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Constructing Justice: Theories of the Subject in Law and Literature

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> The subject, its attributes, and the limitations it imposes on theory are not easily done away with, as all our history (the history of philosophy, of ideas, of literature, of events, and even political and social history) attests. If this . . . can be challenged, it is not through a simple rejection of the subject. . . . A truly radical questioning of the subject, and the resulting emergence of processes, areas of theory and practice, and strategies not totally dependent on the subject can only be realized by a repeated *working through* and undermining of the premises on which the subject depends and which depend on it.[1]

Critics of the legal system have long observed its tendency to distort or ignore connections between its human subjects and the empirical world of their experience.[2] Disregard for the subject's non-theoretical experience also appears in the attempts of certain literary critics to redefine or even remove the concept of the subject from literary theory.[3] In opposition to law's an-

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1. D. CARROLL, THE SUBJECT IN QUESTION 26 (1982).

2. *See generally* B. EDELMAN, OWNERSHIP OF THE IMAGE: ELEMENTS FOR A MARXIST THEORY OF LAW 25 (E. Kingdom trans. 1979) (introduction by Paul Q. Hirst) ("[The jurist's] 'soul', that is, his illusion of taking juridical relations to be human relations, is the soul of an owner and a shareholder . . . ."); *id.* at 147 (19th century child as juridical person); *id.* at 151-62 (Kant's discussion of *jus realiter personale*, the "right of possession of an external object as a thing and to make use of it as a person"); *id.* at 178-91 (Hegel's subject in law and property as embodiment of personality); Gabel, *Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 MINN. L. REV. 601, 634 (1977) (discussing Law as an alienated interpretation of relations between parties); Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 YALE L.J. 949, 976 (1988) (discussing formalism's abstract conception of juridical relationships).

3. *See generally* J. GALLOP, THE DAUGHTER'S SEDUCTION 12 (1982) (there is no place for a "subject" to be human or to make sense outside of linguistic signification); J. DERRIDA, LIMITED INC 36 (1988) (using the concept of incorporation to disregard the individual subject while formulating arguments and theories that will affect that subject). In addition, this Essay's discussion of the work of Paul de Man and Jean-Francois Lyotard considers their attempts to redefine concepts of the subject in literary theory.

tisubjective tendencies and perhaps in response to literary critics' questioning of the subject, several legal theorists who would not otherwise be aligned argue separately that the legal system needs to admit more subjective concerns to legal discourse and to recognize more the humanity of the subject in law.[4] This range of legal scholars includes scientific legal realists and members of the loosely structured congerie of critical legal scholars, all of whom share a concern that the voice of the legal subject be heard in law.

As a preliminary exploration of the treatment of the subject in literature and law, I propose to examine the works of several literary and legal critics. Paul de Man and Jean-François Lyotard offer complementary observations on the subject in literature while Steve Fuller and John T. Noonan Jr. concern themselves with the place of the subject in law.[5]

This Essay is an initial attempt to join in this discussion of subject, to pose questions regarding the relation of literary theory to legal theory and practice, and to inquire whether that relation affects subjects within the legal system. I offer not so much a critique as an attempt to explicate the approaches of several thoughtful critics who discuss how the subject is constituted in literature and in law. As a lawyer new to the world of literary criticism, my focus is on better understanding critical theories in literature before deciding whether to import them (or prevent their migration) into the legal system. The resulting dearth of concrete legal examples in this Essay is one for which I ask the patience of my law colleagues.

A proposal from Judge Noonan[6] provides a convenient entry point into the discussion of the subject in the legal system:

> The central problem, I think, of the legal enterprise is the relation of love to power. We can often apply force to those we do not see, but we cannot, I think, love them. Only in the response of person to person can Augustine's sublime fusion be achieved, in which justice is de-

4. *See* C. MACKINNON, FEMINISM UNMODIFIED, DISCOURSES ON LIFE AND LAW 10 (1987); J. NOONAN JR., PERSONS AND MASKS OF THE LAW 20, 41-43 (1976); Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 YALE L.J. 1, 66-70 (1984); Fuller, *Playing Without a Full Deck: Scientific Realism and the Cognitive Limits of Legal Theory*, 97 YALE L.J. 549, 549-50, 555-56, 575 n.2 (1988).

5. Whether these critics have anything to say to each other within their respective circles of literature and law, and whether those conversations can cross from one discipline to the other, remains to be seen. The debate whether literary theory can offer any guidance to legal interpretation, while pertinent, is beyond the scope of this Essay.

