Power Made Flesh: An Examination of Power in Critical Legal Studies

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An Examination of Power in Critical Legal Studies

Neal Richards
In the beginning was the Word . . . and the Word was made flesh and dwelt among us.¹

As I see it, the central claim of critical legal studies (CLS) is the following: Claims to “neutral” legal reasoning and laws are false. Hiding behind the law is power and the structures that the law forms within society. This central critique, arising out of the judicial realists of the early 20th century, has since been reborn out of the more recent event of expanded formal legal equality. Formal racial equality brought out critiques that formal racial equality under the law only reinforced the racial power structures that existed before formal racial equality. Formal gender equality brought out the same essential critiques— and so on. Yet, in light of all these powerful critiques, precious little attention has been paid to what the central critique means (or should mean) when it speaks of power.

The project of defining power is not simply a semantic exercise. Rather, it is an attempt to access the heart of the central critique in a more explicit manner. To define power is to capture its essence. But power is a naturally slippery concept. It is claimed that power controls almost every aspect of existence, yet its influence remains invisible to many. The

¹John 1:1, 1:14 (King James).
central critique, while gaining toeholds in some places, remains outside the mainstream of legal thinking. Yet as a “critical” or “radical” discipline CLS cannot properly exist within the mainstream. It is by necessity an outsider perspective, even if allowed to exist within the walls of the legal academy. So slippery is this concept of power that to see it is not to expose it, even to expose it does not truly result in its exposure. A critique of power ceases to be a critique if it is fully successful in exposing it and becomes power itself. Res ipsa loquitur.

To be clear, neither CLS nor its intellectual ancestors ignore power itself. But the discourse is an exercise in how or why power exists rather than what power itself is. But this is to be expected. In some sense, power itself is an inaccessible concept. Like black holes, we cannot observe power itself, but only as it draws in matter around it. Naked power, power removed from its results, is not power itself, but nothingness. Thus, discussion of power discourse necessarily leads to balkanization. Discussions of power are broken into critical race theory, feminism, queer theory, and a host of other aspects of society in which the pernicious influence of power structures is asserted. The central critique must extend its branches into each realm as power is exercised. Yet the discourse is not
entirely bereft of glimpses into the nature of power through the process of observing phenomena. Foucault, in particular, through telling the story of power, attempted to get at the nature of power through its implementation, even if its central essence remained inaccessible. Foucaultian power-knowledge will be examined in greater depth subsequently in this paper.

As a reaction against the apparent inaccessibility of power, this paper will attempt to get at, as much as possible, the essence of power. It will make the argument that though power structures are indeed inevitable, the precise conception of power used by one’s theory becomes a normative decision. However, this normative decision is not an autonomous conscious choice, but a product of power dialectics that naturally develop in social settings. Part I will lay the groundwork by laying out the pre-conditions for the existence of power through examining power’s prehistory. Part II will look at the breadth of power by examining the concepts encompassed by the word— with particular emphasis on Foucaultian power-knowledge. Part III will examine the power dialectic as it creates new societal norms. Finally, Part IV will turn back towards integrating this exploration of power with the central critique.
I. In The Beginning

I begin with the proposition that a prerequisite to the existence of power is some form of causality. A completely randomized world of sui generis events, with no causes or effects, could have no place for power. Causality merely implicates a progression and interaction of events and matter. It does not imply an individual autonomy of choosing and creating events, though at this point in the narrative we have not yet excluded this possibility. Setting aside any theistic arguments, causality initially existed independent of subjectivity or collectivity. Gravity caused hydrogen atoms to mass together. Some masses became large and dense enough to begin to create nuclear fusion. Heat resulted. Let there be light.

But it would be hasty to merely proclaim power as a consolidated slice of the causality web. Causality is a precondition to power, not part of its composition. When CLS theoreticians speak of gender, class, and racial power structures, they do not simply mean that the dominant societal structures are a more prolific source of proximate cause than the subjugated structures. It is a larger and more complicated claim than that. CLS claims are not merely of disembodied power,
but power structures. Thus, a second prerequisite for power is the subject.

