⁰ Viewed in the light of these assumptions, we should be grateful to Dworkin for even spending five pages buried one quarter of the way through his book to address this non-issue upon which there is jurisprudential consensus.

There are at least two problems with Dworkin's propositions. First, instrumentalist marxists¹¹ and radically empathetic liberals,¹² for example, have worried at length about the coercive dimensions of law, and so Dworkin's consensual claim is quite simply inaccurate

⁹ *Law's Empire* (1986), 108 [hereinafter *Empire*].

¹⁰ *Id.*, 111.

¹¹ See, for example, certain aspects of Marx's and Engels' analysis of the use of penal laws against Catholics in Ireland in *Ireland and the Irish Question* (1971), and Lenin's, *The State and Revolution* (1976).

¹² See, for example, Robert Cover, "Violence and the Word" (1986), 95 *Yale L.J.* 1601.

unless, of course, he conceives of the legal philosophical community as populated exclusively by relatively like minded (Oxford based) jurists. This, however, leads to my second concern. Just because a bunch of privileged academics agree that the force of law is not important in any jurisprudentially interesting way does not mean that it is not an important question existentially for those who are the victims of legal violence. Indeed the purpose of my essay, drawing as it does from a view from the bottom,¹³ was to introduce a note of discordance into the otherwise harmonious chorus of jurisprudential choirboys. Consensus, if based upon exclusion, can be repressive rather than accurate.

But even Dworkin seems uncomfortable with the position of what might be called "assumed foundational irrelevancy" and so, a few pages later, he supplements his cavalier confession with contrived avoidance. He claims that:

Academic tradition enforces a certain division of labour in thinking about law. Political philosophers consider problems about the force of law, and academic lawyers and specialists in jurisprudence study issues about its grounds. Philosophies of law are in consequence usually unbalanced theories of law: they are mainly about the grounds and almost silent about the force of law. They abstract from the problem of force, that is, in order to study the problem of grounds more carefully.¹⁴

I think two interconnected points are relevant here. Some feminists have suggested that many scholars tend to point to structures as justification for their own personal failures to deal with certain issues. This is variously described as "reification", or the "denial of agency".¹⁵ Viewed from this perspective, and temporarily assuming that Dworkin is accurate, "academic tradition" does not "enforce"; rather, legal philosophers have *chosen* not to deal with the question of the interconnection between law and force. Viewed in this light, Dworkin's "silen(ce) about the force of law" may be reinterpreted as an attempt to wish the problem out of existence.

Secondly, Dworkin's claim that there is a division of labour between "political philosophers" and "academic lawyers" is misleading and unsustainable. Classical jurists as diverse as Plato, Aquinas, Austin, Kelsen and one of Dworkin's own heroes, Kant, have devoted significant aspects of their work to a discussion of

¹³ As the introduction to my essay made clear, my view from the bottom is that of an Irish person who grew up in British occupied Northern Ireland. A parallel but different jurisprudential narrative from the bottom is provided by Mari Matsuda, "Critical Legal Studies, C.L.S. and Reparations" (1987), 22 *Har. C.L.C.R.L.R.* 323.

¹⁴ *Empire*, 111.

¹⁵ See, for example, Jill McCalla Vickers, "Memoirs of an Ontological Exile", in A. Miles and G. Finn (eds.), *Feminism in Canada: From Pressure to Politics* (1982), 27.

the "force" of law, as well as to its "grounds".¹⁶ What this suggests is that Dworkin does not want to deal with the issue of domination through law. Rather, his preference is to simply take it for granted, to use it as a foundation upon which to construct his own legal empire.

But my point about Dworkin, and Galloway's defence of him, is larger. It is not just that Dworkin's discussion of the coercive elements of law is cursory and superficial, an angle that enables him to play out his fantasies of chain novels and Hercules atop Olympus that go on for hundreds of pages. Rather, it is that in his scheme of things, law as coercion is a jurisprudential problematic addressed, if at all, only to be hurriedly disposed of, rather than being understood as a pervasive, systemic and systematic practice of human victimization which philosopher kings cannot even imagine let alone understand. It is for this reason that I asserted, and now reaffirm, that liberal jurists like Dworkin "have tended to ignore" coercion, because we are in fact talking about two different things. Let me develop this last point in more detail by dealing with Galloway's second proposed supporting text for his rebuttal of my comments.¹⁷

As I had not read *The Morality of Freedom* when I wrote "Law's Centaur" I was discomfited by Galloway's proposition that "it offers a penetrating (sic) analysis and persuasive account of (coercion's) proper role in a liberal state" [258]. Consequently, I have spent several weeks studying both the text, and the hefty symposium dedicated to Raz entitled, *The Works of Joseph Raz*.¹⁸ At first blush, it would appear that Galloway's position is fair comment and that I am rightly chastised, and perhaps should even be contrite, for the first three substantive chapters, almost 80 pages in all, are an inquiry into the nature and justification of the authority to use coercion. However, a less superficial analysis rapidly indicates that, in fact, Raz is not really concerned with what I am pointing out in my paper. Raz's primary concern, in perfect harmony with mainstream jurisprudential analysis, is to provide a justification for the authoritative invocation of coercion through state and law. Like Dworkin, at this stage in Raz's argument, coercion is simply assumed and the jurisprudential exercise becomes one of developing arguments to legitimize it. This leads to a fetishization of the concept of authority and a marginalization of the reality of coercion.¹⁹ My

¹⁶ For a brief discussion of some of their thoughts on law and force see R.F. Devlin, "Nomos and Thanatos Part A: The Killing Fields; Modern Law and Legal Theory" (1989), 12 *Dal. L.J.* 298, 317.

¹⁷ Raz, *The Morality of Freedom* (1987) [hereinafter *Morality*].

¹⁸ (1989), 62 *So. Cal. L.R.* 731-1235.

¹⁹ This concern that violence and coercion are not really central concerns for Raz, that they are nagging philosophical nuisances that need to be dealt with, is reinforced by Raz's own proposition, after having discussed "Authority", that "The stage is set for the examination of our main topic" [*Morality*, 107]. Guess what is not really all that important?

paper, on the other hand, seeks to identify a prior question. As its title and overall substance make clear, my primary concern is descriptive and explanatorial rather than legitimizing in nature. It is an attempt to highlight the lived reality and pervasiveness of the violence of law and state in liberal democratic society. The difference is fundamental in that although Raz and I may use the same word, coercion, we are actually talking about two different things. For Raz, coercion is an abstraction, a philosophical problem that needs to be dealt with in order to justify his political morality of freedom through liberty. As such his arguments are squarely in the tradition of positivistic analytic philosophy and his agenda is pitched at the level of how his justifications for coercion are analytically superior to those of a host of other analytic philosophers.

The closest that Raz comes to acknowledging the horror that is law is when he admits that coercion is "evil"²⁰ or when he suggests that:

In a rough and ready way we can divide the ways in which a government controls and influences people into three.

First, some accept its authority and obey its instructions because they are binding on them. Second, the government can and does manipulate the environment, physical, economic and social, in which people live. It constructs roads, flattens hills, digs canals, builds harbours, employs workers, contracts for services. In all these similar ways a government can exercise power and control over people without attempting thereby to exercise authority over them. Finally, a government controls people by providing remedies for breaches of laws and for the violation of people's rights. People who are not subject to the authority of the law may then obey the rules for prudential reasons, or because even though they have no duty to obey, disobedience will do more harm than good.²¹

But even here we must note the positioning and euphemistic way in which Raz discusses state violence. It is placed last, suggesting its relative lack of importance. Moreover, it is characterized as "remedies" for breaches of law and violations of rights. There is a complete absence of context specificity here. There is zero discussion of what types of laws we are talking about; what and whose rights we are assuming; to whose benefit these laws (and consequently these remedies) accrue; the nature of these remedies; and who are the victims of these remedies. Fear of law is re-encoded as obedience for "prudential reasons", and the existential reality of violence is transformed into some rationalistic utilitarian calculus that "disobedience will do more harm than good." Too true.