6. Judge Noonan posed the problem while still a full-time professor of law, before his appointment to the bench.

fined as "love serving only the one loved."[7]

Lyotard and de Man would deride this unabashedly organic, intersubjective statement for its reliance on communication between empirical human beings to solve the posed problem of how law relates love to power. Noonan's statement sharply contradicts the desire of Lyotard and de Man to distinguish the living, breathing, empirical subject from the ontological, discursive subject[8] and thereby diminish or remove the power of the empirical subject in systems of discourse. In the theoretical models that de Man and Lyotard envision (sketched simplistically for the moment) the concept of "relation" poses problems by raising questions of authority and reception in discourse, and suggesting that empirical subjects can communicate effectively with each other. Determining the degree to which communication can occur between subjects — ontological and/or empirical — is of common interest to de Man, Lyotard, and Noonan; their varied responses provide the grist for the discourse that follows.

I. THEORIES OF THE SUBJECT IN LITERATURE

As Lyotard would have us understand the rules for engaging in a particular discourse or language game, I should note some ground rules for this discussion. In this Essay, I treat the terms "subject" and "self" as possessing a certain degree of interchangeability, recognizing that one term can never completely substitute for the other. I also alert the reader to potential confusion of the empirical and ontological subjects, admitting that I will both knowingly and unintentionally engage in some of that confusion. De Man warns against the tendency to "relapse unwittingly into the concerns of the self as they exist in the empirical world,"[9] noting "how difficult it is to remain rigorously confined to the disinterestedness of non-em-

7. J. NOONAN, JR., *supra* note 4, at xii.

8. For the purposes of this Essay, the concept of "discursive subject" refers to the discursive subject — human or otherwise — or that part of the subject that cannot be contained in the physical world, that may exist only in theory, that cannot be touched but can be posited in discourse using written or oral language. Its existence can in one sense be described as linguistic. The term "ontological" helps to describe this conception of the subject by implying its relation to ontology, "the branch of metaphysics dealing with the nature of being, reality, or ultimate substance." WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 995 (2d College ed. 1986). In contrast, the empirical subject exists in the observable world of practical experience.

9. P. DE MAN, BLINDNESS AND INSIGHT: ESSAYS IN THE RHETORIC OF CONTEMPORARY CRITICISM 38 (W. Godzich trans. 2d ed. 1983).

pirical thought."[10] My lapses into confusion of the empirical and ontological selves are due to interest in questions that the failure to connect the two concepts raises. I indulge in these lapses in hopes that they will have some of the revelatory quality that de Man attributes to them.

De Man notes that such "onto-ontological confusion occurs in the most revealing manner. . . . [being] in the long run more instructive than the peremptory dismissal of the question of the subject on historical grounds."[11] Indeed, neither de Man nor Lyotard dismiss the subject out of hand, but undertake closely to examine its constitutive components.[12] De Man identifies a major contribution of twentieth century literary criticism as "establishing [the] crucial distinction between an empirical and an ontological self."[13] Separating these two elements of the self, however, can result in a failure to recognize what effect they have on each other and how the empirical self affects the structural functioning of the ontological self. Such recognition is crucial to an operative literary theory such as de Man's that posits that the ontological self derives in part from questioning the empirical self; a derivation that does not assign to the empirical self the role of creator.[14]

In the legal system, where the human subject has long been categorized and treated as a structural, functional entity, the disappearance of the empirical being as referent is perhaps the main impetus behind the call for more consideration of the human being in legal decisions.[15] That call may also reflect a desire to recognize the differences between juridical (ontologi-

10. *Id.* at 49.

11. *Id.* at 39.

12. Carroll, whose quotation begins this Essay, also argues against "a simple rejection of the subject," relying on Foucault's "overtly antisubject archaeological approach to history" as his model for a criticism which rejects the concept of the subject only after discrediting it as "derivative, an abstraction, the principal obstacle to the development of a science of discourse." D. CARROLL, *supra* note 1, at 121.

13. P. DE MAN, *supra* note 9, at 50.

14. De Man claims that the relationship that Georges Poulet describes between the actual self and the "deeper" self "exists first of all in the form of a radical questioning [in language] of the actual, given self, extending to the point of annihilation." *Id.* at 98. "But if the subject is, in its turn, given the status of origin, one makes it coincide with Being in a self-consuming identity in which language is destroyed." *Id.* at 100-01; *see also id.* at 105 (further discussing Poulet's assertions).

15. Noonan and Fuller offer two versions of this call for the legal system to consider more subjective, human concerns in its decisions. *See infra* Section III.

cal) and empirical selves and to acknowledge that what happens to the juridical subject affects the empirical subject. Lawyers, judges, jurors and other actors in the legal system each take part in constituting the juridical subject. Although literature lacks the structural equivalent of outside parties helping to constitute the subject, the comparison of how legal subjects and literary subjects are constituted is still instructive. De Man's treatment of the self that constitutes its own language offers one such basis for comparison.