Subjectivity may seem at first blush to be at odds with the project of CLS. Part of the project is a rejection of the liberal atomistic model. Indeed, CLS critiques the dominant liberal modes of thinking as begging the question of independent subjectivities. I make a much smaller claim of subjectivity. Here, subjectivity is a canvas on which power can leave its imprint and reflect back. It is not necessarily a tabla rasa, but merely something on which forces can be felt. This claim of subjectivity as a condition of power does not imply dualism or any other particular metaphysics. Rather, it implies only that there are human beings, however one might define the term, on which power can exert and be exerted. As the universe expanded in the wake of the Big-Bang, a singularity became a multiplicity. The individual particles became distinct and began to interact. Thus, a third prerequisite for power is a multiplicity of subjects— the community.

The community is the crux of power. How one defines community is the center of how one defines power itself. A purely liberal conception of the community envisions the independently willed interactions of autonomous subjectivities. An opposite conception might envision the community as a
collection of randomized and mostly inanimate automata. Neither extreme need be parsed to establish preconditions to the existence of power. At this stage of the argument, it is merely necessary that interactions can occur from which there are exertions and on which things are exerted. These interactions need not take place in a human community. As life developed in the early planet community actions had already begun. Scarce and unevenly located resources caused organisms to group together. Sexual reproduction among primitive life forms already enforced certain interactions. Symbiosis developed when certain strengths of individual organisms were balanced by other strengths. Power structures developed as communities enlarged and the preconditions for power’s existence solidified into place.

The narrative thus far indicates community power structures predate human beings— and do not require human communities to exist. It is true that power in its rawest form does not depend on any human element. Symbiotic relationships among animals in nature form a type of power structure. The sea anemone and the clownfish exist in a certain type of power/community relationship. The clownfish protects the anemone from damaging invertebrates; the anemone provides protection for the clownfish

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2 This narrative should not be confused with a state of nature argument— which presupposes a null-point in which to begin analysis. Rather, beginning the narrative of power from a pre-human perspective is precisely the opposite of a state of nature argument. The pre-human condition is not a null-point; it precludes a null point because it demonstrates no genesis from which a null-point could have come into existence.
in its poisonous tentacles. Yet the clownfish deceives the anemone with a protective coating— it does not recognize the clownfish as food even though the fish otherwise fits the category of organism otherwise eaten by the fish. In this deception, there is a certain degree of domination— the fish may leave for another anemone, and may even exist among certain corals in the absence of an anemone. The anemone is rooted in place, subject to vagaries of the events surrounding it— despite its fierce chemical defenses. The anemone/clownfish symbiosis presupposes the existence of predator/prey relationships that could exist in its stead. But even predator/prey relationships do not merely consist of the powerful autonomous predator exerting its consumptive will over the powerless prey. The predator is in a symbiosis with a community of prey, and vise versa. Predation prevents overpopulation and the consequential destruction of the prey community. The predator itself cannot exist without the prey community. Like the clownfish, the predator can exist without a specific community of prey, and may find substitutes for it, but is diminished in doing so. In both predator/prey relationships and strict symbiosis there is the teleology of perpetuated existence at the center. Communities must struggle for existence in a universe that constantly presses towards annihilation through scarcity. The exertion of
force to relieve that scarcity creates further scarcity for other individuals and the communities they constitute.

Economics, defined as the distribution of scarce resources, solidifies the inevitability of power structures. The accessible (that is the terrestrial) portion of the universe is undeniably finite, so too are the resources that enable the continued existence of organisms. Furthermore, organisms do not possess a fixed capacity for consumption, nor is there a fixed number of organisms desirous of a particular resource. Aggregate demand potential between all individual and group consumption is essentially infinite. Therefore, some mechanism must exist by which resources are divided between individuals. This prevents stasis between individuals and groups. As they seek resources, they integrate into the causality web that leads to a certain distribution of resources.