To be fair to Raz, he does in fact specifically devote ten pages to a direct discussion of coercion and I suppose, if we were to take Dworkin as our benchmark, we should be grateful that Raz

²⁰ *Morality*, 377.

²¹ *Morality*, 103.

devotes 2.33 percent of his 429 page book to the issue.²² However, it is not coercion of itself that is Raz's concern, but rather its relationship to autonomy, and more particularly, the philosophical justificatory role autonomy plays in the anti-perfectionist scholarship of Robert Nozick, which Raz is keen to prove fallacious. Once again we encounter an exercise in avoidance.

Raz approaches the issue of coercion by posing the following rhetorical question:

Is there anything about coercion or its political use to justify anti-perfectionism?

Coercion is an evaluative term. While it has a fixed descriptive core, its meaning cannot be fully explained without noting its moral significance. I will adopt the following definition of coercion.

P coerces Q into not doing act A only if

- A (1) P communicates to Q that he intends to bring about or have brought about some consequence, C, if Q does A.
- (2) P makes this communication intending Q to believe that he does so in order to get Q not to do A.
- (3) That C will happen is, for Q, a reason of great weight for not doing A.
- (4) Q believes that it is likely that P will bring about C if Q does A and that C would leave him worse off, having done A, than if he did not do A and P did not bring about C.
- (5) Q does not do A.
- (6) Part of Q's reason for not doing A is to avoid (or to lessen) the likelihood of C by making it less likely that P will bring it about.
- B P's actions which conform to the conditions set out in A are *prima facie* wrong.
- C The fact that Q acted under those circumstances is a reason for not blaming him for not doing A.

Only a communication meeting conditions A1-4 is a coercive threat.²³

To me, this is such a formulaic and philosophically clinical conception of coercion that it anaesthetizes us to the impact of what coercion, particularly by the state, is like. It is decontextual in that it gives no indication of the massive disparities in power between the coercer and the coerced. It is hypothetical rather than

²² For some it may appear curious that I should attempt to quantify both Raz's ten page and Dworkin's five page account, and more seriously that it betrays a philosophical immaturity that focuses on quantity rather than quality. To be clear, I believe that the text of my essay addresses the issue of the quality of Dworkin and Raz's analyses, specifically in that it suggests interpretive voids; as to the quantity, I simply want to refute Galloway's proposition that either jurist provides an "extended analysis of the concept" [258].

²³ *Morality*, 148.

located and for that reason I consider it to be distracting. But none of this comes as a real surprise because, as Raz admits, his concern is not with a description of coercion, but its use as an evaluative term. As he puts it, "while (coercion) has a fixed descriptive core, its meaning cannot be fully explained without noting its full moral significance".²⁴ In one sense I agree with this, for coercion undoubtedly has both descriptive and evaluative dimensions. Where I take issue with Raz is that he ignores completely any contextual descriptive discussion to focus solely on the evaluative element in the light of his theory of autonomy. The descriptive is acknowledged only to be immediately ignored in the pursuit of some more pressing philosophical agenda, his "aim . . . merely to tie the notion of coercion to a view about excuses".²⁵

This reluctance to deal with the reality of coercion is confirmed several lines later when, reminiscent of Dworkin's strategy of avoidance, Raz posits that he only wants to focus on "coercion by threats" as "this is the form of coercion relevant to political theory".²⁶ Who says? Who has the authority to determine the parameters of relevance of political theory? Is this not victory "by verbal legislation",²⁷ to use one of Raz's more felicitous turns of phrase? This proposition may be true of the myopic agenda of liberal political theory, but is this not solipsistic tunnel vision? Might this be because the practice of coercion, as opposed to the threat, is simply too much for liberal theorists to bear, or is the practice of coercion so removed from their own privileged life experiences that they cannot comprehend it, or recognize its political and philosophical significance to those who are on the receiving end?²⁸ Moreover, the remainder of Raz's discussion proceeds to add insult to injury to those who are the victims of coercion, perhaps unintentionally (after all, they were never the intended audience of his book), for he argues that:

These reflections on the moral significance of autonomy show that though coercion often, even usually, adversely affects people's well-being it does not deserve the special importance attributed to it in much of liberal political thought unless one holds personal autonomy to be of very great value. But even if one does it is easy to exaggerate the evils of coercion, in comparison with other evils or misfortunes which may fall to people in their life.²⁹

²⁴ *Id.*

²⁵ *Id.*, 153.

²⁶ *Id.*, 149.

²⁷ *Id.*, 166.

²⁸ I say this because I am somewhat baffled by the nature of enterprises by people such as Raz. How can someone whose biography reflects an Israeli background (See M. Levine "Forward" (1989), 62 *Cal. L.R.* 731, 736) and who appears to support a Palestinian right to "self-determination" (*Morality*, 207) systematically ignore the legalized violence of the Israeli state?

²⁹ *Morality*, 156. Raz repeats this claim in "Facing Up" (1989), 62 *So. Cal. L.R.* 1153, 1232.

It is small comfort to be told that just because you can be harmed in other ways one should not become too preoccupied with the coercion that could put you away for the rest of your life, or may even terminate your life.³⁰

But there is an even more nefarious side to this trivialization of state coercion that manifests itself towards the end of Raz's book. In an absolutely stunning — because so atypical — discussion of a specific problem Raz addresses the issues of the liberal state's response to "immigrant communities, or indigenous peoples, or . . . religious sects" that do not foster his vision of freedom, his perfectionist conception of "autonomy".³¹ Working on the unargued for, and I would suggest paternalistic, assumption "that their culture is inferior to that of the dominant liberal society in the midst of which they live"³² he opines that:

[t]he perfectionist principles espoused in this book suggest that people [identity and culture unspecified] are justified in taking action to assimilate the minority group, at the cost of letting its culture die or at least be considerably changed by absorption.³³

And, as the remainder of the discussion makes clear, such assimilation will not take place solely on the basis of acts of omission or failures by the state to support such diversity, but also by acts of commission deliberately designed to undercut those who resist the modes of educational incorporationism because, according to Raz, "[i]n such cases assimilationist policies may well be the only human course, even if implemented by force of law".³⁴ Let me re-encode these comments in a more radical discourse. Should these religious, indigenous or immigrant communities not embrace the liberal Razian agenda, if they do not play by his rules, state power — read coercion — will be invoked to enforce his vision. Phrased less euphemistically, the victims and their value structure will be violently suppressed "by force of law". It is, indeed, ironic that Raz should pick this as his solitary contextual example for it betrays the limitations of his analysis confirming rather than refuting my own proposition that liberals, like Raz, pay little attention to the

³⁰ For a discussion of imprisonment practices and death squads in the Irish context see, for example, A. Jennings (ed.), *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (1990); R.F. Devlin, "The Rule of Law and the Politics of Fear: Reflections on Northern Ireland" (1992) *Law and Critique* (forthcoming); for a discussion of imprisonment rates for First Nations people in the Canadian context see M. Jackson, *Locking Up Natives in Canada* (1988); for documentation of the racism of what is euphemistically called the "American justice system" in general, and in particular in the application of the death penalty, see (1988), 101 *Harv. L.R.* 1475 and "Supreme Court: Leading Cases" (1987), 101 *Harv. L.R.* 149.

³¹ *Morality*, 423.

³² *Id.*

³³ *Id.*, 424.