De Man's discussion of "the self that writes" highlights how various functions of the empirical and ontological selves can combine and divide within a subject.[16] The self that writes appears in "the intentional relationship that exists, within the work, between the constitutive subject and the constituted language,"[17] converting a subject/object relationship to one of subject/language. This conversion can only occur within time, which is the essential common experience of all subjects. In various moments, the self (the subject) is divided within a structure of time; temporality is thus constitutive and provides the situs for the act of writing itself. A writer's reception of a text involves the subject's participation in the constitution of the work; it is a temporal act by which the subject becomes the self that writes. By identifying with the author, the empirical critic/subject experiences an internal division from which language is produced, yet language also expresses the subject's very experience of time. At that moment of instantaneous transition, *"l'instant de passage,"* from experience to writing, the empirical self decides to write and moves to the ontological level, leaving behind a separate empirical self.[18]

This move, occurring in an *instant de passage*, makes time an element of the discursive, ontological self that writes. Yet

16. The self that writes is among the four types of relationships between "a plurality of subjects" that de Man identifies as posing "the question of the self." That question appears in

> the act of judgment that takes place in the mind of the reader; it appears next in the apparently intersubjective relationships that are established between the author and the reader; it governs the intentional relationship that exists, within the work, between the constitutive subject and the constituted language; it can be sought, finally, in the relationship that the subject establishes, through the mediation of the work, with itself. From the start, we have at least four possible and distinct types of self: the self that judges, the self that reads, the self that writes, and the self that reads itself.

P. DE MAN, *supra* note 9, at 39.

17. *Id.*

18. *Id.* at 98-99.

time — the very thing that constitutes the new ontological self — is also the thing from which both the empirical and ontological selves seek to escape. Time limits and traps the empirical self and ontological self alike, and both are denied authenticity in de Man's understanding of time. In de Man's *instant de passage*, irony splits the subject into two instantaneous elements that differ from each other: "An empirical self that exists in a state of inauthenticity and a self that exists only in the form of language that asserts the knowledge of this inauthenticity . . . [but] to know inauthenticity is not the same as to be authentic."[19] This formulation denies authenticity to both the discursive and empirical subjects. Only language can claim authenticity; the discursive self constituted in language cannot.

Is this authenticity time or death or both? Or is it some form of immortality that transcends time? If time is the only authentic experience, yet neither subject is authentic, why is either one trying to escape a temporal dilemma? Is it impossible or just extremely painful for a non-authentic subject to exist in the authentic dimension of time? For de Man, authenticity is the absence of signification of empirical existence. He speaks of the difference between a "false kind of transcendence that bases poetic immortality on the exemplary destiny of the poet considered as a person" and "authentic poetic immortality that is entirely devoid of any personal circumstances."[20] An authentic subject bears no relation to any objectifiable, empirical self.

Removing the empirical self from the temporal realm of authenticity gives to language a subjectivity and immortality of its own. De Man's empirical subject lacks authenticity because language, not physical being, is the future-oriented means to escape time. A human being cannot conquer time, but language can. "Language, however, is not a source; it is the articulation of the self and language that acquires a degree of prospective power."[21] So language articulates the experience of the subject, returning us to the discursive "self that writes" in which the self constitutes its own language and can only express its experience of time in language. At this point, the subject can only operate at a discursive level, communicating with other discursive subjects but no longer able to communicate with empirical subjects. De Man states that: "the dimension of futurity. . . ex-

19. *Id.* at 214.
20. *Id.* at 180.
21. *Id.* at 100.

ists neither as an empirical reality nor in the consciousness of the subject. It exists only in the form of a written language that relates in its turn to other written languages in the history of literature and criticism."[22] De Man's reference to history seems an oddly retrograde homage to the past, sounding as it does in the same breath with his call for a forward looking discourse. He envisions ongoing dialogues that can be endlessly interpreted, ensuring the livelihood of literary critics but offering little guidance to subjects seeking to escape time.

Perhaps both the discursive and empirical subjects seek to escape time because to be in time is to be confronted with the effects of time that are manifest in the empirical world. Even if the discursive self does not exist in the empirical world it can observe what happens there. Time places demands on both selves to decide whether or how to mitigate the effects of time on themselves and on other empirical beings. Yet in de Man's world, the ontological subject should not use its understanding or knowledge or awareness of time to help the empirical self. There is a strong temptation "for the ironic [ontological] subject to construe its function as one of assistance to the original self and to act as if it existed for the sake of this world-bound person. This results in an immediate degradation to an intersubjective level."[23] Intersubjectivity, communication with human persons, is discouraged.