The pre-existence of power structures as predating human relationships is both true and misleading at the same time. It is true in the sense that a decontextualized proto-power exists in nature as described. That is to say, power stripped to its barest essence. But the barest essence of power does not fully encompass the concept as it is useful to the central critique. To say that bare, pre-human proto-power is the true ghost in the machine of supposed neutral reasoning is no critique at all. The
liberal project in fact embraces and encompasses this proto-power. Neutral reasoning can hold itself out as the neutral arbiter of an existential Darwinian struggle over which only it can intervene. It presents itself as the savior from a savage nature. In this sense, the liberal project is strongly normative and deontological. It is normative in the sense that it establishes a system of laws through “neutral” reason as an alternative, a positive good compared to a “default” state of unregulated struggle. It is deontological in the sense that it appeals to a sense of reified “justice” transcending the specific outcomes it adjudicates. It is possible to step outside of the proto-power because it exists strictly in a material plane and is fully accessible to ordinary consciousness. One can objectively observe the division of scarce resources. But this is not possible under a CLS conception of power or the central critique would be moot. Power, as conceived by CLS, must be a prison from which there can be no escape—physically or mentally.\footnote{See generally Michelle Foucault, Discipline and Punish (Alan Sheridan trans., Pantheon Books) (1977).}

The narrative must therefore push past pre-anthropogenesis.

II. The Word
It has already been posited that power must be more than causal control. To take a page from Plato, imagine a small community of individuals sequestered in a cave. The individuals are prevented from seeing the outside world or leaving the cave. For sustenance, the cave dwellers are able to press a series of buttons affixed to the cave wall. Each button pressed causes the delivery of some basic need. One button delivers water, another food, another a place to sleep. The cave dwellers continue their lives in complete isolation, doing nothing of note besides pressing the buttons. Unbeknownst to the cave dwellers, the buttons have a far greater effect than simply delivering basic needs. Each button results in a large confiscation of goods from a non-cave dwelling community. For example, when the cave dweller pushes the water button, a nearby village is compelled to completely drain its well. The sum total of the button pressing by the cave-dwellers results in the cave-dwellers being responsible for essentially all economic activity taking place outside the cave. However, the cave dwellers receive only their basic survival needs as the result of the button pressing. All the excess accumulates outside the cave, unseen. If power is defined as causal control, the cave dwellers would appear to be the most powerful group of people on earth. They have control
over almost all the activities of the non-cave dwellers. Their mere pressing of buttons reorders society outside of the cave. Yet the cave-dwellers are unaware of their supposed status as power-holders, and are indeed unaware of any reality existing outside the cave. In fact, they would regard themselves as completely powerless—slaves to the button pressing that sustains their existence. Mere power to cause, without more, becomes completely irrelevant.

The cave dwellers thought experiment illustrates a crude attempt to disassociate power from knowledge. The attempt clearly fails—producing not power but merely disembodied causality. Foucault recognized knowledge not merely as a precondition for power, but as an integral part of the concept of power. Power-knowledge becomes a unity, like space-time. The power-knowledge unity leads to the panoptic self-enforcing nature of power. The cave dwellers cannot participate in the greater social dynamic, and are therefore removed not only of academic knowledge of the consequences of their button pressing, but also of the panoptic self-reinforcement that can occur only through direct participation in society.

4"We should admit rather that power produces knowledge (and not simply by encouraging it because it serves power or by applying it because it is useful); that power and knowledge directly imply one another; that there is no power relation without the correlative constitution of a field of knowledge, nor any knowledge that does not presuppose and constitute at the same time power relations." FOUCAULT, supra note 3, at 27.
Power does not consist of autonomy or independence. Indeed, the effect of power structures is often to reinforce dependency. Power creates dependencies even among the powerful. Slavery in the American South produced just such dependencies. The plantation owner was fully dependent on the continued work product of the slave for existence. This dependency was more than field work. Every aspect of the plantation owner’s life was dependent on the slave labor—producing food, cooking food, even raising children became part of the dependency. For all the control the plantation owner had over the slave’s existence, the slave dominated the owner’s existence. Not laboring himself, the plantation owner’s primary occupation consisted of managing and controlling the output of those laboring under him. The strict controls over the slave’s life were very much because the plantation owner feared the slave. Slaves were forbidden from reading, they were forbidden from gathering in too large a group, or travelling without their master. Of course the slaves too were dependent on the master. Their food, though delivered at the master’s foot, had to be returned back to them in sufficient part to continue their existence.\(^5\) The master/slave