³⁴ *Id.*

located and for that reason I consider it to be distracting. But none of this comes as a real surprise because, as Raz admits, his concern is not with a description of coercion, but its use as an evaluative term. As he puts it, "while (coercion) has a fixed descriptive core, its meaning cannot be fully explained without noting its full moral significance".²⁴ In one sense I agree with this, for coercion undoubtedly has both descriptive and evaluative dimensions. Where I take issue with Raz is that he ignores completely any contextual descriptive discussion to focus solely on the evaluative element in the light of his theory of autonomy. The descriptive is acknowledged only to be immediately ignored in the pursuit of some more pressing philosophical agenda, his "aim . . . merely to tie the notion of coercion to a view about excuses".²⁵

This reluctance to deal with the reality of coercion is confirmed several lines later when, reminiscent of Dworkin's strategy of avoidance, Raz posits that he only wants to focus on "coercion by threats" as "this is the form of coercion relevant to political theory".²⁶ Who says? Who has the authority to determine the parameters of relevance of political theory? Is this not victory "by verbal legislation",²⁷ to use one of Raz's more felicitous turns of phrase? This proposition may be true of the myopic agenda of liberal political theory, but is this not solipsistic tunnel vision? Might this be because the practice of coercion, as opposed to the threat, is simply too much for liberal theorists to bear, or is the practice of coercion so removed from their own privileged life experiences that they cannot comprehend it, or recognize its political and philosophical significance to those who are on the receiving end?²⁸ Moreover, the remainder of Raz's discussion proceeds to add insult to injury to those who are the victims of coercion, perhaps unintentionally (after all, they were never the intended audience of his book), for he argues that:

These reflections on the moral significance of autonomy show that though coercion often, even usually, adversely affects people's well-being it does not deserve the special importance attributed to it in much of liberal political thought unless one holds personal autonomy to be of very great value. But even if one does it is easy to exaggerate the evils of coercion, in comparison with other evils or misfortunes which may fall to people in their life.²⁹

²⁴ *Id.*

²⁵ *Id.*, 153.

²⁶ *Id.*, 149.

²⁷ *Id.*, 166.

²⁸ I say this because I am somewhat baffled by the nature of enterprises by people such as Raz. How can someone whose biography reflects an Israeli background (See M. Levine "Forward" (1989), 62 *Cal. L.R.* 731, 736) and who appears to support a Palestinian right to "self-determination" (*Morality*, 207) systematically ignore the legalized violence of the Israeli state?

²⁹ *Morality*, 156. Raz repeats this claim in "Facing Up" (1989), 62 *So. Cal. L.R.* 1153, 1232.

It is small comfort to be told that just because you can be harmed in other ways one should not become too preoccupied with the coercion that could put you away for the rest of your life, or may even terminate your life.³⁰

But there is an even more nefarious side to this trivialization of state coercion that manifests itself towards the end of Raz's book. In an absolutely stunning — because so atypical — discussion of a specific problem Raz addresses the issues of the liberal state's response to "immigrant communities, or indigenous peoples, or . . . religious sects" that do not foster his vision of freedom, his perfectionist conception of "autonomy".³¹ Working on the unargued for, and I would suggest paternalistic, assumption "that their culture is inferior to that of the dominant liberal society in the midst of which they live"³² he opines that:

[t]he perfectionist principles espoused in this book suggest that people [identity and culture unspecified] are justified in taking action to assimilate the minority group, at the cost of letting its culture die or at least be considerably changed by absorption.³³

And, as the remainder of the discussion makes clear, such assimilation will not take place solely on the basis of acts of omission or failures by the state to support such diversity, but also by acts of commission deliberately designed to undercut those who resist the modes of educational incorporationism because, according to Raz, "[i]n such cases assimilationist policies may well be the only human course, even if implemented by force of law".³⁴ Let me re-encode these comments in a more radical discourse. Should these religious, indigenous or immigrant communities not embrace the liberal Razian agenda, if they do not play by his rules, state power — read coercion — will be invoked to enforce his vision. Phrased less euphemistically, the victims and their value structure will be violently suppressed "by force of law". It is, indeed, ironic that Raz should pick this as his solitary contextual example for it betrays the limitations of his analysis confirming rather than refuting my own proposition that liberals, like Raz, pay little attention to the

³⁰ For a discussion of imprisonment practices and death squads in the Irish context see, for example, A. Jennings (ed.), *Justice Under Fire: The Abuse of Civil Liberties in Northern Ireland* (1990); R.F. Devlin, "The Rule of Law and the Politics of Fear: Reflections on Northern Ireland" (1992) *Law and Critique* (forthcoming); for a discussion of imprisonment rates for First Nations people in the Canadian context see M. Jackson, *Locking Up Natives in Canada* (1988); for documentation of the racism of what is euphemistically called the "American justice system" in general, and in particular in the application of the death penalty, see (1988), 101 *Harv. L.R.* 1475 and "Supreme Court: Leading Cases" (1987), 101 *Harv. L.R.* 149.

³¹ *Morality*, 423.

³² *Id.*

³³ *Id.*, 424.

³⁴ *Id.*

existential reality of coercion, subordinating it to the philosophical pursuit of their preferred perfectionist programme.

For me, coercion is a horrific existential reality that we need to confront, acknowledge and decentre. Consequently, it is not simply a philosophical abstraction that can be subsumed and marginalized within an inquiry into the big philosophical question of the meaning of authority or trivialized by an interrogation of the limits of anti-perfectionism. Rather than seeking ways to legitimize coercion, my project is one of conscientization so as to seek to reduce and perhaps, in my more utopian moments, to even eliminate violence from our politico-juridical practices and therefore not require either Razian or Dworkinian exercises in legitimation. At the very minimum, I would hope to persuade scholars such as Raz and Dworkin that their automatic re-encoding of the issue of violence/coercion as a subissue of "the philosophical explanation of authority"³⁵ is problematic and that they simply do not assume that theirs is the agenda, just because they have always done it that way.³⁶

Perhaps, then, the worst that can be said is that critics like myself and mainstream theorists like Dworkin and Raz are simply operating within two different interpretive frameworks and that when our conversations do overlap we are at cross purposes. But what is surprising is that Galloway does not pick up on this difference between advocates of the nonradical agenda and myself, given that

³⁵ *Id.*, 63.

³⁶ There is one other occasion in which Raz devotes significant space to the issue of coercion and, on first read, this would appear to dovetail with rather than ignore my concerns about coercion. Toward the end of the book, in a discussion of his reinterpretation of autonomy and harm, he posits:

And yet the harm principle is defensible in the light of the principle of autonomy for one simple reason. The means used, coercive interference, violates the autonomy of its victim. First, it violates the condition of independence and expresses a relation of domination and an attitude of disrespect for the coerced individual. Second, coercion by criminal penalties is a global and indiscriminate invasion of autonomy. Imprisoning a person prevents him from almost all autonomous pursuits. Other forms of coercion may be less severe, but they all invade autonomy, and they all, at least in this world, do it in a fairly indiscriminate way. That is, there is no practical way of ensuring that the coercion will restrict the victims' choice of repugnant options but will not interfere with their other choices. A moral theory which values autonomy highly can justify restricting the autonomy of one person for the sake of the greater autonomy of others or even of that person himself in the future. That is why it can justify coercion to prevent harm, for harm interferes with autonomy. But it will not tolerate coercion for other reasons [*Morality*, 418.].

But the important point is that his concerns about coercion are that they infringe his concept of autonomy, but autonomy, like everything else in his book, is first and foremost a philosophical concept, the reality of being a victim of coercion relegated to a second order derivative experience.

he was one of the supervisors for my graduate thesis upon which this article was based. But perhaps this suggests that liberals and radicals are not only of different traditions, but that even when we do use similar discourses we are operating in different hermeneutical circles. As Colleen Sheppard reminds us, "[d]ifferent realities may give different meanings to the same words".³⁷ To conjecture further, that difference might be between what Antonio Gramsci calls "organic intellectuals"³⁸ and "professional philosophers".³⁹

The problem that I want to emphasize in Galloway's portrayal of my critical position is that he re-encodes my interpretation of liberal analysis in a manner that suggests a lack of academic integrity on my part, which is a serious intellectual charge, when the difference is one of stance and commitment. The accusatory nature of his argument betrays a presumption on his part that there are fundamentally correct interpretations, and that those who take a different track must be acting in academic bad faith. The reason why I have had to spend an unconscionably large amount of this article elaborating on my own position is to illustrate that to be different is not necessarily to be defective.