II. LITERARY THEORIES OF THE SUBJECT IN A LEGAL SETTING

Transplanted in a legal setting, de Man's discursive subject becomes the juridical self. The literary subject, that was divided against itself and watched the empirical self without offering aid, finds its counterpart in the juridical self that is constituted by the legal system and observes with disinterest the human plaintiff or defendant on whom the law will act. This gap between the juridical self and the human being is claimed to be necessary for the legal system to function justly, yet a legal system that functions without intersubjectivity is in danger of producing a justice devoid of any connection to human actions.

Even if law is viewed as a system that translates human actions into a specialized discourse to reach decisions that will

22. *Id.* at 98.
23. *Id.* at 217.

guide future actions, that discourse can so rid itself of subjective individual concerns that it results in, at best, uninformed justice. Justice must have some connection to and awareness of empirical existence if it is to help empirical subjects deal with the circumstances that accompany time and death.

Although de Man sees little possibility of communication between empirical and ontological selves, Lyotard indirectly acknowledges that important relationships exist between the two. In discussing what justice means, Lyotard defines death in empirical terms as "the form of a possible interruption of the social bond, which is simply called 'death' in all of its forms: imprisonment, unemployment, repression, hunger, anything you want. Those are all deaths."[24] This empirical description of death appears almost accidentally in an ontological discussion of death as a possible outcome of language games. Before listing these empirical forms of death, Lyotard describes the social bond discursively as "the multiplicity of games, very different among themselves, each with its own pragmatic efficacy and its capability of positioning people in precise places in order to have them play their parts."[25] It is not clear whether these "parts" are empirical functions or discursive roles, but at some point (an *instant de passage*?) Lyotard moves from experience to writing to observe the effects that his language games have on the players. "The observable social bond is composed of language 'moves.' "[26] He acknowledges that the social bond is "traversed by terror, that is by the fear of death," engaging in a discursive discussion of death, declaring as unjust any language game that "owes its efficacy . . . to the fear of death."[27]

This apprehension of death in the social bond begins to answer Lyotard's question of what constitutes a just society. Lyotard seeks "an idea and practice of justice that is not linked to that of consensus."[28] When one player demands consensus or conformity from other players by regulating other games that are not like it, that player is operating outside the realm of language games, in the realm of terror and death. A just society does not demand sameness, but rather gives all players equal access to information, enabling them to make knowledgeable decisions without the terror of expectations of performance.

24. J. LYOTARD & J. THEBAUD, JUST GAMING 99 (W. Godzich trans. 1985).
25. *Id.*
26. J. LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (G. Bennington & B. Massumi trans. 1984).
27. J. LYOTARD & J. THEBAUD, *supra* note 24, at 99.
28. *Id.* at 66.

Equal access would allow for ongoing language games "of perfect information at any given moment. But they would also be non-zero-sum games, and by virtue of that fact, discussion would never risk fixating in a position of minimax equilibrium because it had exhausted its stakes."[29] Lyotard's guarantee against fixating, like de Man's provision for never ending interpretation, leads only to a perpetual, discursive existence, a language game with no end. Is this the immortality — the justice — they seek?

For Lyotard as for de Man, language is again the means to the discursive immortality of continuity. Lyotard's endless language games reduce discourse to a level of sheer operativity. Each question engenders another and delegitimates what the previous answer established, posing further questions, without end. Paralogy — the process of questioning and delegitimating existing knowledge — forms the legitimating basis for scientific discourse. For Lyotard, this pragmatics of science provides paralogy with legitimate status for defining all discourse:

> The function of the differential or imaginative or paralogical activity of the current pragmatics of science is to point out these metaprescriptives (science's "presuppositions") and to petition the players to accept different ones. The only legitimation that can make this kind of request admissible is that it will generate ideas, in other words, new statements.[30]

Paralogy fills a generative role and allows scientific and other discourses to continue. The legitimation of discourse fuels the delegitimating process of unseating established rules and replacing them with newer metaprescriptives that will themselves eventually be replaced. Lyotard terms this process the "quest for paralogy"[31] and identifies it as the best hope for a just society.