\(^5\)Though I use the slave example, in terms of power dynamic, the master/slave power dynamic of course exists in paid industrial labor, and indeed throughout society. *C.f.* Georg Hegel, *The Phenomenology of the Spirit* (master-slave dialectic), *See generally* Marx (applying the master-slave dialectic against to industrial relationships).
relationship therefore created a mutual dependency. Power reciprocated, and circled back upon itself.

In short this power is exercised rather than possessed; it is not the ‘privilege’, acquired or preserved, of the dominant class, but the overall effect of its strategic positions— an effect that is manifested and extended by the position of those who are dominated. Furthermore, this power is not exercised simply as an obligation or a prohibition on those who ‘do not have it’; it invests them, is transmitted by them and through them; it exerts pressure upon them, just as they themselves in their struggle against it, resist the grip it has on them.6

This reciprocal power exists not only in the real physical sense of serving and being served. Power becomes its own epistemology.

This concept of power as epistemology is reflected explicitly in the feminist literature.7 Our very knowledge and understanding of gender hierarchy is shaped by the power structures that constitute it. It is not enough to say that formal equality is a sham; our very conception of what would constitute equality has been coopted by power. The entirety of our “knowledge” of gender becomes wrapped in and around the power structure such that power becomes the means for knowing.

This power-knowledge epistemology extends readily beyond the feminist critique. Foucault’s Discipline and

6FOUCAULT, supra note 3, at 326-27.
Punish showed how power shaped not only the educational system, but the very methodology of learning. Knowledge is absorbed by the pupils through the semiotics of power.⁸

Power need not act directly upon us for it to govern the acquisition of knowledge. In 1960, the Soviet composer Dimitri Shostakovich completed his 8\textsuperscript{th} string quartet. The manuscript contained a dedication to “victims of fascism and war”. Western critics and performers of the quartet remarked how the 3\textsuperscript{rd} movement invoked the firebombs falling on Dresden. The work became widely known as an important piece of anti-war art. Yet posthumous letters by the composer discovered years later indicated that the quartet was actually a requiem written to himself, written in response to his forced joining of the Communist Party. The initial dedication was placed to fit the work into an officially approved category of music devoted to “exposing fascism”. Western critics instantly changed their hermeneutics to fit the new information—no longer hearing bombs falling. The music sounded different, the critic’s very senses and perceptions had been altered by the rigid artistic hierarchy of the Soviet Union as projected through

⁸Foucault gives the example of the religious schools where pupils are instructed almost entirely non-verbally. Pupils discerned what they should be learning almost entirely through the exercise of power by the instructors. \textit{FOUCAULT, supra} note 3, at 166.
Shostakovich. Yet the Soviet Union was a cultural other—cutoff from Western critics— they did not live in that society yet had their epistemology was shaped through its power. The same effect occurs as societies react in opposition to the other, shaping their epistemologies to counteract the other’s influence. The epistemologies clash through the power struggle between opposed groups and societies.

These group oppositions eventually help define group identities and perceptions of the world. This is especially acute in the world of gender. The struggle/counter-struggle between gender groups creates different modalities of understanding and approaching the world. An example lies in the “Jake and Amy” ethical problem solving studies. “Jake” as a stand-in for males, approaches an ethical problem through abstraction to general principles. “Amy” as a stand-in for females, approaches an ethical problem in the context of the community. Males and females come to understand ethical problems in fundamentally different ways. The root of these differences, as understood by many critical theorists, is the male/female power dynamic. Males, as dominant actors, create the atomistic abstraction