Galloway's second alleged example of what he calls "misrepresentation" [258] is Allan Hutchinson's suggestion that Dworkin's "fraternal community . . . amounts to the very Lockean social contract of the conditional kind that Dworkin is at pains to discredit and disclaim".⁴⁰ Galloway rejects Hutchinson's interpretation on the basis that Dworkin is precise in his analysis in that his idea of community "embodies the idea that associative obligations can be voluntarily incurred, as opposed to the idea that obligations can only be voluntarily incurred, which is the idea that underlies social contract theory" [258]. Having emphasized this distinction Galloway posits that Hutchinson equates the two, and that this is "an egregious misrepresentation" [258].

Professor Hutchinson and I have discussed this critique by Galloway, and it seems to me that it is perhaps appropriate to allow Hutchinson to speak for himself:⁴¹

At least 5 blunt comments come to mind. First, there is nothing *clear* about this supposed distinction, it seems the usual display of Dworkinian sophistry. Secondly, insofar as I understand the distinction, it hardly meets, let alone defeats, the assessment made by Hutchinson. Thirdly, even allowing the distinction (which I do not), a misreading of it hardly amounts to an "example of egregious

³⁷ "The I and the It" in *Perspectives*, *supra* note 6, 417.

³⁸ A. Gramsci, "The Intellectuals" in *Selections from Prison Notebooks* (1971), 5.

³⁹ S. Burton describes Raz's "Law as Practical Reason" (1988), *So. Cal. L.R.* 747, 750.

⁴⁰ Hutchinson, *Dwelling on the Threshold* (1988), 73.

⁴¹ These conversations took place at the Learned Societies Conference, Queen's University at Kingston, June, 1991, and the following paragraph is from a letter by Professor Hutchinson dated August 19, 1991. Copy on file with author.

misrepresentation." If this is the best Galloway can do by way of example, he is skating on very thin ice. Fourthly, he assumes that my conclusion is an interpretation rather than a criticism. The purpose of my conclusion was to complete an analysis that sought to show that, whatever Dworkin thought or said he was doing, a close examination of the substance of his views disclosed a very different theory. Simply because a writer calls herself an X does not mean that she is one. Is it conclusive that, because someone says that "I am not a racist", they are not one? Finally, Galloway seems to engage in intellectual exchange by bold assertion and allegation; there is no attempt at argument or explanation. He seems to think that, because he claims something is so (i.e. Dworkin means this not that), then it is so. This is an exercise in dogma, not in scholarship. Like any writer, Dworkin's ideas must be read in a reasonable light. In the same way that one must not always read them in the worst light, one must not always read them in the best light. Legal theory is about critical debate, not blind allegiance or wilful hostility.

For good measure and, I suppose, to illustrate the pervasiveness of the nasty critical habit of misrepresentation, Galloway points to a comment of Pamela Chapman which indicates that Dworkin adopts a "normative natural law theory" that attempts to "establish guidelines and sources for legal reasoning, that avoid 'political' choices yet are determinative of the appropriate outcomes".⁴²

Yet again Galloway champions the Dworkinian project but also in problematic ways. First, again there is the problem of contextualism. The sentences to which Galloway refers are in the introduction to Chapman's essay, but the substantive discussion which elaborates upon her proposition comes several pages later at 871-873. Second, Galloway's rhetorical exclamation, "Poor Dworkin!" [258], appears to deny that there is any legitimate foundation upon which to conceive of Dworkin as a natural lawyer, but surely this is at least a possible interpretation given that as recently as 1982, just four years before Chapman published her article, Dworkin himself opined:

If the crude description of natural law I just gave is correct, that any theory which makes the content of law sometimes depend on the correct answer to some moral question is a natural law theory, then I am guilty of natural law. . . . Suppose this *is* natural law. What in the world is wrong with it?⁴³

Viewed in this light Galloway seems to have a breathtakingly broad conception of "misrepresentation".

Third, Galloway's main concern with Chapman's proposition, however, is that it posits that Dworkin believes in the separation of law and politics, and that legal decision-making is "apolitical". Galloway's response, drawing on Dworkin's thesis in *Taking Rights*

⁴² P. Chapman, "The Politics of Judging: Section 1 of the Charter of Rights and Freedoms" (1986), 24 *Osgoode Hall L.J.* 867, 368.

⁴³ R. Dworkin, "Natural Law Revisited" (1982), 34 *U. Fla. L.R.* 165 (emphasis in original).

Seriously that legal decision-making should be based upon principles and not policies, argues that such principles are principles of political morality and therefore are manifestly political. This is assumed by Galloway to be a refutation of Chapman's critical interpretation. But once again Galloway may be too hasty in his accusation. First, as I have pointed out, Chapman does have a substantive discussion of Dworkin several pages into her essay and explicitly deals with the principles/policy distinction, rejecting its aspirations.⁴⁴ Second, it should be noted that Chapman places "political" in inverted commas, clearly suggesting that "political" is a loaded concept. It may be true that Dworkin considers that judges, when making decisions, are acting on the basis of principles of political morality, but it is also equally clear that he has a narrower conception of "the political"; that is, decision-making in its legislative form which he argues is not characteristic of — nor appropriate for — the judiciary.⁴⁵ Thus, it should be clear that the dispute depends upon one's understanding of the nature of the concept "political". Therefore, perhaps Chapman's portrayal refers to Dworkin's narrower conception of the separation of legal decision-making from political decision making, which is, in my opinion, a legitimate, if not necessarily a universally accepted, reading of Dworkin's thesis. Thus, perhaps Galloway's defence of "Poor Dworkin" and his onslaught on Pamela Chapman is a little too quick and easy, premised as it is upon a traditionalist and constrained conception of politics.

If I am correct that Galloway's allegations of misrepresentation are unfounded, if I have dispelled concerns about the academic integrity of the critical agenda, if he is quite simply wrong in his accusations, then I think it is fair for those of us who have been challenged to ask why these charges have been levelled.

The answer, I suggest, is to be found in several comments that pepper the first few pages of his commentary. Galloway posits that the crits believe mainstream jurisprudence to be "so defective as to not merit serious consideration" [255]; "that they have used a number of strategies . . . to dissuade people from exploring in depth or taking seriously the writing of nonradical theorists" [256], or that "it would be a travesty if students or potential readers were dissuaded from reading them" [259] because of the various crit "misrepresentations". I believe these propositions by Galloway reveal more than liberals may want to admit. Galloway seems to be driven by a fear that on the basis of these radical interpretations mainstream scholarship will lose part of its readership. Viewed more cynically, his concern seems to be that perhaps the liberals will lose their hegemonic position within the curriculum of the legal academy, that their capacity for determining the parameters of the discourse will be destabilized. If this is an accurate unpacking of Galloway's text, then his reaction is something more than mere "scholarly interchange" as he portrays it [256]. Rather, it confirms

⁴⁴ *Supra* note 42, 872.

⁴⁵ See, for example, Dworkin, *Taking Rights Seriously* (1977), 82.

a key tenet of the critical agenda: the proposition that legal education is a terrain of political contestation and that scholarship, in spite of its pretensions, is always and already predetermined by politics.

Moreover, it seems to me that Galloway's concern about the blinkering of students and other potential readers by the critical commentary underestimates the capacity of these people to think for themselves. Students of legal theory are neither dupes nor automatons who passively accept what they are provided by the professorate. In my experience, especially when one introduces students to critical, feminist or race analyses, students frequently demand and seek out liberal perspectives on these issues. As good lawyers, they want to encounter both sides of the debate. The proposition that students might uncritically accept the critical perspective fails to pay full respect to the intellectual and interrogative strengths of the student body, and simultaneously underestimates the depth of the liberal mindframe of the vast majority of those who go through higher education in North America.

b) Absence of Consideration

By this, Galloway seems to mean that the crits fail to give a full account of the variety of mainstream analyses of law. Specifically, he complains that the primary focus of the critical analysis is on what he variously calls "functionalist", "instrumentalist" or "evolutionary functionalist" [259] thereby ignoring "nonfunctionalist" mainstream accounts of law. As far as I can make out, by "nonfunctionalist" Galloway seems to be contemplating those who "debate about the nature of law", those who inquire "what is law", those who, quoting Les Green, posit that "law is not distinguished by what it does, but how it does it". Tying these nebulous ideas together, Galloway suggests he is talking about the work of those like — you guessed it — Dworkin, Raz and Hart because "they recognize what has escaped the crits . . . that a complete theory of law and political theory must include some analysis of law's uniqueness, and some account of its form" [259].