Lyotard's paralogy-based society has the ability to turn out volumes of new knowledge in the form of new statements. Yet his description of that society as it was taking shape in the late 1970s raises some troubling questions: "[t]he temporary contract is favored by the system due to its greater flexibility, lower cost, and the creative turmoil of its accompanying motivations — all of these factors contribute to increased operativity."[32] Operativity has negative connotations for both the empirical and ontological self, evoking visions of countless,

29. *Id.* at 67.
30. *Id.* at 65.
31. *Id.* at 66.
32. *Id.*

highly efficient subjects engaging in the endless activity of generating discourse and language games. Whether they engage in this activity at the empirical or discursive level, both the empirical and discursive subjects' hopes for justice are based only on assurances that they will be heard in this flood of new statements and new language games. A just system must accept the plurality of language games, then grant each game validity (although some will be less valid than others). The just system must not tolerate one player totalizing, threatening or killing others by demanding their allegiance, and it must provide equal access to information. But even if each player is assured these protections, it is not clear how justice will be served in a society where discourse leads only to delegitimating utterances and the creation of more information rather than to action.

Lyotard envisions his just society operating on an ontological level more than an empirical level. He speaks of persons in discursive roles, as players of language games: "Basically, minorities are not social ensembles; they are territories of language. Every one of us belongs to several minorities, and what is very important, none of them prevails."[33] Elsewhere he speaks of "forms of language games, that is ways of playing that language has that position the person who enters into the game. This person may enter here or there, he or she will be positioned by the game; in this sense, language is indeed not, and cannot be, mastered."[34] Even the most empirical of his hypothetical game players[35] acknowledge their discursive subjectivity and subjection to language, one stating that "language cannot be mastered. It is something that I do not manipulate . . . it does not come from me."[36] This subject, acknowledging that language comes from outside its empirical self, poses a striking contrast to de Man's "self that writes" that constitutes its own language. Yet, both views of subjectivity transpose empirical human beings to the level of linguistic existence.

Only Lyotard's interest in avoiding deadly totalitarian impulses (where players threaten others with some form of death to gain compliance) suggests the possibility that his just society

33. *Id.* at 95.

34. *Id.* at 98.

35. Referring to Hasidic narratives from the time of the French Revolution, which Martin Buber collected under the name *Gog and Magog*, Lyotard hypothesizes that Hasidic sages condemned Robespierre and the Jacobins for failing to "respect the plurality of language games," by attempting to extend their idea of justice to all conduct and discourse. *Id.* at 97-98.

36. *Id.* at 98.

may have some commensurability with the empirical world its subjects inhabit. Lyotard states: "The question you are asking is: What type of relation is there between justice and the various language games?"[37] Lyotard sees this relation as one of openness to the very variety of those games, recognizing individual conversations as legitimate and delegitimating: "And so, when the question of what justice consists in is raised, the answer is: 'It remains to be seen in each case.' "[38] This reference to "each case" may indicate an underlying concern for the plight of each empirical individual on whom the claimed system of justice operates. It is more likely, however, that discursiveness holds the most interest for Lyotard's conception of justice.

IV. THEORIES OF THE SUBJECT IN LAW

Curiously, while structuralist, anti-realist literary critics have sought to separate the empirical from the discursive selves, some legal critics with antirealist tendencies want to lessen the distance between the two. By introducing more overtly political elements into their theory, some critical legal theorists, more than their literary counterparts, draw on the concerns of empirical subjects to inform their theoretical models. The literary critics' interest in the subject's discursive, structural function resurfaces in some critical legal scholarship as a concern for the independence of self and an attempt to lessen the control of "Structure" over "Self."[39] While sharing this concern for the subject, non-critical legal scholars offer different realist theories to support the independent self.

Professor Steve Fuller[40] seeks a justice that would acknowledge the individual empirical subject but would do so with a realistic assessment of the subject's cognitive limitations.[41] He advocates a realist "political metatheory of irrationalism" to counter the anti-realist, rational critical tradition that denies the effects of human fallibility in matters of scientific and political knowledge.[42] Basing his theory of justice on "scientific realism," Fuller draws on an empirical, realist tradition that explains error "in terms of our beliefs running up against an independently existing reality [whereas] the general an-

37. *Id.* at 96.
38. *Id.* at 99.
39. Fuller, *supra* note 4, at 575-76 n.52 Fuller's footnote challenges this critical legal studies model of Structure versus Self.
40. *Id.*
41. *See id.* at 554-56.
42. *Id.* at 579.

tirealist strategy explains error in terms of two or more perspectives conflicting over some situation."[43] This anti-realist strategy, which elsewhere Fuller identifies as belonging to "the 'conversation of mankind' school of politics,"[44] is manifest in the endless discourse encountered in Lyotard and de Man. For scientific realists like Fuller, this endless discourse cannot serve empirical individuals because it does not recognize their cognitive limitations.[45]