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methodology. Females, in reaction against that power structure seek refuge in the collectivist epistemological methodologies. Each group reinforces the methodology in opposition to the other. Even the feminist literature pointing out the dialectic springs forth as an outgrowth of the power structure— with an explicit brief in opposition.\textsuperscript{11}

The epistemology of power works both when power is opposed and when it is yielded to, yet it is incorrect to conceive of potential responses to power as binary—resistance or yielding. To resist power is not to resist it at all, but merely a certain symptom of relating to power. The central critique does not imbue those who wield it with any special ability to form an alternative structure to the power structure in action. The realization that formal equality is illusory in light of de facto inequality does not by itself present an alternative structure. The opposition to illusory equality in favor of the real equality works in opposition to the power structure, but is itself subsumed by the power structure because the power structure dominates how it behaves. The opposition becomes defined by what, whom, and how it opposes. The struggle towards factual equality then creates its own separate

\textsuperscript{11}One Queer theorists describes the process as “M>F with a brief for F” Ian Halley, *Queer Theory, Feminism, And the Law*, 11 DUKE J. GENDER L. & POL’Y 7, 8 (2004).
power structures—becoming illusory itself as the balance does not reach equilibrium but continues with its own momentum or is stopped by the momentum of the opposition.

A question brought to mind is whether power is an exclusive epistemological methodology or rather a descriptor of epistemology as practiced through the law. Power as epistemology, if accepted as an exclusive methodology, effectively eclipses traditional Western epistemology. Power is almost explicitly anti-rationalist, as it denies the ability to conceive of neutral principles. Yet it is also anti-empiricist, as it denies the ability of neutral observation.\textsuperscript{12} Thus, power as epistemology is fundamentally a radically skeptical discipline. If power is taken to this point in analysis, the CLS scholars are left adrift because power loses the ability to make normative claims— it can only attack normative claims.\textsuperscript{13} At the very least then, power as epistemology has dangers if applied too widely. It is safest confined within the legal realm such that it does not become an exclusive epistemological

\textsuperscript{12}Such epistemology would also foreclose the Kantian compromise between rationalism and empiricism. Something like the “synthetic a-priori” is incomprehensible within the epistemology of power.

\textsuperscript{13}This leads to the problem of cultural and moral relativism. How does one accept the central critique yet condemn cultural practices one finds abhorrent such as the treatment of women in Saudi Arabia? If our thoughts on the matter are merely products of our own power structures, that could delegitimize claims of moral authority in condemning practices that arose though foreign power structures.
method. This divide illustrates an aspect of the central critique in which a choice is made. Power as epistemology is not inherently limited or expansive in scope— theorists choose and defend their own paths in defining it.

III. The Word Made Flesh

Returning to the central critique, a conception of power that fits with CLS must explain precisely what it is about power structures that foreclose the liberal conception of neutral law. Of course, there is the direct and concrete explanation: “The law, in its majestic impartiality, forbids the rich and poor alike to sleep under bridges and beg in the streets.” ¹⁴ Formal legal equality is manifestly a separate thing from factual equality. The laws are not equal because only the poor have reason to be sleeping under bridges. Yet, this explanation is unsatisfying. Mere inequality of application does not by itself expose underlying power structures. A hypothetical neutral reasoning could, in theory, endorse inequity. No judge on the court of *Lochner v. New York*, ¹⁵ which struck down basic workplace protections under the “liberty of contract” doctrine, would have


argued that the bakers’ “liberty of contract” foreclosed inequality of bargaining position between them and their employers. But the central critique contains a larger claim; that the power structures in place at the time infected the reasoning of the Lochner judges, such that they were not, and could not, be accessing truly neutral principles in coming to their decision.

In light of the central critique, the concept of power must necessarily be anti-platonic to avoid self-contradiction. If a platonic form of power existed in a way accessible to human reason, it would indicate the possibility of truly neutral principles which could be accessed by a law-maker. At the very least, it would signify the concept of power itself as a neutral, accessible principle. It would be a short series of leaps from platonic power to platonic justice to neutral reason. So how does one give flesh to the skeleton of power without self-contradiction?