I think that Galloway touches upon an interesting question here — the tendency for crits to disengage their analyses from those of the dominant discourse — which I will come back to a little later. At this stage, I wish to address some problems in relation to the way he develops his critique.

First, it is not totally clear to me what he means by "evolutionary functionalist" accounts and it would help if he had provided examples of mainstream scholarship that manifest this approach and of critical responses to it.⁴⁶ More specifically, Galloway is of course correct to posit that functionalist analyses of law suffer from fundamental weaknesses — mainstream social science taught us that a long time ago — but this only complements the crits for they have been at

⁴⁶ The closest he comes to providing us with guidance is to refer us to Robert Gordon, a crit, and his essay "Critical Legal Histories" (1984), 36 *Stan. L.R.* 57.

pains to emphasize the weakness of mainstream legal analyses that operate on functionalist assumptions.⁴⁷ However, the looseness of Galloway's conception of functionalism causes him problems because his propositions that "Raz and Dworkin reject functionalist accounts of law" [259] suggests that their analyses are purged of any "instrumentalist" elements, that they do not touch the question of, in Green's terms, "the uses to which law may be put". But surely this is a partial reading of their work. Take Raz for example. As Stephen Perry⁴⁸ points out, Raz's earlier book, *The Authority of Law* is very clear that law's primary function is to provide "publicly ascertainable ways of guiding behaviour and regulating aspects of social life".⁴⁹ Moreover, it is to be noted that Raz does not reject this functionalist characterization of aspects of his work when he replies to Perry in "Facing Up". Indeed, Raz explicitly adopts the discourse of "the functions of law"⁵⁰ and indeed, *contra* Galloway, argues that "(o)ur understanding of law is *greatly defective* unless it includes and is based on a sound view of the *role* of law in practical reasoning. The first precept of legal theory is that law is practical, that its *essential function* is to play a role in its subjects' reasoning about what to do".⁵¹ Moreover, it is difficult to comprehend how Galloway fails to recognize the instrumentalist aspects of the *Morality of Freedom* given that the book is touted by Neil McCormick (who Galloway quotes at page 261) as a "transition from analysis to advocacy".⁵² Specifically, it seems to me that Raz's proposition that the law and state should promote perfectionist policies that will facilitate the development of individual well being and autonomy⁵³ is hardly devoid of instrumentalist connotations.

My point here is quite simple. It is that though the primary focus of scholars such as Raz may not be on "the uses to which law may be put" [259] their analyses of the "how" of law are premised upon certain, at least instrumental, assumptions as to the desirable social function of law. If this is so, then Galloway himself has failed at the very minimum to give sufficient consideration to those whose work he advocates or, perhaps more disturbingly, he has provided a selective reading of their work.

Furthermore, Galloway speculates, not for the first time in the essay, that critics reckon that the mainstream approaches are "wholly unimportant, and not worthy of serious consideration" [259]. This, I suggest either misunderstands or demonstrates a lack of familiarity with the extensive critical literature. Hart has received some critical

⁴⁷ See for example, M. Feinman "Critical Approaches to Contract Law" (1983), 30 *U.C.L.A.* 819.

⁴⁸ "Second Order Reasons, Uncertainty and Legal Theory" (1988), *So. Cal. L.R.* 913, 950.

⁴⁹ *The Authority of Law* (1979), 51.

⁵⁰ *Supra* note 29, 1201.

⁵¹ *Id.*, 1154.

⁵² Preface: Symposium, *supra* note 18, 743, 744.

⁵³ *Morality*, 19.

analysis⁵⁴ and Dworkin has been the focus of several challenges by critical scholars.⁵⁵ More generally, the accusation that the crits posit that mainstream scholarship is not "worthy of serious consideration" [259] is not supported by any examples of critical claims to this effect. To the contrary, crits spend a great deal of their time critiquing liberalism both internally and externally, because it is so important as an ideological practice. In part, this may be why crits find it so difficult to articulate their reconstructive agenda: they are continually trying to keep up with the cottage industry that is called mainstream legal theory. This extensive critical focus on the limits of liberalism makes crits an easy target for Galloway's criticism that they are "negative postmodernists" [262]. Thus, crits are damned if they do and damned if they don't. If they focus their critical skills on liberalism they are nihilists, if they pursue their own agenda they are missing the (liberal) boat. This then points to the deeper issue of who controls the discursive agenda, who gets to determine what is important? Viewed in this light, Galloway's essay is an attempt to maintain the discursive hegemony of the nonradical elite, all others being supplicants for inclusion in a pre-structured and constraining liberal discourse.

Finally, under this rubric of absence of consideration, let me briefly address Galloway's proposition, drawing heavily on Les Green, that the key distinction of "nonfunctionalist" accounts of law is that they provide "some analysis of law's uniqueness, and some account of its form" as preliminaries to "a serious inquiry into the general relationship between law and politics" [259-260]. The suggestion, of course, is that these intricacies escape the crit. Once again it is the old story of the higher lights being crassly misunderstood by the pedants. But this betrays a misunderstanding of the critical position. Galloway is correct to suggest that crits do not believe that law is unique, because to focus exclusively on "how it does it" is, from a critical perspective, to reify law,⁵⁶ to disconnect it from the vagaries — both individual and collective — of human agency, to shift the spotlight from legal actors onto some phenomenological fiction called "Law". This is considered to be an exercise in the institutionalization of irresponsibility.⁵⁷ But this does not mean

⁵⁴ See for example, F. de Coste, "Radical Discourse in Legal Theory: Hart and Dworkin" (1989), 21 *Ottawa L.R.* 679; J. Singer, "The Player and the Cards: Nihilism and Legal Theory" (1984), 94 *Yale L.J.* 1, 28; S. Fish, "Force" (1988), 45 *Washington and Lee L.R.* 883; P. Goodrich, "Adventures of Legal Meaning, Herbert Hart and Legal Subjectivism" in *Legal Discourse* (1987), 44.

⁵⁵ M. Feinman, Book Review (1977), 91 *Harv. L.R.* 302; A.C. Hutchinson, "Indiana Dworkin and Law's Empire" (1987), 86 *Yale L.J.* 637; J. Boyle, "Legal Fiction" (1986-87), 38 *Hastings L.J.* 1013; R. Cottrell, "Liberalism's Empire: Reflections on Ronald Dworkin's Legal Philosophy" (1987), *Am. B.F. Res. J.* 509; F. de Coste, *supra* note 54.

⁵⁶ P. Gabel, "Reification in Legal Reasoning" (1980), 3 *Research in Law and Sociology*, 35.

⁵⁷ M.J. Mossman, "Feminism and Legal Method: The Difference it Makes" (1986), 3 *Aust. J. L. and S.* 30.

that crits do not focus on the specificities of law, that they do not take seriously its special modalities of politics.⁵⁸ Rather, crits have been at pains to emphasize that the form of law is perhaps one of its most politically significant and problematic elements.⁵⁹ But again, this is not a quest to find some "general relationship between law and politics" [260] because such a quest is inconsistent with one of the central theses of radical thought at least since Marx, that of historical contingency. As to the relationship between law and politics, there can be no general theory, no super explanation, because the nature of the relationship is exactly that, relational and contextual; it is dependent upon a multitude of social, economic and cultural factors such as class, race, gender etc. As these elements mutate, so too does the nature of the relationship between law and politics. This is called "the relative autonomy thesis".⁶⁰

c) Reductionism and

d) Absence of Discrimination

Not only are "reductionism" and "absence of discrimination", as Galloway points out, two sides of the one coin, they are also specific manifestations of his prior and more general complaint of an absence of consideration. His basic concern here seems to be that in so far as crits have posited that the cause of our ills is "liberalism", they have developed a philosophically unsophisticated caricature that fails to do justice to liberalism as an "intellectual tradition". If accurate, such a criticism would, I believe, be important. However, again Galloway misdirects his critical gaze.