Fuller criticizes certain critical legal scholars for ignoring limitations on empirical beings. If these limitations were understood, they could be overcome or sufficiently adjusted to enable those subjects to work within both the legal system and the larger society to improve their own collective condition.[46] He particularly disagrees with Joseph William Singer,[47] who identifies four very empirically-based general goals that describe a social vision: to prevent cruelty, alleviate misery, democratize illegitimate hierarchies and alter the social conditions that cause loneliness.[48]

Singer's goal of aiding the empirical individual is just one form in which critical legal scholarship seeks to promote the subject's empowerment. His work draws on that of other anti-empirical, anti-realist scholars to show how the legal system is not and should not be grounded on "determinant, objective and neutral decision procedures."[49] Singer's anti-empiricism is slightly different from that found in de Man and Lyotard. Singer acknowledges the needs of empirical subjects. He wants to alleviate the pain associated with the empirical realities of cruelty, misery, and loneliness, but fails to recognize other empirical characteristics of the subjects he wants to help.

Although Fuller shares Singer's interest in empowering the subject within the legal system, he criticizes certain Critical Legal Scholars' limited anti-realist views of the system's ability to oppress the self.[50] Rather, Fuller blames the structure much less than the self for perpetuating a power imbalance that may, in fact, be more perceived than actual: "Now what is the evi-

43. *Id.* at 558.
44. *Id.* at 580.
45. *Id.* at 580 n.62.
46. *See supra* note 5.
47. Singer, *supra* note 4.
48. *Id.* at 67-70. Much of Fuller's article, *supra* note 4, is in direct response to Singer, *supra* note 4.
49. Fuller, *supra* note 4, at 575 n.52.
50. *Id.* at 575.

dence for the existence of this overbearing Structure [society]? Unger[51] and the rest seem to rely on only two sources: the uniformity of legal language and the frequent frustration of Self's [individual's] interests."[52] Fuller considers the ignorance inherent in empirical individuals to be a primary cause of these scholars' failure to account for the cause of Structure's resistance to Self's initiatives. Fuller states:

> After all, social structures may not be so resistant to change if individuals have a competent understanding of how they work. Short of such an understanding, however, these individuals can easily end up undermining their own efforts and magnifying the apparent stability of the social structures, by misinterpreting their ignorance as signs of active social resistance — yet another case of the antirealist reifying what is, in fact, the product of our cognitive limitations.[53]

Fuller calls for empirical subjects to learn how their systems of justice and society operate in order to engage that structural, functional information in their favor. The subject's decision to learn how to "get inside" the legal system could be the very link that Lyotard's paralogical language games need to move beyond operativity without returning to an externally imposed performativity. If invested with an understanding of their real, cognitive limitations, the players in Lyotard's endless language games could assume the self-directed task of introducing new prescriptives into the legal system.

Although he calls for individual persons to learn, and acknowledges their capacity to do so, Fuller warns against putting too much faith in the power of the individual to change the legal system. Fuller accepts Unger's position that each new case is "an opportunity for either reproducing or destabilizing the bias"[54] of the legal structure, but chides him for failing to notice that:

> the legal system is sufficiently independent of the wills of particular individuals — indeterminacy and all — that if a concerted and systematic effort is not made to destabilize the regnant biases on a mass level, then the few isolated pockets of successful self-empowerment will appear as minor statistical aberrations.[55]

Fuller calls for an empowerment of the individual that balances the empirical subject's cognitive limitations with her ability to effect change.

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51. Roberto Mangebeirra Unger, Professor of Law, Harvard University, author of THE CRITICAL LEGAL STUDIES MOVEMENT (1986).

52. Fuller, *supra* note 4, at 575 n.52.

53. *Id.*

54. *Id.* at 572.

55. *Id.* at 572-73.

Fuller lacks confidence that individuals will choose what is right for them. He notes the "fallacy that just because you know what you want, it does not follow that what you want will turn out as you expect."[56] Further, individuals are ignorant not only about their own needs, but also about needs of others.[57] If enough people recognize these limitations, they will be able to "destabilize the biases."[58] This destabilization will not, however, necessarily result from a unified group action. Rather, it will result from enough people considering how their own limitations affect their individual and collective needs.