Foucault structured Discipline and Punish as a dialectic between the old power of the sovereign and the panoptic power of modern society. The old power of the sovereign, while brutal, was merely an assertion of might.\footnote{Foucault describes this power dynamic as the “joust”. The battle of wills between tortured and torturer. See FOUCALUT, supra note 3, at 41.} It lacked the all-encompassing characteristic now present–it could be resisted
without cooption because it was a singular force. If one takes Foucault’s account as a literal historical development, Foucault understood power-knowledge as a development of modernity. In so doing, Foucault avoids self-contradiction. The old sovereign’s laws were an explicit outpouring of the sovereign’s personal power above society. By presenting a historical alternative to modern power Foucault avoids Platonism in favor of a descriptive historicism. Power-knowledge is therefore not an exclusive epistemology but a description of popular epistemology as practiced.

The Foucaultian perspective can be taken past the descriptive into the normative realm. We make real normative judgments when implementing a particular understanding of power. Legal realism resulted in a particular political project diametrically opposed and distinct from the liberal political perspective of the Lochner court. One cannot help but be moved in the direction one’s theory points. If one takes the central critique seriously, one would also have to attribute the political agenda of the realists as reflected through power. Yet the realists were not cultural outsiders to the liberals on the court. In alleging that power lay beneath supposedly neutral decision-making, the realists defined themselves by that same underlying power. A descriptive claim merely points out that
definitional power, but the normative claim affirmatively embraces the position of opposition against that power.

Normative claims regarding power necessarily circle back to the relationship between the community and the individual. If power is merely the outpouring of personal autonomy in search of economic gain, then power should be controlled by legal restraints. Individually-sourced power can and is controlled by the state. While formal racial equality may not produce real equality, it does prevent a business person from starting a dining establishment that openly prohibits racial minorities from entering. By contrast, the most diffuse post-modern conception of the individual as a pure construction renders efforts at establishing formal legal equality almost nonsensical. Taking the extreme form of the argument: If neither gender nor sex exist in a “real” sense, then one might as well establish formal equality between unicorns and minotaurs—both these mythical creatures and gender reality exist in the set of socially constructed things that are not ontologically real. Though proponents of the pure social-construction line of reasoning have not proposed a uniform solution to equality, formal legal equality certainly is not it. Deciding between an

\[^{17}\text{I hope this is not too gross a mischaracterization of the work of Judith Butler. While this may be farther than she would be willing to go, I present this position as the logical extreme of the post-modern, post-structuralist line of reasoning.}\]
atomistic or collectivist understanding of power is to advocate a societal norm— and an ideal legal structure.

These normative choices about community do not arise instantaneously, but evolve through the power dialectic. There is an initial expression of power. This initial expression generally lies in the economic realm— through an opposition against scarcity. The initial expression in turn creates its own scarcity. In response to that initial expression of power comes the opposition against the secondary scarcity created by the initial power. In an industrial context, we see owners of the means of production exploit workers to fulfill an economic scarcity of inexpensive labor. In opposition to that power, workers organize into unions, and create countervailing power structures. As the power/opposition dialectic evolves, the groups develop differential value structures because conceptions of group identity lead to value judgments. Norm creation works together with value creation.

This construction of value judgments is well expressed by Foucault’s narrative of power.¹⁸ The initial power of the sovereign comes as an early reaction against economic scarcity and fear of annihilation. The web-like power-knowledge that

¹⁸It is no coincidence that Foucault cited Nietzsche’s Genealogy of Morals as an inspiration for his own narratives. The stories of power and ethics are deeply intertwined.
follows grew out of years of struggle amongst social groups. The web-like power did not occur at once, but seeped in slowly as the ideas of the “enlightenment” filtered their way through the social consciousness. The narrative also hints at changing value judgments. The modern consensus that torture is a universal wrong would have been incomprehensible to the medieval society that is Foucault’s starting point. Likewise, the panoptic prison of today would be equally incomprehensible from a medieval perspective. Why would one spend so much time confining and observing those opposed to the sovereign when one could simply eliminate them? Power, its opposition, and the method of opposition create these deeply ingrained perspectives.