Although Galloway may be correct to point out that Unger's characterization of liberalism may be too broad as a conception of liberal political and legal philosophy, that position was taken in 1975,⁶¹ and a much more subtle and significantly revised account is provided in Unger's most recent work, *Politics* (1987). But even this does not justify Galloway's stance for he appears to not fully realize the full impact of what he acknowledges in passing — the central point that Unger was making — that liberalism is much more than an academic philosophical tradition — which is, to a significant degree, Galloway's position — that it is a *weltanschauung*, that is, a deep seated and pervasive cultural ideology that extends far beyond and deeper than the academy. This is a point I shall return to later.

Furthermore Unger, though an important influence within the crits, is also somewhat atypical in the breadth of his vision and

⁵⁸ See, for example, A.C. Hutchinson's contribution to *Perspectives*, "Crits and Cricket: A Deconstructive Spin (Or was it a Googly?)" 181.

⁵⁹ See, for example, D. Kennedy, "Form and Substance in Private Law Adjudication" (1976), 89 *Harv. L. Rev.* 1685.

⁶⁰ This point is dealt with, to some extent, in my article, "Law's Centaur's . . .", *supra* note 8, 230, 249.

⁶¹ Roberto Mangabeira Unger, *Knowledge and Politics* (1975), Chapt. 2.

ambitions. While he is first and foremost a social theorist, most crits — perhaps in spite of themselves — are lawyers. As a result, their primary concern tends not to be liberalism more generally, but a particular historically and institutionally specific (and perhaps excessively doctrinal) subcomponent of that tradition, what they sometimes call “liberal legalism”. Karl Klare, for example, argues that:

“Liberal legalism” is a particular historical incarnation of the legalist outlook, which characteristically serves as the philosophical foundation of the legitimacy of the legal order in capitalist societies. Its essential features are the commitment to general, democratically promulgated rules, the equal treatment of all citizens before the law, and the radical separation of morals, politics, and personality from judicial action. Liberal legalism also consists of a complex of social practices and institutions that complement and elaborate upon its underlying political philosophy and jurisprudence. With respect to its modern Anglo-American form, these include adherence to precedent, separation of the legislative (prospective) and the judicial (retrospective) functions, the obligations to formulate legal rules on a general basis (the notion of *ratio decidendi*), adherence to complex procedural formalities, and the search for specialized methods of analysis (“legal reasoning”). All of these institutions are designed to serve the fundamental desideratum of separation of morals, politics, and personal bias from adjudication.”⁶²

With this in mind, it is interesting to note that when Galloway attempts to trace the parameters of the crit conception of liberalism, he does not draw on the work of any critical scholar, but instead reproduces a conception contrived by an anti-crit,⁶³ Les Green, which in turn is unsupported by any references except an unhelpful one “culled from American law reviews”.⁶⁴ To me this is problematic for crits have characterized liberalism in a variety of different ways in a variety of different contexts, depending upon the forum, the audience and more generally, authorial intent. Contextualism is

⁶² K. Klare, “Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941” (1978), 62 *Minn. L.R.* 265, 276 and footnotes therein.

⁶³ The proposition that Green is an anti-crit is based upon his self-perceived provocative lumping of the crits with marxists, feminists et al. in the category of “functionalists”. See his “The Political Context of Legal Theory”, *supra* note 5, 2 & 12.

⁶⁴ “Un-American Liberalism: Raz’s *Morality of Freedom*” (1988), 38 *U.T.L.J.* 317. This self confessed caricature goes as follows:

“Liberals are atomists who think that the individual is prior to society. They prize freedom as the negative virtue of being left to pursue one’s own good in one’s own way. Their political morality is based on individual rights and equality and has the function of regulating competition among self-interested atoms. Liberals recognize a narrow role for the state, which may restrict liberty only to prevent harm to others and must remain neutral among competing conceptions of the good life.” *Id.*

important and I think that it is only fair to let crits speak for themselves rather than ventriloquise through a hostile commentator. This is particularly true when Galloway posits that crits present liberalism as "a canonical static dogma" [260]. Quite simply: where is the reference?

On my understanding, crits have a significantly more sophisticated understanding of liberalism than a mere dogma, although at times some liberals come pretty close to it.⁶⁵ I think that crits⁶⁶ recognize that liberalism has had a venerable history, that it has played a crucial role in freeing western society from the repressive shackles of a feudalistic state and church and that it has taken us in a significant direction towards the achievement of equality. However, the critical belief is that it has stalled in its liberationist agenda. Restated, crits comprehend liberalism contextually and dynamically, through the prisms of history and power. Liberalism has taken on a political mythical quality that transcends even the best intentions and most progressive practices of those who are its academic defenders. Even if liberal theorists once controlled the agenda of liberalism, they no longer do so in the rich North Atlantic societies because through the 1970's and 1980's they have been supplanted by the ideology of "fundamentalist liberalism", particularly as it is espoused by corporations and the New Right. Thus, in so far as liberals continue to seek to carve out a corner of a field that has been occupied by those who are manifestly more powerful than a cabal of abstractionist academics, they will ultimately and in spite of themselves legitimize an oppressive political order. Raz is as good an example of this as any, in that he is willing to confer the status of a "right holder" on corporations⁶⁷ without in any way seriously addressing how in a late capitalist society corporate power rather than state power may be the primary threat to individual autonomy.

Galloway's response would probably be that all of this misses the point because liberalism as a politico-ideological practice is not what he is talking about, but liberalism as a philosophical tradition. This is a point I will return to later, but his key suggestion here is that there are philosophers in this tradition who do not fit the picture portrayed of them by the crits (whatever that might be). Once again, he draws on the recent work of Raz to refute the proposition that liberalism has any core shibboleths. Specifically,

⁶⁵ See for example, B. Schwartz, *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft* (1986).

⁶⁶ A caveat is appropriate here. Given the generic nature of Galloway's criticism of "the crits", I feel obliged to respond on a similar level. This may be impossible given that those who self identify with the critical legal studies movement are highly diversified and it would be very difficult to discover an official "crit position" on any issue. So what follows is perhaps more of a generalization than I might want to make, but is to some degree dictated by the nature of Galloway's approach.

⁶⁷ *Morality*, 176.

although Galloway admits that leading liberals such as Rawls and Dworkin have promoted “at least some of (the) ideas” (which ones?) of “radical individualism, a rights based morality and a neutral state” [261], he also argues that Raz “explodes the myth of their definitional centrality” [261]. I, for one, am unclear as to the epistemological status of the idea of “definitional centrality” and that may be because of my own ignorance of the internal norms of contemporary analytic philosophy. But it certainly does not mean that these same ideas are not of crucial ideological significance, which is the crit claim, because just a few lines later Galloway admits that Raz considers “respect due to individual liberty” as being “the specific contribution of the liberal tradition to political morality.”⁶⁸ So, in spite of everything, “individualism” and “liberty” remain central. Why then are the crits so off the mark?

Galloway’s response, reporting Raz’s position, is as slippery as it is unhelpful. His claim is that there is no essential essence attributed to “liberty” in the liberal tradition, that there are a variety of different conceptions of liberty. For Galloway, Raz “explodes (the) myth (of crit reductionism) with finesse” [261]. I continue to have some problems with this claim. First, and perhaps least importantly, I am disturbed by the violence of Galloway’s discourse. Second, Galloway conveniently drops the element of “individual” out of the debate focusing solely on the question of liberty.⁶⁹ Third, Galloway’s confession of polysemy in fact acknowledges the accuracy of one of the central theses of the crits, the “indeterminacy thesis”. What is it then about liberalism that makes it a tradition “of a considerable degree of unity and continuity”,⁷⁰ if its core concept of “liberty” is essentially contested even by the faithful, and individualism seems to have been dropped, at least by Galloway. Why hang onto liberalism, then, for crits and marxists also have conceptions of liberty, the individual and the role of the state and the desirable nature of the relationship between them? Does the indeterminacy thesis therefore convert marxists and crits into liberals in spite of themselves, or, perhaps more interestingly, does it make Raz a reluctant crit? There are of course a multitude of reasons as to why Raz would refuse to be a crit but one might be because he is conscious of the fact that being a philosopher means more than being heir to a tradition; that philosophy is a form of political practice, and that being a liberal academic remains an acceptable — even laudable — perhaps harmless —

⁶⁸ *Morality*, 2.