Fuller's concern for the realities of human decisionmaking processes is more in keeping with the justice of plurality that Lyotard seeks. Fuller's empirical, cognitively limited individualism and Lyotard's plurality both question whether consensus is an adequate vehicle for expression of individual differences. For Lyotard, "consensus has become an outmoded and suspect value" but justice has not.[59] Fuller claims that consensus is unstable because subjects are ignorant about what others want:

> The fact that people continue to go their way, even against the will of their representative, is at least as much due to the representative's cognitive inability to monitor what the people are thinking as to [the people] actually changing their minds. Indeed, the preponderance of "second-order" ignorance that members of a community have about what one another thinks accounts for the volatility of public opinion, *especially* in democratic societies.[60]

Legislators and judges cannot, as Fuller accuses Singer of assuming, "deliberately bring into existence a consensually desirable social order."[61] Fuller even suggests that consensus may be a myth: "Recent studies in public discourse suggest that societies coalesce, not around values or ideas, but around contained areas of disagreement. [One] conclusion is that the glue binding societies together is, in short, the acceptance of dissensus."[62] A dissensus based on an awareness of individual cognitive limitations may be the empirical version of Lyotard's discursive plurality of justice.

Although Fuller acknowledges the existence of a few successful pockets of self empowerment in the legal system, he does not suggest specific examples of how mass systemic biases

56. *Id.* at 578.
57. *Id.* at 576.
58. *Id.* at 572.
59. J. LYOTARD, *supra* note 26, at 66.
60. Fuller, *supra* note 4, at 576.
61. *Id.* at 577.
62. *Id.* at 576-77 n.56.

have been overcome. Other scholars[63] have suggested that the law of sexual harassment as one of the most visible areas in which subjects have made their voices heard persistently enough to change the legal system. Behaviors that once were not actionable, and often even socially acceptable, eventually were granted legitimacy as legal wrongs in the judicial system because enough victims repeatedly identified such behaviors as socially wrong. In a case of social discourse speaking to legal discourse, societal disapproval finally led to legal sanction for offenses of sexual harassment.[64] This progression followed Lyotard's prescription for justice: "Justice here does not consist merely in the observance of the rules; as in all the games, it consists in working at the limits of what the rules permit, in order to invent new moves, perhaps new rules and therefore new games."[65]

Noonan, too, calls for the legal system to give voice to the individuals who are subject to its acts and omissions, and is concerned that the legal system clearly hear the human voice. He harshly criticizes law for masking the humanity of all who take part in it, the lawyers, judges, plaintiffs and defendants: "By mask I mean a legal construct suppressing the humanity of a participant in the process. . . . 'Property,' applied to a person, is a perfect mask. No trace of human identity remains."[66] Legal constructs are too far removed from empirical experience and mask realities that stem from the empirical subject's experience of time and death. Two examples Noonan uses to illustrate law's masking power involve laws or cases that are generally familiar to all lawyers and to many non-lawyers: slavery laws in pre-revolutionary Virginia and Judge Benjamin Cardozo's opinion in *Palsgraf v. The Long Island Railroad Company*.[67]

The Virginia slavery control and property statutes of the

63. This brief sketch of how the legal claim for sexual harassment developed draws on lectures by University of Minnesota Law Professor Gerald Torres, particularly his consideration of MacKinnon, *Sexual Harassment: Its First Decade in Court*, in C. MACKINNON, *supra* note 4, at 103-16.

64. MacKinnon claims that the sexually harassed victim/subject came to define the harm to her: "The legal claim for sexual harassment marks the first time in history, to my knowledge, that women have defined women's injuries in a law." *Id.* at 105. Victims were "given a forum, legitimacy to speak, authority to make claims, and an avenue for possible relief. What happened to them was all right. Now it is not." *Id.* at 104.

65. J. LYOTARD & J. THEBAUD, *supra* note 24, at 100.

66. J. NOONAN, JR., *supra* note 4, at 20.

67. 248 N.Y. 339, 162 N.E. 99 (1928).

1770s purposefully distanced slaves from the world of men and women. Although slaves felt the statutes' effects most directly and painfully, the statutes were not really addressed to them: "Addressees of the property statutes were only in an incidental way the slaves themselves. In theory, as real estate or personal estate, they could not be addressed at all. Definition as property determined [almost everything about them]. They could not, however, apply this law to themselves."[68] The only way lawmakers — in this case Thomas Jefferson and his teacher George Whythe — could justify slavery, when as white, male revolutionaries they were seeking "universal liberty," was to mask slaves' humanity with the label and law of property.