When power is called normative, it is not to say that individuals affirmatively choose an understanding of society (and by extension power) in hopes of arriving at a particular positive value judgment. Rather, power itself acts upon societies, creating the scarcity/opposition/counter-opposition

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19See, e.g., FOUCALT, supra note 3, at 76-77.

20Foucault describes the medieval attitude towards torture as follows: “To begin with, judicial torture was not a way of obtaining the truth at all costs; it was not the unrestrained torture of modern interrogations, it was certainly cruel, but it was not savage. It was a regulated practice obeying a well-defined procedure; the various stages, their duration, the instruments used, the length of the ropes and the heaviness of the weights used, the number of interventions made by the interrogating magistrate, all this was, according to the different local practice carefully codified . . . Torture was a strict judicial game. And as such, it was linked to the old tests or trials- ordeals judicial duels, judgments of God - that were practiced in accusatory procedures long before the techniques of the Inquisition.” FOUCALT, supra note 3, at 40.
dialectic, thereby shaping the understandings that lead to the value judgments.

To give the word power flesh is not to arbitrarily, or even to rationally define it. Rather, the defining of power is an ongoing process created through the dialectic. The current state of the dialectic, as always, is one of tension between two understandings—yet both are bound by the same basic structure of scarcity/opposition/counter-opposition. The final section will apply the basic structure a bit more closely.

IV. And Dwelt Among Us

Given the attributes of power described above, how does power work through the central critique? When the central critique says that the law replicates entrenched power structures, what is the precise claim it is making about how the modern legal system works? How does one integrate the theory of power with political reality?

The central critique appears relatively straightforward. Judges and lawmakers think they are accessing neutral reasoning, when they are in fact transmitting power. Decisions in favor of liberty of contract are really the retrenchment of interests
which benefit from the inequality of power between those who contract. Decisions stressing formal gender or racial inequality are really decisions to crystalize racial inequality in its pre-formal equality state. But this version of the central critique looks too much like Foucault’s power of the sovereign. This is merely the powerful disingenuously asserting their will over the powerless. However, power as described above is something more insidious and pervasive than Foucault’s pre-modern sovereign will.

The sovereign will conception of power makes judges and law-makers appear as mere pawns or functionaries of a shadowy elite. Though it does not necessarily allege conscious collusion, the sovereign will theory of power is tinged with implicit allegations of conspiracy. Men in power support patriarchy in an effort to suppress women for their own benefit. Racial and cultural majorities suppress minorities because they enjoy the effects of domination. It suggests something like collusion. Under this conception, even if those in power truly believe they are accessing natural principles, it is only through masterful self-delusion that they are able to do so.

Panoptic power-knowledge does not operate in this manner. Power is not a product of individual will, but a multiplicity of micro-reflections upon members of society. “Neutral” legal
decisions are neutral in the sense that they reflect the stasis already present— they do not reflect the particular desires (conscious or subconscious) of the decision-makers. Foucault speaks of “strategies” in reflections of powers, but these strategies are diffuse cultural constructs, rather than the work of any particular mastermind.\(^ {21}\) The individual incentives for becoming an “evil mastermind” of oppression are too small. As a sitting Supreme Court justice, Clarence Thomas could hardly be thought to be implementing any type of grand scheme of domination when he declared in *Adarand Constructors v. Pena*, that “[affirmative action] programs may have been motivated, in part, by good intentions cannot provide refuge from the principle that under our Constitution, the government may not make distinctions on the basis of race.”\(^ {22}\) Clarence Thomas himself has no personal incentive to perpetuate racial power structures through the sham of formal equality. Yet he has indeed helped to perpetuate those power structures as a stalwart proponent of the liberal project of color blindness and empty formal equality. He has merely served as a conduit for power.