⁶⁹ Raz’s strategy is somewhat different. As I read him, Raz seems to distinguish “autonomy-oriented conception of personal well being” from “moral individualism”, building his perfectionist theory on the former rather than the latter. *Morality*, 16; 427.

⁷⁰ *Morality*, 1.

position in the eyes of the power elite, but that being a crit is threatening.⁷¹

None of this, of course, is to deny the banal point made by Galloway that there are important differences between liberals that crits fail to discern. Of course there are, in the same way that there are fundamentally important differences between crits, people of colour, First Nations peoples and feminists. Of course there is a difference between Dworkin's internal "interpretive" methodology and Raz's external⁷² "normative-explanatory" approach [263]. But are we really meant to carefully dissect every new publication that comes out of the Clarendon Press? Are we forever meant to play catch up with the latest twists and turns of what even Galloway admits to be the "dry", "excessively abstract", "inspirationless", "turgid", "pedantic" and complex movements of analytical philosophy [255]? Are we to forever to make our jurisprudential pilgrimages to the Mecca that is called Oxford, and then be pilloried as ignorant heretics when we miss the newest messiah? Raz may be Galloway's newest guru, but it is the same old method.

It is not that Raz's recent book is the only jurisprudential event of the mid to late 1980's. In my opinion, there was a lot more to which the crits had to pay attention. First, it was at about this time that the energy that had sustained the crits for an amazingly prolific decade began to wane. In part, I think, this was because some of the leading figures in the movement had said a great deal of what they wanted to say — dead horses and all that — and were in a period of reconsideration as to where they wanted to go.⁷³ In part, there was the emergence of a new generation of crits who were unsure as to how they wanted to develop their analyses. Second, it was about this time when the academic hatchet began to fall, when the liberal legal academy began to get nervous of the critical intervention and exclude crits or deny them tenure. This,

⁷¹ There is a further point here. I am not even sure if the idea of "respect due to individual liberty" is liberalism's specific contribution, because frequently Raz's discussion of liberty verges on some "dignitarian" conception of the "self" and if this is an accurate interpretation then this fits with the basic tenets of the Judeo-Christian tradition, at least when viewed in its best light, and that predates liberalism. All this, of course, is difficult to get an angle on because the disengaged nature of Razian thought provides us with little by way of specifics.

⁷² As an aside, it always baffles me how legal theorists can posit an external position when they have spent the entirety of their adult life entrenched in an enclave that systematically enforces a sign system and mode of thinking that, intentionally or unintentionally, excludes the reality of otherness. For further discussions of the ideological dimension of the legal educational environment see, for example, W. Conklin, "A Contract" *Perspectives* 207; M. O'Brien and S. McIntyre, "Patriarchal Hegemony and Legal Education" (1986), 2 *C.J.W.L.* 69; M. Maloney and J. Cassels, "Critical Legal Education: Paralysis with a Purpose" (1989), 4 *C.J.L.S.* 99.

⁷³ The exception is, of course, Unger's three volumes of *Politics*. For a discussion see my "On the Road to Radical Reform" (1990), *Osgoode Hall L.J.* 641.

I think, came as a rude awakening to some crits, in spite of their comprehension of the politics of legal education.⁷⁴ Third, and perhaps most importantly, there were the emergence of the feminist criticisms,⁷⁵ and the so called "minority critiques" of the crits,⁷⁶ and these, I believe, hit the crits very hard. It is with these issues of race and gender that the crits have preoccupied themselves,⁷⁷ and not with a text such as *The Morality of Freedom* that assiduously avoids any concrete encounter with such issues. None of this is intended as an apology for not reading Raz, it is just a contextual explanation as to why not everyone's universe is shattered by what is in many ways a very traditional jurisprudential text.

e) The presentation of Mainstream Theory as an Instrument of legitimation

Galloway makes a variety of claims under this rubric including that crits assume, that "liberal theory is the motive force that is presented to justify capitalism, or our hierarchical and patriarchal institutions" [263-264]; or that "the language of rights, being individualist in orientation . . . should itself be abandoned if true political ideals are to be attained" [264] and finally, that "philosophical debate is ideological warfare well concealed under a rational cloak . . . Liberal theory . . . is but propaganda" [264]. Once again, it seems to me that Galloway is somewhat off the mark.

The first and last of these accusations incorporates an instrumentalist conception of ideology suggesting that the crits subscribe to some vulgar conspiracy thesis that liberal academic philosophers are but apparatchi of the power elites. I do not demand that Galloway pursue the extensive and careful left literature, and the important debates that go on therein, as to the nature and processes of ideology. I do wish, however, that once again he would directly quote critical scholars on their conception of ideology rather than another non-

⁷⁴ Mark Tushnet once said, "When they find out what we are up to they will come after us with guns". Coercion and oppression will not always be this direct.

⁷⁵ See for example, C. MacKinnon, *Toward a Feminist Theory of the State* (1989), 290, footnote 18.

⁷⁶ See for example, "Minority Critiques of the CLS Movement" (1987), 22 *Harv. C.R.C.LLR*, 297.

⁷⁷ Moreover, it has taken the crits some time to come to terms with these criticisms for they have not adopted the liberal assimilationist strategy of "add women/people of colour and stir" and as a result the response has been slow in forthcoming. For some early responses see, M. Tushnet, "Rights: An Essay in Informal Political Theory" (1987), 17 *Pol. and Soc'y* 403; A. Freeman, "Racism, Rights and the Quest for Equality of Opportunity: A Critical Legal Essay" (1988), 23 *Harv. C.R.C.LLR* 295; M.J. Horwitz, "Rights" (1988), 23 *Harv. C.R.C.LLR* 393. For later responses, see, D. Kennedy "A Cultural Pluralist Case for Affirmative Action in Legal Academia" (1990), *Duke LJ* 705; G. Peller, "Race Consciousness" (1990), *Duke LJ* 758.

crit, Donald Brosnan.⁷⁸ My only point is that ideology is much more entrenched, sophisticated and pervasive than conspiracy theses suggest;⁷⁹ that it is deeply embedded in our ways of knowing⁸⁰, perhaps unconscious though not necessarily falsely conscious; it is part of the interpretive framework through which we comprehend our understanding of the world, our relationships and ourselves. On this reading, the critical proposition derives from the marxist aphorism that "social being determines consciousness", thereby suggesting that there is nothing necessarily intentionally apologetic in the work of liberal theorists — although it would be foolish to deny that this sometimes happens, when it does⁸¹ — but that they are simply giving voice to their conception of reality, based on their socially constructed lived experiences. Therefore, I suppose that Galloway is correct in that crits see political theory as a form of ideological warfare, but this is because crits do not buy into the liberal assumption that ideology *per se* is a bad thing, for they see it as an inescapable inevitability of being. The more interesting question, from the critical vantage point, is whether a particular ideological position advances progressive politics or impedes them.

This leads me to Galloway's second point, the claim that crits posit that "the language of rights should be abandoned if true political ideals are to be attained" [264]. Two thoughts come to mind here. First, this seems to me to manifest what Galloway accuses the crits of: reductionism, an absence of consideration and a failure to discriminate. The position that rights are individualist in orientation and therefore should be jettisoned has been extremely controversial within the critical community, and many have argued for a re-constructive extension of the discourse of rights.⁸² Second, I do not believe that crits as a collective subscribe to the idea of "true political ideals" for they consider that the invocation of standards of truth, with its connotations of naturalism and inevitability, has historically operated as a form of political and philosophical closure thereby excluding those who either do not have access to, or come within the parameters of that "truth". Thus, most crits, I think, eschew pretensions to truth and make their arguments on significantly more modest grounds, they recognize the importance of openness, and

⁷⁸ Galloway draws on Brosnan's, "Serious but Not Critical" (1987), 60 *So. Cal. L.R.* 259, 270.