The juridical construction that gives this (non-)status to slaves involves a purposeful disregard for the empirical, human person behind the legally constructed mask. A similar disinterest in empirical circumstances occurs in de Man's discursive world, albeit in different form. His theory of the "self that writes" is presented as freeing the subject from the constraints of time and the empirical world. Yet it offers no hope to the empirical being enslaved in an externally imposed system of slavery. The discursive self cannot speak across systems to the empirical subject, but can merely watch the empirical self suffer the effects of time and death.[69]

A discursive subject, constituted by law rather than its own self, appears again in the masks imposed on Helen Palsgraf.[70] Judge Noonan provides extensive detail about factors that the court omitted from its opinion to indicate how artificially removed judicial decisions can be from the events that engendered them. A single statement from William Prosser, twenty-five years after the decision, brings home Noonan's point better than any amount of factual detail: "[A]s described in the opinion the event could not possibly have happened."[71] Even more striking is that this statement did not matter to most law professors, commentators or students.[72] The law had constituted its own language and subjects; too much was riding on its constructions to acknowledge its unstable foundations.

The disregard of empirical events in *Palsgraf* (to the extent they could be documented) is reminiscent of de Man in a

68. J. NOONAN, JR., *supra* note 4, at 42.
69. *See supra* notes 23-25 and accompanying text.
70. Helen Palsgraf was the plaintiff in *Palsgraf*, 248 N.Y. at 339, 162 N.E. at 99.
71. J. NOONAN, JR., *supra* note 4, at 119.
72. *Id.*

slightly different way than the slavery example. De Man's approach to criticism requires "that we must begin by forgetting all the facts."[73] By constructing its own version of "the facts" of a given case, the law also forgets certain facts. Many players and processes operate to constitute the final set of facts recited in a judicial opinion. The parties' versions of the facts as told to their lawyers and on deposition to opposing counsel, the facts attorneys recite in pleadings, the facts to which the parties stipulate, and the judicial clerk's condensation of the facts for use in the final written opinion combine to present a set of "facts" that "forget" the facts of the case.

In the guise of a sincere interest in recreating events "as they happened," the legal authority requesting "the facts" is carefully selecting material for its own limited discourse. The legal system wants only those facts that it deems "relevant," and will shape and reconstitute those facts into its legal discourse. The literary discursive subject escaping its "factual" empirical existence is also escaping time. Similarly, the legal system's discursive subject is removed from time, but in a process that may be more related to empirical death than discursive life.

De Man, Lyotard, Fuller and Noonan each seek a structural understanding of certain discursive systems. De Man and Lyotard are interested in structure because it is a means of escaping temporal limitations. For Fuller, individuals may more effectively challenge and change structures that they have tried to understand, provided that they also recognize their own cognitive fallibility. Noonan is particularly interested in the structural device of a linguistic mask, in order to better understand how to remove it so that "persons speak to persons, heart unmasked to heart."[74] In all these structural inquiries secondary, but not contradictory, interest in intersubjectivity and in the "self that writes" appears in some form. Each critic wants the subject to play some constitutive role in the language that will affect it, whether on a discursive or empirical level. The danger comes when the self that writes communicates only with itself or only within its given discursive system, be it literature or law. Each discursive or empirical self writes its own language, retaining control and focus over that language. If the

73. R. MOYNIHAN, A RECENT IMAGINING: INTERVIEWS WITH HAROLD BLOOM, GEOFFREY HARTMAN, J. HILLIS MILLER, PAUL DE MAN (1986). De Man attributes to Jean Jacques Rousseau this admonition to forget all the facts. *Id.*

74. J. NOONAN, JR., *supra* note 4, at 167.

subject focuses inward and looks only at its own constituted language, the subject may think it is sharing that language with others when, in fact, it is only talking and not listening. This is the danger of de Man's model. The ontological subject is too easily trapped in a repetitive discursive realm and is unable to offer assistance to the empirical self or other discursive selves. Fuller's call for the self to understand its own limitations in the empirical world may provide some room for the subject in the self-writing model to listen to concerns outside itself.

Fuller's approach to the problem of how the self is constituted in the legal system accounts for human cognitive fallibility, but does not deny individuals their say in their legal system. This returns us to the very formulation that began this Essay's inquiry: "the relation of love to power." For Fuller and Noonan, the legal system must deal appropriately with fallible, empirical beings and must relate as a power to empirical subjects' strengths and weaknesses. For Lyotard, the discourse of justice — the discourse in power — must listen to and contain multiple voices or it will become a power that kills. It is almost in giving up its constitutive power that the discursive system of justice relates best to its subjects:

> But there are language games in which the important thing is to listen, in which the rule deals with audition. Such a game is the game of the just. And in this game, one speaks only inasmuch as one listens, that is, one speaks as a listener, and not as an author.[75]

When subjects have a stronger constitutive voice in the discursive system of law, when the legal discourse listens to the empirical and ontological concerns of its subjects, the legal system can better serve its subjects. Subject can speak to system and, in time, shape its operation and structure.

75. J. LYOTARD & J. THEBAUD, *supra* note 24, at 71-72.