The impact of this power on the legal system is enhanced by its invisibility. With the widespread acceptance of the idea of neutral principles and rights, a fictive universe has been

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\(^{21}\)”[T]his power is exercised rather than possessed.” FOUCAULT, supra note 3, at 26.

created apart from the real one. True causality has been obscured by false causality. When a party loses in court, it is often remarked that the party lost “on the merits”—viz., they ran afoul of some diffuse neutrally applied principle. This understanding obscures the complex causality that led to the incident at issue and the creation of the principle. When the principle is obfuscated as a neutral principle of law it encourages observers to limit their time horizon to the immediate present. An affirmative action case is not considered in the timeframe of the greater story of oppression and resistance, but of the instant disagreement between the aggrieved parties. Thus, the neutral principles, as expression of power, have the effect of limiting the debate. Power preempts resistance by causing the dominated to accept the conditions of their domination. Obfuscation is an important tool in creating this acceptance.

The expression of neutral rights is not only an obfuscation of power but a modality of it. Returning to the concept of power-knowledge, to obfuscate is to dominate. Power expresses itself through undermining understanding of human interactions. As the preceding paragraphs explain, this is not an act of conspiracy or a conscious decision made by those in positions of power. The obfuscation occurs as a widespread phenomenon, such
that both the dominant and the dominated are susceptible to it. Collectively, this obfuscation is the matter from which the false-consciousness, often referred to in CLS and its penumbra of disciplines, is made from. It is extremely difficult to escape this false-consciousness because it is impossible to escape one’s own subjectivity and the social constructs that create it. While analysis can attempt to grasp the phenomenon, it cannot fully encompass it— the analysis too is susceptible to obfuscation.

The power of obfuscation is enhanced as society grows and becomes increasingly interconnected. As society grows, so too does its power, and so too does the epistemological force stemming from it. Foucault noted a distinct shift occurring in society with the event of the enlightenment as power shifted from the centralized sovereign to the diffuse panoptic.²³ Circling back to the prerequisites for power discussed in part I, the interactions between subjects become more intense and more common as society grows and becomes interconnected. There are a greater multiplicity of observations and opportunities for reinforcement of behavior. When it becomes de rigeur to post one’s most intimate thoughts on a public website, the scope of community interactions can extend almost infinitely. With this multiplicity of interactions, power can grow and morph into new

²³Foucault, supra note 3, at 109.
forms. Even as power grows and multiples, its influence grows more diffuse and its inputs become less and less apparent. It is easy to see the hand of the king behind the executioner's axe. It is far more difficult to see the hand of society as a whole behind a particular social prohibition.

Foucault noted that as power becomes more outwardly humane; it becomes larger and more diffuse. The terrible tortures of the rack and bloody public executions are replaced by small reprimands, reform, and observation. The more diffuse modern power no longer needs a public display to make its impact felt. Indeed, as discussed previously, the modern power gains its strength from remaining hidden. Yet this strength is an abstraction— it no longer can be attributed to a particular person. As interconnectedness grows, it becomes difficult even to attribute power to groups. Power becomes everything and nothing.

Parting Thoughts

The argument outlined in this paper is as follows: The central critique of CLS is that power lies beneath the supposed neutral

\[24\text{See Foucault, supra note 3, at 16.}\]
reasoning of law. But in engaging that critique, CLS scholars often ignore the problem of defining power. This is for good reason, as power is by its very nature a hard thing to grasp. I have done my best to define it by starting with the preconditions for power: causality, subjectivity, and community. With these three prerequisites in place, power structures become inevitable. They evolve through the scarcity/opposition/counter-opposition struggle into structures that imbed themselves into our epistemological and normative structures. These structures become stronger as the community grows and becomes more connected. As power grows it becomes diffuse and less visible. Eventually it becomes the sculptor of knowledge and thought processes. Power is defined by this dialectic and growth; it cannot be defined in a dictionary. To define power in a pithy dictionary setting is to make a normative and epistemological claim. But such a claim cannot escape from the power structures that influence the person making the claim.

In sum, power is defined by dialectic and evolution. It remains a slippery concept because it is both dynamic and diffuse. It will, by its very nature, remain paradoxically elusive and omnipresent.