⁷⁹ See for example, A. Hyde, "The Concept of Legitimation in the Sociology of Law" (1983), *Wisconsin L.R.* 379. See also Birmingham Centre for Contemporary Cultural Studies, *On Ideology* (1978); C. Sumner, *Reading Ideologies* (1979).

⁸⁰ The ideological ramifications of our gendered nature provides a good example of what I am trying to get at here. See, for example, M. Belenky et al., *Women's Ways of Knowing* (1986).

⁸¹ Consider, for example, Michael Walzer's defence of American warmongering in the Gulf in pursuit of its economic self interest, CBC Radio, "Sunday Morning", 10th Feb. 1991.

⁸² See for example, R.M. Unger, "The System of Rights", *False Necessity* (1987), 508; S. Lynd, "Community Rights" (1984), 62 *Texas L.R.* 1417.

they subscribe to the virtues of contingency and self reflexivity. This, of course, does not make their political decision-making easy or uncontroversial for contextualism has its price. However, it has the virtue of not avoiding responsibility for one's choices based upon something called "truth".

Even more interesting than these misunderstandings of critical positions is the nature of the partial defence that Galloway raises for liberalism. His basic position is that the critical agenda is mistargetted because the problems it highlights exist with the political reality of modernity, "the defects in the political order" [265] and not with the "ideas promoted by (liberal) legal theorists" [264]. These are, indeed, interesting propositions to put forward and they echo his earlier claim that liberalism as an academic tradition — as perhaps "too rich a tradition" [264] — must be distinguished from liberalism as political practice. But there are, in my opinion, some real problems here.

First, Galloway's claim "(t)hat the political world may overlap with the theoretical but they do not share an identity" [264] betrays a disturbing assumption that theory transcends politics, that theory is somehow free floating. This fails to come to terms with the critical conception of ideology that sees the production of theory as always and already overdetermined by relations of power. Second, yet again, Galloway overextends the ambitions of the critical analysis. Critics are not such idealists to believe that legal theorists are crucial to the legitimization strategies perpetrated by the politically and culturally powerful. The critical position, as I have emphasized before, is that perpetuating the ideology of liberalism, even when they attempt to reupholster it in the pursuit of what even some critics might consider to be progressive ends,⁸³ renders them complicit in the continuance of relations of domination and subordination. The suggestion of the critics is that if legal theorists want to pursue the ideals of substantive equality to facilitate genuine conditions for individual fulfilment, then the critical path is the better one to take for it is less contaminated by — though certainly not immune to — the politics of domination and subordination.

These concerns are further reinforced when Galloway admits, as he must, that liberal theorists fail "often to carry their ideals through to consider the implications of their theory for particular groups within the community" such as "native groups and women" [264], that is, those who are dispossessed by the past and present practices of liberal political practice. But Galloway leaves begging the question of why this is the case? Let me make two brief conjectures that build on earlier parts of this essay. The first is that I think that liberal legal theorists, particularly those within the analytical philosophical tradition, begin and end their analyses of freedom, liberty, equality and rights at the level of the conceptual, never really coming to terms with the existential reality of sub-

⁸³ In Raz's case, I am thinking about his seeming support for Palestinian "self-determination", *Morality*, 207.

ordination.⁸⁴ This is not to be taken as an argument against conceptualism or theory, but only to re-emphasize that we are the products of our circumstances and that what we know, and how we even begin to get a grasp of what we know, depends upon the specificities of our experiences. My second proposition is more programmatic. If modern liberal democratic society is to become more responsive to the egalitarian demands of those who have been the victims of liberal praxis, then this will require dramatic transformation of our political, legal, social and economic structures; it will require full and equal participation in all the decision-making spheres of existence; it will require that no aspect of our relations be rendered immune to political reconstruction.⁸⁵ However, to take Raz as an example, his perfectionist theory is not only premised upon a traditionally narrow conception of "the political"⁸⁶ but, in fact, is deliberately constructed so as to avoid the mobilization that would be engendered by "a radical programme of change through political action".⁸⁷

There is a further point here. Galloway also suggests that even though liberal theorists themselves have not addressed the needs of, for example, women or native people, liberal theory can be extended to incorporate them [264]. This, I believe, is a problematic position to take. It structurally places those who have been disadvantaged by patriarchal and ethnocentric privilege in a position of petitioning to be now counted as part of the extended liberal family.⁸⁸ It does not consider that, perhaps, some of the key concepts of liberalism (whatever they might be after the Razian renovation) may themselves be so contingent upon or loaded with preconceptions of privilege that they are fundamentally antithetical to the world view of those who would be allegedly advantaged. Consider, for example, Mary Ellen Turpel's argument that the very nature of the discourse of rights is alien to First Nation's peoples and that the Charter — and the monopolization of the modes of discourse engendered by it — is another form of cultural imperialism;⁸⁹ or Carol Smart's proposition that modern law is a juridogenic social practice.⁹⁰ Galloway's deeply entrenched assumption is that liberalism should be assumed to be at the centre of the jurisprudential universe, and that it be given a chance to work for these outsiders.

⁸⁴ These suspicions are intensified when we are told that Raz, for example, "doesn't do much non-philosophical reading, except for the *New York Review of Books*". See Levine, *supra* note 28, 739.

⁸⁵ See generally, R.M. Unger, *Politics* (1987) and I.M. Young, *Justice and the Politics of Difference* (1990).

⁸⁶ *Morality*, 3.

⁸⁷ *Id.*, 427.

⁸⁸ For a more extended discussion of this problem see Alexandra Z. Dobrowolsky, "Promises Unfulfilled: Women and the Theory and Practice of Representative Democracy in Canada" (1990).

⁸⁹ M.E. Turpel, "Aboriginal Peoples and the Canadian Charter: Interpretive Monopolies, Cultural Differences", in *Perspectives*, *supra* note 6, 503.

⁹⁰ Carol Smart, *Feminism and the Power of Law* (1989), 161.

Surely, the burden should be the other way. Liberal theory because of its acknowledged failure to deal with liberal practice should be assumed to be unsalvageable. The responsibility would be on liberalism to prove itself amenable. A starting point might be for revisionists like Raz to recognize class, race and gender as something more than non-issues.

In the end, it all boils down to an exercise in passing the buck, for as Galloway claims, the focus of the critical legal enterprise should be on "the defects in the political order rather than in our philosophical traditions or theoretical ambitions" [265]. The radical — and here I am using it in relation to its Greek etymology, that is, "going to the root of" — point is that these traditions and ambitions cannot escape their cultural — less euphemistically, class, racial and sexual — and historical context, they are a constitutive part of the political order. Like Galloway's paper, liberalism as a philosophical tradition has become part of the problem, not part of the solution.⁹¹

CONCLUSION

As I stated at the beginning of this essay, I think that Galloway's intervention is an important contribution to the jurisprudential conversation. I certainly welcome it. However, my reasons for appreciating it may not be those which he would expect. First, assuming that he is correct that crits are guilty of false representation, absence of consideration, reductionism, absence of discrimination and an instrumental conception of liberal theory (all of which I have denied), it should be clear that he too is guilty of some of the same sins. Second, and more interestingly, I welcome Galloway's essay because its value, from my perspective, lies not so much in what it says but in what it implies. Primarily it is driven by a fear that the crits are being too successful, that they have destabilized the hegemony of the liberal legal academy, that they have decentred the liberal discursive agenda. But this, I think, is an overreaction. Critical legal studies, in an ironic sort of way, continues to reaffirm the centrality of liberalism because so much of liberalism remains at the core of the critical agenda. The only difference is that it is no longer portrayed in its best light. In short, crits admit that it is dominant ideology. Galloway's essay in retrieval, when viewed in this light, is intriguing because it provides a classic case study of liberal ideological fideism, that in spite of itself acknowledges the poverty of liberal legalism, confirming rather than denying the accuracy of the critical position.

⁹¹ There are several other sub-allegations that Galloway makes against the crits. I have dealt with what I consider to be the more important ones, and I do not wish to burden the reader with a reply to every complaint.